

# CAVEATS AGAINST ARREST AND RELEASE OF SHIPS IN NIGERIA

## 1. What is a caveat against the arrest of a ship?

A caveat against the arrest of a ship is an undertaking provided by the shipowner (or caveator) to anyone concerned that once an action has been commenced against the vessel, they shall enter an appearance in the action, and within three days either provide bail in the action for the amount stated in the caveat or pay a sum that is equivalent to that amount into court. The Admiralty Jurisdiction Procedure Rules 2011 which provides for the procedure relating to caveats against the arrest of ships in Nigeria defines a caveat as “*an undertaking filed in the Registry by the owner of, or person interested in, a ship or other property to appear to any action in rem filed against that ship or other property and provide bail even though the ship or other property is not arrested*”<sup>1</sup>.

## 2. What is the purpose of a caveat against arrest?

Derived from the Latin word “*cavere*”, which means “*to be on one’s guard*”, a caveat is a warning to a potential arrestor to beware and refrain from arresting the ship unless he can show to the satisfaction of the court that he has (or had) good and sufficient reason to arrest the ship while the caveat was in force. The purpose of a caveat against arrest is to avoid the disruption which the arrest of a ship can cause its owner. It places an obligation on the arresting party to notify the owner of the ship of the commencement of an action *in rem* and the impending arrest, to enable them to lodge security for the claim voluntarily to prevent the arrest of their ships.

## 3. Are caveats against arrest value-based?

- (a) Yes, caveats against arrest are value-based. They are fully effective when the amount specified is equal to, or above the plaintiff's claim. Usually, prospective plaintiffs try to escape the limiting effect of caveats by deliberately claiming sums above the amount specified in the caveats.

<sup>1</sup> Order 1 Rule 5 of the Admiralty Jurisdiction Procedure Rules (AJPR)

#### 4. How does a shipowner know in advance the value of a claim to be brought against it and/or its ship?

By considering the potential liability that may arise from its commercial or contractual relationships. As a safeguard, we advise our clients to ascribe to their caveats against arrest values large enough to cover any anticipated claims against them, with some leeway, considering that the filing fees for caveats are uniform and not determined by the value of the caveat.

#### 5. What are the consequences of failure to make good on a caveat?

- (a) Where a caveat is in force and a writ of summons *in rem* has been served on the caveator, and the caveat had specified an amount not less than the amount claimed, the caveator is required to make good on his undertaking<sup>2</sup>. A caveator who fails to do so will be regarded as having reneged on his undertaking<sup>3</sup>, in which case the plaintiff may apply to the court for a warrant of arrest against the vessel or for an order compelling the caveator to pay into court the amount specified in the caveat or provide bail in the said amount.
- (b) Where the amount stated in a caveat is lower than the amount claimed, an arresting party can call on the shipowner to provide security in the value of the claim, failing which the vessel may be arrested.

#### 6. Does a caveat against arrest totally bar a plaintiff from arresting the vessel in respect of which it is entered?

- (a) No, a caveat against arrest does not bar the arresting party from proceeding with the arrest, but it places them on caution and signifies the intention of the owner of the ship to appear in an action and provide security to avoid the complications of an arrest.
- (b) Where a ship is arrested notwithstanding the existence of a caveat against its arrest, the caveator may apply to the court for the discharge of the warrant of arrest. The court may discharge the warrant of arrest and also award the caveator damages in respect of the losses suffered as a result of the arrest if it is satisfied that the arrest was needless or unjustified.<sup>4</sup> The court may however refuse to discharge the warrant of arrest if in its view the warrant of arrest was issued for a good reason, for example where the amount specified in the caveat was less than the amount claimed or where the caveator failed to make good on the undertaking within the specified time.<sup>5</sup>

#### 7. How does a plaintiff know that a caveat against arrest is in force with respect to the target ship?

- (a) The Admiralty Marshall<sup>6</sup> is required by the Admiralty Jurisdiction Procedure Rules to establish and maintain a register of caveats against arrest (and caveats against release) to record the filing of caveats.<sup>7</sup> The register may be inspected by any person without the payment of any fee.<sup>8</sup>
- (b) Before a warrant to arrest any ship is issued, the party applying for the warrant is required to

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<sup>2</sup> Order 8 Rule 4 (1) & (2) of the AJPR

<sup>3</sup> Order 8 Rule 4 (3) of the AJPR

<sup>4</sup> Order 8 Rule 7 of the AJPR

<sup>5</sup> Order 8 Rule 7 of the AJPR

<sup>6</sup> "Admiralty Marshal" means the Chief Registrar of the Federal High Court. In practice, the Deputy Chief Registrars in the judicial divisions of the Federal High Court perform the functions of the Admiralty Marshall in their respective judicial divisions.

<sup>7</sup> Order 8 Rule 10(1) of the AJPR.

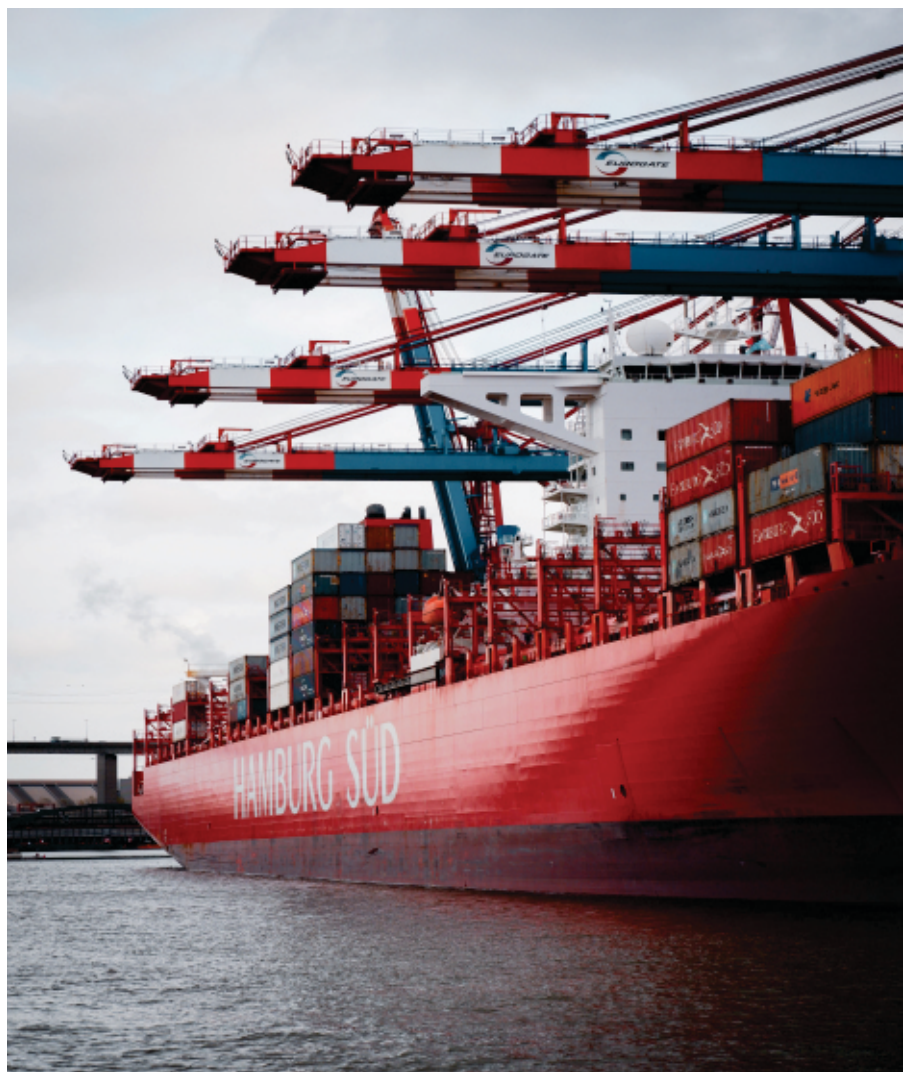
<sup>8</sup> Order 8 Rule 10(2) of the AJPR

search the register of caveats against arrest to ascertain whether there is a caveat in force concerning the ship sought to be arrested.<sup>9</sup> Failure to do this may constitute grounds for the refusal of the application for the warrant of arrest, or its setting aside afterwards.

#### **8. In which court are caveats required to be filed?**

(a) The court that has jurisdiction to order the arrest of a ship is the Federal High Court which is Nigeria's admiralty court. It is at the registry of this same court that caveats against arrest are required to be filed. A caveat is filed by lodging the prescribed form at the registry of the Federal High Court upon the payment of the applicable filing fees.

(b) Although the jurisdiction of the Federal High Court is nationwide and there is only one register of caveats against arrest, the recording of caveats has yet to be centralised. In our experience, a search in the register of caveats kept in the Federal High Court in Lagos is unlikely to reveal the existence of a caveat filed at the Federal High Court in Port Harcourt. In view of this, we advise our clients to file caveats against the arrest of their ships in as many judicial divisions of the Federal High Court as is considered necessary in view of their ships' itinerary within Nigeria's territorial waters, the safest approach being to file caveats in all divisions of the Federal High Court in port areas including Lagos, Port Harcourt, Warri, and Calabar.



#### **9. Is the registry required to accept every caveat presented for filing?**

No, it is not every caveat presented by a caveator that should be accepted at the registry for filing. The Admiralty Marshall may reject any caveat presented for filing if he is not satisfied that the caveator will fulfill his undertaking<sup>10</sup>, although the rejection of a caveat rarely occurs in practice.

#### **10. Is there any restriction on the number of persons entitled to call on a caveat?**

No, there is no limit to the number of persons entitled to call on a caveat. If, hypothetically, the amount

<sup>9</sup> Order 7 Rule 1(2) of the AJPR

<sup>10</sup> Order 8 Rule 2(1) of the AJPR



specified in the caveat against the arrest of a ship is US\$5,000,000 (five million United States Dollars) and 10 plaintiffs institute 10 separate actions *in rem* against that ship each claiming that sum, each of the 10 claimants can call on the caveat. The caveator's potential exposure in making good the undertaking would therefore be US\$5,000,000 x 10. In view of this, we advise our clients against ascribing outlandish values to their caveats.

#### **11. Is a caveat entered after the commencement of an action *in rem* or the issuance of the warrant of arrest valid and/or effective?**

- (a) Yes, a caveat filed after the commencement of an action *in rem* or the issuance of the warrant of arrest is valid and effective. We are not aware of any Nigerian law that stipulates a deadline for the filing of a caveat against the arrest of a ship, as it relates to a particular claim. Since the sole purpose of a search in the caveats register is to enable the plaintiff to ascertain whether a caveat is in force, the filing of a caveat (and notification to the plaintiff of its existence) at any time prior to the execution of the warrant of arrest is valid and effective.
- (b) Where a caveat against arrest is filed after the action is commenced, a sealed copy of the writ of summons is served on the caveator as soon as practicable after the plaintiff becomes aware of the existence of the caveat<sup>11</sup>. The shipowner, desirous of forestalling the arrest of his ship, may then comply with the undertaking contained in the caveat.

#### **12. What is the lifespan of a caveat?**

- (a) A caveat expires one (1) year from the date of its filing except it is withdrawn or set aside earlier<sup>12</sup>. To maintain the protection provided by a caveat, it is advisable to file a new caveat before the expiration of an existing caveat.<sup>13</sup> While a caveat may only be set aside by an order of court, a caveat may be withdrawn by filing an instrument of withdrawal.<sup>14</sup>
- (b) Where a caveator no longer wishes to appear in an action *in rem* against a ship and provide bail or pay the amount claimed, it is advisable for the caveator to immediately file an instrument of withdrawal of the caveat. This is because as long as a caveat remains in force, the caveator remains liable to make good on the undertaking to appear and provide security.

#### **13. What is a caveat against the release of a vessel?**

- (a) Where a ship is under arrest in a proceeding, a person who claims to have a right of action *in rem* against the ship may instead of obtaining a further arrest of the ship, provide an undertaking in damages and file a caveat against the release of the ship from arrest.<sup>15</sup>
- (b) Upon filing a caveat against the release of the ship, the person who entered the caveat against release is entitled to be served a copy of any application for the release of the ship to enable him to respond to the same.<sup>16</sup> He is also jointly and severally liable with the arrestor to pay the Admiralty Marshall's expenses in relation to the arrest of the ship.<sup>17</sup>

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<sup>11</sup> Order 6 Rule 8 of the AJPR

<sup>12</sup> Order 8 Rule 8 (1) of the AJPR

<sup>13</sup> Order 8 Rule 8(2) of the AJPR

<sup>14</sup> Order 8 Rule 9 of the AJPR

<sup>15</sup> Order 8 Rule 6 of the AJPR

<sup>16</sup> Order 10 Rule 6 of the AJPR

<sup>17</sup> Order 9 Rule 2(2)(c) of the AJPR



For further discussion on this subject, do feel free to get in touch with:

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