

# **THE ARREST PROCESS PROPER.**

## **INTRODUCTION.**

One of the benefits of *in rem* actions is that an offending ship can be arrested any where in the world in a State 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. The arrest of ships or other property through a court order is mainly to obtain a pre-judgment security to satisfy any judgment the plaintiff may obtain in his favour after the trial of his claim in court until the release of the arrested ship or other property upon its owner providing an acceptable security whilst the trial of the case goes on. 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. The security is necessary so as to ensure that any judgment the plaintiff obtains at the end of trial is rendered nugatory or barren because there is no asset of the defendant within the jurisdiction of the Court since being a mobile asset a ship moves from one jurisdiction to the other different from where she is registered and from where her owners are based or have assets. Ship arrest and prejudgment security are some of the things that distinguish admiralty actions *in rem* from other civil causes and matters.

It is necessary at the beginning of this paper to define some terms for easier understanding of the paper.

A “**ship**” is simply a floating vessel<sup>[1]</sup> which is self-propelled and capable of carrying cargo or passengers<sup>[2]</sup>. It is also defined in other ways by different maritime legislations and Conventions<sup>[3]</sup>, in the 1952 Arrest Convention<sup>[4]</sup>. In the Coastal and Inland Shipping (Cabotage) Act, No 5 of 2003<sup>[5]</sup> (“Cabotage Act”) a “vessel”, is defined as 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 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.<sup>[6]</sup> I would prefer to use for the purpose of this paper, the definition in the Interpretation Section<sup>[7]</sup> of the Admiralty Jurisdiction Act, 1991, [AJA] namely; “Ship” “*means*

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*a vessel of any kind used or constructed for use in navigation by water, however it is propelled or moved and includes (a) a barge, lighter or other floating vessel, including a drilling rig; (b) a hovercraft; (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* because it is the special law on admiralty dealing with ship arrest. It is noteworthy in understanding the intentions of the Legislature in the definitions of “ship” that the AJA and Cabotage Act, 2003 have no regard to the method or lack of propulsion in defining ships and that the word “means” used in AJA is exhaustive whereas the word “includes” used in the Cabotage Act, is not exhaustive.<sup>[8]</sup>

The definition and rules under AJA are effective, enforceable and not inconsistent with the relevant international convention on arrests of ships because by *Article 8[4] of the Arrest Convention*. the Convention<sup>[9]</sup> does not change the domestic law of any contracting party relating to arrest of a ship within the jurisdiction of the state by a person having habitual residence or principal place of business in that state.

“**Arrest**” of ships is not defined in AJA or Admiralty Jurisdiction Procedure Rules, 1993 [AJPR] or the Federal High Court Civil Procedure Rules, 2000, (“the 2000 Rules”), the three main “laws” on ship arrest process in Nigeria, but “**arrest warrant**” is simply defined in AJPR as “a warrant for the arrest of a ship or other property”<sup>[10]</sup>. 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*”.<sup>[11]</sup> Arrest has also been described as the seizure of a ship by 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 country<sup>[12]</sup>, but the use of “seizure” is questionable because seizure connotes also a forcible possession of a ship by State authority. In *Anna H*<sup>[13]</sup> 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.

“**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

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them”<sup>[14]</sup>. 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.<sup>[15]</sup> Generally speaking, substantive rules give or define the right, which it is sought to enforce, and procedural rules govern the mode or machinery by which the right is enforced.<sup>[16]</sup> Procedure is interchangeable with “practice” or “process”. So, the arrest process proper is the accurate or good mode by which a ship is (properly) judicially arrested and detained until its release is secured by adequate security or bail bond.

### **Admiralty action in rem and in personam.**

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 actions *in rem* are those 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 or for the value of the property proceeded against where that is less than the amount of the claim<sup>[17]</sup>. An action *in rem* has also been described 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 tort and it is necessary to look at the person who was liable at the time the cause of action arose.<sup>[18]</sup> *Simply put, an in rem action is against a thing<sup>[19]</sup> and not its owner, whilst an in personam action is against a person or a company.*

### **WHEN TO ARREST/PROCEDURAL REQUIREMENTS**

A ship can only be arrested when it is within the limits of the territorial waters of Nigeria, namely within 12 nautical miles from the baselines. A Plaintiff may also obtain a warrant of arrest in anticipation of the arrival of an offending ship within the territorial limits and upon the arrival of the ship within Nigerian territorial waters, pounce on it with the arrest warrant. The location of the vessel or other property to be arrested within the limits of Nigerian territorial waters requires further comment especially because the Coastal and Inland Shipping (Cabotage) Act, 2003 which Act deals with matters involving *carriage of cargo and passengers within the coastal, territorial and inland waters, island or from any point to another within the waters of*

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*the Exclusive Economic Zone of Nigeria* has extended the jurisdiction of the Federal High Court on adjudicating on cabotage matters. Since pursuant to Section 2 of the Territorial Waters (Amendment) Act, 1998, the limits of Nigerian territorial waters is 12 nautical miles from the baselines or low water mark, the view has often been held that the Federal High Court lacks jurisdiction to make an order for the arrest of a ship or property lying outside the said 12 nautical miles. However, in the case of *Maxwell Ebube-v-Gold Star Line*,<sup>[20]</sup> an order of arrest was made in anticipation of the arrival of a vessel within Nigerian territorial waters, which vessel was then arrested as soon as it came within Nigerian territorial waters. In his book, the learned author Christopher Hill<sup>[21]</sup> recognised such practice of issuing a writ *in rem* and waiting during the validity of the writ for a time to “pounce” on the *res* when it comes within jurisdiction, as an excellent method of getting the owner of the *res* within the plaintiff’s grasp.

In the case of *Benzene Nigeria Limited-v-Nigerbrass Shipping Line Limited: The Gongola Hope*,<sup>[22]</sup> it was held that the essence of the arrest of a vessel is that it is within the jurisdiction of the court, that is, within the territorial waters of Nigeria and that a vessel flying a Nigerian flag can be arrested and sold through judicial orders. The author humbly submits that given the words in section 7(2) AJA their ordinary meaning under the literal rule of construction of statutes and, because the admiralty jurisdiction of the Federal High Court shall apply to all ships irrespective of the places of residence or domicile of their owners and *all maritime claims, wherever arising*, and from the use of the word “may” which is “discretionary” and not “mandatory”, an order for the arrest of a vessel in an action *in rem* arising from cabotage trade outside the Nigerian territorial waters but within its Exclusive Economic Zone, can be made against a vessel or other property that is outside the limits of Nigerian territorial waters but within the exclusive economic zone of Nigeria. The correctness of this position is easily seen especially where an order of arrest of a vessel outside Nigerian territorial waters is made in anticipation of its arrival within the said territorial waters and the vessel or other property is either waited for to arrive within the territorial waters and be “pounced upon” or arrested or alternatively the vessel or other property may be arrested at any place outside the Nigerian territorial waters. Such orders of arrests would be valid.

The above submission is in line with the decision of the Federal High Court in *Maxwell Ebube-v-Gold Star Line Ltd*, the opinion expressed by a learned author and a maritime law expert, Mr. L.N. Mbanefo SAN, book, “Nigerian Shipping Practice and Procedure” that such an order of arrest would still be valid since section 7(2) of the Admiralty Jurisdiction Act is concerned with the carrying out of the arrest. This seems also to be why in the unreported decision in suit No. *FHC/L/CS/430/2001: Ms Adenike Adejumobi & Anor -v- Mitsui OSK Lines Limited & Ors*, the Federal High Court, Lagos ordered that the defendants should secure the release of goods on board the 1<sup>st</sup> Defendant lying at the Port of Cotonou, Benin Republic, outside Nigerian territorial waters and the exclusive economic zone, although the decision had been criticized as being

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irregular because it is generally believed that the Federal High Court lacks jurisdiction to make an order to arrest a vessel that is not within the limits of Nigerian territorial waters.

A plaintiff or defendant/counterclaimant must take note that in order to arrest a ship or other property, the only Court he can approach in Nigeria is the Federal High Court because it is the only Court constitutionally given exclusive jurisdiction to hear and determine admiralty matters. The jurisdiction of a court is statutory. Arrests and releases of ships are connected with enforcement of admiralty or maritime claims or disputes. Both section 251(1)(g) of the 1999 Constitution<sup>[23]</sup> and section 19 of AJA confer 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 on the Federal High Court. State High Courts lack jurisdictions to entertain admiralty matters<sup>[24]</sup>. There is only one Federal High Court in Nigeria<sup>[25]</sup> with its jurisdiction spreading throughout Nigeria, though having 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.<sup>[26]</sup> *Its admiralty jurisdiction 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 being used by the Navy and all maritime claims), notwithstanding where they arise from*<sup>[27]</sup>. The extent of the admiralty jurisdiction of the Federal High Court is stipulated in *sections 1 and 2 of AJA*<sup>[28]</sup>, a part of which states:

*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.*

It is submitted that the categories of the subject matters of admiralty jurisdiction are not exhaustive because of the use of the word “includes” in section 1(1) thereof and that admiralty claims must be formulated on the writs in order to confer jurisdiction on the Federal High Court under the AJA and 1999 Constitution.

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 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

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arises<sup>[29]</sup> and get it arrested for a pre-judgment security to satisfy a claim when successful. The specified cases are :

- (a) the truly *in rem* cases involving *proprietary maritime claims*<sup>[30]</sup> 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,
  - (b) a claim giving rise to a *maritime lien or other charge on the ship* for the amount claimed. Maritime liens in the AJA<sup>[31]</sup> include 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,
  - (c) claims limited by ownership status referred to in section 2(3) AJA as *general maritime claims* giving rise to *statutory maritime liens* if the conditions stated in *sections 5(4) and 5(4)(a) 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 owner<sup>[32]</sup>, or charterer<sup>[33]</sup>, or in possession or in control of the ship *when the cause of action arose*,
    - (iii) *at the time the action is brought* (i.e. when the writ is issued<sup>[34]</sup>), the person who would be liable on the claim in an action *in personam* must be the beneficial owner<sup>[35]</sup> of all the shares in the ship<sup>[36]</sup> or the demise charterer<sup>[37]</sup>. *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 that case, the ship can still be arrested notwithstanding the change of ownership.
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- (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. sister<sup>[38]</sup> 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<sup>[39]</sup> 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].<sup>[40]</sup>

In order to be entitled to arrest a ship or other property, the Plaintiff must make out or propound an action *in rem*. It is only where an action *in rem* has been filed that a ship can be arrested either at the time of filing the action or subsequently. The writ of summons commencing the action *in rem* which, shall specify a relevant person as a defendant by reference to ownership or other relationship to the ship or other property<sup>[41]</sup>, e.g. “*The owner of the MT Port Harcourt*”<sup>[42]</sup>. This method is useful and safe in avoiding the risk of suing a wrong person where the exact name of the ship owner is doubtful or unknown as at the time of filing the action, since a wrongly sued person may apply to strike out its name. In some cases, the offending ship may be named as a defendant on the writ e.g. “*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”.<sup>[43]</sup>

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. Although the writ commencing an action *in rem* ought to be in Form B in the Schedule of AJPR giving the defendant 14 days from the service of the writ of summons to file acknowledgement of service; in practice, it is the Form of the writ of summons in the Federal High Court (Civil Procedure) Rules 2000 [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 by the Plaintiff. Some have argued that Rules 2000 complement the AJPR whilst some have contended that where Rules 2000 generally makes provisions for what AJPR has already provided for on admiralty matters, AJPR being rules

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specially made for admiralty matters, should govern the situation. It is also argued that *Order 2 rule 1 of Rules 2000* recognises the commencement of suits “by any other method required by other rules of court governing any *special subject matter* as provided in those rules” and that failure to use the right Form of writ should be treated as a mere irregularity which should not nullify the proceedings<sup>[44]</sup>. Some other argument is that the effect of the combined reading of *Order 6 rule 8 and Order 26 rule 1 of Rules 2000* is that unless a statement of claim is endorsed on the writ or the court gives leave to do so, before a writ is issued and served, a writ to commence an admiralty action *in rem* shall be accompanied by a statement of claim and copies of the documents mentioned in the statement of claim to be used in evidence<sup>[45]</sup>. Consequently, a plaintiff filing a writ in an admiralty action *in rem*<sup>[46]</sup> must file a statement of claim and attach copies of pleaded documents to it before the processes are received by the Court’s Registrar for filing. 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 an<sup>[47]</sup> arrest of a ship before the ship leaves Nigerian territorial waters.

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 AJPR 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. It is has also been submitted that in other cases where there is no conflict between the two Rules, the two Rules are meant to complement each other.<sup>[48]</sup>

### **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 caveat<sup>[49]</sup> against arrest registered in respect of the ship because he has to show good and sufficient reason for arresting in the face of the caveat<sup>[50]</sup> whose normal lifespan is 12 months<sup>[51]</sup>, but the caveat does not bar an arrest order

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being made or arrest warrant being issued<sup>[52]</sup>. Any ship whether Nigerian or foreign can be arrested in an action *in rem* against it or its beneficial owner or demise charterer as long as it is within Nigerian territorial waters<sup>[53]</sup>.

A Motion Ex Parte supported by an affidavit and an affidavit of urgency, is filed under *Order 7 AJPR and Section 7 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 may be sworn to by either the applicant, his agent or a solicitor disclosing a strong prima facie case<sup>[54]</sup>. The affidavit in support disclosing a *strong prima facie case* must fully and frankly disclose all material facts and contain the following among other salient facts:

- (i) 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<sup>[55]</sup> and her location within the limits of Nigerian territorial waters<sup>[56]</sup>,
- (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, 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<sup>[57]</sup>.

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

- (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<sup>[58]</sup>.
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The foregoing is one of the reasons why ship arrest is very technical and why a wrong step or procedure leads to wrongful or needless arrest that sounds in damages<sup>[59]</sup> and to also a discharge of the order of wrongful arrest. In *Anchor Ltd-v-The Owners of the ship Eleni*<sup>[60]</sup>, 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*<sup>[61]</sup> 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 plaintiff a right of action *in rem*. In the *Bosnia*,<sup>[62]</sup> 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*,<sup>[63]</sup> 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*<sup>[64]</sup> the order of arrest was discharged because the time charterers instead of the owners of the arrested ship, were sued. In *Sugar Exporters London Ltd & Ors-v-M/V Fairrwind*<sup>[65]</sup>, an action *in rem* did not satisfy section 5(4)(a) 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, the arrest warrant was set aside and the action struck out. Where an application was filed to set aside the writ and arrest warrant and to release the security given on the ground that the arrestor/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 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.<sup>[66]</sup> In *The Phoenix*<sup>[67]</sup>, where the arrest of a vessel is irregularly and unlawfully obtained in that a non-owner is sued in an *in rem* action, upon the application of the rightful owner, the arrest was discharged and the ship was released. Arresting a wrong vessel leads to a dismissal of the case.<sup>[68]</sup>

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### **Caveats against Arrest.**

An arrest warrant may not be issued except with leave of Court if a caveat against the arrest of the ship or other property is in force and the proceeding is of a kind specified in the caveat, the caveat specifies an amount no less than the amount claimed by the applicant, the caveat has not expired, the proceedings is stayed because payment has been made into Court or a bail bond in not less than the amount claimed by the applicant has been filed but the Court may still allow an arrest warrant to be issue notwithstanding that these conditions had not been fulfilled.<sup>[69]</sup> An arrest warrant can no longer be executed anytime after 6 months after it was issued although a further warrant of arrest can be issued after that period.<sup>[70]</sup> What should a plaintiff do if as is often the case, an offending ship jumps arrest before the arrest warrant is executed on it and comes back into our territorial waters after 6 months in its original or changed or pseudo name to avoid arrest? Should the applicant just write a letter to the Admiralty Marshal asking her to renew or revalidate the arrest warrant or file a fresh application in Court for the issue of a “further” arrest warrant? It is submitted that it should file a fresh application for a further warrant of arrest provided that if the claim is not an admiralty action in rem based on traditional maritime liens, the ownership of the ship has not changed. Upon a ship jumping arrest, trial can still proceed and after judgment has been given in the proceeding, the ship can still be arrested<sup>[71]</sup> if it comes within the territorial waters.

### **Service of Process and Arrest Warrant.**

Upon the procurement of the arrest warrant (issued Form E), only the Admiralty Marshal (where the writ *in rem* has either been previously served or is being simultaneously served), executes the warrant of arrest against the ship<sup>[72]</sup> 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 willing solicitor or caveator against arrest, unless the applicant in writing or the court stops the execution.<sup>[73]</sup> 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 the proceedings until the writ *in rem* is served whether the defendant was within or outside jurisdiction<sup>[74]</sup> 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 executed<sup>[75]</sup>. Where a ship has

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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 Marshal.<sup>[76]</sup>

Where a plaintiff cannot make out a proper case for the arrest of an offending ship, 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, the plaintiff will have to comply with the Rules 2000<sup>[77]</sup> on seeking leave to issue and leave to serve the writ outside the jurisdiction and showing there are serious issues to be tried<sup>[78]</sup>, where the defendants are outside Nigeria<sup>[79]</sup>, will not be assured in advance of a security for the satisfaction of his claim if he succeeds at the trial and 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 country on enforcement of judgements<sup>[80]</sup>. Where a plaintiff files an action *in rem* against a government ship or property, the suit can be converted into and proceed as an action *in personam*, if it is satisfied that it was so commenced on the reasonable belief that the ship or property was not a government ship or property.

### **The Role of the Admiralty Marshal & Harbour Master**

The Admiralty Marshal is the officer of the Court who executes the arrest warrant on any day on a ship or other property where the writ has been previously served or is to be served concurrently with the execution of the arrest warrant and the arrest ship or other property shall remain under arrest until it is lawfully released from arrest or is sold by the order of court.<sup>[81]</sup> The Admiralty Marshal is bound to execute an issued arrest warrant unless before the execution, the applicant stops the execution in writing or the Court stops it or orders on just terms that the warrant be discharged or not executed at all or within a specified time due to a caveator's application because a caveat against arrest is in force or a person interested in the ship or other property (such as a ship mortgagee or insurer or cargo insurer or financier or charterer or shiprepairer) so requests the Court.<sup>[82]</sup> A copy of the warrant of arrest and detention of the ship or other property is served on other persons including the Harbour Master and Admiralty Marshal.

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In arresting a ship or other property, the Admiralty Marshal has custody of her/it and unless the Court otherwise orders, she shall take all appropriate steps to retain custody of and to preserve the ship or other property including removing from the ship and storing arrested cargo, removing un-arrested cargo from a ship under arrest and storing it or disposing of it (especially if the cargo is perishable) and moving or shifting the arrested ship.<sup>[83]</sup> Many times, an arrested ship prevents other ships from berthing and discharging their cargo at a jetty or port and disturbs ports operation causing the Nigerian Ports Authority and other terminal operators to lose revenue and charterers to incur costs/demurrage because the arrested ship is occupying the space where their chartered ships should have berthed to discharge their cargo. In such a case, any interested party, or the Admiralty Marshal or the arrestor can apply to the Court for directions with respect to moving the ship to another safe location and removing the serious hardship, difficulty or danger<sup>[84]</sup> and in order to make room for other ships to berth and discharge. Any one who interferes with or removes arrested ship or other property from the Court's jurisdiction without authority commits contempt of court and is liable to be committed to prison, but any one entitled to the immediate possession of a ship or cargo not under arrest who undertakes in writing to meet the Admiralty Marshal's expenses/fees or indemnify him for same, or the plaintiff, may apply to the court to discharge the cargo from the ship<sup>[85]</sup>. An applicant for the release of arrested vessel 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.<sup>[86]</sup>

Another significant point is that an application for an arrest warrant constitutes an undertaking to the Court by the applicant to pay to the Admiralty Marshal, on demand, an amount equal to the fees and expenses of the Admiralty Marshal in relation to the arrest. Although on account of this undertaking, the arresting party is liable to pay the fees and expenses of the Admiralty Marshal, where another party arrests the arrested vessel or files a caveat against release of the arrested vessel, he shall be jointly liable with the first arrestor to pay the Admiralty Marshal's expenses.<sup>[87]</sup> In fact without the payment of the fees and expenses which in practice is N100,000.00 initial deposit, contrary to N5,000 stated in the rules<sup>[88]</sup> and N100,000.00 interim payments every fortnight for as long as the ship is under arrest, the Admiralty Marshal would not execute the arrest warrant or may after executing same threaten to withdraw her services including the security guards onboard the arrested ship, the consequences of which may be unpalatable to the arrestor. Usually, because of the financial strain associated with the payments of the fees and expenses for a prolonged period, the shipowner who does not have business for his ship or that desires to put the arrestor under pressure, prolongs the detention of the ship by

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failing or refusing to negotiate an acceptable security with the arrester so as to delay the ship's release and/or applies to the Court for the ship's release unconditionally or on a less amount of security. However, the arrester could in that case also put such shipowner under pressure by applying to court to sell the ship *pedente lite* with or without valuation especially if the ship is deteriorating in value.<sup>[89]</sup> The notice of an application other than for the release of the ship or other property from arrest, made by a person other than the Admiralty Marshal must be served on the Marshal.<sup>[90]</sup>

### **Bail Bond/Security/Release of Arrested Ships.**

In order to mitigate his damages/loss costs incurred including 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 of cargo, loss of business/employment of the vessel, payment of port charges<sup>[91]</sup> a prudent ship owner is anxious to have his arrested ship quickly released from arrest. The shipowner may do so by paying an amount equal to the amount claimed or the value of the ship or property (whichever is less) into Court or file in Court a bail bond for an amount equal to the amount claimed or the value of the ship or other property (whichever is less) or apply to the Court for the release, serving the application on any existing caveator against the ship's release. The release of a ship from arrest is discretionary and the usual practice of the court is to order release upon the provision of sufficient security to cover the amount claimed, plus interest and costs on the basis of the plaintiff's reasonably best arguable case<sup>[92]</sup> but the security demanded must not be above the value of the property arrested. Also the ship or other property would be released from arrest if the arrester gives a written consent to the release or the action is discontinued or dismissed. The ship will not be released if any of the Marshal's expenses had not been discharged.<sup>[93]</sup> Common security include either an insurance company's or bank's guarantee or letter of indemnity or P&I Club's letter of undertaking or guarantee whichever is acceptable to the arrester. There is often a controversy about the nature of security or bail bond to post for the release of the arrested ship or other property, but it is advisable that a bank guarantee should be requested for since a letter of indemnity or P&I Club's letter of indemnity is fraught with problems of enforcement abroad. In *Maxwell Ebube-v-Gold Star Line Ltd*<sup>[94]</sup>, a P&I Club's undertaking offered as security for the release of an arrested vessel was rejected on the ground that it is not popular in Nigeria and a reputable Nigerian bank guarantee in the sum claimed was imposed by the court for the ship's release<sup>[95]</sup>. Bail is the security given to the court as pledge or

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substitution of personal property for the property or *res* proceeded against pending the adjudication of the cause involving the vessel and a court is entitled to release a vessel on bail on the fulfilment of such terms and conditions as the court may deem fit to impose<sup>[96]</sup>.

In the *Chaika*<sup>[97]</sup>, it was held that the amount of security to be provided by an applicant for the release of an arrested ship is based on the two principles that the arresting party is entitled to sufficient security to cover the amount of his claim with interest and costs on the basis of his reasonably arguable best case<sup>[98]</sup> and that the security should be based on the value of the vessel.<sup>[99]</sup> However, one has to consider which one 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 oppressively<sup>[100]</sup>. The power of court to fix the amount of bail or security being discretionary,<sup>[101]</sup> in approving the security, it considers the balance of convenience of the parties<sup>[102]</sup>. In the *S. Araz No. 2*<sup>[103]</sup> it was held that in determining the reasonably arguable best 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.

**Other Sources:**

1. Admiralty Jurisdiction Act, 1991.
  2. Admiralty Jurisdiction Procedure Rules, 1993.
  3. The Constitution of the Federal Republic of Nigeria, 1999.
  4. Federal High Court (Civil Procedure) Rules, 2000.
  5. Maritime Law by Christopher Hill 5<sup>th</sup> Edition.
  6. Nigerian Shipping Practice and Procedure by Mr. L.N. Mbanefo, SAN.
  7. Admiralty Jurisdiction and Practice by Nigel Meeson, 3<sup>rd</sup> Edition, 2003.
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