

ARREST OF SHIPS IN NIGERIA: THE LAW, PRACTICE AND PROCEDURE

by

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INTRODUCTION

Legal proceedings for obtaining a final enforceable Court decision usually take a considerable time, and it is not unusual that at the end of lengthy proceedings, the defendant is found without any assets upon which the claimant may enforce the final judgment, which he has obtained after such long effort at litigation. This is particularly frequent in the field of maritime law, where the practice of single-vessel companies is widespread, and by the end of the proceedings, the vessel may have been sold, may have sunk or may in one way or another be difficult to locate. A remedy to this problem is for the claimant to ask for security and interim relief at the outset or at any time he feels that the future enforcement of his claim is endangered. This is achieved in the area of maritime and shipping law by the arrest of ships. To avoid ending up with a 'pyrrhic' victory of an enforceable final judgment or a final arbitral award, a claimant can invoke the jurisdiction of the English High Courts or the Federal High Courts in Nigeria to secure his claims prior to the substantive hearing of the claim. This, the claimant can do in one of two ways. The claimant can invoke the *in rem* jurisdiction of the Admiralty Court to arrest the defendant's vessel or cargo within the territorial waters of Nigeria. Alternatively, it can invoke the *in personam* jurisdiction of the commercial court to obtain a freezing order, otherwise known as Mareva injunction, restraining the defendant from disposing of its assets pending the final judgment or final arbitration award in the matter.

This paper seeks to examine arrest of ships in Nigeria by considering the law, practice and procedure, with a comparative study of ship arrest in other jurisdictions such as Belgium and Greece. The reference to Belgium and Greece is not far-fetched. Belgium has an impressive tradition in Maritime Law and most specifically, the Port Antwerp, has a favourable reputation of being a convenient place to arrest ships.

1. THE CONCEPT, MEANING AND PURPOSE OF AN ARREST OF SHIP

A. The Concept of Arrest

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It may not be particularly easy to define the word arrest with any satisfactory measure of precision under Nigerian Law even though its usage is widespread in maritime practice and in our criminal jurisprudence. Defining a concept in law, like writing research papers, is perhaps one of the most challenging, engaging and difficult intellectual expressions.¹ As a matter of fact, the term “Arrest” is not defined by the Constitution,² the Federal High Court Act,³ the Admiralty Jurisdiction Act,⁴ the Federal High Court (Civil Procedure) Rules,⁵ the Admiralty Jurisdiction Procedure Rules,⁶ the Criminal Code, the Penal Code or indeed the Administration of Criminal Justice Act, 2015.⁷ **Doherty** merely made a statement in her book⁸ that the appearance of an offender may be secured before a court of law by means of an arrest. The offender may be arrested with or without a warrant of arrest. **Order 16, Rule 2** of the **Federal High Court (Civil Procedure) Rules** used the word, “**Warrant to Arrest**” but that word or phrase is not defined in **Order 1, Rule 3, Sub-Rule 1** of the **Federal High Court (Civil Procedure) Rules** which is the interpretation section. An attempt was however made in **Order 1, Rule 3** of the **Admiralty Jurisdiction Procedure Rules** when it interpreted “**Arrest Warrant**” to mean a warrant for the arrest of a ship or other property.⁹

That definition is with respect, as unhelpful as it is misleading. It is unhelpful because it has not offered any useful definition. It is misleading because the definition further strengthened the complexity of the problem. In other therefore, to make the concept of an arrest clear and obviate being misunderstood, we take the liberty to rely on the definition proffered by the Webster’s Collegiate Dictionary, the Black’s Law Dictionary and the 1952 Brussels Convention on the Arrest of Sea-Going Ships.

The **Webster’s Collegiate Dictionary** defines the word, “**Arrest**” to mean to bring to a stop, to make inactive, to seize, capture.¹⁰ Specifically, it means to take or keep in custody by authority of law; to catch suddenly and engagingly. If something is under arrest, it means it is in legal custody. On the other hand, the **Cambridge International Dictionary of English** defines “**Arrest**” to mean (of the Police) to use lawful authority to catch (someone) and take them to a place

¹ I.L. Worika., ‘Writing Research Papers, Dissertations and Thesis: From Choice of Topic to Final Work’ in Kelvin N. Nwosu ed., *Legal Practice Skills & Ethics in Nigeria: Essays in Honour of Chief Babatunde Abiodun Ibiroke*, SAN (Lagos: DCON Consulting Publishers, 2004) 353.

² The Constitution of the Federal Republic of Nigeria, 1999 (as amended).

³ The Federal High Court Act, Cap F4, LFN, 2004.

⁴ Admiralty Jurisdiction Act, Cap A5, Laws of the Federation of Nigeria, 2004.

⁵ Federal High Court (Civil Procedure) Rules, 2009.

⁶ Admiralty Jurisdiction Procedure Rules, 1993.

⁷ Section 494(1) which is the interpretation section of the Act never mentioned or defined the word ‘arrest’. Rather, Arrest, bail and preventive justice appears in Part 2, Sections 3-34 of the Act. In making an arrest, the Police Officer or other persons making the arrest shall actually touch or confine the body of the suspect, unless there is submission to the custody by word or action.

⁸ Oluwatoyin Doherty *Criminal Procedure in Nigeria: Law and Practice*, (Britain, Blackstone Press, 1990) 90.

⁹ See Order 1, Rule 3, of the Admiralty Jurisdiction Procedure Rules, 1993.

¹⁰ *Merriam Webster’s Collegiate Dictionary*, 10th ed., (1998) 64.

where they might be accused of a crime.¹¹ It also means to stop or interrupt the development of something. It further means to catch or attract someone's attention. In the words of the **Black's Law Dictionary**, "Arrest" means a seizure or forcible restraint.¹² It also means the taking or keeping of a person in custody by legal authority, especially in response to a criminal charge. **Louis N. Mbanefo, SAN** however prefers to use the word, "Detain" instead of "Arrest" because according to the learned SAN, there is no criminal element in the arrest of a ship.¹³ The **1952 Brussels Convention on the Arrest of Ships** defines the word "Arrest" to mean, "the detention of a ship by judicial process to secure a maritime claim, but does not include execution or satisfaction of a judgment".¹⁴ A similar definition is provided by the **Geneva Convention on the Arrest of Ships, 1999**. It provides in **Article 1(2)** that "Arrest" means:

*Any detention or restriction on removal of a ship by order of a court to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument.*¹⁵

We shall therefore safely adopt the definitions as given by the 1952 Brussels Convention and the 1999 Geneva Convention on the arrest of Ships. In adopting same however, it is apposite to emphasize that the Brussels Convention on the arrest of Ships was never ratified by Nigeria because it was enacted at a time when Nigeria was a British Colony.¹⁶ There was at that time no Nigerian Legislation governing Admiralty Practice and Procedure. According to Louis Mbanefo SAN,¹⁷ the provisions of the Brussels Convention were incorporated into the **British Administration of Justice Act, 1956** and that Act was applied by Nigerian Courts in exercise of their *in rem* jurisdiction. Though the 1956 Act was superseded by the **Supreme Court Act, 1981** in England, the 1956 Act continued to be applied in Nigeria due to legislation made at the time of independence authorizing our High Courts to apply the then existing English Rules of Practice and Procedure.¹⁸ Although, the definition in the 1999 Convention is more extensive and detailed as it encompasses the French Practice of *Saise* and *Conservatoire* and American Maritime Attachment, one would in a nutshell, say that arrest is a form of judicial restraint, and detention of a ship pending the determination of a claim against it.¹⁹

B. Meaning of Ship

¹¹ *Cambridge International Dictionary of English*, Cambridge University Press, (1995) 64.

¹² *Black's Law Dictionary*, 7th ed., West Group Pub., (1999) 104.

¹³ Louis N. Mbanefo, 'Maritime Law and Admiralty Jurisdiction in Nigeria' in I.A. Ayua, T.A.T. Yagba's (Eds.), *The New Law of the Sea and the Nigerian Maritime Sector: Issues and Prospects for the Next Millennium*, NIALS Lagos, (1988) 92.

¹⁴ See Article 1(2) of the Brussels Convention on the Arrest of Sea-Going Ships, 1952.

¹⁵ See International Convention on Arrest of Ships, 1999 held at the *Palaise des Nations*, Geneva, from 1 – 12 March, 1999.

¹⁶ Mbanefo, "Maritime Law and Admiralty Jurisdiction in Nigeria (n 15) 93.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Rita C Obodo 'Arrest of Ships under International Law', Seminar Paper Presented to the 2003/2004 LL.M Class of International Maritime Law, Faculty of Law, OAU, June (2005) 10.

None of the International Conventions defined the word, “**Ship**”. The only provision in attempting a definition of ship was made in respect of a “warship” which by definition has very *restricted* application to the word, “**Ship**”. **Article 29 of the United Nations Convention on the Law of the Sea**²⁰ provides that for the purpose of this Convention “warship” means a ship belonging to the armed forces of a state bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the state and whose name appears in the appropriate service lot or is equivalent, and manned by a crew which is under regular armed forces discipline. This is an unfortunate description of a warship which has no relevance for our search for the meaning of a ship. Interestingly, our local statutes made adequate definition of a ship. **Section 2(1) of the Merchant Shipping Act**²¹ which is the interpretation section of the Act defines a “**Ship**” as meaning:

- 2(1) Any vessel other than –*
- (a) A vessel propelled solely by oars or paddles, or*
 - (b) A vessel which has been generally exempted from the provisions of this Act by the Minister under Chapter 95 of this Act;*
 - (c) A vessel which has been partially exempted under provisions of this Act by the Minister under Chapter 95 of this Act to the extent of such exemption.*²²

C. The Aim, Basis and Purpose of an Arrest of Ship

The fundamental objective of arresting a vessel or ship is to obtain satisfaction of a judgment in an action in *rem*.²³ Consequently, the issue of arrest or security in lien of arrest of a ship would not arise if there is no subsisting action in *rem* against the vessel or when the person seeking the security is not a party to such action or has no claim in such action.

The right to an arrest was conterminous with maritime lien. Where there was no maritime lien, there was no right to arrest the ship. A maritime lien, of course, existed only in respect of the offending ship. It lay for such claims as salvages and collision, damages, etc. The claimant had a right to arrest the offending ship for his claim.²⁴ According to **Lord Denning** in the *Banco’s* case,²⁵ the aim of arrest is to make the defendant put up a bail or provide in advance of the judgment, a fund or securing compliance with the judgment if and when it is obtained against him. The security may also be a bank or insurance company guarantee or letter of identity or P and I club letter of undertaking.²⁶ Apparently, the plaintiff in an action in *rem* does not wait until after the trial and judgment of the case before he

²⁰ 1982 Convention on the Law of the Sea (UNCLOS 111).

²¹ Merchant Shipping Act, Cap 224, LFN, 2004.

²² Section 2(1) Merchant Shipping Act, Cap 224, LFN, 2004.

²³ *Ibe Abai Coy (Nig) Ltd v. Oceanic Traders Navigation Ltd (1907-1979)* 1 NSC 418; *Mt ‘Delmar’ v. MT ‘Ane (EX MT Leste)’* (2016) 13 NWLR (pt 1530) 482 at 504 para E-G.

²⁴ Per Lord Denning, M.R. in the *ELEFTERIO, SCHWARZ & CHRAIN LTD. v. ST. ELEFTERIO* (1957) 2 ALL E.R. 374.

²⁵ (1971) Probate 137 at 151.

²⁶ Emejuru Chukwuecheta ‘Arrest of Ships Under Nigerian and International Law’, Seminar Paper Presented for the M. Phil Programme in Law, OAU, (2002) 18.

can be sure of having his claim satisfied. According to the court in *THE CELLA*,²⁷ the arrest constitutes the ship or other property as security in the hands of the court for the claim, which security cannot be defeated by the subsequent bankruptcy of the owner of the arrested ship because the rights of the parties are determined by the state of things at the time of the filing of the action.

A ship cannot be arrested merely for the asking, just as a litigant cannot just wake up in the morning and call for an arrest of a vessel without having a proper claim or basis. According to **Okunribido, J.** in the case of *Cheilchan Enterprises Ltd. v. Owners of Sea Thand II*,²⁸ “there is nothing either in the application itself or the supporting affidavit which makes it appear that there exists in the plaintiff a proper right to the arrest of the ship in question, or that the local representatives have been made aware of the alleged loss of the goods. The mere fact that he has brought an action in *rem* does not, as a matter of course, entitle the plaintiff to a warrant of arrest of the *res*”.²⁹ It must therefore be shown that unless the ship is arrested, the plaintiff may not be able to reap the fruits of the judgment that may be awarded in its favour. According to **Agbakoba**,³⁰ several theories have been advanced as the basis for an arrest. A theory that has been widely accepted is that advanced by **Marsden** who says that the purpose of an arrest is to compel the attendance of the vessel owner and to obtain security before judgment for the claim. Another popular theory is one originally advanced by **Roscoe** in his book, ‘*Admiralty Practice*’ and in recent times reinstated by **Professor Edward Ryan** that the purpose of arrest is to give the Courts jurisdiction. According to Agbakoba, “it is not in my view strictly necessary to decide whether the aim of arrest is to establish jurisdiction, compel appearance or furnish security as all these multifaceted purposes coalesce in the arrest order made by the Court. The fact is that all ship arrests save for administrative distress and execution of judgments flow from an arrest order ...”³¹ It can be seen from the above that a court can order the arrest of a vessel in order to confer jurisdiction upon itself to provide pre-judgment security for the applicant.

D. What Can Be Arrested? What Ships Can Be Subject or Object of an Arrest

According to **Grime**,³² the most usual object in *rem* proceedings are a ship. However, other maritime property may be arrested in appropriate proceedings: a cargo claim might rise to proceedings against the freight earned by the ship and a

²⁷ (1888) 13 Probate Div. 82.

²⁸ Reported by Louis Mbanefo, *Nigerian Shipping Cases*, Vol. 1, Professional Books Ltd. (1987) 295.

²⁹ *Ibid* 299.

³⁰ Olisa Agbakoba, ‘Arrest and Caveat Procedure,’ Papers on Maritime Seminar for Judges Organized by the Nigerian Shippers Council in Conjunction with the National Judicial Institute @ Sheraton Hotel, Abuja, (1997) 77–78.

³¹ *Ibid* 78.

³² Robert Grime, *Shipping Law, Concise College Texts* (2nd ed.), Sweet & Maxwell Pub. (London), (1991) 20.

salvage claim might be enforced against the cargo that was salvaged. The overriding principle is that the claim must relate directly to the property arrested. The **Supreme Court Act**³³ and the **1952 Brussels Convention**³⁴ approached the question: what can be arrested or what ships can be the subject or object of an arrest, by defining two types of ship susceptible to arrest.

- (i) *The offending ship or the particular ship in respect of which the maritime claim arose.*
- (ii) *The sister ship which is in the same ownership with the particular ship.*

Article 3(1) of the Arrest Convention provides thus:

*Subject to the provision of paragraph (4) of this Convention and Article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose or any other ship which is owned by the person who was at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail, but no ship other than the particular ship in respect of which the claim arose may be arrested in respect of any maritime claims enumerated in Article 1(i) – (q).*³⁵

On the other hand, **Section 21(4)** of the Supreme Court Act provides: in the case of any such claim as is mention in **section 20(2) (e) to (r)**, where –

- (a) *the claim arises in connection with a ship; and*
- (b) *the person who would be liable on the claim in an action in personam (“the relevant person”) was, when the cause of action arose, the owner or character of, or in possession or in control of the ship.*

An action in *rem* may (whether or not the claim gives rise to maritime lien on that ship) be brought in the High Court against –

- (i) *that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the character of it under a charter by demise; or*
- (ii) *any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respect all the shares in it.*³⁶

D – 1 The Offending/Particular Ships

The offending ship can be said to be the particular ship in respect of which the maritime claim arose.³⁷ This ship can even be arrested in case the owner of the ship is not the debtor of the maritime claim. The owner of the ship shall, in order to have his ship released from the arrest, have to give security that guarantees the payment of the claim of the arrestor.³⁸ **Article 3(1) (a–e) of the 1999 Arrest Convention** dealing with the subject, Exercise of Right of Arrest, Sets out the Conditions that are Prerequisite to the Arrest of the Particular Ship. This

³³ See section 20(2)(a) & section 21(2); s. 21(2) & s. 21(4) of the Supreme Court Act, 1981.

³⁴ See Article 3(1) of the 1952 Arrest Convention.

³⁵ See Article 3(1) of the International Convention for the Unification of certain Rules relating to the Arrest of Sea-Going Ships, Brussels.

³⁶ See s. 21(4) of the Supreme Court Act, 1981, quoted in Christopher Hill, *Maritime Law*, 5th ed., Lloyd’s Practical Shipping Guides, London, (1998) 106.

³⁷ <http://www.%Ship%20Arrest%20IN%20BELGIUM.htm> accessed on 21/10/2016 at 3:17pm.

³⁸ *Ibid* 4.

provision³⁹ permits arrest of the offending ship of which a maritime claim is asserted if:

- (a) *The person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or*
- (b) *The demise character of the ship at the time when the maritime claim arose is liable for the claim and is demise character or owner of the ship when the arrest is effected; or*
- (c) *The claim is based on a mortgage or a “hypothèque” or a charge of the same nature on the ship; or*
- (d) *The claim relates to the ownership or possession of the ship; or the claim is against the owner, demise character, manager or operator of the ship and is secured by a maritime lien which is granted or arises under the law of the state where the arrest is applied for.*⁴⁰

The above provisions are akin to the practice obtainable in England as provided under the **Supreme Court Act**.⁴¹ The Supreme Court Act allows the arrest of a particular ship in respect of which a maritime claim arose if the persons would be liable in an action in *personam* (*i.e.* the relevant person) is the owner, character or in possession or ownership of that ship at the time the claim arose and also still owns or charters the by demise the particular ship at the time of arrest.⁴²

In Nigeria, the position is not fundamentally different. Apart from following the provisions of the **1999 Arrest Convention**, our **Admiralty Jurisdiction Act**⁴³ provides that an action can be brought against the offending ship if:

- (a) *That ship, at the time the action is brought the **relevant person** is either the beneficial owner of that ship as respects all the shares in it or the character of the ship under a charter by demise. **Who then is the relevant person?** Section 26(1) of the Act⁴⁴ describes the “**relevant person**” in relation to a maritime claim as meaning, “a person who would be liable on the claim in a proceeding commenced on an action in *personam*”. This definition has received judicial blessing in the case of *M.V. Araz v. M.V. Scheep*⁴⁵ where the Court of Appeal held that failure to sue the relevant person being the persons that will be liable in *personam* would be fatal to the arrest process as the issue goes to the jurisdiction of the Court.*⁴⁶

D – 2 Sister Ships

The 1952 Arrest Convention introduced sister-ship arrest. A sister ship is a ship which is in the same ownership with the particular ship that committed the wrong. It is therefore possible to arrest another ship, which is owned by the person who, at the time when the maritime claim arose, was the owner of the particular ship in

³⁹ That is, Article 3(1) (a–e), 1999 Geneva Convention on Arrest of Ship.

⁴⁰ *Ibid.*

⁴¹ See s. 21(4) of the Supreme Court Act, 1981.

⁴² See s. 21(4) (a) (b) (i) (ii), Supreme Court Act, 1981.

⁴³ See s. 5(4) (a) (b) of Admiralty Jurisdiction Act.

⁴⁴ The Admiralty Jurisdiction Act.

⁴⁵ (1996) 5 NWLR (Pt 447) 207.

⁴⁶ See also, Wondah Jose Obinna, “Arrest of Ships under Nigerian Law: A Comparative Analysis”, being long Essay Submitted to the Faculty of Law, OAU for the Award of LL.M Degree, (2001) 60.

respect of which the maritime claim arose.⁴⁷ Ships will be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.⁴⁸ However, the right to arrest an alternative ship,⁴⁹ as opposed to the offending or involved vessel, rested on the determination as to whether that ship arrested, as alternative was owned as respects all its shares by the person who would be liable on the claim. This is because the Courts required **Common Ownership Link** between the offending or involved vessel and the alternative ship selected for arrest.⁵⁰ The two vessels had to be under the **same beneficial ownership** as respects all their shares. Thus, various countries⁵¹ have used the words “**Beneficial Owner**” in their domestic enactments. In England for instance, the arrest of sister ships is permitted under the Supreme Court Act,⁵² but subject to the condition that the “**beneficial owner**” of the sister ship at the time the activities were brought against it is the “**relevant person**” who was liable personally on the claim when the cause of action arose. In Canada,⁵³ the requirement of beneficial owner is also a prerequisite for the arrest of alternative vessel or ship. As a matter of fact, only ships beneficially owned by the owner of the “**offending ship**” may be Arrested, and once there is a change in ownership of the offending ship after the cause of action arose but before the action was brought, the court cannot exercise its jurisdiction of arrest over the sister ship. In Nigeria, the **Admiralty Jurisdiction Act** provides that where there is a maritime claim, arrest can be made of: Any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares on the ship.⁵⁴ Finally, it is imperative to emphasize that this provision⁵⁵ does not apply to claims in respect of ownership or possession of a ship.

II ADMIRALTY JURISDICTION IN NIGERIA AND THE INNOVATIVE CHANGES INTRODUCED BY THE INTERNATIONAL CONVENTION ON ARREST OF SHIPS, 1999

A. Admiralty Jurisdiction in Nigeria

In the day-to-day practice of any branch of law and in every legal system, practitioners must ensure that they take suit before the proper court or tribunal, lest their actions be “thrown out” for lack of jurisdiction.

⁴⁷ Rita C Obodo, ‘Arrest of Ships under International Law’, Seminar Paper Presented to the LL.M Class 2003/2004, Faculty of Law, OAU, June (2005) 24.

⁴⁸ See Article 3(2) of the 1952 Brussels Convention on the Arrest of Ships.

⁴⁹ Christopher Hill, *Maritime Law*, 5th ed., Lloyd’s Practical Shipping Guides, London (1998) 107.

⁵⁰ See the dicta in the *Eschersheim* case (1976) 2 Lloyd’s Rep. 1, H.L.

⁵¹ Countries like England, Nigeria, Canada and United Kingdom.

⁵² See s. 24(1) (a) (b) (i) (ii) of the Supreme Court Act, 1981.

⁵³ See section 43(3) of the Federal Court Act, 1988 of Canada.

⁵⁴ See section 5(4) of the Admiralty Jurisdiction Act.

⁵⁵ That is, the provisions in Article 3(2) (a) (b) of the 1999 Arrest Convention. See also, Article 3(1) of the 1952 Arrest Convention.

Admiralty Law has been described as the distinct body of law (both substantive and procedural) governing navigation and shipping.⁵⁶ Admiralty Law is the whole body of Private Law, which concerns itself with the rights and obligations between persons involved in sea and water transport in all its various forms.⁵⁷ The issue of jurisdiction (even as it concerns admiralty matters which include the arrest of ships) is also radically fundamental that it forms the foundation of adjudication. If a court lacks jurisdiction, it also lacks the necessary competence to try the case at all. A defect in competence is fatal, for the proceedings, is null and void *abinitio*, however well conducted and well decided they may otherwise be.⁵⁸ According to **Oduyemi, J.C.A.**, “A defect in competence is extrinsic to adjudication. The Court must first of all be competent, before it can proceed on any adjudication”.⁵⁹ Where a court has no jurisdiction to entertain a matter, the court cannot for any reason, even if in the interest of justice, assume jurisdiction. A Court is said to be competent to adjudicate on a matter when:

- (a) *It is properly constituted as regards the number and qualification of the members;*
- (b) *The subject matter of the case is within its jurisdiction;*
- (c) *The case comes before the Court initiated by due process of law.*⁶⁰

It is therefore, imperative that the issue of admiralty jurisdiction in Nigeria be settled in the interest of justice for the judge, the counsel or the litigant labour in vain who acts without jurisdiction.⁶¹

It is sufficient to state that with the promulgation of the **Admiralty Jurisdiction Act**⁶² a new lead regime has been blazed which have finally resolved the issue of the admiralty jurisdictional conflict in favour of the Federal High Court.⁶³

The section provides –

- S. 1 (1) – The admiralty jurisdiction of the Federal High Court (in this Act referred to as “the Court”) includes the following, that is –*
- S. 19 – Notwithstanding the provisions of any other enactment or law, the Court shall, as from the commencement of this Act, exercise exclusive jurisdiction in admiralty causes or matters, whether civil or criminal.*⁶⁴

The Act also repealed the Admiralty Jurisdiction Decree, 1962 under which the State High Courts were given admiralty jurisdiction. This position is further

⁵⁶Oluwadere Bejide, ‘Historical Development, Contents and Scope of Admiralty Jurisdiction in Nigeria’, Seminar Paper Presented to the LL.M Class (2003/2004) Session, Faculty of Law, O.A.U., (2004) 1.

⁵⁷ William Tetley, *International Maritime and Admiralty Law*, (Canada: Int’l Shipping Publishers, 2002) 9.

⁵⁸ See *Senate President, Federal Republic of Nigeria v. Senator Francis Arthur Nzeribe* (2004) All F.W.L.R. (Pt 215) 359 at 373.

⁵⁹ *Ibid*, per Oduyemi, J.C.A. at p. 373, paras f–H, ratio 1; see also *Madukolu v. Nkemdilim* (1962) 1 All N.L.R. 587.

⁶⁰ *Sossa v. Fokpo* (2000) FWLR (Pt 22) 11111 at 1125, paras F–G, ratio 8; see also, *Ajayi v. Military Adm. Ondo State* (1997) 5 NWLR (Pt 504) 237; *Madukolu v. Nkemdilim* (1962) 1 All N.L.R. 507.

⁶¹ See Agbaje, Fred, “Avoiding Vain Labour by Counsel”, *The Guardian*, Wednesday, September 20, 1989 at p. 62.

⁶² See Admiralty Jurisdiction Act, Cap A5, LFN, 2004.

⁶³ See section 1 and 19 of the Admiralty Jurisdiction Act.

⁶⁴ *Ibid*.

consolidated and strengthened by the provisions of **Section 251(1) (g) of the Constitution**.⁶⁵ The section provides thus:

*S. 251(1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other Court in civil cases and matters – (g) any admiralty jurisdiction, including shipping and navigation on the River Niger or River Benue....*⁶⁶

From the totality of the foregoing, what emerges is that issues relating to the arrest of ships and other maritime claims are unambiguously within the confines of the Jurisdiction of the Federal High Court.⁶⁷

III. CLAIMS TO SUSTAIN AN ACTION FOR ARREST OF SHIPS IN NIGERIA

A. Claims to Sustain an Action for Arrest of Ships in Nigeria

The legal framework for the exercise of the right of arrest in respect of claims which will warrant an arrest is provided for in the 1952 Arrest Convention. The Convention provides that:

*A ship flying the flags of one of the contracting states may be arrested in the jurisdiction of any of the contracting states in respect of any maritime claim, but nothing in this Convention shall be deemed to extend or restrict any right or powers vested in any Government or their departments, public authorities or dock or harbor authorities under their existing domestic laws or regulations to arrest, detain or otherwise prevent the sailing of vessels within their jurisdiction.*⁶⁸

Thus, a ship may only be arrested based on a maritime claim and perhaps in respect of special legislative powers and rights of state governments and authorities. Special legislative powers and rights of states are rights permitting Government and certain other public bodies of a state to seize, detain and in some cases confiscate ships in order to guarantee certain claims *e.g.* harbour dues, pollutions or as sanctions for offences committed in the coastal states.⁶⁹

Maritime Claims

None of the International Conventions on arrest of ships define what actually a maritime claim is but provides a List⁷⁰ upon which any claim arising from it could be a basis for an arrest. In Nigeria, the **Admiralty Jurisdiction Act** did not also provide for a definition of maritime claim but stated that a reference in this Act to

⁶⁵ Constitution of the Federal Republic of Nigeria, 1999.

⁶⁶ S. 251(1) (g), 1999 Constitution, emphasis underlined; see also, part 1 of the Second Schedule to the 1999 Constitution which listed maritime, shipping and navigation as item 36 in the Exclusive Legislative List, thus bringing admiralty under the control of the National Assembly.

⁶⁷ Emejuru (n 28) 7.

⁶⁸ See Article 2 of the 1952 Arrest Convention; Article 2(2) and Article 8(3) of the 1999 Arrest Convention.

⁶⁹ See Obodo, 'Arrest of ships under International Law' (n 49) 18.

⁷⁰ See Article 1 (1) (a-q) of 1952 Arrest Convention; Article 1 (1) (a-v) of 1999 Arrest Convention.

a maritime claim is a reference to a **proprietary maritime claim** or a **general maritime claim**.⁷¹ According to **Section 2(2)** of the Act:

“S. 2(2)-A reference in this to a **proprietary maritime claim** is a reference to *inter alia*-

- (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
 - (iii) A mortgage of a ship or of a share in a ship, or
 - (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 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*; etc.

B. Actions in Rem

For the maritime claims we have examined above⁷² to succeed, there must be an action in *rem*. One of the condition precedent to filing an application to arrest a ship is to have a claim in an action in *rem*. According to **IYIZOBA, JCA** in the **Delmar** Case, a claim is necessary before any relief can be granted the Caveator by the court because there has to be a claim before an application to arrest a vessel can be made.⁷³ An action in *rem* is separate and distinct from an action in *personam*. It is not ancillary to it.⁷⁴ Two types of action are available within the Admiralty Jurisdiction of the Federal High Court. There are the action in *personam* and the action in *rem*. The former is an action against persons who are usually the owners of the ship vessel that gave rise to the cause of action. The latter is an action against the “*res*” or property, which is usually the vessel itself. The action is against the ship. Or, in appropriate circumstances other properties such as cargo, freight or even the proceeds of sale and not its owner. Judgment may eventually be given against the ship, the owner perhaps having never appeared to answer the writ.⁷⁵ An owner may however, take part in an action in *rem* if he considers it to be appropriate to defend his property, but it is essentially an action against his property, not against him and a judgment in *rem* is good as against the world. Although, a ship is a movable object or property, its nature, function and characteristic are such that from time immemorial, all nations, by common agreement and international usage, have accorded it special rights and privileges. It is usually regarded as real property as distinct from personal property. An action against a ship is regarded as an action in *rem* rather than in *personam*. Matters relating to the arrest and detention of a ship are matters in *rem* in admiralty.⁷⁶ The Nigerian Supreme Court has further remarked⁷⁷ that an action

⁷¹ See section 2(1) Admiralty Jurisdiction Act.

⁷² That is, maritime claims falling within section 2(2) (3) of the Admiralty Jurisdiction Act.

⁷³ Per Iyizoba, J.C.A. in *MT Delmar v. MT Ane (Ex MT Leste)* (2016) 13 NWLR (pt 1530) 482 at 506-507 paras H-A.

⁷⁴ Christopher Hill, *Maritime Law*, op. cit. at 102.

⁷⁵ *Ibid.*

⁷⁶ See *Namos Navigation Ltd v. Ojomo & Anor* (1956) NSC vol. 1 p. 306 at 313.

⁷⁷ See *Anchor Ltd v. The Owners of the Ship Eleni* (1956) NSCC 16.

in *rem* is one in which the subject matter is itself sought to be affected. In such actions, the claimant is enabled to arrest the ship or other property, and to have it detained until his claim has been adjudicated upon, or until security for bail has been granted for the amount, or for the value of the property proceeded against, where this is less than the amount of the claim. According to **Hill**:

*The modern writ in rem has become a piece of legal machinery directed against the ship alleged to have been the instrument of wrong doing in cases where it is sought to enforce a maritime or statutory lien or in a possessory action against the ship whose possession is claimed. This does not mean the vessel itself is the wrongdoer but that it is the means by which the wrongdoer (its owner) has done wrong to some other party. It is also logically the means by which the wrongdoer is brought before the court as a defendant to what may thereafter turn into an action in personam.*⁷⁸

Finally, before looking at Maritime liens and Statutory liens, it is important to note that an action in *rem* cannot be commenced against a Government ship or against a Government property.⁷⁹

Maritime Liens and Statutory Liens

What is a Maritime Lien?

There are two alternative definitions of maritime liens:

- (1) *A right to a part of the property in the res;*
- (2) *A privileged claim upon a ship, aircraft or other maritime property in respect of services rendered to, or injury caused by that property.*⁸⁰

A maritime lien attaches to the property at the moment when the cause of action arises and remains attached (rather like a leech to human skin), traveling with it through changes of ownership. It is, however, inchoate or of little 'positive' value unless and until enforced by action in *rem*. It is not dependent upon possession nor is it defeated or extinguished because the *res* may happen to be transferred to new ownership for value and without notice.⁸¹

It is a right which springs from general maritime law and is based on the concept that the ship (personified) has itself caused harm, loss or damage to others or to their property and must itself make good that loss. The ship is, in other words, the wrongdoer, not its owners. This may make very little sense to the practical mind. How can a ship do wrong? It is, however, the instrumentality by which its owners or their legal servants do wrong. The most obvious example of such a lien was the collision at sea-physical impact ship to ship or ship to fixed property. At the moment of impact and the causing of harm to others or to their property, a maritime lien arises in favour of all those suffering, attaching to the ship. Thus, the sense of a maritime lien was expressed concisely, in the case of **THE BOL**

⁷⁸ Christopher Hill, *Maritime Law*, 5th edn., Lloyds Practical Shipping Guides, London (1998) at page 92.

⁷⁹ See Section 24(2) (a) (b) of the Admiralty Jurisdiction Act.

⁸⁰ Hill, *Maritime Law* (n 42) 120.

⁸¹ *Ibid.*

BUCLEUGH,⁸² a Scottish ship “random” an English ship in the Humber; proceedings were commenced but before the Scottish ship could be arrested, she left and went to Scotland (Scotland is, of course, a separate legal system) Later, she was sold and the purchasers, quite ignorant of the Collision and the proceedings, sent her to England where the warrant of arrest was executed and the proceedings were allowed to continue despite the complete ignorance of the current owners. The court said that the injured party had a right in the ship before the sale. The collision itself created the right which “ran with” the ship, into whosoever’s hands it might come. This right was incomplete, “inchoate” if you wish-but could be completed – “perfected” – by legal action. However, until such time as it might be lost or defeated if the *res* is either

- (a) *sold by order of a court, or*
- (b) *transferred to a foreign government who can plead sovereign immunity or*
- (c) *the holder of the lien been neglectful of his interest and thus deemed to have waived or forfeited his rights, it continued to exist, without legal action being taken, without the need to notify the owners.*

It is of great significance to note that liens generally require possession before they come into effect. However, a maritime lien does not require possession for its creation. For instance, a repairman has a mechanic’s lien over a Guests luggage against payment of the Bill. If the guest is quick enough to remove his luggage, the innkeeper is left lien-less. But the claimant against the **Bold Buccleugh** had his right long before he obtained possession by executing his arrest warrants and to realize what is aimed from the vessel or property.

In Nigeria, **Section 5(3)** of the **Admiralty Jurisdiction Act** deals with maritime lien. According to the section- “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 of a member of the crew of a ship; or*
 - (d) *master’s disbursements.*⁸³
- Finally, it is necessary to mention that the buyer of a vessel in an Admiralty sale acquire a clean, unencumbered title.*

WHAT IS STATUTORY LIEN?

The Administration of Justice Act, greatly widened the scope of the admiralty jurisdiction of the High Court by extending the right to proceed in *rem* to many claims which would not have ordinarily given rise to a maritime lien.⁸⁴ This position has been maintained under The Admiralty Jurisdiction Act. Such liens are often described as statutory liens because they arise from statute, unlike the

⁸² (1852) 7 Moo PC 267; Reported also in r Hill, Maritime Law, (n 42) 122; Grime, *Shipping Law* (n 38) 14.

⁸³ Section 5(3) (a) (c) (d) of Admiralty Jurisdiction Act.

⁸⁴ See ss. 3(2) and (4) of the Administration of Justice Act, 1956.

maritime liens which are a product of the Common Law system. The complete list of statutory liens or “General maritime claim” as used in the Admiralty Act which the Federal High Court has power to hear are set out in **Section 2(3) (a–u) of the Act**. They are as follows: **Section 2 (3) (a)**: a claim for damage done by a ship whether collision or otherwise. In the case of *Westminster Dredging Company v. Adeyemi Ikesusan*,⁸⁵ a plaintiff engaged as a deck hand on a ship whilst in the pursuit of his work discharging sand from a stationery dredger suffered injuries and lost his left leg. The court held that a claim in tort or negligence committed on a ship comes squarely under paragraphs (d) and (f) of **Section 1 (i) of the Administration of Justice Act, 1958** which are the equivalent sections of paragraphs **2(3)(a)** and **S. 2 (3) (c)** of the **Admiralty Jurisdiction Act**:

Section 2 (3) (b); a claim for damages received by a ship.

Section 2 (3) (c): a claim for loss of life or for personal injury sustained in consequence of a defect in a ship or in the appeared or equipment of a ship.

Section 2(3) (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;*

Section 2(3) (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 charter-party or otherwise. In the case of **THE ST, ELEF TERIO**,⁸⁶ it was held that the words of the equivalent section **1(i) (h) of the Administration of Justice Act** were wide enough to cover claims whether in contract or tort arising out of any agreements relating to the carriage of goods in a ship, such as a claim for refund for demurrage payments. The claim must arise out of the agreement between the parties. Where a contract of carriage, for example, does not make provision for the return of a container, a claim for the value of such a container will not constitute a maritime claim within the ambit of this section.⁸⁷

IV. CAN NIGERIAN COURTS MAKE A MAREVA ORDER AGAINST SHIP OUTSIDE JURISDICTION?

The question whether a Nigerian Court can grant a Mareva injunction against ships and vessels outside Nigeria has not been considered by Courts in Nigeria. It would however appear from judicial authorities that a Mareva order cannot be made on assets outside Nigeria. Support for this view could be seen in the *locus classicus* on Mareva in Nigeria, the case of *Sotuminu v. Ocean Steamship (Nig.)*

⁸⁵ (1985) NSC Vol. II, page 314.

⁸⁶ (1957)2 ALL E. R 374; See also *Savannah Bank Ltd v. Pan Atlantic Shipping & Transport Agencies Ltd* (supra) at 17.

⁸⁷ *African Container Express v. The Tourist Co.* Vol. 3. NSC 268; see also *West African Shipping Agency (Nig.) Ltd v. Nabio Ltd.* (Unreported) Suit No FHC/L/52/86.

*Limited.*⁸⁸ Here, the Supreme Court stated that one of the conditions for the grant of the Mareva injunction is that:

*... there are reasons to believe that the defendant has assets within the jurisdiction to meet the judgment, wholly or in part, but might deal with them so that they will not be available or traceable when judgment is given against him.*⁸⁹

It therefore follows, as a matter of inexorable logic that where the assets sought to be attached are outside the shore of Nigeria, a Nigeria, court cannot make the order sought based on the principle of territorial jurisdiction. The assets, which are the subject of the Mareva Injunction, must be within the jurisdiction of the Court, which is making the Order. Within jurisdiction in the context of this paper means that the assets are within the territorial jurisdiction of Nigeria where the order is being made. Consequently, the movement of assets from one state to another within Nigeria is not out of jurisdiction. In *Solomon v. Pickering and Co. Ltd.*,⁹⁰ it was held that where the defendant company was having its business in one town but was still carrying on that business in two other towns, it was still within the jurisdiction of Nigeria. The reason for this is that if the defendant merely removes his property from one state to another, a plaintiff judgment creditor could still levy execution under the Sheriffs and Civil Process Act.⁹¹ The implication of the foregoing is that Nigerian Courts can only make Mareva Orders against ships within Nigeria.

In England however, a Mareva Order may, subject to certain conditions be made against assets outside England. In *Babanaft International Co. S.A v. Bassatne*,⁹² the English Court of Appeal held that a Mareva injunction should be granted subject to the proviso to protect third parties outside jurisdiction and save to the extent that the order might be enforced by the local court. The English court noted that the injunction is one granted in rare cases and would more readily be granted against assets abroad in a post-judgment case than in a pre-judgment case. The power to grant a Mareva Order against assets abroad was confirmed by the English Court of Appeal in *Republic of Haiti v. Duvalier*.⁹³ The case involved the alleged misappropriation of the sum of \$120m from the Republic during the reign of Jean-Claude Duvalier. The Court granted a pre-judgment Mareva injunction against worldwide assets, although recognizing that this was a most unusual measure which should rarely be granted. Consequently, if third parties interest in the assets are protected and there is a possibility of its enforcement, a Nigerian court ought to, following its English counterparts, grant an Order of Mareva

⁸⁸ See Wondah Jose Obinna, while quoting C. Ilugu, 'Admiralty Jurisdiction and Practice in Nigeria' Paper Presented at a seminar on Admiralty Practice and Carriage of Goods by Sea, 30th April, 1998 *Arrest of ships under Nigerian law: A comparative Analysis* (Unpublished) being long Essay submitted to the Faculty of Law, OAU for the Award of LL.M (2001) 40-41.

⁸⁹ (1992) 5 NWLR (Pt 239) 1.

⁹⁰ (1928) 8 N.L.R 75.

⁹¹ Ss. 104 and 105 of Cap 407, LFN, 1990.

⁹² (1990) ALL E.R 13.

⁹³ (1990) 1 Q.B 202.

Injunction on assets, ships outside its jurisdiction. This, the Courts in Nigeria can do under the **Foreign Judgments (Reciprocal Enforcement) Act**,⁹⁴ especially in respect of post judgment cases. This submission also finds support in the view of Nwobike in his well-considered article on the question whether a Nigerian court can make a Mareva Order against Foreign Assets.⁹⁵

ORIGIN OF THE MAREVA INJUNCTION

The injunction draws its name from Lord Denning's decision in 1975 in the case of *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*⁹⁶ The erudite and most sagacious common law jurist also described the injunction as "the greatest piece of judicial law reform in my time".⁹⁷ While Donaldson, L.J. described the Mareva order along with the Anton Pillar Order as one of the law's two nuclear weapons.⁹⁸ In most countries of the world, a creditor can impound the property of his debtor, at the outset, long before he has got judgment against the debtor, and then have the property retained as security for payment of the debt in case he afterwards sets judgment. This process is called in the French language *saisie conserva toire*, meaning 'a seizure of assets so as to conserve them for the judgment'. According to Lord Denning in his book, *The Due process of Law*, English law for the last 150 years had nothing of such law.⁹⁹ On June 23, 1975, Lord Denning introduced the process when the case came before him. Prior to that time, on May 22, 1975, a similar case of *Nippon Yusen Kaisha v. Karageorgis*.¹⁰⁰ The facts were simple. Japanese ship owners entered into charter parties with two Greek gentlemen. The slump in shipping overtook them. They did not pay the hire. They disappeared. Their office in the Piraeus was closed. But they had funds with a bank in London. The Japanese owners feared that the two Greek gentlemen would transfer those funds to Switzerland or some other country. It could be done in a moment by a telegraphic transfer. So their solicitors issued a writ for service out of the jurisdiction – and immediately – before service, applied to the Court here for an injunction to stop the funds being removed outside the jurisdiction. The Judge refused it on the simple ground that nothing of that kind could be done in England. The Japanese ship owners immediately came to our Courts and we immediately granted the injunction. According to Lord Denning:

We are told that an injunction of this kind has never been granted before. It has never been the practice of the English courts to seize assets of a defendant in advance of judgment or to restrain the disposal of them...It seems to me that the time has come when we should revise our practice.... It is warranted by Section 45 of the Supreme Court of Judicature (Consolidation) Act 1925 which says that the High Court may grant a mandamus or injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do. It seems to me that this is just such a case. There is a strong

⁹⁴ Cap 152, LFN 1990.

⁹⁵ J.C. Nwobike, 'Can A Nigerian Court Make A Mareva Order Against Foreign Assets?' Vol. 1, Port Harcourt Law Journal, 1PHLJ (1999) 144.

⁹⁶ (1975)2 Lloyd's Rep. 509.

⁹⁷ Lord Denning, *THE DUE PROCESS OF LAW*, (New York: Oxford University Press, 1980)134

⁹⁸ See *Banks Mellat v. Nipour* (1985) F.S.R 87 at 92.

⁹⁹ Denning, *The Due Process of Law*, (n 105) 133.

¹⁰⁰ (1975) 1 WLR 1093 at 1094.

*prima facie case that the hire is owing and unpaid. If an injunction is not granted, these moneys may be removed out of the jurisdiction and the ship owners will have the greatest difficulty in recovering anything. Two days ago, we granted an injunction ex parte and we should continue it.*¹⁰¹

According to William Tetley, the Mareva injunction or freezing order is quite simply an interlocutory injunction issued by the competent court, prohibiting the defendant, before or during a suit, or even after judgment, from removing assets (real or personal, moveable or immovable) from the court's jurisdiction or from dealing with them, where it appears to the Court that without such an order the plaintiff's recovery on his claim will be jeopardized.¹⁰² Thus, in the *Mareva Compania v. International Bulkcarriers* (Supra), the plaintiff ship owners let their vessel, **the Mareva**, to time charters on terms which required hire to be paid half monthly in advance. The defendant charterers defaulted on the third installment. But there was money in a London bank in their name. It had been paid to them by the Government of India as freight for the voyage, which the time charterers should use to pay the hire. They had not paid it. The English Court of Appeal granted the Mareva Order. In granting the Order, Lord Denning had this to say:

*If it appears that the debt is due and owing – and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment – the court has jurisdiction in a proper case to grant an interlocutory injunction so as to prevent him disposing of those assets.*¹⁰³

It has thus become a well-established principle of English jurisprudence that a Mareva order will be available to prevent the removal of assets outside jurisdiction so that if the plaintiff is successful in the substantive suit, there will be property of the defendant available to satisfy the judgment.¹⁰⁴ Mareva Injunction as developed in England has found expression in Nigeria through our statutes and judicial decision.¹⁰⁵ The Rivers State High Court (Civil Procedure) Rules, 2010 provides as follows:

If in any action the defendant is about to leave Nigeria or has disposed of or removed from Nigeria his property or any part thereof or is about to do so, the claimant may, either at the institution of the suit or at any time thereafter until final judgment, apply by ex-parte motion to the Judge for an Order that the defendant do show cause why security should not be taken for his appearance to answer and satisfy any judgment that may be passed against him in the suit.

*If the Judge after making such investigation as he may consider necessary shall be of opinion that there is probable cause for believing that the defendant is about to leave Nigeria and that by reason thereof the execution of any judgment which may be made against him is likely to be obstructed or delayed, the Judge shall issue a warrant to bring the defendant before him, that he may show cause why he should not give good and sufficient bail for his appearance.*¹⁰⁶

¹⁰¹ Ibid.

¹⁰² Tetley, *International Maritime and Admiralty Law*, (n 59) 410.

¹⁰³ (1975) 2 Lloyd's Report at p. 514.

¹⁰⁴ For more recent cases on *Mareva injunction*, see the cases of *KETCHUM INT'L PLC. GROUP PUBLIC HOLDINGS LTD.* (1997) 1 W.L.R. 4; *MERCEDES-BENZ A.G. V. LEIDNEK* (1996) 1 A. C. 204.

¹⁰⁵ For statutes, see Order 46 Rules 1 and 2 of High Court (Civil Procedure) Rules, 2010 in Rivers State. See also *ACB Ltd V. AWOEBORO* (1991)2 NWLR (Pt 176) 711 at 719; *OZIOKO V. UGWU* (1994)4 NWLR (Pt 337) 242 at 254

¹⁰⁶ See Order 46 Rules 1 & 2 of the Rules of the High Court of Rivers State, 2010.

The combined effect of the provisions of the High Court Rules and decided cases is to enable the High Court in Nigeria to grant a Mareva injunction upon the fulfillment of certain conditions. We shall now turn to these conditions.

Conditions for the Grant of Mareva Injunction

A Mareva injunction, like any other injunctions generally, is an equitable remedy which is usually granted at the discretion of the court. It operates to stop a defendant against whom a plaintiff has a good, arguable claim from disposing of or dissipating his assets pending the determination of the case or pending payment to the payment. The injunction can also be granted against anybody who is in possession of the defendant's assets.¹⁰⁷ However, such discretion must be founded on well-established principles and not on the whims and caprices of the judge. According to the Supreme Court in the *Sotuminu v. Ocean Steamship (Nig.) Ltd.*,¹⁰⁸ because by its very nature, a Mareva injunction could be open to abuse, the Courts are ever conscious of its grant, and before it could be granted, the applicant must establish the following conditions:

- (a) *The plaintiff must demonstrate that he has a good arguable case or a prima facie case against the defendant.*¹⁰⁹
- (b) *That there is a real and imminent risk of the defendant removing his assets from jurisdiction and thereby rendering nugatory any judgment which the plaintiff may thereafter obtain.*¹¹⁰
- (c) *That the applicant has made a full disclosure of all material facts relevant to the application.*¹¹¹
- (d) *That the applicant has given full particulars of the assets within jurisdiction.*
- (e) *That the balance of convenience is on the side of the applicant.*
- (f) *That the applicant is prepared to give an undertaking as to damages.*

It is the law that, the applicant must cumulatively satisfy all of the above conditions. Consequently, in the *SOTUMINU'S* case, the application for Mareva Order failed because the applicant could not satisfy all the above requirements.¹¹²

V. METHOD AND PROCEDURE FOR ARREST OF SHIPS UNDER NIGERIAN LAW

The method and procedure for procuring the arrest of a ship under Nigerian law is clearly set out in the Admiralty Jurisdiction Procedure Rules.¹¹³ **Section 21** of the Admiralty Jurisdiction Act makes provision for the Chief Judge of the Federal High Court to make rules of practice and procedure for the purpose of carrying

¹⁰⁷ *Union Bank of Nigeria v. Matthew Joseph Pam* (2016) 14 NWLR (pt 1533) 400 at 420 paras B-E.

¹⁰⁸ (1992) 5 NWLR (pt 239) 1 at 26.

¹⁰⁹ See also, *Siskina (Owners of cargo lately laden in Board) v. Distas Compania S.A.* (1929) A. C 210.

¹¹⁰ See also, *Barclay Johnson v. Ynill* (1980)1 WLR 1259 at 1264.

¹¹¹ See also, *Nepocious Del Maar S.A. v. Doric Shipping Corp. S.A.* (The Assions) (1979)1 Lloyd's Rep. 331.

¹¹² See the Judgments of Nnaemeka-Agu, J.S.C. in the *Sotuminu's* case at Pages 26-27.

¹¹³ The Admiralty Jurisdiction Procedure Rule, 1993 (hereinafter referred to as AJPR).

into effect the objects of the Act. In exercise of this power, M.B Belgore, C.J. on the 2nd of August, 1993 signed into Law the Admiralty Jurisdiction Procedure Rules. The jurisdiction of the court¹¹⁴ to exercise its power of arrest is invoked when the writ of summons is served on the ship to be arrested and the warrant of arrest is executed.¹¹⁵

A. **Form and Commencement of Suits**

Every admiralty action filed in the Court shall be commenced by a writ of summons signed by a judge or other officer empowered to sign summonses. The writ shall be issued by the Registrar or other officer of the Court empowered to issue summons upon receipt of written particulars of claim filed by a plaintiff.¹¹⁶ Every writ of summons in an action in *rem* shall be accompanied by a statement of claim. A document filed in or issued out of the court in an admiralty proceeding shall include as part of the heading of the document, the word "In Admiralty".¹¹⁷ Where the action is an action in *rem*, a document filed shall contain the heading "Admiralty Action in Rem".

B. **Procedure for Arrest**

Once an applicant has ascertained that his claim falls within the meaning of a maritime claim as defined by the Act, he may commence the proceedings by filling an action in *rem* at Federal High Court in the judicial division covering the port or area where the ship is located. He may at the same time file an Ex-parte application disclosing a strong *prima facie* case for the arrest of the ship. The Rule¹¹⁸ provides that "A party to a proceeding commenced as an action in *rem* may by motion Ex-parte apply for an arrest warrant in respect of the ship or other property against which the proceeding was commenced. The application shall be supported by an affidavit of the applicant or of a solicitor or agent of the applicant which shall disclose a strong *prima facie* case. Subject to this rule, the court may issue an arrest warrant,¹¹⁹ which shall be executed only by the Admiralty Marshall.¹²⁰ Execution of an arrest warrant shall be verified by affidavit and may be executed on any day.¹²¹

The application for the arrest of ship must be supported by an affidavit stating the following:

- (i) *The nature of the claim.*
- (ii) *That the ship is within the jurisdiction of the Court.*
- (iii) *That the ship may leave the jurisdiction of the court at any time thereby depriving the applicant of his pre-judgment security.*
- (iv) *The fact that the claim has not been satisfied.*

¹¹⁴ The court here refers to The Federal High Court. See section 2(1) of the Admiralty Jurisdiction Act.

¹¹⁵ See Afe Babalola, *Judgment and Enforcement of Orders*, (Ile-Ife: OAU Press, 1991) 207.

¹¹⁶ Order II, Rule 1 sub Rule 1 & 2, AJPR.

¹¹⁷ Order II, Rule 3 (1) AJPR.

¹¹⁸ Order VII, Rule 1 (1) & (2) AJPR.

¹¹⁹ Order VII, Rule 2 (1).

¹²⁰ Order VII, Rule 4 (1).

¹²¹ Order VII, Rule 6 and 7.

- (v) *The nature of the property to be arrested; including the name and port of registry of the ship.*
- (vi) *Statement whether the defendants are owners of the ship, charterers or persons in possession.*

The applicant is also required to provide with the application, the following:

- (i) *Exhibits supporting the claim.*
- (ii) *An undertaking to indemnify the ship against wrongful arrest.*
- (iii) *An undertaking to indemnify the Admiralty Marshal in respect of any expenses incurred in effecting the arrest.*
- (iii) *An affidavit of urgency stating facts why the application needs to be heard expeditiously.¹²²*

An arrest order can be obtained within 24 hours of filing the above requisite processes. It is important to emphasize that unlike the position in England, the Nigerian Courts will in most cases entertain an application for an arrest only when the ship has entered the territorial waters of Nigeria.¹²³ Thus, Anga and Emuwa has advised that where a prospective applicant is aware that a ship sought to be arrested is bound for a Nigerian port, it is advisable for him to instruct his solicitors in Nigeria as soon as possible so that the requisite processes can be prepared and filed immediately the ship enters Nigerian territorial waters.¹²⁴

C. Service of Processes

A Writ in a proceeding commenced in an action in *rem* in the court may be served on a ship or other property.¹²⁵ However, an arrest shall not be executed on a ship or other property unless the writ in the proceeding concerned has previously been served, or is to be served concurrently with the execution of the warrant, on the ship or property.¹²⁶ An arrest order is usually served alongside an arrest warrant and the Writ of summons and statement of claim by delivering same to the master of the ship or by affixing a sealed copy of the process to a mast or some other conspicuous part of the ship.¹²⁷ Copies of the said processes must also be delivered to the appropriate officers of the Nigerian Ports Plc, example, the Chief Harbour Master, Traffic Manager or the Ports Manager.¹²⁸ The Admiralty Marshall shall effect the service of a Writ in a proceeding commenced as an action in *rem* against a ship or other property.¹²⁹ In a proceeding commenced as an action in *rem*, the court shall not order substituted service of the writ that is to be served on a ship or other property.¹³⁰

¹²² Anga & Emuwa, Ship Arrest in Nigeria, <http://www.aalex.com.htm>. Accessed on 21/10/2016 at 4:19pm.

¹²³ See Section 7(2) of the Admiralty Jurisdiction Act.

¹²⁴ Anga & Emuwa, Ship Arrest in Nigeria, (n 124)

¹²⁵ See Section 7 (1) of the Admiralty Jurisdiction Act.

¹²⁶ See Order VII, Rule 4(2) AJPR.

¹²⁷ See Order V, Rule 1 AJPR.

¹²⁸ See Order V, Rule 4 AJPR.

¹²⁹ See Order V, 7 AJPR.

¹³⁰ See Order V, 8 AJPR.

D. Caveats

The Rules provides that the registrar shall establish and maintain a register, to be known as the Register Caveats against Arrest, which may be inspected by any persons, without charge.¹³¹ A Caveat against the arrest of a ship may be filed in the Registry in **Form C** in the schedule to these Rules.¹³² The filing of a Caveat shall constitute an undertaking by the Caveator to appear in the proceedings and to provide bail.¹³³ The Registrar may also require the Caveator to produce an undertaking in writing issued by a Protection and Indemnity club or a bank within the meaning of the Banks and other Financial Institutions Act carrying on banking business in Nigeria or an Insurance company of reports carrying on business in Nigeria.¹³⁴

The Rules further provides that the fact that there is a caveat against arrest in force shall not prevent the arrest of the ship or property to which the caveat relates.¹³⁵ Where a ship or other property is under arrest in a proceeding, a person may file in the court a caveat against the Release from arrest of the ship or property in lieu of obtaining a further arrest of that ship or property.¹³⁶ It is important to note that if the original arrest order is withdrawn, it will be necessary for the Caveator to obtain a fresh arrest order. Finally, a Caveator may withdraw a Caveat by filing an instrument of withdrawal of the Caveat.¹³⁷

E. Security for Costs

There is a world of difference between an application for issuance of a caveat and an application to provide security for a claim in an admiralty suit.¹³⁸ An applicant for an arrest order may be required to give security for costs by the court, if it sees fit.¹³⁹ The court will be more inclined to order security for costs where the plaintiff's claim is in excess of One million Naira or where the plaintiff has no asset in Nigeria.¹⁴⁰ The form of security required is usually a deposit of the sum specified by the court; or a guarantee supplied by a Protection and Indemnity Club, an insurance company of repute or a bank.¹⁴¹ In determining the quantities of security to be provided, the court shall have regard to all the circumstances of the case and shall not restrict itself to the costs of the legal proceedings.¹⁴² However, a plaintiff shall be at liberty to withdraw any security provided to the Registrar upon obtaining judgment against the defendant or defendants in the

¹³¹ See Order VI, Rule 11 (1) & (3) AJPR.

¹³² Order VI, Rule 1, AJPR.

¹³³ See Order VI, Rule 3 (1) (a) (b) AJPR.

¹³⁴ See Order VI, Rule 3 (a) (b) (c) AJPR.

¹³⁵ See Order VI, Rule 6, AJPR.

¹³⁶ See Order VI, 7, AJPR.

¹³⁷ See Order VI, Rule 1 (1) AJPR.

¹³⁸ Ibid at page 512 paras C-D.

¹³⁹ See Order X, Rule 1(1) AJPR.

¹⁴⁰ See Order X, Rule 1(2) AJPR.

¹⁴¹ See Order X, Rule 2 (a) (b) AJPR.

¹⁴² See Order X, Rule (3) AJPR.

action or upon discontinuance of the suit.¹⁴³ In the event of the plaintiff failing in the action, the defendant or defendants shall be entitled to the costs of the proceedings not of the security provided by the plaintiff and the balance of the security shall be returned to the plaintiff.¹⁴⁴ Thus, in *Jimi Oduba v. CV. Scheep Houtmangracht & Anor*,¹⁴⁵ the Supreme Court held that security cannot be ordered as of course by the courts from a foreign plaintiff unless the court is satisfied that it is proper and just to order such security.¹⁴⁶ It was also held that it is not in every case where the plaintiff is a foreigner with no assets within Nigeria that the Court will order him to provide security for costs in favour of the defendant.¹⁴⁷

CONCLUSION

We have attempted an analysis of the conceptual and theoretical legal framework of the law, Practice and Procedure of arrest of ships in Nigeria. We have seen that the fundamental objective of arresting a ship is to obtain satisfaction of a judgment in an action in *rem*. We have examined the object of the arrest. It is revealed that the offending ship or the particular ship as well as sister ships or alternative ship can be the object or subject of an arrest. We have looked at the admiralty jurisdiction in Nigeria. All the legislations touching on the arrest of ships under Nigerian law have been considered as well as the changes introduced by the International Convention on arrest of ships, 1999. We have listed in a comprehensive manner the claims to sustain an action for arrest of ships. We posed the question whether Nigerian Courts can make a Mareva order against ships outside jurisdiction. While admitting that ships must be within the internal coastal waters for the courts to exercise its jurisdiction, we submitted that in post judgment cases, Nigerian Courts would be competent to do so, as its English counter parts, and enforce such judgment under the Foreign Judgments (Reciprocal Enforcement) Act. The conditions and principles guiding the grant or refusal of Mareva injunction are also examined.

We have further attempted an analysis of the method and procedure for arrest of ships under Nigerian law. From the analysis, it is clear that arrest proceedings are not free from complexities and legal problems, but they are also endowed with considerable flexibility. We have examined most recent judicial pronouncement of the appellate courts on the subject. The enactment of the **Admiralty Jurisdiction Act**, is a welcomed innovation in Nigerian admiralty practice as it laid to rest the ghost of the jurisdictional conflict between the Federal High Court and the State High Courts. Indeed, the Admiralty Jurisdiction Procedure Rules have further improved on the development and practice of maritime law in Nigeria as it reflects

¹⁴³ See Order X, Rule 5 (1) AJPR.

¹⁴⁴ See Order X, Rule 5 (2) AJPR.

¹⁴⁵ (1997)6 NWLR (Pt 508) 185.

¹⁴⁶ Ibid 202.

¹⁴⁷ Ibid

to a very great extent the rules that have been established in the leading maritime nations of the world. It is however suggested that the provisions of **Order XI** of the Admiralty Jurisdiction Procedure Rules dealing on reparation for needless arrest and stipulating “not exceeding the sum of twenty thousand” be reviewed as it is not a reasonable compensation. Certainly, that sum cannot be proper reparation for arrest of a vessel in modern economic realities and current commercial inflationary trends in the Nation where the country is tilting towards economic depression from recession.