

ARREST OF SHIPS & RELEASE - A synoptic Guide on Procedure & Laws.

Being a paper presented at the Eleventh Workshop series of Alpha Juris Continuing Legal Education Department held between 5th and 6th June, 2003 at the Presidential Hotel, Port-Harcourt, Rivers State.

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1. Introduction.

The arrest of ships or other property through a court order for a pre-judgment security to satisfy any judgment the claimant may obtain after the trial of his claim and the release of the arrested ship or other property upon its owner providing some security, whilst the trial of the case goes on, are at the centre of admiralty actions and are some features of admiralty actions *in rem*, which distinguish admiralty actions *in rem* from other civil causes and matters. They are very technical and require appropriate special education, training and experience to properly handle with negligible losses or costs to both the claimant and the owner of the ship or other property to be arrested and/or released. Through a ship's arrest, the claimant obtains a pre-trial and pre-judgement security for satisfying his claim if he eventually succeeds in the action in that the *res* may be arrested and sold to satisfy the judgement *in rem* against it but a ship arrest, whilst often quickening the end of the proceedings by settlement, is not the end of the proceedings since the plaintiff or defendant/counterclaimant still has to prove that he is entitled to the *substantive* claim/counterclaim, which requires a good understanding of the principles of maritime law governing the substantive claim/counterclaim

1.1 Definition of Relevant Terms.

“Ship”: A ship simply means, a floating vessel² which is self-propelled and capable of carrying cargo or passengers³. It is defined in the Merchant Shipping Act, 1990⁴ (“MSA”) as any vessel other than a vessel propelled solely by oars or paddles and as including barges, lighters and other like vessels used in navigation in Nigeria and howsoever propelled. A ship has been described in other ways by different maritime legislations and Conventions⁵ including the 1952 Arrest Convention⁶. However, the Interpretation Section 26 of the Admiralty Jurisdiction Act, 1991, [“AJA”] states that “Ship” “means *a vessel of any kind used or constructed for use in navigation by water, howsoever it is propelled or moved and includes (a) a barge, lighter or other floating vessel, including a drilling rig; (b) a hovercraft; (c) an off-shore industry mobile unit; and (d) a vessel that has sunk or is stranded and the remains of such vessel, but does not include a vessel under construction that has not been launched.* Moreover, in the new Coastal and Inland Shipping (Cabotage) Act, 2003⁷ (“Cabotage Act”), a “vessel”, includes any description of vessel, ship, boat, hovercraft or craft, including air cushion vehicles and dynamically supported craft, designed, used or capable of being solely or

¹ Being the text of a paper presented by M.I. Igbokwe Esq LLB. [Hons]; BL, PG Dip (Maritime Law), Principal Partner, Mike Igbokwe & Co, (Commercial and Maritime Lawyers & Consultants) at the Eleventh Workshop series of Alpha Juris Continuing Legal Education Department held between 5th and 6th June, 2003 at the Presidential Hotel, Port-Harcourt, Rivers State.

² “Vessel” means a ship or a boat: Dictionary of Shipping Terms, by Peter Brodie 2nd Ed, page 197.

³ See, Dictionary of Shipping Terms, by Peter Brodie 2nd Ed, page 161.

⁴ Section 2 cap. 224 Laws of the Federation of Nigeria 1990.

⁵ E.g. Art.1 1952 Convention on Civil Jurisdiction; Art. 1 1969 Civil Liability Convention; 1986 Convention on Conditions for Registration of Ships; 1974 Athens Convention.

⁶ International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952, ratified by Nigeria on 7/11/63.

⁷ Section 56.

partly (used) for marine navigation and used for the carriage on, through or under water of persons or property without regard to method or lack of propulsion. It is noteworthy in understanding the intentions of the Legislature in the definitions of “ship” in the aforesaid laws that whilst the MSA excludes vessels propelled solely by oars or paddles (like canoes) from the meaning of “ship”, the AJA and Cabotage Act have no regard to the method or lack of propulsion in defining ships and that the word “means” is exhaustive whereas the word “includes” is not exhaustive.

One of the benefits of *in rem* actions is that an offending ship can be arrested any where in the world in a contracting State to the Arrest Convention other than where it breached a contract or committed a tort leading to the claim against it, if the local laws relating to arrest are properly followed.

1.2 Neither the word “**Arrest**” nor the word “**Release**” of ships is defined in the AJA⁸ or AJPR or the Rules 2000 or the MSA or the Cabotage Act, in any of the five main “laws” on ship arrest and release procedure and maritime claims, in Nigeria, but “**arrest warrant**” is simply defined in AJPR as “a warrant for the arrest of a ship or other property”⁹. However, Art.1(2) of the 1952 Arrest Convention states that “**arrest**” “**means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of the ship in execution or satisfaction of a judgement**”.¹⁰ Arrest has also been described as the seizure of a ship the by the authority of a court of law either as security for a debt or simply to prevent the ship from leaving until a dispute is settled or for contravening the laws of a country¹¹, but the use of “seizure” is questionable because seizure connotes also a forcible possession of a ship by State authority. In *Anna H*¹² it was held that the definition of arrest in the 1952 Convention is concerned with the character of the legal process, not the motivation of the arresting party and that the purpose of the Convention was to harmonize the laws of the Contracting States as to the types of claims which could found arrest and that arrest is not to be used to secure other claims than maritime claims. On the other hand, the release of a ship is the discharge of an arrested vessel from arrest upon the giving of security to meet the claim/counterclaim of the arrester.

1.3 “Procedure” means “the mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the right...The judicial process of enforcing rights and duties recognised by substantive law for justly administering redress for infraction of them”¹³. Procedure is interchangeable with “practice”. Procedure or practice belongs to the realm of adjectival or procedural law, made up of essentially rules of court, whether civil or criminal or appellate as opposed to laws which fix duties, establish rights and responsibilities among and for persons-be they natural or corporate which are known as substantive laws.¹⁴

⁸ See, The *Al -Akbar*, Vol. 4 NSC 251 at 255.

⁹ O.1 r.3 AJPR.

¹⁰ Since this definition does not include arrests of property where title to or the possession of such property is in dispute and cannot strictly be regarded as claims, the definition of arrest in the Convention has been described by Berlingieri as “not wholly satisfactory”. The view has also been held by Sanyaolu J. in *The Al -Akbar*, Vol. 4NSC at page 251 that the definition of arrest in Art 1(2) of the Arrest Convention is limited only to pre-judgement arrest.

¹¹ This definition in the Dictionary of Shipping Terms, by Peter Brodie 2nd Ed, page 8, appears to have taken care of arrests of ships until disputes of ownership or possession of the ship are settled.

¹² (1995)1Lloyd’s Rep.11.

¹³ Black’s Law Dictionary, 6th Ed. Pages 1203-1204.

¹⁴ See, *NV. Scheep-v-MV “S.Araz”* (2000)15NWLR [Pt.691] 622 at 653.

As called for by the title, this paper is therefore to show through legislative and judicial authorities, the proper manner and way of arresting and releasing arrested ships in the process of enforcing or defending maritime claims in the competent Nigerian court.

2.0 Guide on Procedure & Laws on Arrest & Release of Ships.

2.1 Admiralty Jurisdiction.

Jurisdiction of a court is a strict matter of law conferred by either the Constitution or by statute.¹⁵ Arrests and releases of ships are connected with the enforcement of admiralty or maritime claims or disputes. Section 251(1)(g) of the 1999 Constitution¹⁶, section 19 of AJA and sections 7 and 8 of the Federal High Act (as amended by section 230 of Act No. 107 of 1993) confer on the Federal High Court, *exclusive* jurisdiction in admiralty causes or matters whether civil or criminal including shipping and navigation in the Rivers Niger, Benue and their affluents and international inland waterways... and carriage by sea. State High Courts lack jurisdiction to entertain admiralty matters¹⁷. There is only one Federal High Court in Nigeria¹⁸ with its jurisdiction spreading throughout Nigeria and although it has various judicial divisions for convenience, admiralty proceedings *may* be filed in any judicial division of the Court in which the ship or other property is located.¹⁹ The admiralty jurisdiction of the Federal High Court covers all ships, whether or not their owners reside or are domiciled in Nigeria (but not ships demised or sub-demised to the Federal or State Government or ships being used by the Navy) and all maritime claims notwithstanding where they arise from²⁰. In spite of this, where contrary to this law which upholds the principle of sovereign immunity in international law, a plaintiff files an action *in rem* against a government ship or property, the suit can be converted into and can proceed as an action *in personam*, if the court is satisfied that it was so commenced on the reasonable belief that the ship or property was not a government ship or property.

The extent of the admiralty jurisdiction of the Federal High Court is stipulated in *sections 1 and 2 of the AJA*²¹, a part of which is set out as follows:

1(1) The admiralty jurisdiction of the Federal High Court (in this Act referred to as "the Court") includes the following, that is-

(a) jurisdiction to hear and determine any question relating to a proprietary interest in a ship or aircraft or any maritime claim specified in section 2 of this Act.

By virtue of section 1(1)[a] of AJA and section 11 of the Federal High Court Act, the exercise of the jurisdiction of the Federal High Court in a case inevitably involves the right to hear and determine the case on the merits, but security for damages, interest and/or costs that may be awarded in a proceeding cannot constitute a cause of action because they belong to the realm of adjectival law which prescribes a method of enforcing rights or obtaining redress for their invasion.²² It is submitted that the categories of the subject matters of admiralty jurisdiction are not exhaustive because of

¹⁵ See, *Owners of Baco Liner 3 –v- Adeniji* (1993)2NWLR (Pt274) 195 at 201. CA

¹⁶ See also, *Crownstar & Co Ltd-v-The Vessel MV Vali* (2000) 1NWLR (Pt 639) 37. See, Section 42 of the Coastal and Inland Shipping (Cabotage) Act, 2003 which gives jurisdiction to the Federal High Court over the matters and offences referred to in the Act.

¹⁷ See, *Alraine Shipping Nigeria Limited –v-Endura Auto Chemicals* (2001) 12 NWLR (Pt. 728) 759 [CA].

¹⁸ See, Section 249(1) 1999 Constitution.

¹⁹ See, Section 22 AJA.

²⁰ See, Sections 3 and 24 AJA. See also, *The Sea Winner*, Vol. 2 NSC 25 where a vessel in Nigerian waters was ordered to be arrested by the Federal High Court for the enforcement of a claim which has no connection with Nigeria.

²¹ See, *The Tee Jay* No. 2 Vol. 7NSC 396. See also *G & C Lines –v- Hengrace Nigeria Limited* (2001) 7NWLR [Pt.711] 51.

²² See, *NV. Scheep-v-MV "S.Araz"* (2000) 15NWLR [Pt.691] 622 at 669.[SC].

the use of the word “ includes” in section 1(1) thereof and that maritime claims must be formulated on the writs in order to confer jurisdiction on the Federal High Court under the AJA, the 1999 Constitution and the Cabotage Act. It is significant that its admiralty jurisdiction can be exercised in *rem* or *in personam*, but whilst all cases falling within the admiralty jurisdiction may be brought *in personam*, not all cases within the admiralty jurisdiction can be brought *in rem*.²³ A major implication of the admiralty jurisdiction of the Federal High Court is that where a case falling within its admiralty jurisdiction is filed in a court other than the Federal High Court, the suit will be incompetent and the court will lack jurisdiction to hear and determine it. Consequently, any order made by such a court will be null and void for being made without jurisdiction.²⁴

2.2 Mode of exercise of Admiralty Jurisdiction.

Both the Admiralty Jurisdiction Procedure Rules, 1993 and the Federal High Court (Civil Procedure) Rules, 2000 regulate the practice and procedure in maritime claims in the Federal High Court, which arrest and release of ships are a part of. But it has been argued that by virtue of *Order 54 rule (2)[1] of the Federal High Court Civil Procedure Rules, 2000*, which states that “where no specific procedure is given in any of the enactment in Appendix 1 to these Rules, the rules and procedures in these Rules shall apply with necessary modification so as to comply with the subject matter the enactment in Appendix 1 to these Rules deals with”, the Admiralty Jurisdiction Procedure Rules 1993 which is an enactment listed in Appendix 1, being rules made to govern specific situations, should prevail in respect of any conflict between those Rules and the Federal High Court (Civil Procedure) Rules 2000 in matters of practice and procedure on admiralty matters. However, in other cases where there is no conflict between the two Rules, the two Rules are meant to complement each other.²⁵ It is only where an action *in rem* has been filed that a ship can properly be arrested either at the time of filing the action or subsequently.

2.3 Admiralty actions in rem and in personam.

The distinction between an admiralty action *in rem* and an admiralty action *in personam* must be understood for purposes of knowing how to properly obtain an arrest of a ship or other property or obtain its release from arrest. All *actions which are aimed at the person* requiring him to do or not to do or to take or not to take an action or course of conduct are actions *in personam* whilst all actions in which the subject-matter is itself sought to be affected and in which the claimant is enabled to arrest the ship or other property and to have it detained until his claim has been adjudicated upon or until security by bail has been given for the amount claimed or for the value of the property proceeded against where that is less than the amount of the claim, are actions *in rem*.²⁶ An action *in rem* has also been described in the case of *Mercantile Bank of Nigeria Ltd-v-Tucker & Ors, The Bosnia*²⁷ as an action against a *res* (thing) which is usually a ship or cargo or freight and may be filed against the proceeds of sale by the court of the *res* and the *res* may be arrested if within jurisdiction whilst an action *in personam* is like an action in contract or

²³ See, section 5 of AJA.

²⁴ See, *Alraine Shipping Ltd-v-Endura Auto Chemicals* (2001) 12NWLR (Pt728) 759 CA where the Anambra State High Court, Onitsha was held to lack the jurisdiction to entertain a suit claiming that the 2nd respondent was not entitled to clear and warehouse the goods covered by some bills of lading and orders of injunction and damages for breach of contract.

²⁵ Hon. Justice E.O.Sanyaolu in his Lordship’s paper “Appraisal of Procedural Problems in Maritime Litigation-Expedition Disposal of suits and appeals” presented at the Maritime Law Seminar of the Nigerian Maritime Law Association, in Lagos in May, 2003.

²⁶ See *Rhein Mass Und See GmbH –v-Rivway Lines Limited* (1998)5NWLR (Pt. 549) 265 at 277/278.[SC]. .

²⁷ See, Vol.1NSC 428 at 430.

tort and it is necessary to look at the person who was liable at the time the cause of action arose. Simply put, an *in rem* action is against a thing and not its owner, whilst an *in personam* action is against a person or a company.

Although, an action *in rem* is primarily a proceeding against the ship or res by way of an arrest, yet it is indirectly a process compelling the appearance of the owner of the ship to defend his property thereby impleading him to answer to the judgement to the extent of his interest in the property.²⁸ As stated earlier, although any of the cases falling within the admiralty jurisdiction of the court may be instituted by an action *in personam*, yet it is only in a few specified cases that an action *in rem* may be brought against the ship or other property in connection with which the claim or question arises²⁹. Where the defendant enters appearance in an action *in rem*, it proceeds like an action *in personam* and judgment against the defendant can be executed against any of his property within the jurisdiction including his other ships or goods by way of a writ of *fifa* after final judgement has been obtained. But if no appearance is entered to the suit, it remains an action *in rem* only as it began and operating against the ship or *res* arrested so that any default judgement can only be enforced by a sale of the ship or other property, but not enforced against the defendant personally.³⁰ If the proceeds of sale of the ship are insufficient to cover the sum claimed, the plaintiff who has earlier obtained a judgement *in rem* may bring a subsequent action *in personam* in respect of the same claim. Although a plaintiff cannot enter a judgment for default of appearance or defence in an action *in rem* like in an action *in personam*, yet he can file a Motion for judgment in default of appearance in an action *in rem* and prove to the court that he is entitled to judgement because it is wrong to apply for a summary judgement in an action *in rem*.

The said specified cases of *in rem* actions which I prefer to classify as follows³¹, are :

- (a) the truly *in rem* cases involving *proprietary maritime claims*³² relating to the possession, ownership, mortgage of a ship or a share in it or mortgage of its freight; or interest payable on any general maritime claim or a claim between co-owners of a ship relating to the possession, ownership, operation or earning of a ship where actions *in rem* can be brought against the ship or other property in connection with which the claim arises irrespective of who owns it at the time the action commenced and who may be liable in an action *in personam*.
- (b) a claim giving rise to a *maritime lien or other charge on the ship* for the amount claimed³³. Maritime liens in the AJA³⁴ include claims for salvage, or damage done by a ship, or wages of the master or a member of the crew of a ship, or master's disbursements (that is, disbursements in which the Master makes himself liable in respect of things immediately necessary for ships'

²⁸ See Chief Registrar High Court, Lagos State-v- Vamos Navigation Limited (1976)Vol.1NSC 40/42, Ming Ren Shipping-v- Amatemesso Shipping Agencies Ltd(1979)Vol. 1NSC 462 at 466/7, Rhein Mass Und See GmbH-V-Rivway Lines Ltd, supra.

²⁹ See section 5 of AJA.

³⁰ See, The Banco (1971) Probate 137 at 151.

³¹ The AJA classifies maritime claims in section 2 thereof in two respects, namely proprietary maritime claims and general maritime claims.

³² See sections 2(2) and 5(2) of AJA. Many of the maritime claims stated here are similar to or in *pari materia* with those in section 21(3) of the Supreme Court Act, 1981 of UK.

³³Due to the absence of proof of a maritime lien or charge on the vessel in The Advance Vol. 4 NSC at 54, the prayer for arrest was refused.

³⁴ See, section 5(3) AJA. In "Bold Buccleugh" (1851) 7 Moo. P.C. 267, claims leading to maritime liens were stated as damage done by a ship, salvage, seamen's wages, bottomry and *respondentia*. A maritime lien is also described as a claim or privilege upon a maritime *res* in respect of service rendered to it or injury caused by it and attaches to the *res* and travels with it into whosoever's possession the *res* comes: "*The Bosnia*", supra.

navigation). Being a charge on maritime *res* arising by operation of law and binding the property a maritime lien can be enforced by an action *in rem* in such person's hands or the hands of a bona fide purchaser for value without notice, and so it is not affected by a subsequent sale of the *res* to a third party or change of ownership. From the time it attaches, a maritime lien sticks to the ship like a leech and continues binding on the *res* until the maritime lien is discharged either by being satisfied, or from laches or delay of the owner or operation of law³⁵, or by total destruction or capture or judicial sale.

(c) claims limited by ownership status referred to in section 2(3) of AJA as *general maritime claims* and giving rise to *statutory maritime liens* which may be brought as actions *in rem* against a ship or other property if the conditions stated in *sections 5(4) and 5(4)(a) of AJA* are fulfilled, namely:

- (i) the claim must have arisen in respect of a ship,
- (ii) the person who would be liable on the claim in an action *in personam* must have been the owner³⁶, or charterer³⁷, or in possession or in control of the ship³⁸ *when the cause of action arose*,
- (iii) *at the time the action is brought* (i.e. when the writ is issued³⁹), the person who would be liable on the claim in an action *in personam* must be the beneficial owner of all the shares in the ship⁴⁰ or the demise charterer⁴¹. This requirement of beneficial ownership and demise charterer is to show an *in personam* link between the ship against which the *in rem* action is brought and the arrest is effected and the Plaintiff's claim, and as such if the ship has been sold after the claim has arisen but before the writ is issued, the ship cannot be arrested because the relevant person is no longer the beneficial owner of the ship, but an *in personam* action can be maintained against the relevant person. This is unlike the case where at the time of the change in its beneficial ownership a traditional maritime lien has attached to the ship before the action was brought because in such a case, the ship can still be arrested notwithstanding the change of ownership. In *Sugar Exporters London Ltd & Ors-v-M/V Fairwind & Ors*⁴², following, *The "I Congresso del Partido"*⁴³ & *The Andrea Ursula*⁴⁴, a beneficial owner was held to be a legal owner or an equitable owner or the person who has full lawful possession and control and has all the benefits and use of the ship which a legal or equitable owner would

³⁵ See, "*The Two Ellens*" (1872) LR 4PC 161.

³⁶ The word "owner" refers to a registered owner: *The Evpo Agnic* (1988)1WLR 1090 CA.

³⁷ The word "charterer" includes both a demise charterer and a time charterer: "*The Permina 108*": (1978)1Lloyd's Report 31.

³⁸ In *The Phoenix* (Vol.4 NSC at 260/263) it was held that by section 5(4) of AJA, the onus is on the plaintiff to show that it had a valid claim against the ship owners or charterer by demise. In *Tigris Int. Co-v-Ege Shipping* 6NSC 285, it was held that a person merely in control or possession of the ship who is not the owner or demise charterer is not contemplated under section 5(4) AJA and cannot be sued.

³⁹ See, "*The Carmania II*" (1963) 2 Lloyd's Rep. 364.

⁴⁰ There are historically, 64 shares in a ship but since it became common to have one-ship companies, the 64-share ownership is becoming insignificant in ship ownership. See also, "*The Chaika*" Vol. 6NSC 368. In *The MV S. Araz-v-Scheep* (1996)5NWLR (Pt447) 204 at 219, it was because Koray Shipping was not the beneficial owner as respects all the shares in MV S. Araz that the application for its arrest was held not maintainable.

⁴¹ A demise charterer is the lessee of a ship and during the charter he is treated as the owner of the ship employing the master and crew of the vessel: *Franco Daval Ltd-v-The Owners M/V "Vitali II" & Anor* (Vol. 3NSC, 630).

⁴² Vol. 7NSC 330

⁴³ [1971]1 Lloyds Rep. 531.

⁴⁴ [1971]1 AllER 821.

normally have. An arrest of a ship was set aside and the ship because released because the person who would have been liable in an action *in personam* was not the beneficial owner of the vessel in the case of *MV S. Araz-v-LPG Shipping SA*⁴⁵. In *The Advance*⁴⁶, the arrest of a ship was refused because there was evidence that the 1st Defendant was not the owner of the vessel and there was no evidence that the vessel was beneficially owned by him. The court also held that it is important that the nature of charterparty be established because it is only in a case where the charterparty is by demise that an order for arrest can be made against a vessel.

- (d) maritime claims which can be brought against either the offending ship or *another ship in the same ownership as the offending ship* (i.e. sister⁴⁷ or alternative ship) if:
- (i) the claim arose in respect of the offending ship,
 - (ii) the person who would be liable on the claim in an action *in personam* (i.e. “relevant person”) is the owner or charterer or is in possession or control of the offending ship when the cause of action arose,
 - (iii) at the time the action is brought, the relevant person is the beneficial owner of all the shares in the ship against which the action is brought [i.e. sister ship]. It is only where the arrest of the offending ship is sought that the person liable *in personam* must be the beneficial owner or demise charterer but it has been held that where it is sought to arrest a sister ship, the person who is liable *in personam* must at the time the action is brought be the owner of the offending ship and not merely a demise charterer of the offending ship.⁴⁸

2.4 The writ of summons commencing the action *in rem* shall specify a relevant person as a defendant by reference to ownership or other relationship to the ship or other property⁴⁹, e.g. “*The owner of the MT Alpha Juris*”⁵⁰. In some cases, the offending ship may be named as a defendant on the writ like “*The Motor Tanker Port Harcourt*”. But if the defendants are sued in their correct names, the identity of the ship should be stated in the heading of the writ and statement of claim as: “*In Re:- The Motor Tanker Port Harcourt*”. The writ including other documents filed in the action *in rem* shall contain the heading “ADMIRALTY ACTION IN REM”.⁵¹ The moment the writ *in rem* is issued, and even before the writ is served, the plaintiff’s statutory right of action becomes effective and cannot be defeated by a subsequent change in the ownership of the ship.⁵²

Although the writ commencing an action *in rem* ought to be in Form B in the Schedule to the AJPR giving the defendant 14 days from the service of the writ in rem to file

⁴⁵ (1996) 6NWL(R Pt.457) 720/732

⁴⁶ Vol. 4 NSC page 54

⁴⁷ A ship owned by a sister company is not a “sister ship”, because it is not in the same ownership as the offending ship; see *The Evpo Agnic* (1988) 2 Lloyd’s Rep. 411.

⁴⁸ See, section 5(4)[b] of AJA.

⁴⁹ Order IV rule 2 AJPR

⁵⁰ In *Nigeria Agip Oil Co Ltd-v-Owners of the vessel “Renate Leonhardt” & Ors* Vol. 4 NSC 186, it was held that since the Plaintiff has also sued a party named as “Owners of the vessel MV “Renate Leonhardt” which expression means anybody who is found to be the owner of the vessel, it is otiose to sue the 2nd defendant as owners of the same vessel, and so since they were not alleged to be co-owners, 2nd defendant’s name was struck out.

⁵¹ Order I rule 3 AJPR

⁵² See, *The Monica* (1976)2Lloyds’ Rep. 113.

acknowledgement of service without requiring any formal appearance⁵³, in practice it is the Form of the writ of summons in the Federal High Court (Civil Procedure) Rules 2000, giving 8 days to the defendant to enter appearance to the suit that the Registry of the Federal High Court insists must be followed and used by the Plaintiff. Some lawyers have contended that where Rules 2000 generally makes provisions for what AJPR has already provided for on admiralty matters, AJPR being rules specially made for admiralty matters, should govern the situation.

2.5 Furthermore, it is submitted that the effect of the combined reading of *Order 6 rule 8 and Order 26 rule 1 of Rules 2000 and Order II rule 2(1) AJPR*, is that unless a statement of claim is endorsed on the writ or the court gives leave, before a writ is issued and served, a writ to commence an admiralty action *in rem* or *in personam* shall be accompanied by a statement of claim *and copies of the documents mentioned in the statement of claim to be used in evidence*. Consequently, a plaintiff filing a writ in an admiralty action *in rem*⁵⁴ must file a statement of claim and attach copies of pleaded documents to it before the processes are filed in the Federal High Court. In practice, the Registrar of the court will not approve for filing, any writ *in rem* without a statement of claim and attached copies of documents pleaded in the statement of claim. The rationale behind the rule is to speed up trial by ensuring that parties are not taken by surprise in preparing for their cases and that documents, which are not in existence at the time the action is being filed, are not “manufactured” and concocted for the purpose of the case. In spite of this, it has been argued that the drawback in the application of this rule to admiralty actions *in rem* is that it causes avoidable delay in the preparation and filing of processes required to quickly obtain an⁵⁵ arrest of a ship before the ship leaves Nigerian territorial waters.

2.6 Motion Ex Parte for Warrant of Ship Arrest.

It is advisable that before applying for a warrant of arrest of the offending vessel, the plaintiff should search the caveat register to see if there is a caveat⁵⁶ against arrest registered in respect of the ship because he has to show good and sufficient reason for arresting in the face of the caveat⁵⁷, but the caveat does not bar an arrest order being made or arrest warrant being issued⁵⁸. Any ship whether Nigerian or foreign can be arrested in an action *in rem* against it or its beneficial owner or demise charterer at any location within Nigerian territorial waters⁵⁹. The objective of an arrest is to make the defendant to put up a bail or provide in advance of the judgement, a fund for securing compliance with the judgement if and when it is obtained against him.⁶⁰ A Motion Ex Parte supported by an affidavit and an affidavit of urgency, is filed under *Order 7 of AJPR and Section 7 of AJA* by a party (who may be a plaintiff or defendant/counter-claimant) to a proceeding commenced by an action *in rem*, to procure a warrant of arrest of a ship or other property against which the suit is filed. The affidavit in support of the Motion Ex Parte may be sworn to by either the applicant, his agent or a solicitor

⁵³ Order XI rule 2(1) AJPR

⁵⁴ Even though under AJPR a plaintiff in an admiralty action *in personam* is not required to file a statement of claim and the documents to be tendered at trial, he is now bound to do so under the Rules 2000 and in practice the Registry of the court will not accept his writ in personam unless it is accompanied with the statement of claim and pleaded documents.

⁵⁵ Section 24 AJA.

⁵⁶ A caveat is an undertaking filed in the court's registry by the owner of or person interested in a ship or property to appear to an action in rem filed against that ship or property and provide bail even though the ship or property is not under arrest.

⁵⁷ In the *St. Roch* (1998) Vol. 7NSC 380 it was held that an agent of the ship owner can file the caveat against arrest on its behalf and that time could be extended for the ship owner to file the bail bond as indicated in the caveat.

⁵⁸ See, Order 6 rule 6 AJPR

⁵⁹ See, *The Gongola Hope* Vol. 6NSC 237.

⁶⁰ See, *The Banco supra*, at 151

disclosing a strong prima facie case⁶¹. By virtue of the affidavit of urgency, the application for the ship's arrest can be heard and granted the same day it is filed. A warrant of arrest can be applied for after the issue of the writ *in rem* but it is usually applied for at the time of issuing the writ *in rem*.

The affidavit in support of the Motion Ex Parte, which must show a strong prima facie case, must fully and frankly disclose all material facts and contain the following among other salient facts:

- (i) a brief account of the nature of the claim or counterclaim,
- (ii) the fact that the claim or counterclaim has not been satisfied,
- (iii) if the claim arises in connection with a ship, her name, port of registry, other identification, beneficial ownership and her location within the limits of Nigerian territorial waters,
- (iv) if not a ship, the nature of the property to be arrested,
- (v) unless the arrest is to execute a judgment *in rem*, the amount of security sought from the defendant, if any;
- (vi) indemnity/undertaking in favour of the Admiralty Marshal to pay on demand his fees and expenses incurred by him in respect of the arrest of the ship or other property and its subsequent care whilst under arrest.

However, if it is a claim giving rise to a statutory maritime lien or an action *in personam* under sections 2(3) and 5(4) of AJA, the affidavit must contain the following facts in addition to the above;

- (vii) the name of the person who would be liable on the claim if it were started as an action *in personam* (i.e. "the relevant person"),
- (viii) the fact that the relevant person was when the cause of action arose, the owner or charterer or in possession or in control of the ship in connection with which the claim arose, [specifying which one is applicable],
- (ix) the fact that when the writ was issued, the relevant person was either the beneficial owner of all the shares in the ship to be arrested or if the ship to be arrested is the ship in connection with which the claim arose, the demise charterer of the ship, and,
- (x) whether or not the claim was filed on a sister-ship basis.

2.7 The realization of the satisfaction and the satisfaction of the foregoing requirements are some of the reasons why ship arrest is very technical and why a wrong step or procedure in the process leads to wrongful or needless arrest that sounds in damages⁶², why it leads to a discharge of the order of wrongful arrest and why the satisfaction of judgement in a good maritime claim cannot be secured in advance of judgement. They are also why the applicant for arrest of a ship or other property must have and depose to correct facts about the particulars of the owners or demise charterers of the ship. For instance, in *Anchor Ltd-v-The Owners of the ship Eleni*⁶³, where the plaintiff proceeded in an action *in personam* and obtained judgement against the defendants personally, the arrest of the ship was held wrong. In *Supermaritime Nigeria Ltd-v-International Chartering, Operating Shipping MV Antwerp & Anor*,⁶⁴ an application to arrest the "MV Advance" was refused because no maritime lien or charge on the vessel was proved to attach to the vessel to give the

⁶¹ See, *Chullam Enterprises Ltd-v-Owners of Sea Thand II*; "The Sea Thand II", INSC 295.

⁶² See Order 11 AJPR. "The Orion" (1852) 14 ER 946.

⁶³ (1966) Vol. 1 NSC, 22.

⁶⁴ Vol. 4 NSC at 54

plaintiff a right of action *in rem*. In the *Bosnia*,⁶⁵ the claim was held un-maintainable against the owners of *The Bosnia* since a maritime lien did not arise from the claim. In *the MV S. Araz-v-Scheep, supra* at 225 it was held that the court would not have jurisdiction to arrest a ship simply to meet an award to be given in an arbitration when no proper action *in rem* was before the court, the sole purpose being to provide security in respect of an action for which an arbitration proceeding was already in progress in a foreign country. In *Franco Daval Ltd-v-The Owners M/V "Vitali II" & The Master*,⁶⁶ the order of arrest was discharged because the time charterers instead of the owners of the arrested ship, were sued.

2.8 In *Sugar Exporters London Ltd & Ors-v-M/V Fairwind*⁶⁷ *supra*, an action *in rem* did not satisfy the stipulations in *section 5(4)(a) of AJA* and the defendants were not the owner or demise charterers of the ship but merely parties to a voyage charter party in respect of the ship, and so, the arrest warrant was set aside and the action was struck out. Where an application was filed to set aside the writ and warrant of arrest and to release the security given on the ground that the arrester/plaintiff had failed to show that at the time the action was brought, the relevant person was the beneficial owner of the ship, the court held that the person who would be personally liable to the plaintiff was the registered owner who did not at the time the action was brought, own any shares in the ship against which *in rem* action was brought and so the security was released.⁶⁸ Arresting a wrong vessel leads to a dismissal of the case.⁶⁹ In *The Phoenix*⁷⁰, where the arrest of a vessel was irregularly and unlawfully obtained in that a non-owner of the vessel was sued in an *in rem* action the plaintiff having neglected to search the Lloyds Shipping Register and other sources for the real owner, upon the application of the rightful owner, the arrest was discharged and the ship was released.

2.9 The Service of Writ and Arrest Warrant.

Upon the Applicant's procurement of the issuance of the arrest warrant in Form E and its giving a written undertaking to the Admiralty Marshall to pay on demand, the fees of the Admiralty Marshall and all expenses incurred by him in respect of the arrest and subsequent care of the property whilst under arrest, only the Admiralty Marshal (where the writ *in rem* has either been previously served or is being simultaneously served with the warrant of arrest), or his representative executes the warrant of arrest against the ship on any day of the week either by affixing a sealed copy of same to the mast or other conspicuous part of the ship or delivering them to the master of the ship or a willing solicitor to the owner of the res or caveator against arrest, unless the applicant in writing or the court stops the execution. The arrest constitutes the ship or other property as security for the claim in the hands of the court and the security cannot be defeated by a subsequent bankruptcy of the owner of the arrested vessel or other property because the rights of the parties are determined by the state of things at the time of the filing of the action.⁷¹

When an arrest is threatened, the ship owner or its P&I Club may post security and undertake to accept service of the writ through its solicitors, but a court is not *seised* of

⁶⁵ (1978) Vol. 1NSC 428 at 430.

⁶⁶ Vol. 3NSC 630.

⁶⁷ See *Stallion Nigeria Ltd-v- The MV Aria & Ors: "The Aria"* Vol. 7 NSC 204.

⁶⁸ See, *The Mawan* (now named the *Mara*) (1988)2 Lloyd's Rep. 459.

⁶⁹ See, *The Evangelismos* (1858) 14 E.R. 945.

⁷⁰ Vol. 4NSC 260

⁷¹ See, *The Cella* (1881) 13 PD 82.

the proceedings until the writ *in rem* is served whether the defendant is within or outside jurisdiction⁷² because the jurisdiction of the court is invoked not when the writ is issued, but when it is served on the ship or *res* and the warrant of arrest is executed⁷³. As soon as a ship or other property is arrested, it comes under the Admiralty Marshal's custody (but not his possession) on behalf of the court.⁷⁴ Where a ship has already been served with a writ or is arrested in an action *in rem* to enforce a particular claim, no other ship can be arrested or served with a writ to enforce the same claim in that or another action unless the first mentioned ship has been released from an invalid arrest or has been unlawfully removed from the custody of the Admiralty Marshal⁷⁵ and any removal or interference with the arrested property by a person who knows that a warrant of its arrest has been granted, is contemptuous of the court and punishable by committal to prison or fine. A writ in an action *in rem* may not be served outside the jurisdiction (since usually the *res* has to be within the limits of the territorial waters of Nigeria before the *res* could be arrested) or by substituted service, but a writ *in personam* may pursuant to a court order be served on a defendant outside the jurisdiction by a reputable courier company.⁷⁶

2.10 Where a plaintiff sees that it cannot make out a proper case *in rem* for the arrest of the offending ship or other property, it can still file a maritime claim in an action *in personam* against the owners of the ship and other persons who are liable in contract or tort. However, where the defendants are outside jurisdiction, the plaintiff will have to comply with the provisions of Rules 2000⁷⁷ on seeking leave to issue and leave to serve the writ outside the jurisdiction and showing there are serious issues to be tried⁷⁸. The claimant will in that case not be able to obtain an arrest of the ship or other property to secure the satisfaction of his claim, but will be left with levying execution of the judgment on the available assets of the defendants within jurisdiction or registering the judgment in a foreign court for enforcement if there is reciprocity treaty between Nigeria and the foreign country on enforcement of judgements⁷⁹.

2.11 Caveat against arrest or release of ship.

A caveat is an undertaking filed in the Registry of the Federal High Court by the owner of or person interested in a ship or other property to appear to an action *in rem* against that ship or other property and provide bail even though the ship or property is not under arrest.⁸⁰ ⁸¹ The lifespan of a caveat is 12 months if not withdrawn or set aside before then, although at the expiry of 12 months, a further caveat may be filed.⁸² It may be either a caveat against the arrest of a ship or other property in the prescribed Form C⁸³ or a caveat against the release of an arrested ship or other property⁸⁴ and the two caveats are kept in separate registers maintained for that purpose by the Court Registrar and are open to public inspection without any fee.⁸⁵ A caveat against the arrest of a ship or other property

⁷² See, *The Sargasso* (1993) 1 Lloyd's Rep. 424.

⁷³ See, *The Banco* (1971) Probate 137 at 153

⁷⁴ See, Order VIII rule 4(1) AJPR.

⁷⁵ The Plaintiff could file a writ naming more than one ship or file more than one writ naming different ships as defendants. See also Section 5(8), 5(9) and 5(10) of AJA.

⁷⁶ See Order V AJPR.

⁷⁷ See, Order 13 rules 13 & 14 of the Federal High Court Civil Procedure Rules, 2000.

⁷⁸ See *Seaconsar Far East Limited –v- Bank Markazi Jomhuri Islam Iran* (1994) 1 Lloyd's Rep. 1

⁷⁹ See *Unipetrol Nigeria Limited –v- Prima Tankers Ltd* (1986) 2NSC 646 where judgement obtained in an admiralty matter in Nigeria was registered in Gibraltar and enforced against the defendants who were outside Nigeria.

⁸⁰ See, Order 1 AJPR.

⁸¹ See, Order VI rule 6 AJPR; *The "Don Richardo"* (1879) 5PD 121.

⁸² See, Order VI rules 8-10 AJPR.

⁸³ Order 6 rules 1 to 5 AJPR.

⁸⁴ See Order VI rules 7 and 8 AJPR.

⁸⁵ See Order VI rule 11 AJPR.

can be filed if the caveator or its solicitor satisfies the Court's Registrar, usually by a written undertaking that it will appear to the suit and provide bail should there be any proceeding of the kind stated in the caveat, or provide security by a written undertaking of a P & I Club or a guarantee of a bank or a reputable insurance company doing business in Nigeria to satisfy any judgement for the amount specified in the caveat⁸⁶ The undertaking to appear and give bail is taken as being given to the court and enforceable by the court against the caveator and within three days of the service of a writ *in rem* on the caveator, the caveator shall pay into court, a sum equal to the amount claimed or the sum contained in the caveat whichever is less or post a bail bond in Form D, unless he has reached a contrary agreement with the claimant, failing which the caveator is treated to have failed to appear in the proceedings within the limited time.⁸⁷

Even though a person who has a right *in rem* against a ship or other property under arrest may file a caveat against the release of the ship or other property instead of filing a suit *in rem* and an application for a further arrest of such property⁸⁸ so that he may save costs of filing a new suit and be served with any application to have the caveat removed or the ship released; yet if he has a claim which gives rise to only a statutory right *in rem* and not a maritime lien, it is better for him to file a writ *in rem* instead so that he can ensure that his right of action *in rem* is not lost by the sale of the ship whilst it is under arrest by another person. The caveator may whilst the ship or other property is under arrest, apply to court to have the arrest discharged and the court may if the arrest has not been backed with good and sufficient reasons, discharge the arrest and direct the arrester to pay damages to the applicant for the loss the owner of the res suffers as a result of the arrest. It should be noted that the filing of a caveat by the owner of a ship or other property and the provisions of Order 6 rule 6 of AJPR do not preclude an arrest of a ship or other property from been ordered or preclude a warrant of arrest from being issued, if the claimant has made out a prima facie case. It is the duty and the risk of the claimant to inspect the caveat register and decide whether the undertaking in the caveat is satisfactory to him or not and to apply for an arrest warrant if the caveat is not satisfactory to him.

2.12 Release of Arrested Ship.

A ship or other property under arrest remains so from the time the warrant of arrest is executed until it is lawfully released from arrest or sold by the order of court⁸⁹. In order to mitigate the colossal damages/loss and costs incurred including port charges/dues, crew wages and maintenance by running the ship as a hotel/storage and carriage facility and loss of earning/income whilst under arrest, delayed delivery or sale of cargo, loss of business/employment of the vessel, a prudent owner of or interested person in a ship or other property under arrest, is anxious to have it quickly released from arrest (so that the ship can continue with its trade and not be sold and the property may be applied as he had wished. An order of arrest of a ship or other property is not a final decision of the court in the *in rem* action and as such when the prescribed conditions have been met, the ship or other property under arrest will be released from arrest by the same court of first instance.

The release of an arrested ship or other property may be obtained by any of the following ways, namely:

⁸⁶ See, Order 6 rules 2 and 3 AJPR.

⁸⁷ See, Order VI rules 4 and 5 AJPR.

⁸⁸ See, Order VI rule 7 AJPR.

⁸⁹ See, Order 8 rule 5 AJPR.

- (i) by the Registrar of the Federal High Court upon a written application by a relevant person⁹⁰ for such release upon the Court's satisfaction that the relevant person has either paid into court an amount or filed in the proceedings a bail bond in the prescribed Form D (entered into by sureties in the presence of the Commissioner for Oaths), *for an amount equal to the amount claimed* in the suit or *the value of the ship* whichever is the less, but if the claim relates to salvage, the release is subject to the value of the ship or other property under arrest being agreed upon by the parties or being determined by the court⁹¹ or,
 - (ii) if the arrester consents in writing to the release, or
 - (iii) if the proceedings have been discontinued or dismissed,
- provided that in any of the above cases, if a caveat against the release of the ship or other property is in force, the res will not be released unless pursuant to the court's order for its release;⁹² or,
- (iv) If a party to the proceedings applies to the court for the release of the ship or other property, but where there is a caveat against the release of the ship or other property in existence, he has to serve the application on the caveator requiring the caveat to be withdrawn.

2.13 The application for the release of a ship or other property, which is supported by an affidavit containing relevant facts showing the grounds for applying for the release, the security or guarantee being offered and documents being exhibited, is filed along with an affidavit of urgency to ensure an expeditious hearing of the Motion for release⁹³ and it is usually heard after being duly served on the arrester. The Federal High Court has the discretion both to refuse or grant the release of an arrested ship or other property on such terms as may be just in the circumstances⁹⁴ and to reduce or increase the amount in respect of which a bail has been provided.⁹⁵ The court is also entitled to release a vessel on bail on the fulfilment of such terms and conditions as the court may deem fit to impose⁹⁶. Bail is the security given to the court as a pledge or substitution of personal property for the property or *res* proceeded against pending the adjudication of the cause involving the vessel and as a security given to the court, it is only available in answer to the action in which it is given.⁹⁷ Bail may be given either to release an arrested ship or to avoid a threatened arrest of a ship. Such terms and conditions as may be imposed by the court for the release of the ship may be a bail or the right security either by way of insurance company's or bank's guarantee or letter of indemnity or P&I Club's letter of undertaking or guarantee⁹⁸ in the amount being claimed in order to secure the plaintiff's claim or whatever judgement is given in Plaintiff's favour⁹⁹ or in line with the court's order.

⁹⁰ An applicant for the release of an arrested ship need not be a party to the suit, it is enough if he is an interested person under Order 1 rule 3 AJPR and the court can suo motu order him to be joined as a party. See *The Chaika* NSC Vol 6 at 367.

⁹¹ See, Order IX rule 1 AJPR. The money paid into court by bail bond or other security is put in a fixed deposit account with a prime bank: Order XII rules 1-2 AJPR.

⁹² See, Order 9 rule 5 AJPR.

⁹³ See *The Valdora* Vol. 4 NSC 140 at 142/148.

⁹⁴ See Order 9 rule 2 AJPR.

⁹⁵ See Order 12 rule 3 AJPR.

⁹⁶ See, *The Silvia* Vol. 4NSC 69

⁹⁷ See *The Roberta* (1938) Probate at 1. A bail is often seen as representing the ship in which case when the ship is released on bail the ship is equally released from the action. In the case of *Tayasa Dredging & Construction Ltd-v-The Owners of M/T "Silvia" & Anor: The Silvia* [supra], the Federal High Court held that a bail is the security given to the court as a pledge or substitution for the property proceeded against and given to the court pending the adjudication of the cause involving the vessel to be bailed.

⁹⁸ See, Order 10 rule 2 and Order 6 rule 3 of AJPR.

⁹⁹ See, *The Lupex* Vol. 5 NSC at 182.

2.14 The power of the court to fix the amount of bail or security is discretionary¹⁰⁰ and in approving the security, it considers the balance of convenience of the parties. In *Kanvas Fishing –v-Owners Tug Boat South Fish & Anor*¹⁰¹, it was held that *in considering the amount of bail to set for the release of the vessel, both the amount of the Plaintiff’s claim and the daily loss to the Applicants for the release of the vessel, should be taken into consideration and the power to fix the amount for bail should not be used oppressively*. Where the plaintiff puts forward an arguable case at the stage of demanding a guarantee as to the value of the loss suffered by it, the general rule is that the Court cannot and ought not at that stage to take a position that would adversely prejudice its claim by so severely reducing the value stated therein, unless a very clear case justifying that course has been made out by the defendant¹⁰² or to scrutinize the merits of the claim.¹⁰³

2.15 The two principles one of which the Federal High Court chooses under its discretion in fixing the *amount of security to be given by the defendant owner of the ship or other property for the release of his ship*, are first that *the arresting party is entitled to sufficient security (or guarantee) to cover the amount of his claim with interest and costs on the basis of his reasonably arguable best case*¹⁰⁴ and second, that *the security should be based on the value of the vessel*.¹⁰⁵ In *The Chaika*¹⁰⁶, it was held that the amount of security to be provided by an applicant for the release of an arrested ship is based on these two principles and that in spite of this, one has to consider which of the two principles is more attractive in terms of doing substantial justice to all the parties subject to the overriding principle that the power to extract security must not be used oppressively¹⁰⁷. In *Baldock Shipping Lines Ltd-v-Owners M/T “Aditya Prabha” and Anor*¹⁰⁸, the Federal High Court, Benin held inter alia in a claim brought by the charterers of a shore discharge crane belonging to the Delta Steel Company Limited which crane was damaged by the “Aditya Prabha”, that it is not in all cases that the value of the arrested vessel shall be the amount of security for its release and no more, the best arguable case is not the value of the vessel but the totality of the available evidence that will sustain the plaintiff’s claim, (*that is to say the amount which the plaintiff would be entitled to at best, if he can prove his claim*) and where there are conflicting reports on the value of the vessel, the amount of security to be fixed is at large and is at the court’s discretion to be exercised judicially and judiciously and the best thing in the circumstance was to strike a balance between the highest and the lowest valuations of the vessel. In the *S. Araz No. 2*,¹⁰⁹ it was held that in determining the best arguable case, the details and particulars of the claim showing how the figure claimed is arrived at, must be given, so as not to render the amount fixed arbitrary.

2.16 Conversely, in *Delta Steel Company Limited-v-The Owners of the ship “Aditya Prabha” & Anor*¹¹⁰, Belgore CJ of the Federal High Court (as he then was), held that the amount of security to be provided for the release of a vessel under arrest should not

¹⁰⁰ It has also been held in the case of *Ebube-v-Gold Star Line Ltd* 4NSC at 226 that the discretion as to the type of security for the release of an arrested ship is left to the claimant and the court.

¹⁰¹ Vol. 3 NSC 639.

¹⁰² See, *Finunion Limited –v-The M/V “Briz” & Anor* : “The Briz” Vol. 7 NSCpage 131. [CA].

¹⁰³ See, *The Lupex*: Vol 5 NSC at 182 CA.

¹⁰⁴ See, *The Moschanty* (1971) 1 Lloyds Rep. 37 at 44.

¹⁰⁵ See, *The Charlotte* (1920) Probate 78. See also *The “Tribels”* (1985) 1Lloyd’s Rep. 128 at 130.

¹⁰⁶ Vol. 6NSC 367.

¹⁰⁷ In *The S. Araz No 2* Vol. 6NSC 149, the Court of Appeal chose the first principle which is the one stated in “*The Moschanty*” supra, in fixing the security for the release of the vessel.

¹⁰⁸ Vol. 3 NSC 594.

¹⁰⁹ See Vol. 6NSC 149

¹¹⁰ NSC Vol.3 at page 602

automatically be the amount claimed in the writ, the court has to consider which is more attractive between the two principles upon which the amount of security for the release of a vessel under arrest is based since there is no laid down criteria as to which of the two principles to choose and the words, “the best arguable case” lack precise meaning ordinarily or in legal terms. The court consequently chose the principle of the value of the vessel¹¹¹ as being fair to all the parties in the circumstance.

2.17 In some cases, after the posting of security which the court is satisfied¹¹² with as being adequate, the court orders the release of the vessel and the parties enter into negotiations which usually lead to settlement and a withdrawal of the suit. In some other cases, parties are not able to agree on the nature or amount of security to be provided especially due to demands of excessive security thereby occasioning avoidable delayed releases of arrested vessels or other property even though demands of excessive security is wrong.¹¹³ In the case of *Tayasa Dredging & Construction Ltd-v-The Owners of M/T “Silvia” & Anor: The Silvia*¹¹⁴ the Federal High Court accepted a P & I Club’s letter of guarantee in lieu of bail subject to the deletion of the clause relating to statutory limitation of liability, for the release of the arrested vessel. However, in *Maxwell Ebube-v-Gold Star Line Ltd*¹¹⁵, whilst stating that the discretion as to the type of security for the release of an arrested vessel is left to the claimant and the court, the Federal High Court rejected a P&I Club’s undertaking offered as security for the release of an arrested vessel on the ground that it is not popular and is sparingly used in Nigeria and has not ousted the use of other forms of security like bail bond and bank guarantee which are more popular and so ordered a reputable Nigerian bank guarantee in the sum claimed as security for the release of the ship¹¹⁶. In a case where the defendants declined to offer any security on the ground that the vessel was already subject to two mortgages, it was held that the release of an arrested vessel must be on terms because the plaintiff is entitled to such security as would cover the whole of its case.¹¹⁷

2.18 In as much as there is nothing wrong in counsel for the defendant owner of a ship or other property under arrest and counsel for the claimant arrester, to negotiate, agree on and implement terms for the release of arrested vessel or other property, counsel should be cautious in such dealings without involving the court so that, should any counsel or party resile from such terms without performing their duties under the agreed terms, the court could intervene. This is a lesson to be learnt from the case of *Oshinloye-v-Owners of the vessel Saint Roland, The Saint Roland*,¹¹⁸ where counsel to the defendant/ship owner entered into a written agreement with counsel to the plaintiff that a bank draft for the sum claimed would be handed over to the plaintiff’s counsel on trust in which that the plaintiff’s counsel undertook to hand back the bank draft as soon as the defendant secured a bank guarantee in the sum claimed, based on which agreement the vessel was released from arrest. However, the plaintiff paid the bank draft into his account and cleared it. Upon procurement of the bank guarantee, the defendant’s counsel requested for a return of the said bank draft, but the plaintiff’s counsel refused to return the bank draft and filed a notice of discontinuance of the suit, which notice the defendant’s counsel sought to set

¹¹¹ This second principle was stated in “The Charlotte”, supra.

¹¹² Order IX AJPR

¹¹³ See section 13 of AJA.

¹¹⁴ Vol. 4 NSC 69.

¹¹⁵ Vol. 4 NSC 226.

¹¹⁶ In *The Valdora* Vol. 4 NSC 140, a P & I Club’s letter of guarantee was rejected as a security for the release of an arrested vessel.. But see Order 10 rule 2 & Order 6 rule 3 AJPR which have made a P & I Club’s letter of guarantee or undertaking as acceptable security for the release of vessel.

¹¹⁷ See, *Anglo-French Steel Corporation-v-Panfixing Shipping Co. Ltd* Vol. 2 NSC page 302.

¹¹⁸ Vol. 4 NSC 243 at 249/250.

aside on grounds of fraud. The Federal High Court held that the agreement between the counsel was without recourse to it (court) and that it could not hold that the plaintiff used the machinery of the court to gain an unmerited advantage over the defendant and so struck out the suit because the plaintiff had unqualified right at that stage to withdraw it without leave of court.

2.19 The party applying for the release of an arrested ship or other property has to pay the fees and expenses already incurred by the Admiralty Marshal whilst the ship was under his custody or make adequate arrangements with him whether by a written undertaking (which could be given by his solicitor) to the Admiralty Marshal to pay his fees or expenses incurred or to be incurred in connection with the arrest, care and custody of the res whilst under arrest and release¹¹⁹ or by depositing the sum the Marshal considers reasonable to meet such expenses and fees. Non-compliance with this rule is a basis for the Admiralty Marshal not to release the arrested ship or other property. Where there is a failure to perform any undertaking or honour a guarantee given for the release of the arrested ship or other property, it can be re-arrested in the proceedings relating to the claim.¹²⁰ Moreover, where no bail has been supplied in respect of the first arrest of a vessel, its re-arrest is permissible.¹²¹

2.20 It is significant that in Nigeria, many claimants prefer bail bonds or bank or reputable insurance company's guarantees and payments of moneys into court, to P & I undertakings or guarantees because whilst the defendant has something at stake in the former which would make him anxious to conclude the case timeously, in the latter situation he has nothing at stake except his usual annual premium to the P & I Club and if the plaintiff wins, he may face the task and cost of enforcing the P & I undertaking in a foreign court. It is important to state here that for the reasons that the AJPR and AJA specially regulate arrests and release of ships, the practice whereby lawyers rely on Order 9 rules 11 and 12 of the 2000 Rules to apply to court to discharge or vary the ex parte order of arrest of a ship, is erroneous because such rules are inapplicable to ex parte order of arrest. It is submitted that the rules may be applicable to complement the AJPR only if the interim order of injunction (for instance an interim injunction to retrain the clearance or sailing of an offending vessel) to be discharged or varied was made in a maritime action.

Any one entitled to the immediate possession of a ship or cargo which is not under arrest who undertakes in writing to meet the Admiralty Marshal's expenses/fees or to indemnify him in respect of any claim arising from the discharge, or the plaintiff and subject to just terms and conditions, may apply to the court to discharge the cargo from the ship¹²².

CONCLUSION.

In as much as arresting and releasing of ships are peculiar to admiralty actions *in rem*, they are to be cautiously and properly applied bearing in mind the economic effects which frivolous arrests have on ship owners and cargo owners. When the counsel, the parties and courts involved in a maritime litigation concerning arrest and release of ship or other property are familiar with the applicable substantive and adjectival laws and cooperate in properly applying them, delayed release of ship will be avoided, arrest could

¹¹⁹ See Order 9 rule 3 AJPR.

¹²⁰ See Section 6 AJA.

¹²¹ See, *M/V Da Qing Shan & Ors-v-Assan Oil Mills Ltd. The Da Qing Sahn No 1*. Vol. 4 NSC 153 .

¹²² Order VIII rule 6 AJPR.

be avoided and losses suffered by ships under arrest would be avoided or minimized. I thank you for your attention.

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5/6/03