



## **SHIP ARREST - RECENT DEVELOPMENTS IN NIGERIAN ARREST LAW<sup>1</sup>**

### **INTRODUCTION**

This paper considers the recent developments in Nigerian Ship Arrest Law – the Admiralty Jurisdiction Procedure Rules (AJPR) 2011 for the Federal High Court of Nigeria (FHC), and its effect on ship arrest practice.

The new AJPR 2011 (the New Rules) was made by the Chief Judge of the FHC (CJF)<sup>2</sup> on 1<sup>st</sup> March 2011 and came into force on 14<sup>th</sup> March 2011. This is pursuant to section 254 of the Constitution of the Federal Republic of Nigeria 1999<sup>3</sup> and section 21 of the Admiralty Jurisdiction Act (AJA) 1991<sup>4</sup> which empower the CJF to make rules of practice and procedure for the FHC and to carry into effect the objects of the AJA. Together, the AJA and the AJPR govern admiralty matters in Nigeria, with the FHC as the court of first instance. The admiralty jurisdiction of the FHC is well stated in the AJA<sup>5</sup>, whilst the AJPR provides the procedure for the exercise of its jurisdiction. Appeals from the FHC lie to the Court of Appeal and the Supreme Court.

The New Rules are the result of the review of AJPR 1993 (Old Rules), which became necessary to keep up with the demands in shipping practice; noting the dynamic nature of the shipping industry. Various issues have been addressed in the AJPR 2011, with new rules added to bring the AJPR in line with modern shipping practices. There is in total, 23 Orders in the New Rules, amounting to an increase from the 17 Orders in the Old Rules.

I shall briefly highlight the criteria for arresting a ship in Nigeria before discussing the provisions of the New Rules as it affects ship arrest.

### **CRITERIA FOR ARRESTING A SHIP IN NIGERIA**

The process of applying for the arrest of a ship requires that the claimant possesses a 'Maritime Claim' as defined in Section 2 AJA and reproduced in Appendix 1 to this paper. This generally means that the claim must be a '*proprietary maritime claim*' or a '*general maritime claim*' as follows:

1. Proprietary maritime claims include claims relating to the possession of a ship, title to or ownership of a ship or a share in a ship, mortgage of a ship or of a share in a ship, mortgage of a ship's freight or claims between co-owners of a ship relating to the possession, ownership, operation or earning of a ship. Also claims for the satisfaction or enforcement of a judgment given by the Court or a court (including a court of a foreign country) against a ship or other property in an admiralty proceeding *in rem*.
2. General maritime claims include claims for damage done or received by a ship (whether by collision or otherwise), claims for loss of life, or for personal injury, sustained in consequence of a defect in a ship or in the apparel or equipment of a ship as well as arising out of an act or omission of the owners or characters of a ship.

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<sup>1</sup> Presented at the 8<sup>th</sup> Shiparrested.com Conference, June 2011, Athens, Greece

<sup>2</sup> Justice Daniel Dantsoho Abutu, FCI Arb. (as he then was)

<sup>3</sup> Cap. C23, Laws of the Federation of Nigeria (LFN) 2004

<sup>4</sup> Cap. A5, Laws of the Federation of Nigeria (LFN) 2004

<sup>5</sup> Sections 1, 3 and 5 AJA



Once the claimant has ascertained that his claim falls within the meaning of a Maritime Claim as listed above, he may shall commence proceedings against the ship at the FHC (in the judicial division covering the port or area where the ship is located). The procedure for applying for the arrest for a ship shall be discussed later under the New Rules.

## **SHIP ARREST DEVELOPMENTS IN NIGERIA**

The New Rules in its bid to update the AJPR has provided new provisions, thus changing the face of ship arrest in Nigeria. Some of the important provisions are discussed below:

### **1. Application for the Arrest of a Ship**

The new procedure for applying for the arrest for a ship is set out in Order 7, Rule 1 (1) AJPR 2011 and reproduced in Appendix 2 to this paper. With this, a claimant with a Maritime Claim may now commence *in rem* proceedings against the ship once the ship is within jurisdiction **or expected to arrive jurisdiction within three days** (*Emphasis mine*), at the time of filing the application.

This amounts to a major improvement as the Old Rules (Order VII) failed to state whether a ship must be within the jurisdiction of the court or not, before an application for the arrest of the ship can be made to the FHC. The practice therefore was for a ship to be within the jurisdiction of the court (and no more) before an application for the arrest of the ship can be brought made. This was premised on the fact that the FHC cannot arrest a ship<sup>6</sup> not within its jurisdiction (.i.e. every open sea within twelve (12) nautical miles of the coast of Nigeria (measured from the low water mark) or of the seaward limits of inland waters<sup>7</sup>); and that the grant of an order otherwise, would amount to an order in futility.

The documents required to be filed for the warrant of arrest of a ship remains the same as under the Old Rules: Writ of summons; statement of claim; motion *ex parte* disclosing a strong *prima facie* case for the arrest of the ship; supporting affidavit stating the nature of the claim, that the ship is within the jurisdiction of the court or is expected to arrive jurisdiction within three days, and that the ship may leave the jurisdiction of the court at anytime. The claimant is also required to provide an Affidavit of Urgency; Indemnity in favour of the Admiralty Marshall for his expenses in effecting the arrest order; and an undertaking as to damages in favour of the Defendants.

The new procedure for applying for a warrant of arrest of a ship deals with the lacuna in the Old Rules which allowed claimants to lose their window of opportunity to arrest a ship for a claim, simply because they have to wait for the ship to be within jurisdiction before applying a warrant of arrest.

### **2. Caveats**

As part of the new procedure for obtaining a warrant of arrest for a ship, the New Rules clearly state that the Claimant shall be responsible for conducting a search of the caveat book for the purpose of ascertaining whether there is a caveat against arrest in force with respect to that ship.<sup>8</sup> This puts an end to a lacunae in the Old Rules that allowed a claimant obtain an arrest order for a ship, knowing fully well that a caveat against arrest exists. This was the practice simply because the Old Rules did not require the Claimant to search the caveat register before applying for a warrant of arrest of a ship and where such a caveat exists, inform the court accordingly.

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<sup>6</sup> Section 7, AJA provides that the service and arrest of a ship shall take place within the limits of the territorial waters of Nigeria.

<sup>7</sup> Section 1(1) Territorial Waters Act, Cap. T5, Laws of the Federation of Nigeria (LFN) 2004

<sup>8</sup> Order 7 Rule 1(2) AJPR 2011



Although the Praecipe for Caveat against Arrest – Form C in the Schedule to the Old Rules provides that the Caveator undertakes to appear with 14 days of service of a writ commencing action against a ship, the Caveat against Arrest issued in practice and accepted by the Registrar/Admiralty Marshal provides that the caveator shall in a suit involving the ship within 3 days of been served. The New Rules have amended (Form 8 in the Schedule to the AJPR 2011) and brought the rules in line with practice.

Finally, a Praecipe for Caveat against Release of a Ship is provided for the first time in Form 10 to the Schedule to the New Rules.

### **3. Change in Beneficial Ownership**

The provisions of the New Rules provide that a warrant of arrest of a ship may not be issued where the beneficial ownership of the ship has, since the issuance of the writ of summons, changed as a result of a sale or disposal by any court exercising admiralty jurisdiction<sup>9</sup>. It is however the duty of the new owner to inform the FHC of his ownership of the ship to prevent the arrest of his ship.

### **4. Custody and Sale of Ship Under Arrest**

As you would recall, the application for a warrant of arrest constitutes an undertaking from the Claimant to the Court to pay the Admiralty Marshal, on demand, an amount equal to the expenses of the Admiralty Marshal in relation to the arrest. As such the Admiralty Marshal was allowed under the Old Rules to accept from the Claimant, an amount not exceeding ₦5,000.00 (Approx. USD\$32.30) as deposit towards discharging its liability and the Admiralty Marshall may make more demands for interim payments on account of those fees and expense. This amount is clearly not commensurate to the demands of the time. Whilst advising claimant's on the ship arrest practice in Nigeria, we estimate the Admiralty Marshal's weekly cost as ₦100,000.00 (Approx. USD\$645.15). Taking note of the current realities, the New Rules now provided that the *“Admiralty Marshall may accept an amount of money not less than ₦100,000.00 and not more than ₦500,000.00 as deposit towards discharging the liability; and make more demands fortnightly for payment on account of those expenses.”*<sup>10</sup>

The Admiralty Marshall is also required to file a return or receipts and expenditures to the Court within 7 working days of the release of the ship<sup>11</sup>.

### **5. Judicial Sale of a Ship**

In light of the various ships that litter the waterways of Nigeria as a result of ship owners failing to provide bail for the release of vessels under arrest or entering appearance in a suit, Order 9, Rule 6(2) of the New Rules now empowers the court on the application of the arrestor or other interested party order the sale of the ship where the bail or sufficient security has not been provided 6 months after the date of arrest.

The ship is to 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.

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<sup>9</sup> Order 7 Rule 1(4) AJPR 2011

<sup>10</sup> Order 9, Rule 2 (2(a and b) AJPR 2011

<sup>11</sup> Order 9, Rule 2 (2d) AJPR 2011



## 6. Reparation For Needless Arrest

One of the most notable changes to ship arrest practice under the New Rules is the issue of reasonable compensation for needless arrest. This is addressed under Order 11, Rule 2 AJPR and reproduced in Appendix 3 to this paper the New Rules.

Under the Old Rules, if it appears to the Court that the arrest of any defendant, or any order of attachment, sale, or injunction, or any warrant to stop clearance of, or to arrest any ship was applied for on insufficient grounds; or if the suit in which any such application was made is dismissed, or judgement 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 3 months from the termination of the suit) award against the plaintiff such amount, not exceeding the sum of ₦20,000.00 (Approx. USD\$129.00) (Emphasis mine)**, as it may deem a reasonable compensation to the defendant for any loss, injury, or expenses which he may have sustained as a result of such arrest, attachment, order of sale or injunction , as aforesaid.

The maximum sum of ₦20,000.00 for compensation for needless arrest of a ship has been highly criticised over few years. The frivolous and/or vindictive arrest orders obtained over the years by various claimants has been blamed on this provision as it does not serve as a deterrent. The New Rules, understanding the economic importance of a ship arrest to a ship owner has provided the Court with the power to “award against the plaintiff **such amount as it may deem reasonable compensation (Emphasis mine)** to the defendant for any loss, injury, or expenses which he may have sustained as a result of such arrest, attachment, order of sale or injunction.”

Order 11, Rule 2 AJPR would definitely serve as a deterrent to false applications for arrest orders and prevent an abuse of the court process.

## CONCLUSION

It is believed that the AJPR 2011 would improve maritime practice in the Nigeria as well as help in mitigating cost of doing business in the country. The above rules mirror current realities in the industry and closely modelled in line with notable Maritime Jurisdictions of the world like, England & Wales.

Although the implementation of some the provisions of the New Rules might not be clear, I believe this would be “ironed out” with practice as Nigeria remains a significant shipping nation and the largest in cargo volume in the West African sub-region. Nigeria therefore remains a favourable jurisdiction for ship arrests and an enviable investment destination.

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## **APPENDIX 1**

### **Section 2 AJA**

- 1) A reference in this Decree to a maritime claim is a reference to a proprietary maritime claim or a general maritime Claim
- 2) A reference in this Decree to a proprietary maritime claim is a reference to--
  - (a) a claim relating to -
    - (i) the possession of a ship, or
    - (ii) a title to or ownership of a ship or of a share in a ship, or of share in a ship, or
    - (iii) a mortgage of a ship or of a share in a ship,
    - (iv) a mortgage of a ship's freight
  - (b) a claim between co-owners of a ship relating to the possession, ownership, operation or earning of a ship
  - (c) a claim for the satisfaction or enforcement, of a judgement 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;
  - (d) a claim for interest in respect of a claim referred to in paragraph (a) , (b) or (c) of this subsection.
- 3) A reference in this Decree to a general maritime claim is a reference to-
  - (a) a claim for damage done by a ship whether by collision or otherwise;
  - (b) a claim for damage received by a ship
  - (c) a claim for loss of life or for personal injury, sustained in consequence of a defect in a ship or in the apparel or equipment of a ship;
  - (d) subject to subsection (4) of this section, a claim, including a claim for loss of life or personal injury, arising out of an act or omission of-
    - (i) the owner or charterer of a ship,
    - (ii) a person in possession or control of a ship,
    - (iii) a person for whose wrongful act or omission the owner, charterer or person in possession or control of the ship is liable;
  - (e) a claim for loss of or damage to goods carried by a ship;
  - (f) a claim out of an agreement relating to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by charterparty or otherwise;
  - (g) a claim relating to salvage (including life salvage of cargo or wreck found on land);
  - (h) a claim in respect of general average;
  - (i) a claim in respect of pilot age of a ship;
  - (j) a claim in respect of towage of a ship or an aircraft when it is water-borne;
  - (k) a claim in respect of goods, materials or services (including stevedoring and lighterage service) supplied or to be supplied to a ship for its operation or maintenance;



- (l) a claim in respect of the construction of a ship (including such a claim relating to a vessel before it was launched);
  - (m) a claim in respect of the alteration, repair or equipping of a ship or dock charges or dues;
  - (n) a claim in respect of a liability for port, harbour, canal or light tolls, charges or dues, or tolls, charges or dues of any kind, in relation to a ship;
  - (o) a claim arising out of bottomry;
  - (p) a claim by a master, shipper, charterer or agent in respect of disbursements on account of a ship;
  - (q) a claim for an insurance premium, or for a mutual insurance call, in relation to a ship, or goods or cargoes carried by a ship
  - (r) a claim by a master, or a member of the crew, of a ship for-
    - (i) wages, or
    - (ii) an amount that a person, as employer, is under an obligation to pay to a person as employee, whether the obligation arose out of the contract of employment or by operation of law, including by operation of the law of a foreign country
  - (s) a claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried in a ship, or for the restoration of a ship or any such goods after seizure;
  - (t) a claim for the enforcement of or a claim arising out 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;
  - (u) a claim for interest in respect of a claim referred to in any of the paragraphs (a) to (t) of this subsection.
- 4) A claim shall not be made under subsection (3) (d) of this section unless the act or omission in an act or commission relating to the management of the ship, including an act of commission or omission relating to the management of the ship, including an act or omission in connection with -
- (a) the loading of goods onto or the unloading of goods from a ship;
  - (b) the embarkation of persons on to or the disembarkation of persons from a ship ; and
  - (c) the carriage of goods or persons on a ship.
- 5) A claim under paragraphs (a) to (c) of this subsection may be made against the owner, agent or charterer of a ship.



## **APPENDIX 2**

### **Order 7, Rule 1 (1) AJPR 2011**

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 any time of the application the ship or the other property is within Nigerian territorial waters or is expected to arrive there within three days.



### **APPENDIX 3**

#### **Order 11, Rule 2 AJPR**

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
- (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 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, as aforesaid.