

REVOLUTIONIZING ADMIRALTY PRACTICE IN NIGERIA: ANALYSIS OF THE NOVEL PROVISIONS OF THE ADMIRALTY JURISDICTION PROCEDURE RULES 2023

¹ See Section 254 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Section 21 of the Admiralty Jurisdiction Act 1991 ("AJA").

² Whilst the commencement date of the AJPR 2023 is said to be May 18, 2023, 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.

³ Order, 2 Rules 1 and 3 of the AJPR 2023.

⁴ Order 2, Rule 2 of the AJPR 2023.

⁵ Order 2, Rule 10 of the AJPR 2023.

⁶ Order 3, Rules 3 (1) and 4 (1) of the AJPR 2023.

⁷ This is also an inclusion to the documents required to be frontloaded for an action in personam via Writ of Summons

Synopsis

As a global practice, Maritime holds a significant space in international and local trading. To reflect modern-day realities that aid cross-border and municipal shipping transactions, both local and international legal regimes must play substantial roles, and in particular, domestic Courts, where most maritime disputes are commenced, should remain progressive in reflecting these realities. In this regard, and in the exercise of his powers¹ as Chief Judge of the Federal High Court ("FHC"), Hon. Justice John Terhemba Tsoho (the "Chief Judge") passed² the Admiralty Jurisdiction Procedure Rules 2023 (the "AJPR 2023" or the "Rules").

The AJPR 2023 revokes the outdated Admiralty Jurisdiction Procedure Rules 2011 ("AJPR 2011") and introduced several transformative changes aimed at simplifying Nigeria's admiralty practice, blurring certain technicalities in Nigeria's admiralty space, and expediting the resolution of admiralty matters in Nigeria.

Notable Features of the AJPR

Below are the notable introductions of the AJPR 2023:

Establishment of Admiralty Divisions and Designation of Admiralty Judges of the FHC

The AJPR 2023 empowers the Chief Judge to establish Admiralty Divisions within relevant judicial divisions of the FHC³. As part of this process, it is expected that judges with cognate knowledge and experience in admiralty law and practice will be designated as judges of these Admiralty Divisions, and they shall exclusively preside over all admiralty matters⁴. There is no doubt that Admiralty practice, being a specialized area of law, requires the expertise of specially trained judges, and creating the Admiralty Divisions is a step in the right direction

Creation of Admiralty Registries and Appointment of Admiralty Marshal

The Rules introduce Admiralty Registries in the Admiralty Divisions overseen by the Admiralty Marshal or its Substitute. As prescribed under Order 2, Rule 5 of the AJPR 2023, the Admiralty Marshal or its Substitute's responsibilities include a range of crucial tasks, such as serving originating processes, executing arrest warrants, preserving and safeguarding arrested ships or other properties, moving vessels that are under arrest, arranging for release, valuation or sale of ships or other properties, and managing the proceeds of such sales.

Preservation of Arrest Warrant upon its Transfer

The AJPR 2023 ensures the preservation of arrest warrants even when an admiralty action in rem is transferred to a different Judicial Division where the subject of the maritime res is located or expected to arrive. As such, the arrest warrant issued by the Court in the previous Judicial Division remains valid and enforceable against the res in any Judicial Division located within the jurisdiction⁵.

Accompanying Originating Processes for Actions Commenced by Writ of Summons

The AJPR 2023⁶ more succinctly details the originating processes in an action in rem commenced by Writ of Summons filed before the FHC, in line with the current practices at the FHC. Along with the Statement of Claim and copies of documents to be relied on at trial, litigants must also frontload (i) a list and copies of documents to be relied on at the trial,⁷ (ii) a list of non-documentary exhibits, and (iii) a list of witnesses to be called at the trial.



8. Order 3, Rule 3(2)(a), and Order 3, Rule 4(1)(e)(i) of the AJPR 2023.
9. Order 3, Rule 3(3)(ii) of the AJPR 2023.
10. Order 3, Rule 3(3)(iii) of the AJPR 2023.
11. Order 3, Rule 10(1) of the AJPR 2023.
12. As listed in Section 2(2) of the AJA.
13. As defined in Section 5(4) of the AJA.
14. As listed in Section 2(3) of the AJA.
15. Order 5, Rule 2 of the AJPR 2023.
16. *MV "MUSTAFA" v. AFRO ASIAN IMPEX LTD & ANOR* [2002] 14 NWLR (Pt. 787) 395 at 410-411, paragraphs F-A and paragraphs B-E (CA).
17. Order 6, Rule 3 of the AJPR 2023.
18. Order 6, Rule 14 of the AJPR 2023.
19. Order 7, Rules 1 (2), (3) and (4) of the AJPR 2023.
20. Order 7 Rules 1 (6)
21. Order 7, Rule 1(8) of the AJPR 2023
22. Order 6, Rule 5 of the AJPR 2023.
23. Order 7, Rule 1(10) of the AJPR 2023.
24. Order 7, Rule 8(1) of the AJPR 2023.
25. Order 7, Rule 8(3) and (4) of the AJPR 2023.
26. Order 7, Rule 8(5) of the AJPR 2023.
27. Order 8, Rule 5 of the AJPR 2023.

Deposition to Witness Statements on Oath by Witnesses in Foreign Jurisdictions and Subpoenaed Witnesses

The Rules now recognize and permit the notarization of Witness Statements on Oath by notary publics or other persons authorized to administer oaths in foreign jurisdictions⁸. Additionally, it eliminates the need to file statements on oath of witnesses for subpoenaed witnesses at the commencement of the action for an action in rem commenced by Writ of Summons⁹. However, parties intending to subpoena/summon witnesses must serve them with Form 3 (Summons to Witness Requiring Subpoena) before filing the statements of these witnesses¹⁰.

Procedure for the Recognition or Enforcement of an Arbitral Award

By Order 3, Rule 5 of the AJPR 2023, an application for the recognition or enforcement of an arbitration agreement or arbitral awards related to any maritime claim, either from a domestic or foreign arbitration proceeding, must be made through an Originating Motion. This is a most welcome development as it puts to bed the brewing issue regarding the mode of application.

Filing and Service of Originating Processes

Under the Rules,¹¹ every originating process presented for filing must be marked with the date and time of presentation by the Admiralty Marshal, who shall subsequently arrange for service to be effected.

Parties in Actions in rem

Order 5, Rule 1 of the AJPR 2023 waives the previous requirement for Writ of Summons, in proceedings commenced as an action in rem concerning proprietary maritime claims¹², to specify a **relevant person**¹³ as a defendant. On the other hand, a ship or other property must be specified as a defendant in a general maritime claim¹⁴ commenced as an action in rem¹⁵. This aligns with the position of the Nigerian Court of Appeal in the *MV MUSTAFA* Case¹⁶.

Service of Process

Per Order 6, Rules 1 and 2 of the AJPR 2023, service of the Writ of Summons (in an action commenced in rem against a ship or other property on board the ship at the time of service) by affixing a sealed copy of the process to a mast or other conspicuous part of the ship or by delivering same to the ship's master is deemed sufficient service of the Writ of Summons **on the owners of the ship or other property**. Likewise, service of the Writ of Summons (in an action commenced in rem against any property not on board the ship at the time of service) by affixing a sealed copy of the process to the property, or to a package, or container or on the storage facility containing the property is deemed sufficient service of the Writ of Summons on the owner of the property.

Notably, the Rules¹⁷ require service of Writ of Summons, a court order of arrest, and a warrant of arrest in an action in rem **to be by physical service**. Other processes in the action may, however, be served on the defendant through the defendant's known email address or through the Defendant's Counsel, where represented by Counsel. This digital-friendly approach enhances convenience and accessibility for all parties involved. It also permits the defendants' Counsel in actions in personam to accept service on behalf of the defendant where the Counsel undertakes in writing to accept service of the Writ of Summons or any other process in relation to the proceeding.

Under Order 6, Rule 15, the Court may, in an action in personam filed through an agent against a defendant ordinarily resident or carrying on business outside jurisdiction, order that service on the defendant or the owner of such ship or other property be done through any other mode of service acceptable to the court – this may include service on the defendant or owner of a ship or other property's last known place of business (through a reputable courier company operating a courier service across Nigeria or the relevant country) or email address.

Arrest of Ship and Other Property

In a significant move towards digitization, the AJPR 2023 recognizes physical and e-filing (in Portable Document Format (PDF)) of ex parte applications for a warrant of arrest of a ship or other property, with fees assessed and paid through designated electronic payment platforms¹⁹. It also sets a twenty-four (24) hours timeline from the date of filing (where practicable) for the hearing and determination of such application, which may now be conducted physically or virtually on any day, including Sundays and public holidays²⁰.

In a bid to formalize the mandatory process of ascertaining that there is a (or there is no) caveat against arrest in place before an arrest application is lodged in relation to a ship or other property, the Rules now require the Admiralty Registry to issue a report of the outcome of any party's search of the caveat against arrest register as in Form 8A (Report of Search of Caveat Against Arrest Register).²¹

Furthermore, the Rules direct that a copy of the arrest order must be served on the Harbour Master of the Nigerian Ports Authority²².

To safeguard the interests of vessel purchasers (and their financiers), the Rules reiterate the provisions that abhor the issuance of an arrest warrant if the beneficial ownership of a vessel or other property has changed after the issuance of the Writ of Summons, except actions in rem based on a maritime lien commenced in relation to a general maritime claim²³.

Arrest of Ship and Other Property for Security in support of Pending Foreign Court and Arbitral Proceedings (Foreign and Domestic)

Notably, the AJPR 2023 provides for an application for an arrest warrant of a ship or other property regarding claims pending in courts outside Nigeria or arbitral proceedings within or outside Nigeria without instituting the substantive claim at the FHC²⁴. However, as a condition precedent to the grant of the said arrest order, such applicant must provide a duly notarized undertaking to the Court indemnifying the ship or other property, its owners, and any other interest holders for all losses suffered because of the arrest if it is later found that the arrest order ought not to have been made²⁵. The original undertaking to indemnify is to be delivered to the ship when executing the warrant of arrest²⁶. Although the AJPR 2023 does not precisely state the mode or form such undertaking may take, the literal meaning of the provision of Order 7 Rule 8 (5), in our opinion, requires such undertaking to be a duly executed standalone document (which would be exhibit to the relevant processes and served on the defendant(s) as opposed to a mere deposition or averment to provide an undertaking in an affidavit to support an arrest application.

Caveats and Release of Vessel Under Arrest

The Rules retain the Admiralty Marshal's powers to enter a caveat against a vessel's arrest, where the Admiralty Marshal is satisfied that the caveator shall, within three (3) days of being served with the originating processes of an action commenced in rem,



28. *Order 8, Rules 7 (a) & (b) of the AJPR 2023.*
29. *MT "DELMAR" & ANOR v. MT ANE (EX MT LESTE) & 2 ORS. (2016) 13 NWLR (pt 1530).*
30. *Order 9, Rule 3 (3) of the AJPR 2023.*
31. *Order 9, Rule 6 (3) of the AJPR 2023.*
32. *Order 9, Rule 7 of the AJPR 2023.*
33. *Order 22, Rule 2(1) of the AJPR 2023.*
34. *Order 17, Rule 1 (2) of the AJPR 2023.*
35. *Order 11 of the AJPR 2023.*
36. *(1858) Vol. 4 ER*
37. *(1980-1986) NSC Vol. 2.*

provide security in the form of the committed security (this could be an undertaking, a guarantee or bond from (i) a member of the International Group of Protection and Indemnity Clubs, (ii) a licensed Nigerian bank, or (iii) a registered Nigerian insurance company of repute (the "Acceptable Securities").

Notably, the Rules introduce provisions to the effect that a caveator's failure to provide the security stated in its filed caveat against arrest, and within the requisite timeline, shall be deemed to have failed to appear in the proceedings within the time prescribed, and its caveat shall be deemed canceled.

In relation to the regime for filing a caveat against the release of an arrested ship or other property, the Rules also made notable provisions. Currently, a person having a claim against a ship or other property that is under arrest may, on providing an undertaking in damages, file in court a caveat against the release of the ship or other property in lieu of obtaining a further arrest of that ship or other property, provided that:

- (a) the caveator has not commenced an admiralty action in rem before filing the caveat against the release from arrest of the ship or other property; or
- (b) where security is furnished in relation to a caveat against release from arrest; the caveator shall file an action in rem in respect of the claim for which the caveat against release was filed within fourteen (14) days of the issuance of the security, otherwise the security shall forthwith be cancelled and released by the Admiralty Marshal to the party that furnished it.²⁸

These new caveats against release provisions provide much-needed guidance on this matter, and the same aligns with the Nigerian Court of Appeal's position in the MT DELMAR Case and international best practice²⁹.

Transparent Custody and Sale of Ship and other Property under Arrest

To enhance transparency, the Admiralty Marshal is obligated to prepare and file monthly reports detailing the location, security status, and condition of the arrested ship or other property to the Court/Judge who issued the arrest warrant and immediately deliver said report to the parties to the suit and any other party as ordered by the court³⁰.

Sale of Ship and other Property under Arrest

In cases where the owner of the arrested maritime res fails to provide security for its release **within sixty (60) days from the date of arrest**, the Court may, on an application by the arrestor or **an interested person**, order that it be sold by the Admiralty Marshal and the sales proceeds shall be deposited into an interest-yielding account, bearing the Admiralty Marshal's name³¹. The aforesaid sale proceeds are to be subsequently distributed after final judgment in accordance with the Rules³², ensuring a fair and lawful disposition of the ship's value.

This above-stated timeline (a departure from the previous six (6) month period under the AJPR 2011) is aimed at ensuring that owners/managers of arrested maritime res promptly provide requisite security and not burden the claimant with the enormous costs of maintaining the vessel under arrest.

In the same vein, the following new definition of an 'interested person' has expanded eligible parties to include the underlined persons³³:

"Interested person" in relation to a proceeding or in relation to a ship or other property that is under arrest, includes an underwriter or an insurer of the ship or other property, or of a liability in relation to the ship or other property or any person that has a legal or an equitable or a security interest in the ship or other property."

Clear Order of Priority for Maritime Claims

The Rules now lay out a clear order of priority³⁴ for claims against arrested ships or property, ensuring a systematic and efficient resolution of competing interests, as follows:

- (a) Statutory/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 the 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.

The above-stated order provides the needed guidance to the Court, practitioners, and other related parties (like mortgages).

Safeguarding Against Needless Arrest

The AJPR 2023 continues to take a strong stance against arrest, attachment, order of sale, or injunction procured in bad faith, gross negligence, or unlawfully. It permits the defendant to maintain an action for wrongful arrest and for reasonable compensation to be awarded in favour of the defendant by the Court for any loss, injury or expenses sustained as a result of same³⁵.

The test for wrongful arrest has now, controversially, departed from the 'unreasonably and without good cause' position and somewhat reverted to the previous herculean position of mala fides (bad faith) or through crassa negligentia (gross negligence) (as established in the English case of **THE EVANGELISMOS Case**³⁶(and which was initially adopted in Nigeria by the 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))**³⁷, along with a further provision for 'unlawfully'.

A school of thought would argue that the 'unreasonably and without good cause' test was better because it was less cumbersome, but there is a dearth of available case law on the matter,



38. Order 22, Rule 2(1) of the AJPR 2023.

39. Under the AJPR 2011, the previous threshold was Five Million Naira (N5,000,000.00).

40. Order 13, Rules 1(1) and (2) of the AJPR 2023.

41. Order 13, Rule 3 of the AJPR 2023.

42. Order 1, Rule 5 (1) of the AJPR 2023.

locally and internationally, which meant shipowners were unable to take an informed decision whether to claim for any loss, injury or expenses sustained as a result of the needless arrest. This is why it was recommended that the test revert to the old one, which has local and international case laws to serve as a guide. We look forward to developing this important area of our admiralty practice under the new AJPR 2023 and future amendments to the AJA.

Intervener

In a bid to cure the mischief regarding the proper parties that may intervene, with leave of court further to Order 18, in an action in rem in respect of an arrested property or money representing the proceeds of the same of the arrested property, the AJPR 2023 provides, for the first time, the following concise definition of an 'Intervener'³⁸:

"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.

It is hoped that 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.

Security for Costs

The Rules now provide a higher claim threshold for determining when the security for cost is to be mandatorily provided. As such, where the claim exceeds **Ten Million Naira (N10,000,000.00) (or its foreign currency equivalent)**³⁹, the same shall require security for costs, which shall take the form of any of the Approved Securities or a deposit in an account nominated by the Court, of the sum specified by the Court, thus promoting fair and responsible litigation⁴⁰. The foregoing is also relevant considering the headwinds in the exchange rate between the Nigerian Naira and other international trading currencies like the United States Dollars, Chinese Yuan, and Euros.

Furthermore, in determining the quantum of security to be provided, the Rules now require the Court (regarding all the circumstances of the case) to include the interest rate, if any, payable by the defendant to a bank or other financial institution providing the security.⁴¹

Distinct Definition of an Aircraft

The AJPR defines an Aircraft to mean any waterborne aircraft⁴². Following the amendment of the definition of 'Aircraft' (to relate to only waterborne aircraft), the FHC's Civil Aviation (Procedure) Rules 2013 would now cover only non-waterborne aircraft, thereby clearly demarcating the aviation and the admiralty jurisdiction of the FHC as it relates to aircraft.

Conclusion

The AJPR 2023 is a welcome development that heralds a new era for admiralty practice in Nigeria. The innovative provisions catalyze a faster, more effective, and well-structured legal framework.

By establishing the Admiralty Divisions, empowering designated admiralty judges, reducing the technicalities in Nigeria's maritime practice (especially as it relates to parties and service of originating processes), promoting international cooperation in maritime legal proceedings, and demystifying the somewhat blurry requirements of the law regarding filing caveats against the release of vessels, the AJPR 2023 promises more efficient dispensation of admiralty matters and this will not only boost the development of Nigeria's maritime industry but will ultimately improve the industry's outlook internationally.

Lastly, it is essential to note that the Nigerian Maritime Law Association ("NMLA") played a very active and pivotal role in providing robust recommendations and engagements that ultimately birthed the Rules. In 2020, the NMLA constituted a sixteen (16) member committee (which comprised a member of our Firm) to review the laws (including the AJPR 2011) governing admiralty practice in Nigeria with the view to ensuring the effective resolution of disputes in accordance with current standards and expectations in the global maritime industry. Further to the result of the aforesaid committee, the NMLA submitted a draft Admiralty Jurisdiction Procedure Rules to the Chief Judge for consideration and followed up the process till the Rules were made. We are confident that the reforms championed by the NMLA, including the review of the AJA and the Nigerian Constitution, will revive confidence in the Nigerian maritime industry.

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