

# NIGERIA FINALLY OPENS TO THE PROCUREMENT OF SECURITY (VIA SHIP ARRESTS) IN SUPPORT OF MARITIME CLAIMS IN FOREIGN COURTS OR ARBITRAL (FOREIGN AND LOCAL) PROCEEDINGS

1. (2000) 15 NWLR (Pt.691) 622.
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 1, Rule 1 of the AJPR 2023.
4. Section 251(1)(g) of the Constitution of the Federal Republic of Nigeria, 1999 as amended; Section 7(1)(d) of the Federal High Court Act, 2004 and Section 1(1) of the Admiralty Jurisdiction Act, 1991.
5. Order 7, Rule 1(1) of the AJPR 2023.
6. Section 2 of the AJA.
7. Section 1 of the AJA confers jurisdiction on the FHC to hear and determine any question relating to a proprietary interest in a ship or any maritime claim, while section 10 deals with the FHC's power to obtain security in an action where proceedings are stayed on the ground that the dispute be determined by arbitration in a foreign country.
8. (2017) LPELR 44023.
9. Section 2(3)(f) of the AJA.

## BACKGROUND

Ship arrest is an intricate tool in admiralty actions. The essential purpose for arresting a ship is to obtain pre-judgment security in respect of an *'in rem'* action, such that the ship is under detention of the Court pending the determination of the suit. In various jurisdictions, plaintiffs typically seek to arrest vessels to obtain security in support of claims in foreign courts or arbitration (foreign and local) proceedings – that is, to keep the ship as security to answer the final judgment or arbitral award at the end of proceedings.

For over two (2) decades, the practice in Nigeria was that an action could not be maintained at the Federal High Court (“FHC”), where it was entirely based on obtaining an arrest order as security for a claim pending in foreign courts or arbitration proceedings (local and foreign). The foregoing results from the long-standing decision of the Supreme Court in **MESSRS. NV. SCHEEP & ANOR v. THE MV “S. ARAZ” & ANOR<sup>1</sup>** (the “S. ARAZ Case”).

Following the coming into force of the Admiralty Jurisdiction Procedure Rules, 2023 (the “AJPR 2023”)<sup>2</sup>, which repealed the Admiralty Jurisdiction Procedure Rules, 2011 (the “AJPR 2011”)<sup>3</sup>, there has been a shift from the decision in the S. ARAZ Case by the introduction of Order 7, Rule 8 of the AJPR 2023. This article analyzes Order 7, Rule 8 of the AJPR 2023, in juxtaposition with the precedent laid down in the S. ARAZ Case. It also examines the English law position while interrogating some decided Nigerian cases. We also highlight the procedure to be adopted at the FHC for obtaining security in support of claims in foreign courts or arbitral (foreign and local) proceedings.

## POSITION BEFORE THE AJPR 2023

The FHC is vested with primary admiralty jurisdiction<sup>4</sup> and thus can validly order an arrest of ships, where they are within its jurisdiction or are likely to be in three (3) days.<sup>5</sup> However, prior to the passage of the AJPR 2023, the position in Nigeria was that the jurisdiction of the FHC could not be invoked to arrest a vessel solely to procure security for foreign court or arbitration (foreign and local) proceedings. In other words, security for damages was not a cause of action that could ground a claim, as the court could not hear and determine a case where the only purpose of the action brought before it was for security in respect of foreign court or arbitral (foreign and local) proceedings. The substantive dispute must, therefore, have been before the court to confer its jurisdiction and consequently grant an arrest order.

This position is traceable to the Supreme Court's decision in the S. ARAZ Case, where the plaintiffs, owners of MV CINDYA, filed an action in 1995 against the defendants for Three Hundred Thousand United States Dollars (US\$300,000.00) as security for arbitration damages, interest, and costs related to a London arbitration that started in 1992 over demurrage/damages for the MV CINDYA hire. The plaintiff obtained an arrest order for MV S. ARAZ to secure this claim. The defendants contested that the FHC lacked jurisdiction to entertain the claim as it did not fall within the recognisable claims stipulated in the Admiralty Jurisdiction Act, 1991 (“AJA”)<sup>6</sup>. The trial judge, in dismissing the defendants' aforesaid objection, and allowing the arrest, affirmed the FHC's jurisdiction in sections 1 and 10 of the AJA.<sup>7</sup>

On the other hand, the Court of Appeal overturned the trial court's decision, ruling that (i) the FHC lacked jurisdiction since the cause of action was not a maritime claim under sections 1 and 2 of the AJA; and (ii) section 10 of the AJA was inapplicable, as the arbitration had begun before the vessel's arrest in Nigeria. Consequently, the suit struck was out, and the vessel was released.

The Supreme Court, upon appeal, considered whether the claim constituted a cause of action for the court. Distinguishing between substantive (rights, responsibilities) and adjectival (enforcement methods) laws, it ruled that “security for damages, interest and costs” is an adjectival issue not constituting a cause of action unless specifically legislated, as in the English Civil Jurisdiction and Judgments Act, 1982. The court found no equivalent legislation (like the English Civil Jurisdiction and Judgments Act, 1982) in Nigerian law, so it dismissed the appeal, reiterating that the FHC lacked jurisdiction for the claim.

Interestingly, the Nigerian Court of Appeal, while considering the **BONAVISTA SHIPPING CORPORATION v. AKRON TRADE AND TRANSPORTATE DE VENEZUELA C.A.** (the “BONAVISTA Case”)<sup>8</sup> in 2017, got another opportunity to reflect on the S. ARAZ Case. The main issue in the BONAVISTA Case was whether the appellant's claim was solely a claim for the provision of security for ongoing arbitration proceedings in London. While the FHC, relying on the S. ARAZ Case, answered the foregoing issue in the affirmative, and subsequently discharged the arrest orders and struck out the appellant's claim, the Court of Appeal held that unlike in the S. ARAZ Case, the appellant's claim was not just to obtain security for the claim at the arbitration in London, but the appellant also had a substantive claim for the unpaid charter fees before the lower court (the FHC), which was a maritime claim under the AJA.<sup>9</sup>



10. (1984) 1 Lloyd's Report 235; (1984) QB 477.
11. Supra.
12. (1987) 2 Lloyd's Report 164 at page 165.
13. Order 7, Rule 8(2) of the AJPR 2023.
14. Order 7, Rules 8(3) and (4) of the AJPR 2023.
15. Order 7, Rule 8(5) of the AJPR 2023.

The court, therefore, unanimously granted the appeal and held that it had jurisdiction to determine the claim.

In light of the above, for a plaintiff to successfully maintain an action to obtain security for foreign court or arbitration proceedings, both the claim for security and the substantive claim must have been included in the writ, as that was what would accord the court jurisdiction to determine the claim pursuant to the BONAVISTA Case.

### ENGLISH LAW POSITION

To further put the S. ARAZ Case in perspective, we trail the English position, which was considered a persuasive authority by the Nigerian Supreme Court.

Prior to the enactment of the English Civil Jurisdiction and Judgments Act, 1982, English Courts could not exercise their jurisdiction to arrest a ship in an action in rem to secure a potential award from arbitration proceedings. The foregoing was evident in **THE VASSO**<sup>10</sup>, where the English Court of Appeal, per **Goff L.J.**, affirming **Sheen, J.**, declared:

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

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

*"The appellant's only purpose in arresting Vasso was to obtain security for the satisfaction of whatever award might ultimately be made by the arbitrators; the appellants did not purport to invoke the jurisdiction of the court for the purpose of hearing and determining any claim; accordingly the court had no jurisdiction to arrest the vessel and the club's undertaking would be discharged."*

The practice, therefore, followed that if a plaintiff invoked the jurisdiction of the Court to obtain the arrest of a ship as security for an award in arbitration proceedings, the English Court would not issue a warrant of arrest<sup>11</sup>.

The enactment of the English Civil Jurisdiction and Judgments Act, 1982 heralded a new era, as its section 26 provided as follows:

*"Where in England and Wales, or Northern Ireland, a court stays or dismisses Admiralty proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another part of the United Kingdom, or of an overseas country the court may, if in those proceedings property has been arrested, or bailor other security has been given to prevent or obtain release from arrest –*

- a. order that the property arrested be retained as security for the satisfaction of any award of judgment which:
  - i. is given in respect of the dispute in the arbitration or legal proceedings in favour of which those proceedings are stayed or dismissed and
  - ii. is enforceable in England and Wales, or as the case may be, in Northern Ireland, or

*b. order that the stay or dismissal of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award or judgment."*

The English Court has interpreted this section to mean that a plaintiff would be enabled to obtain security if it proceeded by way of arbitration rather than by court action – see **THE JALAMATSYA**<sup>12</sup> where **Sheen, J.** opined that section 26 applied whether or not an arbitration has already been commenced. Thus, where an arbitration has commenced, and the plaintiffs in the arbitration have not obtained security for any possible award, they can issue a writ in rem if they know that a ship belonging to the respondents in the arbitration is coming within the jurisdiction, and plaintiffs may arrest that ship to obtain security.

Based on the foregoing, the Nigerian Supreme Court in the S. ARAZ Case rejected the plaintiffs' argument that section 26 of the English Civil Jurisdiction and Judgments Act, 1982 was in pari materia with section 10(2) of the AJA, as the latter presupposes the existence of a pending action that is to be ordered to be stayed or dismissed in favour, while the former goes further than this.

### POSITION POST AJPR 2023

As stated earlier, there are new provisions contained therein, specifically Order 7, Rule 8(1), to the effect:

*"(1) Notwithstanding the provisions of Order 3 and Order 7 (1) of these Rules, where an application is for a warrant of arrest of a ship or other property in respect of a claim commenced in a court outside Nigeria or commenced by way of arbitration proceedings [within or] outside Nigeria, such an application can be made without commencing an action before the Court for the substantive claim."*

Essentially, this means that the AJPR 2023 has done away with the decision of the Nigerian courts in the S. ARAZ Case. The effect of this is that the FHC is now clothed with jurisdiction to entertain an action solely based on obtaining security via ship arrest in claims before a foreign court or arbitration (foreign and local) proceedings.

### PROCEDURE FOR SHIP ARREST FOR SECURITY IN SUPPORT OF A CLAIM IN A FOREIGN COURT OR ARBITRAL (FOREIGN AND LOCAL) PROCEEDINGS

The AJPR 2023 has also entrenched the procedure to be adopted in arresting a ship where a claim has commenced in a foreign court or arbitration (foreign and local) proceedings, and they are as follows:

- a. The application for the arrest warrant shall accompany an original or certified true copy of the processes in relation to the foreign court or arbitration (foreign or local) proceedings.<sup>13</sup>
- b. At the time of making the application for the arrest warrant, the applicant shall file a duly notarised undertaking to indemnify (in as many original copies that the court may require for service) the ship or other property, its owners, and any other interests in the ship or other property against all losses suffered as a result of the arrest if found that the arrest order should not have been made or should it later transpire that the order is needless. The submission of the notarized undertaking is crucial as an arrest order cannot be made without it.<sup>14</sup>
- c. Where the court grants an arrest order, an original of the above-stated undertaking to indemnify will be delivered to the ship at the time of executing the arrest warrant.<sup>15</sup>



16. Order 7, Rule 8(6) of the AJPR 2023.

Note that an order made for the arrest of a ship may be made subject to such other conditions as the Court deems just in this circumstance.<sup>16</sup>

### CONCLUSION

The AJPR 2023 signifies a pivotal shift in Nigerian maritime jurisprudence, aligning it more closely with best international practices. The introduction of Order 7, Rule 8 of the AJPR 2023 is a commendable stride because it demonstrates Nigeria's responsiveness to the ever-changing legal and commercial industry needs. Exciting times lie ahead, as the position of the law is now on sound footing, and plaintiffs can proceed with an action before the FHC without having to file the substantive claim alongside the claim for security. This will pave the way for a more robust and forward-thinking approach to maritime law in Nigeria.

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