

ARREST OF A VESSEL FOR THE PURPOSE OF OBTAINING SECURITY IN FOREIGN ARBITRATION PROCEEDINGS – whether permissible under Nigerian law.

Claimants have traditionally used arrest of vessels as an effective way of securing their claims in admiralty actions. The main purpose of an arrest is to obtain security to satisfy any judgement that may be obtained in an “in rem” action. The vessel or the “res” becomes security in the hands of the court, which can be used to ultimately satisfy any judgement that may be awarded by the court. However, in order for a court to be able to validly order an arrest, it must have the requisite jurisdiction to do so. This would usually be contained in relevant legislations, statutes or treaties of the country involved.

The Federal High Court (FHC) is vested with jurisdiction to determine admiralty causes and matters in Nigeria. The admiralty jurisdiction exercisable by the FHC is contained in the Admiralty Jurisdiction Decree (AJD) 1991 and the Admiralty Jurisdiction Procedure Rules 1993 made pursuant to the AJD.

The issue that recently came up before the Nigerian Supreme Court in the case of *Scheep V The MV “S.Araz” and Owners of the MV “S.Araz”* (unreported SC167/1996 – judgement delivered on 8th December 2000) was whether an action to obtain security for foreign arbitration was permissible under Nigerian law.

On 28th February 1995, the plaintiffs, as owners of the MV “Cindya”, filed an action in rem against the defendants for the sum of \$300,000.00 as security for damages, interest and costs in respect of arbitration which was commenced in London in 1992. The claim in the arbitration was for demurrage and/or damages for detention for the second defendant’s use or hire of the MV “Cindya” pursuant to a charter party dated 17th October 1989. Simultaneously, the plaintiff applied for and obtained an order for the arrest and detention of the MV “S.Araz” pending the provision of an acceptable bank guarantee in the sum of \$300,000 as security for its claim.

The defendants applied to set aside the writ of summons and the order of arrest mainly on the ground that the plaintiff’s claim does not fall within the categories of claim cognisable by the FHC. After hearing the arguments of both counsel, the trial judge held that the FHC had jurisdiction by virtue of sections 1 and 10 of the AJD and dismissed the defendant’s application.

Section 1 of the AJD confers jurisdiction on the FHC to hear and determine any question relating to a proprietary interest in a ship or any maritime claim. The definition of a proprietary interest in a ship or a

maritime claim is provided for in section 2 of the AJD and none of the categories include a claim for security for damages, interest and costs. Section 10 on the other hand, deals with the power of the FHC to obtain security in an action where proceedings are stayed on the ground that the dispute be determined by arbitration in a foreign country.

On appeal, the court of Appeal set aside the decision of the trial court and held that since the plaintiff's claim does not fall within any of the categories of claim listed in sections 1 and 2 of the AJD, the FHC accordingly lacked jurisdiction to entertain the suit. The court further held that section 10 of the AJD relied on by the trial judge was inapplicable because the arbitration in respect of which the plaintiff was seeking security began in London prior to the arrest of the vessel in Nigeria. The court was of the view that section 10 only applies in cases where arbitration has not commenced in the foreign country at the time the vessel is arrested in Nigeria. The court struck out the plaintiff's suit and ordered the immediately release of the vessel. The plaintiff appealed to the Supreme Court.

In determining the appeal, the Supreme Court considered whether the plaintiff's claim constituted a cause of action over which a court can adjudicate upon. The Supreme Court stated that there were two types of law: substantive and adjectival laws. Substantive laws fix duties and establish rights and responsibilities among and for persons, while adjectival laws merely prescribe methods of enforcing rights or obtaining redress for their invasion.

The Supreme Court held that a claim for "security for damages, interest and costs" belong to the realm of adjectival laws and do not constitute a cause of action on which a court can adjudicate unless specifically provided for by statute. An example is section 26 of the UK Civil Jurisdiction and Judgements Act 1982, which allows an arrest for the purpose of obtaining security. The court rejected arguments by the plaintiff's counsel to the effect that section 10 of the AJD is *pari materia* with section 26 of the UK Act holding that section 10 does not create a new action but presupposes the existence of a valid action. The court further held that since there was no equivalent of section 26 of the UK Act in our legislation, the FHC lacked jurisdiction to entertain the plaintiff's claim and dismissed the appeal.

The Supreme court's decision in the "S.Araz" finally puts to rest any doubt that may exist over whether Nigerian courts can arrest vessels solely to provide security for proceedings pending in other jurisdictions. The only instance where it is permissible to obtain security for foreign arbitration in Nigeria is if the action filed falls within the admiralty

jurisdiction of the FHC and the foreign arbitration has not commenced at the time of the arrest in Nigeria.

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