ADMIRALTY JURISDICTION PROCEDURE RULES, 2023 AND MATTERS ARISING

History of Admiralty Rules:

The procedure in Admiralty matters was hitherto regulated by the Admiralty Jurisdiction Procedure Rules (**AJPR**) 1993, which took effect on 2nd August 1993. Then came AJPR 2011. On 18th May 2023, the Chief Judge of the Federal High Court (**FHC**), the Hon. Justice John Terhemba Tsoho, signed the AJPR 2023. The AJPR 2023 thus came into force on 18th May 2023.[1] Before the AJPR 1993, the Admiralty regime in Nigerian Courts was regulated by the provisions of the English Administration of Justice Act 1956 (replaced by the English Supreme Court Act 1981). The Administration of Justice Act (**English AJA**) 1956 incorporated the provisions of the United Nations International Convention Relating to the Arrest of Sea-going Ships, Brussels, 10 May 1952 (The 1952 Arrest Convention). Therefore, the English AJA 1956 was the source of authority for the exercise of Admiralty Jurisdiction. See: **AMERICAN INTERNATIONAL INSURANCE CO. LTD. V. CEEKAY TRADERS (1981) 2 NSC 65.**

In matters of procedure, the provisions of the civil procedure rules in England were the source from which the old Supreme Court Rules were fashioned before the creation of the various High Courts. The Supreme Court Rules 1948 were

[1] However, it was only published in the Federal Republic of Nigeria's Official Gazette on September 26, 2023, and the published copy was unveiled by the Chief Judge to the public in the second week of December 2023.

fashioned after the County Court Rules. Even upon creation, those High Courts still applied the County Court Rules until Rules of Court were made for the various Courts. This was after the old Supreme Court was federalised. It is instructive that the FHC Civil Procedure Rules, 1976 was a carbon-copy of the English Supreme Court Rules of 1948.

The new High Court rules also made provision for resorting to the practice and procedure for the time being in force in England, where there is no provision on the particular subject matter in the Rules. See: **MANAGEMENT ENTERPRISES V. OTUNSANYA (1987) 2 NWLR 179 CS.C.**

Logically, therefore, the FHC admiralty procedure was initially based on the provisions of the FHC Civil Procedure Rules 1976. This is more so in view of Section 9 of the FHC Act, which made provision for resorting to the Rules of the High Court of Lagos State in the absence of rules on a particular subject matter. The Admiralty procedure was thus found in Order 21, Rule 1 of the FHC 1976 Rules, and Order 75 of the 1948 Rules of the Supreme Court in England. (The White Book).

The statutory basis for the exercise of Admiralty Jurisdiction by the FHC was the 1973 Federal Revenue Court Decree. **See: Section 7 (1) (d)**. This jurisdiction was restated in the 1979 Nigerian Constitution. The details of this jurisdiction were not, however, spelled out in local legislation or the Constitution until 1991, when the Admiralty Jurisdiction Act No. 59 of 1991 (**AJA**) was promulgated. The AJA spelled out in detail the extent of the

admiralty jurisdiction of the FHC. It was not entirely tailored after the English Supreme Court Act 1981 as it contains some peculiar provisions based on the Nigerian situation, notably sections 16 and 20 on the liability of ship's agents, and abolished the then prevalent foreign jurisdiction clauses. Section 6 also introduced the concept of a re-arrest.

The AJPR of 1993 was tailored to meet the needs of Nigeria as a cargo-owning nation and to discourage frivolous arrests. There was also the problem of very low filing fees which was attended to in FHC Rules of 2000. Some of the perceived inadequacies of the AJPR 1993 were corrected in the AJPR 2011, which itself, in due course, had to be looked at again, culminating in the AJPR 2023. There was also a suggestion for the creation of a separate admiralty registry and for specialized admiralty Judges at the Nigerian Shippers' Council (**NSC**) Maritime Seminar for Judges in 2000.

As regards the AJPR 2023, the input of the Nigerian Maritime Law Association (**NMLA**) was significant, as the body produced a draft of the AJPR (and proposed changes to the AJA). The Hon. Chief Judge of the FHC referred the drafts to the FHC Rules Committee which came up with drafts of both the AJPR and the AJA. The proposed changes to the AJA, requiring legislative approval, have not gained much traction, but we now have a new AJPR for 2023.

That the AJPR 2011 was due for a review is thus not in doubt.

Those are the matters arising.

This paper will address those aspects of the AJPR 2023 that are improvements on the AJPR 2011.

History of Admiralty Rules:

The new provisions of the AJPR 2023 are as follows:

A. *Admiralty Division, Registry, and Designated Judges:*

The first and most obvious matter is the creation of an Admiralty Division, an Admiralty Registry, the designation of Admiralty Judges and the setting out of the duties of the Admiralty Marshal.

This is treated in Order 2, Rules 1 to 5, under part B of the Rules, which state as follows:

1. The Chief Judge shall establish Admiralty Divisions for the Court.

2. The Chief Judge shall designate Judges as Admiralty Judges.

3. The Chief Judge shall issue directions to establish the Admiralty Registry of the Admiralty Division of the Court.

4. The Admiralty Marshal or his substitute shall be the head of the Admiralty Registry of each Admiralty Division.

5. The Duties of the Admiralty Marshal shall, unless the Court otherwise directs, include

(a) serving initiating process;

(b) executing arrest warrants;

(c) taking appropriate steps to retain safe custody of, and to preserve, a ship or property under arrest, including —

(i) removing from the ship, or storing, cargo that is under arrest,

(ii) removing cargo from a ship that is under arrest and storing it,

(iii) removing, storing or disposing of perishable goods that are under arrest or are in a ship that is under arrest, and

(iv) moving the ship that is under arrest ;

(d) arranging for the release of a ship or property pursuant to an order of court ;

(e) arranging for the valuation and sale of a ship or property pursuant to an order of court ;

(f) filing a return of sale, and an account of sale and documents in support of the account for taxation ;

(g) paying the proceeds of the sale of a ship or property into the Court ;

(h) filing copies of notices concerning an application for a determination of the order of priority of claims against the ship or property, or the proceeds of the sale of such ship or property ; and

(i) filing a return of expenditure for deposits made for arrest of ships or vessels before further deposits are made.

6. The Chief Judge shall make such further Rules to guide the operation of the Admiralty Registry.

In essence, therefore, these provisions give the Hon. Chief Judge of the FHC powers to create an Admiralty Division and Admiralty Registry of the Court.

It is not in doubt that the FHC has many heads of jurisdiction and has, in recent times, been conferred with additional jurisdiction, particularly, in the area of distressed assets as they relate to the banking industry and many other heads of jurisdiction. The Court was conceived of as a revenue court but, over time, became the court with, *inter alia*, exclusive admiralty jurisdiction. The creation of an Admiralty Division has been an issue on the front burner since the 2000 edition of the NSC Maritime Seminar for Judges, at which event speakers agreed that a division with specialized Judges and an Admiralty Division be created. The idea is welcomed because it ensures the development of specialization in this rather technical area of law. The nature of shipping and its importance to the economy cannot be overstated, and being international, what happens in Nigeria affects the whole world and *should we not be in sync with the rest of the world, particularly as regards the resolution of maritime and other commercial matters that would not have a positive effect on the growth of international trade - Nigeria being an export-dependent nation,* shipping lines will be hesitant to sail to Nigeria. The world over, most countries pay special attention to matters of commerce and some have specialized

divisions with specialized Judges. The creation of this division will, therefore, ensure the development of more skills in the adjudication of maritime disputes. That will enhance efficiency and speed in the determination of maritime disputes.

The divisions will be in riparian, littoral, or port states where shipping activities exist, such as Lagos, Port-Harcourt, Warri, Uyo, Calabar, and Yenagoa.

The head of the Admiralty Registry shall be the Admiralty Marshal, who is defined as the Chief Registrar or anyone he assigns the duties to. As the Chief Registrar is usually stationed at the FHC Headquarters in Abuja, the Admiralty Marshal substitute in divisions of the FHC is usually the Deputy Chief Registrar (DCR) and other Heads of Division where there are no DCRs.

The duties of the Admiralty Marshal have been stated in Order 2 Rule 5.

The first duty of the Admiralty Marshal is to confirm that the processes presented for filing comply *prima facie* with the Rules. The Admiralty Marshal shall also indicate the date and time of presentation for filing on every Admiralty originating process presented for filing and shall arrange for service thereof to be effected. I do not think that this should be limited to originating processes.

The Admiralty Marshal is also to accept service of originating processes against proceeds of sale and on funds in his

custody. He has a duty under that situation to notify the court hearing the particular matter of the filing of that process. The various personnel to be served with court processes must also be identified by the Admiralty Marshal, and the processes properly served in accordance with the Rules. The proper keeping of a book to record service is also an important aspect of the Admiralty Marshal's functions. He must also ensure that a warrant of arrest is served after the initiating processes have been served or at least contemporaneously with such service.

The keeping of the caveat registers and the confirmation of the identity of the person giving the undertaking (be it a bank, insurance company, or Protection and Indemnity (**P&I**) Club, which is a member of the International Group of P&I) for securing a caveat against arrest or the release of *res* from arrest, is also the duty of the Admiralty Marshal. Ensuring the proper execution of the bail bond is also the duty of the Admiralty Marshal.

The main duties of the Admiralty Marshal, however, relate to the custody and sale of *res* under arrest, and this raises documentation and accounting issues as regards the deposit paid by the arrestor, proceeds of sale, limitation fund, and other funds.

The Admiralty Marshal must exercise proper custody of the *res* and notify the court once it begins to deteriorate.

When the court orders for the valuation and sale of a *res*, the Admiralty Marshal has a duty to ensure a proper valuation

(as he must sell at the best price available), and for this purpose, he may utilize the service of shipbrokers. See **THE ADITYA PRABHA (1987 – 1990) NSC VOL. 3**.

Therefore, these enormous duties of the Admiralty Marshal justify the creation of the Admiralty Registry, which must be of modern-day standards. The Admiralty Registry must be of world-class with the necessary implements, such as (i) an integrated online database with information (like filed caveats) synched from all divisions and (ii) 24-hour efficient internet access that is accessible to all divisions that have ports.

There is also the need for training, retraining, and more training of all personnel involved in admiralty proceedings, so as to ensure an efficient system. There must also be collaborations with reputable shipping organisations like the International Maritime Organisation (IMO), the Lloyd's Register of Ships, Members of the International Association of Classification Societies (IACS) (including Bureau Veritas, Lloyds Register, DNV, and American Bureau of Shipping) and other credible avenues for tracking ships and identifying their locations, flags and ownership and other interests thereat. The Registry should also have facilities at its disposal that ensure access to online information about the maritime industry in relation to the Court's Admiralty jurisdiction.

There are, however, other duties of the Admiralty Marshal, for instance, in Order 7, Rule 1 (7) & (8), which provides as follows:

(7) Before a warrant to arrest any ship and other property is issued, the party applying shall procure a search to be made in the caveat book for the purpose of ascertaining whether there is a caveat against arrest in force with respect to that ship and other property.

(8) The Admiralty Registry shall issue a report of the outcome of any search of the caveat against arrest register procured by a party as in Form 8A.

The Admiralty Marshal is thus required to issue a report on the outcome of a search of the caveat Register.

Order 9, Rules 2 to 7 contains other duties in the following terms:

2.

(1) The documented expenses of the Admiralty Marshal including bank charges shall be paid by the arresting party.

(2) Where a person is liable to pay for expenses, the Admiralty Marshal may—

(a) accept an amount of money not less than ₦100,000 and not more than ₦500,000 as deposit towards discharging the liability ; and

(b) make more demands fortnightly for payment on account of those expenses.

(3) Where another party arrests the arrested vessel or files a caveat against release, he shall be jointly and severally

liable with the first arrestor to pay the Admiralty Marshal's expenses.

(4) Within 7 working days of the release of the ship or other property, the Admiralty Marshal shall file a return of---

> ***(a) receipts and expenditures in the Admiralty Registry; and***
>
> ***(b) expenditure for deposit made for arrest of ships or vessels before further deposits are made.***

3)

(1) The Admiralty Marshal shall, after executing the order of arrest of a ship or other property, have the custody of the ship or other property.

(2) The Admiralty Marshal or his substitute shall, unless the Court otherwise orders, take all appropriate steps to retain custody of, and preserve the ship or other property, including —

> ***(a) removing from the ship, or storing place, cargo that is under arrest ;***
>
> ***(b) removing cargo from a ship that is under arrest and storing it;***
>
> ***(c) removing, storing or disposing of perishable goods that are under arrest or are in a ship that is under arrest ; and***

(d) for a good cause, moving the ship that is under arrest to a safe berth or location within jurisdiction upon application to the Court, by the arrestor, caveator against release, port authorities, relevant government or law enforcement agencies, and any other interested party.

(3) Where a ship or other property is under arrest, the Admiralty Marshal shall prepare and file in the Court or with the Judge that issued the warrant of arrest, a monthly report stating the location, security status and condition of the arrested ship or other property, and immediately deliver a copy of the monthly report to the parties to the suit or as the court may order.

4

(1) Where the Admiralty Marshal has the custody of a ship or other property, he or a party interested may at any time apply to the Court or a Judge in Chambers for directions with respect to ship or other property, and such directions may include steps to be taken where an arrestor defaults in payment of the expenses of the Admiralty Marshal after a demand has been made for same.

(2) Notice of an application (not being an application for the release from arrest of a ship or other property) made by a person other than the Admiralty Marshal shall be served on the Admiralty Marshal.

(3) The Court may order the applicant to give notice of the application and directions to the person specified in the order.

(4) The Court may make such orders as seems to it just including an order for the immediate and unconditional release of any ship or other property under arrest in the proceedings.

5

(1) A person who is entitled to immediate possession of a ship or a cargo may apply to the Court to discharge the cargo from the ship, where —

(a) cargo on board a ship is under arrest but the ship is not ; or

(b) a ship is under arrest but its cargo is not.

(2) The Court may order discharge where —

(a) the Court is satisfied that the applicant is entitled to immediate possession of the ship or the cargo, as the case may be ;

(b) the applicant gives an undertaking in writing satisfactory to the Admiralty Marshal, to pay on demand to the Admiralty Marshal any fee and expenses of the Admiralty Marshal in connection with the discharge ; and

(c) the Court so requires that the applicant indemnifies the Admiralty Marshal in the form satisfactory to the Admiralty

Marshal in respect of any claim against the Admiralty Marshal arising from the discharge.

(3) Where—

(a) cargo on board a ship is under arrest but the ship is not ; or

(b) a ship is under arrest but its cargo is not, the Court may, on application of the plaintiff and subject to such terms and conditions as are just, order the discharge of the cargo from the ship.

6

(1) The Court may, at any stage of a proceeding, make appropriate orders with respect to the preservation, management or control of a ship or other property that is under arrest in the proceeding.

(2) Where the arrestor fails to continue to meet the expenses of the Admiralty Marshal in relation to the continued arrest of the vessel, the Admiralty Marshal may seek the directives of the court.

(3) Where a ship or other property has been arrested and the owners have failed to provide security for the release of same for a period of not less than 60 days from the date of the arrest, the Court may, on the application of the arrestor or other interested party, order that the ship or other property be sold by the Admiralty Marshal, and the proceeds of sale paid into an interest-yielding fixed deposit

account in the name of the Admiralty Marshal, pending further orders of the Court.

7 *Where a ship is sold following an order of Court, the proceeds of sale shall after final judgement, be distributed in accordance with the provisions of Order 17 of these Rules.*

The Admiralty Marshal has the main crux of his duties in Order 9, which deals with the custody and sale of a vessel under arrest. The duties are as under the 2011 Rules, with the major differences being that Order 9, Rule 3 requires the Admiralty Marshal to make a monthly report to the Court stating the location, security status, and condition of the arrested ship or other property, and immediately deliver a copy of the monthly report to the parties to the suit or as the Court may order.

Order 9, Rule 6 (2) also permits the Admiralty Marshal to seek directives from the Court where the arrestor fails to meet the expenses of the Admiralty Marshal in relation to the continued arrest of the vessel.

Order 9, Rule 7 gives the Admiralty Marshal guidance as to the distribution of the proceeds of the sale of a vessel after final judgment. Hitherto, Order 17 of the AJPR 2011 did not state the order of priorities, but in **Order 17, Rules 1 and 2 of the AJPR 2023**, a clear order of priority is laid out as follows:

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(1) Where a ship or other property has been arrested in a proceeding, a person who has obtained a judgement in any

Court (including a judgement in a court of a foreign country) against the ship or other property, being a judgement that is enforceable in the Court, may apply to the Court for the determination of the order of priority of claims against the ship or property.

(2) The order of priority of claims against an arrested ship or other property is as follows —

> *(a) statutory or court charges and expenses like the Admiralty Marshal's expenses in connection with the ship or property ;*
>
> *(b) salvage, wreck removal and contribution in general average ;*
>
> ***(c) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship;***
>
> *(d) disbursements of the master on account of the ship*
>
> *(e) loss of life or personal injury occurring whether on land or on water in direct connection with the operation of the ship;*
>
> *(f) ports, canal and other waterways, dues, and pilotage dues;*
>
> *(g) possessory liens (repairer's lien where ship is still in possession);*

(h) mortgages - priority of mortgages is determined by the date on which each mortgage is recorded in the register and registered mortgages have priority over unregistered mortgages;

(i) in rem action for possession or ownership of a ship

(j) in rem action in relation to a dispute between co-owners, possession or use of a ship;

(k) in rem action in relation to loss or damage to cargo carried on a ship;

(l) lien in rem action in relation to damage received by a ship;

(m) in rem action in relation to a dispute arising out of contracts for carriage of goods or use of a ship; and

(n) in personam action.

(3) The Court may on application, under this rule, order that notice of the application specifying the period within which claims may be notified, be given or published as the Court directs.

(4) The determination shall not be made until after the end of the period specified in the notice.

(5) The Admiralty Marshal shall file a copy of the relevant part of each publication in which the notice appeared.

2. The expenses of the Admiralty Marshal in complying with an order of the Court under this Order shall be part of the expenditure of the sale of the ship or other property.

This Order takes cognizance of the expenses of keeping a vessel under arrest, statutory charges, and then maritime liens. Crew men's wages are high on the priority list and qualify as Maritime Liens, which are defined in section 5(3) of the AJA as follows:

3) In any case in which there is a maritime lien or other charge on any ship, aircraft, or other property for the amount claimed, an action in rem may be brought in the Court against that ship, aircraft, or property; and for the purpose of this subsection, ***"maritime lien" means a lien for-***

(a) salvage; or

(b) damage done by a ship; or

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

(d) master's disbursements.

The concept of maritime lien is peculiar to maritime law. As regards certain maritime claims, the ship or other property in respect of which the claim arises is charged with that claim, the maritime claim being that "charge" so that the maritime lien can be enforced by an action *in rem* in whosoever's hands the property may be. See: **NIGEL MEESON: ADMIRALTY**

JURIDICTION AND PRACTICE 1993, Lloyd's of London Press at pages 70-71.

Some force is also given to the nature of a maritime lien by Order 7, Rule 1 (10) of AJPR 2023, which provides:

> ***(10) Except in an action in rem based on a maritime lien commenced in relation to a general maritime claim, a warrant of arrest shall not be issued by any Court exercising admiralty jurisdiction in the case of a ship or other property whose beneficial ownership has since the issuance of the writ of summons, changed as a result of a sale or disposal.***

The AJPR 2011 has a similar provision in Order 7, Rule 1 (4) but is less emphatic than the AJPR 2023 provisions.

The AJPR 2023 Rules, therefore, emphasizes the nature of a maritime lien, i.e., a lien that attaches even where beneficial ownership of the ship or other property has changed since the issuance of the writ either because of a sale or disposal by any court having admiralty jurisdiction.

Notwithstanding the foregoing, a maritime lien is extinguished three (3) years after the cause of action arose unless the ship is arrested or seized within that period, leading to a judicial sale by the FHC. **See: Section 18 of the AJA.**

Crewmen also enjoy immunity from security for costs as stated in Order 13, Rule 6 AJPR 2023, which provides:

6. The master or a member of the crew of a ship who is a plaintiff in a proceeding for his wages or loss of goods or clothes in a collision between two or more ships, shall not be required to give security for costs.

The right to proceed *in rem* against the offending vessel, regardless of a change in its ownership, is a peculiar remedy available to crewmen and is only obtainable in the admiralty Court. In this case, the FHC is. The current state of the law as regards the jurisdiction of the courts on suits for crew wages is as laid down in the case of **THE VESSEL MT SAM PURPOSE (EX MT. TAPTI) & ANOR V. BAINS & ORS (2021) LPELR-56460(CA)** where the Court of Appeal held:

Coming back to the facts in the instant appeal, it remains settled and well established that the lower Court fell into a serious error when it overlooked the overriding effect of the provisions of Section 254 C (1) as it relates to a claim for the payment of due and accrued wages of any workers, but more specifically workers who are employed in the maritime sector as members of crew of a sea going vessel. The lower Court also misconceived the law when it read the provisions of Section 251 (1) (g) of the Constitution, as amended along with Section 2 (3) (r) of the AJA only without focusing on the other provisions of the Constitution providing for similar jurisdiction for the National Industrial Court of Nigeria (NICN)*. Since the NICN was established as a Court of special jurisdiction for labour*

related matters, it appears to me that the robust and more engaging arguments and submissions of learned counsel to the Appellants that the FHC lacks jurisdiction to hear any case relating to the claim of wages of crew men on board a ship is more in line with the principles of interpretation of the Constitution and Statutes as well as existing established case law.

A lot of ink has flowed on the legislative provisions as they relate to claims by crewmen for their wages. The current position is that such claims cannot be filed in the Court, which reserves to crewmen the right to pre-judgment security, particularly where, in most cases, the vessel's owner is outside jurisdiction. The power to arrest ships even for crew wages is a common law power vested in the admiralty courts. Nigerian legislation, however, seems to be far behind in this area, and thus, I would respectfully suggest some legislative activity in this area to preserve this peculiar right of crewmen. The decision in **THE VESSEL MT SAM PURPOSE (EX MT. TAPTI) & ANOR V. BAINS & ORS (Supra)**, however, represents the current state of the law, and it is binding on all lower Courts, including the FHC.

B. ARBITRAL PROCEEDINGS:

Another aspect of the matter is as regards arbitral proceedings, foreign judicial proceedings and arbitral awards.

Order 3, Rule 5 of the AJPR 2023 thus provides:

5. An application for the recognition or enforcement of an arbitration agreement or arbitral award made in relation to any maritime claim in any domestic or foreign arbitration proceedings shall be by an Originating Motion.

This provision deals with the recognition or enforcement of a foreign arbitral award or agreement. This seems to me to be misplaced in the AJPR as the Arbitration and Mediation Act of 2023 (AMA) makes provision for the recognition and enforcement of arbitral awards, local or foreign. The arbitration rules also contain provisions for the procedure to be adopted. The Arbitration Proceedings Rules provide, in Rule 7, the procedure for recognition or enforcement of arbitration awards and interim measures of protection. The procedure is by an originating notice of motion supported by an affidavit. What seems a bit unclear is the provision for the recognition or enforcement of an arbitration agreement. What readily comes to mind is a stay of proceedings pending arbitration by which application a defendant seeks to hold a plaintiff to his bargain in view of an existing arbitration clause in the relevant agreement.

One provision that seems to put Order 3, Rule 5 of the AJPR 2023 in proper perspective seems to be Order 7, Rule 8 of the AJPR 2023, which reads as follows:

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(1) Notwithstanding the provisions of Order 3 and Order 7 (1) of these Rules, where an application is for a warrant of arrest of a ship or other property in respect of a claim

commenced in a court outside Nigeria or commenced by way of arbitration proceedings within or outside Nigeria, such an application can be made without commencing an action before the Court for the substantive claim.

(2) The application for warrant of arrest referred to in sub-rule (l) of this rule shall be supported with the original or certified true copy of the court or arbitration processes in relation to the court or arbitration proceedings commenced within or outside Nigeria.

(3) The Applicant shall, at the time of making the application for warrant of arrest under this rule, submit to the Court, in as many originals as may be required for service, a duly notarized undertaking by the applicant to indemnify the ship or other property, its owners and any other interests in the ship or other property for all losses suffered as a result of the arrest if it is later found that the order for arrest ought not to have been made.

(4) The order for arrest shall not be made until the undertaking referred to in sub-rule (3) is submitted to the Court.

(5) Where the order for arrest is granted, an original of the undertaking to indemnify provided for in sub-rule (3) shall be delivered to the ship at the time of executing the warrant of arrest.

(6) An order for arrest of the ship under this rule may be made subject to such other conditions as the Court deems just in the circumstance.

This rule seems to permit the filing of an application for a warrant of arrest of a ship or other property without commencing an action in Court for the substantive claim**. I do not think we should see this as giving the court power to grant an order of arrest in the absence of a substantive claim.** What this provision seems to suggest is that regardless of what the plaintiff's claim is, whether for loss of or damage to goods, etc., he can apply for an arrest warrant simply because he has a Court case abroad or a claim in arbitration whether locally or internationally. In essence, this provision seems to permit the court to allow the arrest of a vessel as security for foreign court proceedings or arbitral proceedings, be they local or international. **It definitely is not for the enforcement of a judgment as contemplated by section 2(2)(C) AJA, which provides as follows:**

(2)A reference in this Act to a proprietary maritime claim is a reference to-

1.

2.

(a)

(b)

(c) a claim for the satisfaction or enforcement of a judgment given by the Court or any court (including a court of a foreign country) against a ship or other property in an admiralty proceeding in rem;

This provision contemplates that an action has been concluded and all that is to be done is for the judgment to be satisfied.

In other words, it is an action on the judgment since a judgment on its own gives rise to a cause of action.

Sub-section 3 (t) of the AJA provides as follows:

*3**. A reference in this Act to a general maritime claim is a reference to-***

(t)

a claim for the enforcement of or a claim arising out of an arbitral award (including a foreign award within the meaning of the Arbitration and Conciliation Act made in respect of a proprietary maritime claim or a claim referred to in any of the preceding paragraphs;

Order 7, Rule 8 is also not contemplated by this provision. There is thus an ongoing debate on Order 7, Rule 8.

There is a school of thought that this provision seeks to confer substantive jurisdiction on the court to proceed *in rem* even though the claim is not within sections 2 or 3 of the AJA. There is another school that holds the view that the purpose of this provision is to provide security where there are ongoing

proceedings, be they foreign judicial or arbitral proceedings- local or international- and the Plaintiff in those proceedings has not been able to obtain pre-judgment security. This is thus something within comity, and states should be able to assist one another in such a situation. There are jurisdictions where pre-judgment security is available, even for arbitral proceedings or foreign judicial proceedings.

A similar scenario came up in the case of MESSRS NV. SCHEEP & ANOR v. THE MV "S.ARAZ" & ANOR (2000) LPELR-1866(SC) where the claim was as follows:

The Appellants had commenced an action against respondents at the FHC, Lagos, claiming as follows: "Plaintiffs are agents to Messrs. N.V. Scheep Vaatmij Unidor Willie Mstad of Curacoa, claim against the defendants jointly and severally the sum US $1,250,000 (United State Dollars Three hundred thousand only) **as security for damages interest and cost relating to a claim for demurrage and/or damages for detention of the 2nd defendant's use or hire of the said M.V. CINDYA pursuant to a charter party dated 17th October, 1989, which claim is presently before arbitration in London, United Kingdom."** Appellant's ex parte motion seeking to arrest and detain the M.V. "S. Araz", was refused and dismissed by the trial Court. Appellants thereafter filed another action *in rem* in the name of Messrs. N. V. Scheep Vaatmij Unidor Willie Mstad as agents appellants in suit No. FHC/L/CS/213/95 to issue the writ of summons. The particulars of the claim in this suit are verbatim

with that in FHC/LICS/213/95. The only difference was in the amount of US $300,000. The trial Court granted the application simultaneously filed with the second action FHC/L/CS/236/95, and arrested and detained the M. V. "S. Araz."

Respondents, by motion on notice, sought to strike out and/or set aside the order for the arrest and detention of the M. V. "S. Araz", and for her release unconditionally. The reasons for the application were that the action of the appellants constituted an abuse of the process of the Court and that the Court, at the time of the making of the Order of arrest and detention of the vessel M. V. "S. Araz," did not have the requisite jurisdiction. Before the motion was heard, the appellant filed a notice of discontinuance in respect of FHC/L/CS /213/95. Arguments in the application were concluded on the 23rd of May 1995. Dissatisfied, the respondents appealed to the Court of Appeal against the order of dismissal. The appeal was allowed. Dissatisfied with the Court of Appeal decision, the appellant appealed to the Supreme Court.

The Supreme Court held at 35- :

> **What is plaintiff's cause of action in the present proceedings? Is security for damages, interest and/or costs that may be awarded in a proceeding a cause of action? Certainly not. Security for damages, etc, belongs to the realm of adjectival law, that which prescribes method of enforcing rights or obtaining redress for their invasion. It is essentially Rules of Court, whether civil,**

criminal or appellate. Laws which fix duties, establish rights and responsibilities among and for persons - be they natural or corporate - are known as substantive laws. But those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a Court are adjectival or procedural laws. ***Security for damages, etc, belongs to the latter group. It is usually required of a debtor or defendant to assure the payment or performance of his debt by furnishing the creditor or plaintiff with a resource to be used in case of failure in the principal obligation. It is not a cause of action that can ground a claim, unless otherwise specifically provided by statute. One of such statute is the U.K. Civil Jurisdiction and Judgments Act, 1982 Section 26 of which provides***:

> **"Where in England and Wales, or Northern Ireland, a Court stays or dismisses Admiralty proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the Courts of another part of the United Kingdom, or of an overseas country the Court may, if in those proceedings property has been arrested, or bail or other security has been given to prevent or obtain release from arrest - (a) order that the property arrested be retained as security for the satisfaction of any award of judgment which (i) is given in respect of**

the dispute in the arbitration or legal proceedings in favour of which those proceedings are stayed or dismissed and (ii) is enforceable in England and Wales, or as the case may be, in Northern Ireland, or (b) order that the stay or dismissal of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award or judgment."

It was on the basis of the above provisions that Sheen, J in the "Jalamatsya" (supra) held at page 165:

"That Section (that is Section 26) was enacted to enable claimants (I use a neutral expression) to obtain security if they proceeded by way of arbitration rather than by action. In my judgment S.26 applied whether or not an arbitration has already been commenced. It follows that if an arbitration has been commenced, and if the claimants in the arbitration have not obtained security for any possible award, they can quite properly issue a writ in rem if they know that a ship belonging to the respondents in the arbitration is coming within the jurisdiction, and they may arrest that ship in order to obtain security."(Words in earlier brackets are mine)

In an earlier case, The "Vasso" (1984) 1Lloyd's Report 235; (1984) QB 477, which arose before the enactment of the

1982 Act, the Court of Appeal (England), per Goff LJ, at affirming Sheen J, declared:

> **"However, on the law as it stands at present, the Court's jurisdiction to arrest a ship in an action in rem should not be exercised for the purpose of providing security for an award which may be made in arbitration proceedings.** That is simply because the purpose of the exercise of the jurisdiction is to provide security in respect of the action in rem, and not to provide security in some other proceedings, for example, arbitration proceedings. **The time may well come when the law on this point may be changed: See S.26 of the Civil Jurisdiction Act, 1982 , which has however not yet been brought into force. But that is not yet the law. It follows that if a plaintiff invokes the jurisdiction of the Court to obtain the arrest of a ship as security for an award in arbitration proceedings, the Court should not issue a warrant of arrest."**

Sheen J had at the trial in the Admiralty Court held that:

> "The appellant's only purpose in arresting Vasso was to obtain security for the satisfaction of whatever award might ultimately be made by the arbitrators; **the appellants did not purport to invoke the jurisdiction of the Court for the purpose of hearing and determining any claim; accordingly the Court had**

<u>no jurisdiction to arrest the vessel and the club's undertaking would be discharged."</u>

The plaintiffs in the appeal on hand have urged this Court to follow The Jalamatsya, arguing that Section 26 of the U.K. Act of 1982 is in the pari material with Section 10(2)(a) and (b) of our Admiralty Jurisdiction Act, 1991. Now, Subsections (1) and (2) of Section 10 provide-

"10 (1) Without prejudice to any other power of the Court -

(a) where it appears to the Court in which a proceeding commenced under this Decree is pending that the proceeding should be stayed or dismissed on the ground that the claim concerned should be determined by arbitration (whether in Nigeria or elsewhere) or by a Court of a foreign country; and

(b) where a ship or other property is under arrest in the proceeding, the Court may order that the proceeding be stayed on condition that the arrest and detention of the ship or property shall stay or satisfactory security for their release be given as security for the satisfaction of any award or judgment

that may be made in the arbitration or in a proceeding in the Court of the foreign country.

(2) The power of the Court to stay or dismiss a proceeding commenced under this Decree includes power to impose any conditions as is just and reasonable in the circumstances, including a condition.

(a) with respect to the institution or prosecution of

the arbitration or proceeding in the Court of a foreign country; and,

(b) that equivalent security be provided for the

satisfaction of any award or judgment that may be

made in the arbitration or in the proceeding in the

Court of a foreign country."

With profound respect to learned counsel for the plaintiffs, I do not share the view that Section 26 of the U.K. Act is in pari materia with Section 10(2) (a) & (b) of our own Act. Section 10 of our Act presupposes the existence of a pending action that is ordered to be stayed or dismissed. Section 26 of the U.K. Act goes further than this. **Although the facts in The Jalamatsya (supra) are almost on all fours with the facts of the case on hand, but because there is no equivalent of Section 26 of the U.K. Act in our Admiralty Jurisdiction Act, 1991, that case is not relevant to the case on hand. There is nothing in Sections 1, 2 , 5 and 10 of the**

> **Act or any other Section, that empowers the plaintiffs to invoke the admiralty jurisdiction of the Federal High Court in the circumstances of this case. Plaintiff's claim is not for the enforcement of, or a claim arising out of an arbitral award, it is for the sole purpose of obtaining security for the satisfaction of whatever award that might ultimately be made in their favour in the U.K. arbitration proceedings. They cannot invoke the admiralty jurisdiction of the Federal High Court by an action in rem for that purpose. Our law as it stands does not clothe the Federal High Court with such admiralty jurisdiction.**

The provisions in Order 7, Rule 8 admit that no substantive claim needs to be filed before the warrant therein can be applied for.

The decision in S. ARAZ also emphasised that until there is an equivalent of section 26 of the Civil Jurisdiction and Judgements Act (CJJA) in force in Nigeria, the sort of claim filed in the said case is not cognizable. It, therefore, seems to me that Order 7 Rule 8 seeks to overrule the decision in MV S ARAZ, and that cannot be done by rules of Court but by statute, which must confer a cause of action based on a substantive relief or reliefs. That cannot be done by Rules of Court, which in any event derive their validity from a statute and must not go beyond the powers conferred by the statute. It thus seems to me that AJPR 2023 cannot, qua Rules of Court, seek to do what only a statute such as the CJJA could do and indeed has done in England. **With this precedent before us, it seems to me that there again is a**

need for some legislative activity in this regard. The intention behind the rule is laudable, but the mode of carrying out that intention, to my mind, is not operational. There is no doubt that arbitration as a mode of dispute settlement is prominent in commercial matters, particularly shipping. Arbitration is a quick and confidential mode of dispute settlement, and most, if not all, the major forms of contracts of affreightment have arbitration clauses. The courts also must encourage arbitration as it assists in decongesting the dockets of the court. It is also a mode of dispute settlement suitable particularly in commercial matters and should be encouraged. However, what needs to be done must be done. It is my humble and respectful view, therefore, that this laudable attempt at moving maritime practice forward in our Country falls a bit short of the requirements of law and should be looked at again through legislative lenses.

I must quickly add that as a member of the drafting committee, I am aware that the committee proposed an amendment to the AJA in terms similar to section 26 CJJA so as to correct the lacuna pointed out by the Supreme Court in the S. ARAZ case. Hopefully, when this is done, the challenges identified supra will be taken care of.

Having looked at the teething problems of Order 7, Rule 8, sub-rule 6, gives a window for the Court to make the order subject to conditions. The usual condition is that the order subsists until security is given in any of the recognised forms. This means that the order is not a final order. The respondent must also be given

liberty to apply to discharge the order or, at worst, post the requisite security.

If the desired legislation is as in section 26 of the CJJA, I am not sure that the said section contemplates the scenario of Order 7, Rule 8 of the AJPR 2023.

Luckily too, the Supreme Court in S ARAZ held that there is no equivalent of section 26 of the CJJA in our AJA. In any event, as stated by the Supreme Court, such a course of proceeding must be permitted by legislation and not as done in the instant by the AJPR, which is merely adjectival and not substantive**. Our AJA not having been amended, there is a need for legislation for the benefits intended by Order 7, Rule 8 to be realizable.**

C. ARREST OF SHIPS:

Another matter is that of the arrest of ships.

Order 7 Rule 1 governs this. It reads:

> *1.---*
>
> *(1) A party to a proceeding commenced as an action in rem may by a motion ex parte apply for a warrant of arrest in respect of the ship or other property against which the proceeding was commenced, provided that at the time of the application, the ship or other property is within Nigerian territorial waters, or is expected to arrive there within three days.*

(2) An ex parte application for a warrant of arrest of a ship or other property may be filed physically at the Admiralty Registry or by e-filing at the Admiralty E-filing Unit.

(3) The e-filed arrest processes shall be in Portable Document Format (PDF) and the Admiralty Registry of each Admiralty Division shall provide email address(es) which the PDF of the processes shall be sent to.

(4) Fees shall be assessed and paid through the designated electronic payment platform and evidence of payment shall be forwarded to the designated email address(es).

(5) An application for a warrant of arrest of a ship or other property shall be heard and determined within 24 hours of its being filed in Court where practicable.

(6) The hearing of an application for a warrant of arrest of a ship or other property may be conducted physically or virtually on any day, inclusive of Sundays and public holidays.

(7) Before a warrant to arrest any ship and other property is issued, the party applying shall procure a search to be made in the caveat book for the purpose of ascertaining whether there is a caveat against arrest in force with respect to that ship and other property.

(8) The Admiralty Registry shall issue a report of the outcome of any search of the caveat against arrest register procured by a party as in Form 8A.

(9) A warrant of arrest shall not be issued until the party applying has filed an affidavit sworn to by him or his agent containing the particulars required by sub-rule (l l) of this rule.

(10) Except in an action in rem based on a maritime lien commenced in relation to a general maritime claim, a warrant of arrest shall not be issued by any Court exercising admiralty jurisdiction in the case of a ship or other property whose beneficial ownership has since the issuance of the writ of summons, changed as a result of a sale or disposal.

(11) A warrant of arrest shall be signed by the Admiralty Judge and shall be as in Form 7 of the Schedule to these Rules

The new provisions are those on e-filing of an application for an arrest. Indeed, the NJC has an e-filing project, which when fully operational, will make it easier for applications for arrest to be filed electronically. Pending that time, the AJPR 2023 provides that the processes shall be in PDF (portable document format) and shall be sent to an email to be provided by the relevant admiralty registry. Of course, we are all aware of the problems of hacking, phishing, and identity theft. It is, however, expected that the relevant registries will be equipped with access to

firewalling applications to safeguard processes filed pursuant to the AJPR. The payment shall be electronic too. Even though there are occasional issues with technology, these provisions are in the right direction and can only get better. This emphasizes the need for proper equipment and training for the admiralty registry.

The hearing and determination of an application for arrest within 24 hours are possible, and I am certain that most, if not all, admiralty lawyers can attest to the fact that applications for arrest are attended to urgently. Experience has shown that on occasion, which is not infrequent, by the time the file gets to the assigned Judge, the Counsel invariably asks for the following day to move his application. It is thus practicable to hear and determine an application for arrest within 24 hours of it being filed.

The provision for a virtual hearing of an application for arrest is practicable. I will illustrate this. There was an occasion when during the annual Judges Conference, which took place in Abuja, an admiralty matter was filed in the Lagos division. Counsel was directed to file the processes, which were scanned to Abuja, where a Judge heard and determined the application by virtual means, sitting in a Court room with a lap-top in front of the Judge. In this day and age, it is just normal for matters to be heard virtually. The order was made, signed and sent to Lagos by the fastest means possible. Order 7, Rule 1 (6) is thus a progressive provision that is long overdue.

Order 7, Rule 1 (7) & (8) are improvements upon the provisions of Order 7, Rule (1)(2) of AJPR 2011, which states:

> *(2) Before a warrant to arrest any ship or other property is issued, the party applying shall procure a search to be made in the caveat book for the purpose of ascertaining whether there is a caveat against arrest in force with respect to that ship or other property.*

The registry is now to issue a report on the outcome of any search of the caveat register as in Form 8A, which contains the following particulars:

> *Whether or not there is a caveat against the arrest of the particular vessel in force,*
>
> *If there is, the following details will be provided, i.e., name of caveator, caveator's contact details, and form of security.*

D. ON CAVEATS:

Order 8 of the AJPR 2023 regulates this.

A major difference between the 2023 AJPR and the 2011 AJPR is that the undertaking to be provided by the caveator shall be by

> ***(a) a protection and indemnity association that is a member of the International Group of Protection and Indemnity Associations; or***

(b) a bank within the meaning of same in the Banks and other Financial Institutions Act carrying on banking business in Nigeria; or

(c) an insurance company of repute under the Insurance Act carrying on business in Nigeria.

The permissive provisions of the AJPR 2011 have been replaced with the mandatory provisions of Order 8, Rule 2(2) of the AJPR 2023, as follows:

(2) The Admiralty Marshal shall demand that the undertaking, guarantee or bond to be produced to secure the amount claimed or to satisfy any judgment in the amount claimed shall be by—

(a) a protection and indemnity club that is a member of the International Group of Protection and Indemnity Clubs ;

(b) a bank within the meaning of same in the Banks and other Financial Institutions Act carrying on banking business in Nigeria; or

(c) an insurance company of repute registered under the Insurance Act carrying on business in Nigeria.

Order 8, Rule 4(3) has been improved upon by the addition of the words: ***'and his caveat shall be deemed cancelled'*** after the words:

(3) A caveator who fails to comply with Sub-rule 2 of this rule shall be taken to have failed to appear in the proceedings within the time limited for appearing.

The consequences are more far-reaching as Order 8, Rule 5 of the AJPR 2023 states:

5. A caveator who fails to comply with his undertaking under this Order shall be taken to have failed to appear in the proceedings within the time limited for appearing and his caveat shall be deemed cancelled.

So, if a caveator fails to provide security in terms of his undertaking, not only will he be deemed to have failed to appear and thus liable to judgment in default of appearance his caveat will be deemed to be cancelled - in other words, that caveat no longer has the legal capacity to prevent the caveated vessel from being arrested. Otherwise, caveators will observe the requirements of caveats more in breach and that will not augur well for the system.

The rules also make it mandatory for the Admiralty Marshal, where a ship or other property is under arrest to give a monthly report stating the location, security status, and condition of the arrested ship or other property, and immediately deliver a copy of the monthly report to the parties to the suit or as the Court may direct.

See Order, 9 Rule 3(3) which states:

> *(3) Where a ship or other property is under arrest, the Admiralty Marshal shall prepare and file in the Court or with the Judge that issued the warrant of arrest, a monthly report stating the location, security status and condition of the arrested ship or other property, and immediately deliver a copy of the monthly report to the parties to the suit or as the court may order.*

Order 9, Rule 6(2) states:

> ***Where the arrestor fails to continue to meet the expenses of the admiralty marshal in relation to the continued arrest of the vessel, the Admiralty Marshal may seek the directives of the court.***

Can the Admiralty Marshal seek a directive that the vessel be sold? This does not seem so since a vessel can only be sold upon the order of a Court. It may, however, propel the arrestor into action, particularly in view of Order 9, Rule 6(3) of the AJPR 2023, which states:

> ***Where a ship or other property has been arrested and the owners thereof have failed to provide bail for the release of same for a period of not less than sixty days from the date of the arrest, the Court may, on the application of the arrestor or other interested party order that the ship or other property be sold by the Admiralty Marshal and the***

proceeds of sale paid into an interest-yielding fixed deposit account in the name of the Admiralty Marshal pending further orders of the Court.

Similar provisions exist in Order 9, Rule 6(2) of the AJPR 2011, *albeit* with a long period of **six (6) months** from the date of the arrest. This provision puts the ship owner on notice that should he fail to provide security for the claim within the reduced period of **sixty (60) days (that is two (2) months)** of the arrest, then his vessel could be judicially sold. This will clearly reduce the plaintiff's huge cost of maintaining the vessel under arrest. That said, it could also be an arm-twisting avenue for plaintiffs who want to force a defendant into a settlement and would rather have acrimonious motions for the release of the vessel when they could easily, as Counsel, agree on the terms and form of security. There are several reported cases where vessels were under arrest for years and became wrecks, jeopardizing the freedom of navigation in our local waters.

What I am trying to say is that it is not in all cases that the delay in providing security is attributable to the shipowners. On many occasions, the shipowner is ready to provide security, but the arrestor is asking for impossible terms.

In relation to the above, it is imperative that I briefly touch upon the concept of the judicial sale of a ship (or forced sale of a ship – as it is also known) and the international impact of such a powerful tool. The judicial sale of a ship essentially is the sale of

a ship that is under arrest (or control of a court) by means of the judicial process and relevant rules of court or law.

In addition to Order 9, Rule 6(2) of the AJPR 2011 in relation to when judicial sales may be undertaken, Order 16 Rule 1 of the AJPR 2023 provides as follows:

1 (1) The court may, on application by a party and either before or after final judgment in a proceeding, order that a ship or other property that is under arrest in the proceedings –

(a) be valued
(b) be valued and sold

(2) An application under sub-rule (1) of this rule constitutes an undertaking by the party who made it to pay on demand to the Admiralty Marshal an amount equal to the expenses in complying with the order.

(3) If the ship or property is deteriorating in value, the Court may, at any stage of the proceeding, on notice to the parties order it to be sold subject to valuation.

Further, the law is that a court that orders the arrest of a vessel also has inherent power to make any order it deems fit in respect of the vessel, particularly an order for her judicial sale where the vessel is deteriorating for the purpose of satisfying any potential judgment in the matter. See: The ruling of the Honourable

Justice B. B. Aliyu JCA in **Suit No: FHC/L/CS/344/03 - NATIONAL BANK OF NIG. LTD. v OWNERS OF MT "DESTINI 1" & Ors, delivered on April 18, 2005. (Unreported)**.

It is settled law that the court before which a matter is pending has a duty to preserve the *res* to ensure that any decision reached at the conclusion of the suit is not rendered nugatory or to avoid being faced with a fait accompli. This is what the provisions of Order 16, Rules 1 and (2) seek to achieve. In **UNITED SPINNERS v. CHARTERED BANK LIMITED (2001) LPELR-SC.101/1996**, the Supreme Court held as follows:

> *"The primary duty of all courts (both trial and appellate) is to preserve the res (subject matter of litigation) so that at the end of the exercise, whatever decision is reached is not rendered nugatory".*

Apart from providing the arresting party with security for its claim, **the other key criterion for the judicial sale is that it is a legal means by which the purchaser acquires a ship's title, with enforceable rights against all parties and free from any registered liens (like that of a mortgagee) or maritime liens, as discussed above**. Clean title to a ship is very important to the purchaser and/or its financiers.

While similar concepts (forced sale) have been mentioned in previous conventions, like the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages 1967; and the International Convention on Maritime Liens and Mortgages 1993, there was no certainty on key issues

such as the clean title for a purchaser vis a vis prior interest and the recognition of judicial sale of ships by a foreign court. This led to the United Nations Convention on the International Effects of Judicial Sales of Ships, which was adopted by the United Nations Commission on International Trade Law (UNCITRAL) General Assembly on December 7, 2022 (the **Beijing Convention**).

The Beijing Convention aims to establish standardized regulations to enhance the accessibility of information regarding potential judicial sales to interested parties. It also streamlines the re-registration of ships following a judicial sale, eliminating title disputes from previous owners and claims from parties with pre-sale rights.

A detailed review of the Beijing Convention will warrant a whole day or more. As such, by way of highlight, the Beijing Convention addresses the following:

- Instances when purchasers of vessels in judicial sales free and unencumbered have had their ships wrongly arrested by the vessel's previous creditors;
- Instances when registrars of the ships sold have been unable to delete the vessel's pre-sale registration;
- Instances when registrars of ships have had difficulties transferring the registered ownership to the new owners when the new owners wish to retain the flag; and

- Instances, when financiers of vessels purchased free and unencumbered in judicial sales, have been unable to obtain the deletion of old mortgages or register their new ones.

The Beijing Convention has no force of law in Nigeria as the same is yet to be domesticated as required by Section 12 of the 1999 Nigerian Constitution (as amended). The current signatories to the Beijing Convention are China, Burkina Faso, Comoros, El Salvador, Grenada, Honduras, Kiribati, Sao Tome & Principe, Saudi Arabia, Switzerland, Singapore, Liberia, Malta, Senegal, Sierra Leone, Syria, Tanzania, Ecuador, Belgium, and the European Union.

Given the significance of the above, it is recommended that Nigeria takes steps to domesticate the Beijing Convention as a law of Nigeria – after the necessary stakeholder engagements and deliberations in the National Assembly. It is my opinion that the Beijing Convention will give confidence to vessels judicially sold by the FHC. It will also provide further reassurance to financiers of Nigerian-flagged vessels, thereby enhancing their confidence in the security of their investments. This bolstered confidence is expected to facilitate an increase in the financing available for the acquisition and operation of vessels under the Nigerian flag, ultimately contributing to a significant growth in Nigerian tonnage.

There is also a more pressing matter as regards the maintenance of vessels under arrest. The issue raises the likelihood of inadequacy of the provisions of the rules on

expenses of the Admiralty Marshal, particularly the deposit for arrest and the statutory role of the Nigerian Navy. The Nigerian Navy is usually asked to protect vessels under arrest since the Court-appointed security is not as equipped as the Navy and sometimes vessels are arrested at locations which only the navy can conveniently access. The Navy, at the end of the litigation, or upon release of the vessel by Court order, then gives the shipowner a bill for services rendered. The Navy has, on occasion, explained this as a regular and legitimate charge that goes into the Federal Government's treasury. This is no doubt an additional expense for the shipowner, who, having done all that he is expected to do to get his vessel released, now has to face the challenge of paying an additional sum, which ordinarily should be the responsibility of the arrestor.

It is suggested that the communique at the seminar should suggest a meeting of all stakeholders in the Industry and, in particular, the relevant ministries and the Nigerian Navy with the NMLA in attendance. At the end of the day, the aim should be to ascertain a standard rate for this charge to factor the same into the expenses of arrest to be paid by the arrestor. Since invariably, it is the arrestor that needs the assistance of the Navy, he should, in his application for arrest, undertake to pay the cost of the Navy. Where the cost is ascertained and made public, same will serve as a deterrent to frivolous arrests (as the cost is likely to be substantial – just like in Singapore where the arrestor has to pre-fund its counsel with substantial

funds for maintaining the vessel under arrest before the counsel procures the arrest order).

Where there is a need to move the vessel:

Order 9, Rule 2(d), which gives the Court, upon application, to order that a vessel be moved from the place of arrest to a better place is a good idea. There are situations where vessels could be interfering with navigation or with port operations. In such a situation, the port operator approaches the Court for an order to move the vessel to a place where she will not affect port operations. The Rule now gives guidance as to how this should be done as follows:

> *(2) The Admiralty Marshal or his substitute shall, unless the Court otherwise orders, take all appropriate steps to retain custody of, and preserve the ship or other property, including —*
>
> *(a) removing from the ship, or storing place, cargo that is under arrest;*
>
> *(b) removing cargo from a ship that is under arrest and storing it;*
>
> *(c) removing, storing or disposing of perishable goods that are under arrest or are in a ship that is under arrest; and*
>
> ***(d) for a good cause, moving the ship that is under arrest to a safe berth or location within jurisdiction upon application to the Court, by the arrestor, caveator against***

release, port authorities, relevant government or law enforcement agencies, and any other interested party.

E. REPARATIONS FOR NEEDLESS ARRESTS:

The AJPR 2023, in its provisions on reparation for needless arrest, has dumped the **'insufficient ground'** test in Order 11, Rule 2 of the AJPR 2011 for the **'bad taste, gross negligence or unlawful'** test.

The relevant provision to wit: Order 11, Rule 2 of the AJPR 2023 states:

2. In any case in which an arrest order has been made —

*(a) if it afterwards comes to the knowledge of the Court that the arrest of any defendant, or any order Of attachment, sale, or injunction, or any warrant to stop the clearance of, or to arrest any ship, **was applied for in bad faith or in gross negligence, or unlawfully**; or*

*(b) if the suit in which any such application was made is dismissed, or judgment is given against the plaintiff by default or otherwise, and it appears to the Court that there was **no probable ground for instituting such suit,** the Court may (on the application of the defendant made at any time before the expiration of three (3) months from the termination of the suit) award against the plaintiff such amount, as it may deem a reasonable compensation to the defendant for any loss, injury, or expenses which he may*

have sustained by reason of such arrest, attachment, order of sale or injunction,

On the other hand, Order 11, Rule 2 of the AJPR 2011 states:

In any case in which an arrest order as aforesaid has been made—

(a) if it afterwards appears to the Court that the arrest of any defendant, or any order of attachment, sale, or injunction, or any warrant to stop the clearance of, or to arrest any ship, was applied for ***on insufficient grounds****; or*

It however seems that section 13 AJA laid down another test in the following terms:

(1) Where, in relation to a proceeding commenced under this Act-

(a) a party ***unreasonably and without good cause-*** *(i) demands excessive security in relation to the proceeding; or (ii) obtains the arrest of a ship or other property under this Act; or*

(b)a party or other person ***unreasonably and without good cause fails to give a consent*** *required under this Act for the release from arrest of a ship or other property, the party or person shall be liable in damages to a party to the proceeding, being a party or person who has suffered loss or damage as a direct result.*

(2) The jurisdiction of the Court shall extend to determining summarily, in relation to the proceeding, a claim arising under subsection (1) of this section.

The question would seem to be, does the phrase **'unreasonably and without good cause'** mean the same as **'bad faith, gross negligence, unlawfully.'**

It seems that the new provisions are more tedious, and thus, the task of the shipowner in establishing wrongful arrest is more onerous. That was the situation before the AJPR 2011. These requirements of *mala fide* (bad faith) and *crassa negligentia* were established in the old English case of the **EVANGELISMOS (1858) Vol. 4 ER** and followed by the Nigerian Court of Appeal in **CAMPANIA NAVEGACION & FINANCIERA BOSNIA S.A. (OWNERS OF THE SHIP M.V. BOSNIA) v MERCANTILE BANK OF NIGERIA LIMITED (THE BOSNIA No. 2) (1980)-1986) NSC vol.2 17**

Other matters:

I have so far considered the provisions I consider major in the new rules and their likely effectiveness and also effect and whether or not there are some areas for improvement. Definitely, the 2023 AJPR has made significant contribution to admiralty practice.

There are a few other areas, though.

F. SUITS FILED IN THE WRONG DIVISION:

The first one is Order 2, Rule 10, which provides:

10. Where an admiralty action in rem is not commenced in the Judicial Division of the Court in which the res may be found or is expected to arrive, and the action is subsequently transferred to the appropriate Judicial Division, any warrant of arrest issued by the Court in the previous Judicial Division shall remain in force and be enforceable against the res in any Judicial Division in which it is located.

This ensures that even where an order of arrest was obtained in a division where the vessel was not being expected, it will remain in force after the matter has been transferred to the appropriate court.

G. PROCESSES TO BE FILED IN AN ACTION IN REM:

On the processes to be filed in an action *in rem*, Order 3, Rule 3 is now more comprehensive as it provides:

3.—

(1) An action in rem shall be commenced by a writ of summons as in Form l, which shall be accompanied by

(a) statement of claim;

(b) list and copies of documents to be relied on at trial;

(c) a list of non-documentary exhibits; and

(d) list of witnesses to be called at the trial.

(2) The Plaintiff shall within 7 days of filing the writ of summons file written statements of his witnesses which shall be adopted on oath at the trial,

Provided that the

> ***(a) statement on oath of witnesses outside the jurisdiction of the Court may be notarized by a notary public in the foreign jurisdiction or signed before any person authorized to administer oaths in the foreign jurisdiction ;***
>
> ***(b) statements on oath of witnesses requiring subpoena from the Court need not be filed at the commencement of the action ; and***
>
> *(c) witnesses who require a subpoena or summons shall at the instance of the party calling them be served with Form 3 before the filing of the statements of such witnesses.*

Order 3, Rule 3(2) (a) also permits witness statements to be notarized.

With respect to parties in actions in rem, Order 5, Rule 1 of AJPR 2023 provides as follows:

1.

The Writ of summons in a proceeding commenced as an action in rem in relation to a proprietary maritime claim shall specify the ship or other property as the defendant and the plaintiffs shall not be required to specify a relevant person as a defendant in the action and shall be as specified in Form 1 of the Schedule to these Rules.

The above waives the previous requirement for a writ of summons in proceedings commenced as an action in rem concerning proprietary maritime claims to specify the relevant person as a defendant.

H. SERVICE OF ORIGINATING PROCESS IN ACTIONS IN REM:

Order 6, Rules 1 and 2 of the AJPR 2023 provides as follows:

1.—

-(1) The writ of summons in a proceeding commenced as an action in rem against a ship or other property that is at the time of service on board a ship, shall be served by securely affixing a sealed copy of the process to a mast or some other conspicuous part of the ship, or delivering same to the master of the ship.

(2) The service described in sub-rule (I) of this rule shall be sufficient service of the writ of summons on the owners of the ship or other property.

2.

(1)The writ of summons in a proceeding commenced as an action in rem against any property that is not, at the time of service, on board a ship shall be served by securely affixing a scaled copy of the process to the property or to a package or container or on the storage facility containing the property.

<u>(2) The service described in sub-rule (I) of this rule shall be sufficient service of the writ of summons on the owners of the property.</u>

A writ in rem can thus be served on the vessel's owners by securely affixing it to a mast or other conspicuous place, which will be good service to the owners. Does this obviate the need to obtain leave to serve the owners where they are outside the jurisdiction? This rule emphasizes the rule that the presence of the vessel within the jurisdiction and service of the originating processes on the owners, along with an order of arrest, means that the owners are also impleaded.

I. <u>SECURITY FOR COSTS:</u>

Order 13, Rule 1 of the AJPR 2023, provides

1.

(1) In every action in rem, the Court may on the application of an interested person, if it deems fit, require any plaintiff at whose instance a ship or other property has been arrested either at the commencement of the suit or at any time in the course of the proceedings, to give security for costs.

(2) Where the plaintiff's claim is in excess of ***<u>10 million naira</u>*** *or* ***<u>its foreign currency equivalent</u>*** *or where the plaintiff has no assets in Nigeria, and the Court is so satisfied, security for costs shall be ordered by the Court.*

This is a higher claim threshold, as the threshold under the AJPR 2011 was Five Million Naira (₦5,000,000). It was important to increase the same due to the exchange rate between the Nigerian Naira and other international trading currencies.

Order 13, Rule 3 further provides:

> ***In determining the quantum of security to be provided, the Court shall have regard to all the circumstances of the case, including the interest rate, if any, payable by the defendant to a bank or other financial institution.***

The above goes on to set examples of the circumstances to be taken into consideration (as a guide to the Court and defendants) for determining the quantum of security, as opposed to the provision of the AJPR 2011, which contained no such guidance.

J. INTERVENER:

Order 22, Rule 2 (1) of the AJPR 2023 provides, for the first time, a concise definition of an "intervener" as:

> *"Intervener" in relation to a proceeding or to a ship or other property under arrest means any person not named in the writ of summons in an admiralty action in rem who is interested in the res under arrest or in the fund at the Admiralty Registry and includes mortgagees, trustees in bankruptcy, underwriters who have accepted abandonment, charterers, persons who have possessory liens or competing maritime liens, and generally persons*

who are plaintiffs in other actions in rem against the same property.

This new definition of an Intervener would prevent meddlesome interlopers who crash the party with a view, in some instances, to prevent the arrestor from (i) procuring security after arresting the maritime res or (ii) enjoying the spoil of its final judgment.

K. DEFINITION OF AN AIRCRAFT:

Order 22 Rule 2 (2) (1) defines an Aircraft to mean any waterborne aircraft.

This follows that the FHC's Civil Aviation (Procedure) Rules 2013 will now cover only non-waterborne aircraft, thereby demarcating the aviation and the admiralty jurisdiction of the FHC as it relates to aircraft.

Conclusion.

On the whole, it is apparent that the promulgation of the AJPR 2023 is a significant stride in rule-making in Nigeria. It is obvious that the Rules will ensure a more robust and efficient admiralty practice in Nigeria.

The need to amend relevant provisions of the Constitution as well as the AJA is urgent. It is also recommended that a new law be passed for the domestication of the Beijing Convention.

This will enable the maritime industry to enjoy the benefits of efficient and up-to-date legislation and thus positively impact

Admiralty practices and procedures in Nigeria. This of course, will boost Nigeria's role as a maritime hub in Africa.

The creation of an Admiralty Division as well as an Admiralty Registry will enhance the efficacy of the peculiar procedure recognized by Admiralty Law worldwide.

Hon Justice Olayinka Faji,

Judge,

Federal High Court, Lagos.

24th June 2024.