

ARREST ALERTS – THE NECESSITY FOR CAVEATS

The right to arrest seagoing vessels has been traditionally exercised by countries engaged in maritime commerce all over the world for the purpose of providing security to prospective claimants against shipowners whose vessels damage other people's property. This is essentially because maritime commerce is international in nature and is effected by means of vessels which ply ports of different nations distinct from their ports of registration or the nationalities or places of domicile of their owners.

During the course of her voyage, a ship may cause damage either to other property or cargo in her custody, leaving the owners of such goods with no right of recourse, if the ship were allowed to sail away from the jurisdiction where the loss occurred. In order to ameliorate situations where potential claimants are unable to enforce judgements obtained, the right of arrest was devised and developed in the admiralty courts of different countries. This practice was given international backing in the 1952 Convention relating to the Arrest of Sea going Vessels, which has been ratified by almost all maritime nations in the world. However, along with the need to ensure the provision of adequate security for claims, also arose a corresponding need to prevent undue disruption of maritime commerce and the losses and expenses usually attendant to arrests of vessels, hence the development and practice of filing caveats against arrests.

A caveat is an undertaking, given by a ship owner referred to as the caveator, or his solicitor to appear in court in any action commenced against the property in respect of which the caveat is filed and also provide security. It is usually filed on behalf of a ship owner by his solicitor to prevent the arrest of a ship or other property.

In Nigeria, Order 6 of the Admiralty Jurisdiction Procedure rules (AJPR) 1993 provides for the filing of caveats against arrests at the registry of the Federal High Court. The Rules stipulate that the Registrar of the court may file a caveat, if satisfied by an undertaking in writing provided by either the caveator or his solicitor, or for any other sufficient reason, that the caveat shall appear in court to any proceedings, commenced against the ship specified in the caveat and also provide bail in respect of such action. The Registrar may also be satisfied by an undertaking provided by a Protection and Indemnity Club belonging to the International Group, a registered bank in Nigeria or a reputable insurance company carrying on business in Nigeria.

In practice, however it is the caveator's solicitor that provides the undertaking required and in the event that a writ or other process is issued against the ship, service would be effected on the solicitor. The undertaking will only apply if the following conditions are satisfied:-

- the caveat is in respect of the ship sought to be arrested;
- the service of the writ has been effected on the solicitor; and
- the amount specified in the caveat is not less than the amount claimed.

Order 6 rule 5 sub – rules 2 and 3 of the AJPR provides that the caveator shall within three days of service, unless otherwise agreed with the plaintiff, pay into court, either the amount claimed or the amount specified in the caveat, whichever is less, or provide a bail bond. In our experience most claimants usually insist that the amount claimed be paid into court. If the caveator fails to comply with the foregoing, upon service, judgement may be entered against his ship as he shall be taken to have failed to appear to the proceedings. In addition, the solicitor will be liable to pay the caveat sum into court or provide bail and in the event of a failure, will face committal proceedings. In several cases in Nigeria, solicitors have had to face the music where caveators have refused to honour their obligations under caveats filed. It is therefore not unusual to find solicitors requesting for counter-indemnities to cover potential liabilities they may be exposed to.

Prior to the issuance of any warrant of arrest, a search is required to be conducted on the register of caveats at the court's registry. If there is a caveat in existence, the court will not order an arrest unless the court is of the opinion that the caveat does not constitute adequate security because the caveat sum is less than the value of the plaintiff's claim. Therefore, in deciding to file caveats, it is necessary to ensure that the caveat sum corresponds with either the value of the ship or her cargo, as this may directly impact on a court's decision to order or refrain from ordering the arrest of a vessel.

A caveat is valid for a period of twelve months or for such shorter period (not less than 7 days) as may be specified. It may be withdrawn at anytime, by filling an instrument of withdrawal at the court's registry. Upon its expiry, it may be renewed for another period of twelve months or such shorter period as may be desired. A subsequent caveat may be filed in respect of the same ship during the validity of the initial caveat filed. This may be done in situations where the ship owner desires to increase the amount specified in the caveat to correspond with the value of the ship or for any reason.

The commercial necessity of filling caveats by ship owners' cannot be over-emphasised especially in a trade where any delay in a ship's voyage could involve the owner in huge expenses and losses. Furthermore, since the right of arrest is mainly to provide security, the existence of a valid and sufficient caveat would be deemed as adequate security, which will in turn dispense with the need to arrest a ship. This will ensure that international trade proceeds smoothly and unhindered.

It would appear that the Nigerian courts now realise more than ever, the need to allow the free flow of international trade, and would not ordinarily issue a warrant of arrest against a ship where there is a valid and sufficient caveat in force. Even where a warrant of arrest has been issued, the court may on the application of a caveator or any person interested in the ship, prevent the warrant of arrest from being executed by making an order to that effect. In addition, a party whose ship is arrested despite the existence of a valid caveat may claim damages against the arresting party for losses resulting from the arrest, unless the arresting party is able to satisfy the court that he has a good and sufficient reason for the arrest. This may prove to be an uphill task.

In conclusion, despite the efficacy of filing caveats, the decision on whether to leave vessels unprotected and subject to the risk of arrests or take the precautionary measure of filing caveats will in the final analysis lie with ship owners and their agents.

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