

## **OBTAINING LOCAL SECURITY IN ANTICIPATION OF FOREIGN MARITIME CLAIMS.**

Usually parties to contracts for carriage of goods by sea prescribe that disputes arising goods by sea prescribe that disputes arising between them be resolved by arbitral tribunals or courts of a particular country. It is not uncommon for disputes in respect of such contracts to arise in countries outside forum of choice of the parties.

This may warrant Plaintiff taking preemptive steps in such jurisdiction, for the limited purpose of obtaining security prior to commencing the substantive suit at the proper forum. Obtaining this security from the local court and thereafter proceeding to the appropriate forum for the determination of the appropriate forum for the determination of the claim is a course, which may be fraught with difficulty.

Firstly, under Nigerian law, where an action is filed for the purpose of obtaining security, the local court may assume jurisdiction over the substantive suit notwithstanding the foreign jurisdiction clause. Proceedings will only be suspended as a matter of discretion. See the Nigerian

Supreme Court case of SONNAR (NIG.) LTD. -V-  
NORDWIND NSC VOL. 3 1987-1990.

Secondly, the party who commences the proceedings in the local court may subsequent to obtaining security apply for a suspension of proceedings, pending determination of the dispute in a foreign court. Such party may be afflicted by waiver, that is to say, he may be considered to have taken such steps in the local court as to forfeit the right to have the dispute determined in the foreign jurisdiction.

Thirdly, what is the position of the security obtained in the local court in the event that proceedings in the substantive action are suspended? Could such security be applied towards settlement of the judgment or award given by the foreign court or tribunal?

Section 10(1) of the Nigerian Admiralty Jurisdiction Decree 1991 provides as follows:

*“10(1) without prejudice to any other power of the court,  
where –*

*It appears to the court in which a proceeding commenced  
under this Decree is pending that the*

- *proceeding should be stayed or dismissed on the ground that the claim concerned should be determined by arbitration (whether in Nigeria or elsewhere) or by a court of a foreign country; and*
- *A ship or other property is under arrest in the proceeding, the court may order that the proceeding be stayed on condition that the arrest and detention of the ship or property shall stay or satisfactory security for their release be given as security for the satisfaction of any award or judgment that may be made in the arbitration or in a proceeding in the court of the foreign country.*

The Nigerian Court of Appeal in M.V. "S ARAZ" -V- SCHEEP 1996 5 NWLR Part 447 Pg. 204 held that the courts in Nigeria, in admiralty actions in rem, have power to suspend proceedings before them pending determination of the substantive matter by arbitration or legal proceedings abroad and security already obtained in the Nigerian court may be applied towards the satisfaction of the award or judgment of the foreign tribunal or court as the case may be.

However, the court admonished that Section 10(1) could only be properly invoked when proceedings have not yet been commenced at the foreign forum.

In M.V “S ARAZ” supra, arbitral proceedings were already in progress in London. In consequences of which the court refused a suspension of proceedings or indeed any other relief under this section.

It was observed that as *“the only purpose of bringing, this action is to obtain security from the appellants to ensure payment of any arbitration award that may be made in favor of the respondents in an arbitration which has commenced in London”* the provisions of section 10(1) of the Act could not be applied.

The claim in that case was solely for “the sum of 250,000 US dollars as security for damages ..... which claim is presently under arbitration in London”

This decision is consistent with the principle that “there cannot be two tribunals each with jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision”.

It also underscores the point that a security is supposed to preserve an action and not the converse; so that an action filed expressly for the sole purpose of obtaining security is incompetent.

Consequently, if an admiralty action in rem (i.e. an action against a ship or its cargo which entitles the plaintiff to arrest such ship or cargo) is filed when no other proceeding is pending at the foreign court or tribunal, then the power of court to suspend or dismiss the action and preserve whatever security that may already have been obtained for the purpose of satisfying the award or judgment of the foreign tribunal may be validly invoked.

The issue of waiver raised at the project under the second problem as to the position of the Plaintiff who files an action in Nigeria and then applies for suspension of proceedings after security for the claim has been obtained is not clear under Nigerian law.

Under the Nigerian Admiralty Jurisdiction Rules of 1993, a plaintiff in an admiralty action in rem must file a statement of

claim before a Vessel or cargo can be arrested. Filings of pleadings have always been regarded as a fresh step in an action, sufficient to constitute waiver of a party's right to have disputes resolved via arbitration.

However, Section 4(1) of the Arbitration Act, Laws of The Federation of Nigeria 1990 provides an escape route:

It provides thus:

“A court before which an action which is the subject of an arbitration agreement is brought, shall if any party so request at anytime before submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the parties to arbitration.”

This suggests that a plaintiff may obtain a suspension of proceedings if his application is made not later than when submitting his first statement on the substance of the dispute. A statement on the substance of the dispute means pleadings.

It is to be noted that the benefit of this provision would equally apply to non-arbitral proceedings. Although it is arguable that in this context the discretion to stay (not being circumscribed

by statute) is more flexible and thus could still be exercised even after the pleadings have been filed.

It is our view that a plaintiff in an admiralty action in rem may only obtain a suspension of proceedings for the purpose of pursuing his substantive claim abroad if at the time of the filing of the statement of claim and application for security, he files an application for suspension of proceedings.

Such plaintiff would proceed with the application for security first and thereafter proceed with the application for suspension of proceedings.

## **CONCLUSION**

- A court in Nigeria can assume jurisdiction over the substantive claim in an admiralty action in rem notwithstanding a foreign jurisdiction clause.
- It could alternatively make an order for security and proceed to suspend proceedings pending the determination of the substantive suit before the foreign court or arbitral tribunal.
- This discretion can only be exercised when proceedings have not yet been commenced at the foreign court or tribunal.

- The Nigerian court can in addition order that the security already obtained be applied towards the satisfaction of the foreign award or judgment.
- Generally, the plaintiff may be disentitled to the discretionary order of suspension of proceedings as he would have been deemed to have submitted to jurisdiction having filed pleadings at the commencement of the action (as required under our local rules).
- However this problem can be surmounted where such plaintiff files his application for suspension at the same time as his application for security.

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