

Key contacts



Adewale Atake, SAN
Partner and Head,
Dispute Resolution
wale.atake@templars-law.com



Sodiq Lawal
Associate,
Dispute Resolution
sodiq.lawal@templars-law.com

TEMPLARS ThoughtLab

Navigating the Murky Waters of Arresting a Ship in Nigeria

Introduction

In maritime litigation, a Claimant has two options in enforcing a maritime claim. First, the Claimant, like in any other claim, may commence an action *in personam* against the person or entity who is personally liable for the claim. Secondly, the Claimant may also commence the action *in rem* against the ship in connection with which the claim arose (i.e the “offending ship”¹). In invoking the admiralty jurisdiction *in rem*, one of the strongest weapons in the Claimant’s arsenal is to arrest the ship either as a pre-judgement security² and/or to secure the appearance of the Defendant in court.³

However, the option of arresting the offending ship is not as a matter of course, the law places certain preconditions which must be present and complied with before the admiralty jurisdiction of the court can be invoked otherwise, the arrest will be wrongful and unlawful thereby making the Claimant liable to damages. These preconditions are the focal point of this piece.

Instances when a ship may be arrested

As already stated above there are certain criteria that must be met before the admiralty jurisdiction of the Court can be validly invoked to arrest the offending ship. The most important condition, as we shall demonstrate shortly, is that the claim qualifies as a maritime claim within the meaning and spirit of **Section 2 of Admiralty Jurisdiction Act, 1991 (AJA)**. The law then imposes certain other preconditions on specific maritime claims which are also mandatory before the jurisdiction of the Court can be properly invoked. Also, there are instances where a ship may be arrested even though it is not the offending ship.

¹ The term “offending ship” is adopted here for convenience to refer to the ship which would have been originally proceeded against.
² See: *Maertsch & Ors v. Bisiwa* (2013) LPELR-21025(CA). Typically, the ship owner usually pays the amount claimed or the value of the ship (whichever is less) or executes a bail bond equal to the amount claimed or the value of the ship (whichever is less) as security for the release of the arrested ship. See Order 10 Rules 8 of the Admiralty Jurisdiction Procedure Rules 2011. The commonly accepted form of security are bank guarantees, P&I Club LOUs and insurance bonds.
³ *Brown Energy Trading Limited v. OAN Overseas Agency (Nig) Limited & Ors.* (2014) LPELR -24111(CA); *Pacers Multi - Dynamic Ltd V. The M. V. "Dancing Sister" & Anor* (2012) 4 NWLR (PT.1289) 169

The claim must qualify as a maritime claim

A ship cannot be proceeded against, or arrested, except the claim qualifies as a maritime claim.⁴ Section 2 of AJA classifies maritime claims into two – proprietary maritime claim and general maritime claim.

Proprietary maritime claim

A proprietary maritime claim relates to the claims that touches on the proprietary interest of the ship. This category of maritime claims are listed in **Section 2(2) of AJA**, and they include claims relating to the possession of a ship, title to or ownership of a ship or of a share in a ship, mortgage of a ship or of a share in a ship or of a ship's freight. Also, claims between co-owners of a ship relating to the possession, ownership, operation or earning of a ship or claims 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*. Furthermore, claims for interest arising from any of the above heads of claim also qualify as a proprietary maritime claim.

For this class of maritime claims - except claims 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, Section 5(2) of AJA provides that an action in rem may be brought against the offending ship without any further precondition. In other words, once the claim is pitchforked within any of the above listed maritime claims, the admiralty jurisdiction of the court can be invoked for the arrest of the offending ship.

General maritime claim

The second category of maritime claims for which the admiralty jurisdiction of the Court may be invoked *in rem* are the general maritime claims listed in **Section 2(3) of AJA** and they include claims for: (a) damage done or received by a ship; (b) loss of life or for personal injury, sustained in consequence of a defect in a ship, or in the apparel or equipment of a ship, or arising out of the omission of the owner (or charterer) or a person in possession or control of a ship or their agents; (c) loss of or damage to goods carried by a ship; carriage of goods or persons by a ship, or to the use or hire of a ship, whether by charter-party or otherwise; relating to salvage (including life salvage of cargo or wreck found on land); (d) general average; pilotage of a ship; (e) towage of a ship or an aircraft when it is waterborne; (f) supply of goods, materials or services (including stevedoring and lighterage service) for the operation or maintenance of a ship; (g) construction of a ship (including such a claim relating to a ship before it was launched); (h) alteration, repair or equipping of a ship or dock charges or dues; (i) liability arising from port, harbour, canal or light tolls, charges or dues, or tolls, charges or dues of any kind, in relation to a ship; (j) bottomry; disbursements by a master, shipper, charterer or agent on account of a ship; (k) insurance premium, or for a mutual insurance call, in relation to a ship, or goods or cargoes carried by a ship; (l) claim by a master, or a member of the crew, of a ship for wages or an amount that an employer is obliged to pay to an employee, whether the obligation arose out of the contract of employment or by operation of law; (m) forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried in a ship, or for the restoration of a ship or any such goods after seizure; (n) enforcement of a claim arising out of an arbitral award (including a foreign award within the meaning of the Arbitration and Conciliation Act).

Maritime lien

⁴ See *Scheep & Anor v. The MV "S.Araz" & Anor* (2000) LPELR-1866 (SC); *Bronwen Energy Trading Limited v. OAN Overseas Agency (Nig) Limited & Ors* (2014) LPELR-24111 (CA)

Some of the above-listed general maritime claims enjoy certain special privileges and elevated status. This category of general maritime claims are referred to as maritime liens. **Section 5(3) of AJA** defines maritime liens to include claims or liens for salvage, damage done by a ship, wages of the master or crewmen, or master disbursements. **Section 67 of the Merchant Shipping Act** ("MSA") further extends the list to include claims for loss of life or personal injury occasioned in connection with the operation of a ship, claims for wreck removal as well as claims for ports, canal and waterways dues and pilotage dues.⁵

A maritime lien is a privileged claim on a ship, aircraft or other maritime claim upon a ship, aircraft, or other maritime property in respect of services rendered to, or injury caused by that property. It attaches to the property or ship when the cause of action arises and remain attached to a ship irrespective of a change in ownership or registration of the ship.⁶

For maritime liens, as in proprietary maritime claims, the offending ship may be arrested and proceeded directly against in the enforcement of the maritime lien without any further statutory preconditions. In effect, the admiralty jurisdiction of Court can be invoked against the offending ship, and the offending ship arrested irrespective of a change in ownership, at any time after the cause of action has arisen until the claim becomes statute barred⁷.

Statutory lien

Statutory liens are the other categories of claims (which do not give rise to a maritime lien), listed in **section 2(3) of AJA**. For these categories of claims⁸, **section 5(4)(a) of AJA** prescribes certain conditions that must be met before the court can invoke its admiralty jurisdiction for the arrest of a ship. The section provides: "In any other claim under section 2 of this Act, where the claim arises in connection with a ship and the person who would be liable on the claim in an action in personam (in this Act referred to as "the relevant person") was, when the cause of action arose, the owner or charterer of or in possession or in control of the ship, an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought against - (a) that ship, if at the time the action is brought the relevant person is either the beneficial owner of that ship in respect of all the shares in it or the charterer of the ship under a charter by demise."

Furthermore, the Court of Appeal has since interpreted the foregoing provision in the case of **MV "S Araz" v. LPG Shipping SA (1996) 6 NWLR (Pt 457) 720** to mean that: "an action can only be brought against a ship if at the time the action is brought the relevant person⁹ is either the beneficial owner of the ship in respect to all the shares in the ship or the charterer of the ship under a charter by demise". Therefore, if the relevant person ceases to be the

⁵ The argument could be made however that for the maritime lien not expressly listed under section 5(3) of AJA (i.e the lien provided for by section 67 of MSA) does not qualify as an action *in rem* for which an arrest of the ship can be made.

⁶ Section 71(2) of MSA. See also *Iroegbu v. MV. Calabar Carrier & Ors* (2007) LPELR-5143(CA). However, section 73 of the MSA provides that a maritime lien extinguishes after One year unless a claim of forced sale is commenced against the ship, and the ship is arrested, before the expiration of the one (1) year.

⁷ By section 18 of AJA, the time within which a maritime lien may be commenced is three (3) years from when the cause of action arose except the action is initiated under a separate statute.

⁸ In addition to any claims 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*.

⁹ To determine who the relevant person, section 5(7) provides that the law will assume that the person resides or carries on business in Nigeria. The import of this is to put away any defence by a foreigner that he is not subject to the jurisdiction of Nigerian Court.

beneficial owner¹⁰ or demised charterer¹¹ of the ship at time the writ for the arrest of the ship is issued, the Court will no longer have the jurisdiction to arrest the offending ship. These conditions¹² are extremely important such that in the absence of any of the preconditions, a Claimant cannot arrest the offending ship, but may only proceed *in personam* against the person who would have been personally liable under the claim.

Sister Ship Arrest

In practice, arresting a ship is a difficult and nearly impossible task. This is because a ship is ever mobile moving from one jurisdiction to the other and may take years before returning to a jurisdiction at which time, a Claimant's claim may have become statute barred.

In this regard, the law gives a Claimant the option of arresting another ship besides from the offending ship provided the offending ship is in the same beneficial ownership as the "other ship". The other ship is usually arrested as "sister ship". Therefore, where a Claimant is unable to arrest the offending ship, it may be able to proceed and arrest that other ship (sister ship) provided the other ship is in the same beneficial ownership as the offending ship. However, the conditions prescribed under **section 5(4)(b) of AJA** must be met.

Section 5(4)(b) of AJA provides that: *In any other claim under section 2 of this Act, where the claim arises in connection with a ship and the person who would be liable on the claim in an action in personam (in this Act referred to as "the relevant person") was, when the cause of action arose, the owner or charterer of or in possession or in control of the ship, an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought against – (b) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner in respect of all the shares in the ship.*

As can be deduced, there is a striking difference in the conditions stipulated by AJA on arresting a ship pursuant to **Section 5(4)(a) and 5(4)(b) of AJA**. Under **section 5(4) (a) of AJA** the court may exercise its *in rem* jurisdiction (to enforce a statutory lien) on the offending ship, only if the relevant person is either the beneficial owner of the ship or the charterer of the ship under a charter by demise. Regarding **section 5(4) (b) of the AJA** however, the court may only exercise its *in rem* jurisdiction for the arrest of a sister ship, i.e., the ship other than the offending ship, only if the sister ship is in the same beneficial ownership as the offending ship.

¹⁰ Beneficial owner of a ship was defined in the case of *The M.V "S Araz" v. Scheep* (1996) 5 NWLR (Pt. 447) 204 by Hon. Justice Muhammad JCA as follows: "a ship would be beneficially owned by a person who, whether he was the legal owner or equitable owner or not, lawfully had full possession and control of her, and by virtue of such possession and control, had all benefit and use of her which a legal or equitable owner would ordinarily have". See also *The Andrea Ursula* (1971) 1 All ER 821. Also, in *The Permina 3001* [1977] 2 MLJ 129, the Singaporean Court of Appeal adopted this definition when it held as follows: "The question is what do the words "beneficially owned as respects all the shares therein" mean in the context of the Act. These words are not defined in the Act. Apart from authority, we would construe them to refer only to such ownership of a ship as is vested in a person who has the right to sell, dispose of or alienate all the shares in that ship. **Our construction would clearly cover the case of a ship owned by a person who, whether he is the legal owner or not, is in any case the equitable owner of all the shares therein**".

¹¹ In the case of *MV Long Island v. Federal Republic of Nigeria* (2018) LPELR-43479 (CA), Hon. Justice Nimpar JCA in defining a demise charter held as follows: "A charter party agreement is generally the contract of hiring the ship or vessel on a given voyage or for a given period of time, generally known by the specific nature as time, usage, management, voyage and demise (bare boat) charter. ... **Under a bare boat charter party, the charterer not only has the use of the chartered vessel, the charterer or hirer also engages or employs its own crew, the master and the crew are the charterer's servants, the charterer puts its own stores, bunkers etc. In other words, the possession and control of the vessel vest in the charterer**". See also *Franco Daval Limited v. Owners of MV Vitali 11 & Anor* (NSC) Vol. 1 @ 630. We note that the term demise charter and bareboat charter are sometimes used interchangeably (as in this authority) but in the real sense of it, there is a fine difference in the terminologies. Whilst in a bareboat charter, the charterer engages his own crew members, in a demise charter, the charterer may be required to engage the crewmen of the shipowner. However, for our discussion, we note that it suffices for the relevant person to either be the demise charterer or a bareboat charterer, in its strict sense.

¹² The burden of proving whether the relevant person is the beneficial owner or demise charterer of the offending ship in the case of **section 5(4)(a) of AJA**; or the beneficial owner of the sister ship in the case of **section 5(4)(b) of AJA**, rests squarely on the Claimant. Usually, an entry in the relevant volume of Lloyd's Register of ships is normally the ground for believing that a ship is owned by a particular person. See *M.V "S Araz" v. Scheep* (1996) 5 NWLR (Pt. 447) 204 supra.

Recommendation and Conclusion

Arresting a ship has severe consequences on the business of ship owners and ship operators as well as on international trade and commerce. An arrested ship would obviously be unable to move out of jurisdiction until the arrest warrant is revoked or security is provided. In effect, the shipowner is unable to put the ship into commercial use for this period. It becomes worse if there are pending obligations to be fulfilled by the ship.

Furthermore, the ship owner is required to pay demurrage and other imposed port dues to the relevant authority for the period of the arrest. Also, the ship itself may have become a wreckage at the time the arrest is set aside. These could expose the ship owner to severe losses or damages running into millions of dollars.

Although the ship owner may claim damages as compensation for a wrongful and unlawful arrest¹³, most times, the compensation is insufficient to meet the injury or damage suffered by the ship owner. It therefore behooves the Claimant, and ultimately the court, to diligently take caution and have due regards to the provisions of **Section 5 of AJA** in an application for the arrest of a ship.

¹³ Section 13(1) of AJA. See *Bronwen Energy Trading Limited v. OAN Overseas Agency (Nig) Limited & Ors* (2014) LPELR-24111 (CA). By section 13(2) of AJA, such an order for damages may be summarily made by the Court.