

COVID-19 AND THE NIGERIAN MARITIME SECTOR: Lessons and Way Forward: Maritime Dispute Resolution Perspective.¹

BACKGROUND

- The Nigerian maritime sector contributes a lot to the Nigerian economy, but like any other sector involving human ventures, it has its fair share of claims or disputes which are resolved by litigation (starting from Federal High Court ('FHC'), or arbitration or mediation where agreed to by parties to maritime contracts.
- "Admiralty has so much affinity with maritime law, so much so that the words are used interchangeably in marine practice." See **Integrated Timber & Plywood Products Ltd v UBN Plc** (2006) LPELR-1519(SC).

EFFECT OF COVID-19 ON MARITIME CLAIM/DISPUTE RESOLUTION

1. **Standstill, and subsequently delay, in the hearing and determination of maritime disputes or claims.**

- (i) In March 2020, the Federal and Lagos State Governments and the National Judicial Council on 23 March 2020, took intervening actions to curb the spread of Corona virus and Corona virus disease ("COVID-19") by 'lockdown', suspension of court proceedings or hearings, social or physical distancing, mandatory 14-day quarantine period for those returning to Nigeria, suspension of international flights, ban on inter-State movements etc
- (ii) Judges of the Federal High Court ("FHC) responsible for hearing and determining maritime claims or disputes could not go to Court to hear and determine maritime claims and disputes, and so were the judicial staff that were to help them.
- (iii) Ships and other property that ought to have been arrested to get pre-judgement security for the satisfaction of maritime claims or released from arrest, could not be arrested, or released. Continuous judicial detention of ships or cargo that would have been released from arrest but for COVID-19 Pandemic, occasioned increased costs including demurrage losses to, and breaches of contracts by, cargo and ship owners.
- (iv) "Admiralty matters by universal practice and procedure, must be given expeditious trial with utmost dispatch." See **Tiwani Ltd. v. C.T.M.B. Ltd. [1997] 8 N.W.L.R. (Pt. 515) 140 at 146.**

This is because:-

- Admiralty claims, or disputes usually involve heavy sums of money and goods (ship and cargo) or port assets of colossal sums of money.
- When maritime claims and disputes are not quickly resolved, lots of financial losses occur to owners, seafarers, etc that adversely affect businesses and individuals and any nation's economy.
- Ships and other maritime property that were under judicial arrest when the lockdown took effect and the FHC was closed to business, that could not be released, could not continue with their trade and were exposed to increased costs, claims of breaches of charterparties, demurrage etc.
- Ships and other maritime property that ought to have been judicially arrested in order to obtain a pre-judgment security to satisfy any judgment the plaintiff or counterclaimant

¹ Being a text of the paper delivered by Mr. Mike Igbokwe SAN,FCI Arb, FBR, at the Mike Igbokwe (SAN) & Co Zoom Mi Webinar Series on COVID-19 AND THE NIGERIAN MARITIME SECTOR: Lessons and the Way Forward. 12.30pm Wed 10/6/2020.

may obtain after the trial of his claim or counterclaim in court, could not be arrested. They escaped justice and left Nigerian admiralty actions in rem claimants without security for their claims! These Nigerian claimants may end up resorting to admiralty actions in personam that leaves them without security or abandon such claims at their expense.

- Pre-judgement security obtainable by judicial arrest is at the centre of admiralty actions and it is one of the features of admiralty actions in rem, which distinguish admiralty actions in rem from other civil causes and matters, and make them sui generis. Only the FHC can make such orders.

2. Denial of opportunity to Maritime lawyers to practice their trade.

- Covid-19 Pandemic lockdown prevented maritime lawyers from having access to courts to conduct their clients' cases in the resolution of maritime claims or disputes that were pending or about coming up or that arose, during the 'lockdown'.
- Lawyers' income dwindled and, in some cases, was nil during the lockdown.
- Some lawyers could not meet costs of running their practice, and had to reduce or not pay salaries, and some lawyers lost their jobs and some could not be employed due to downsizing.
- NBA had to set up '**NBA COVID-19 Relief Fund**' to raise fund from lawyers to help lawyers that had been adversely affected by Covid-19 Pandemic.
- Frustration due to boredom and lack of work to do and suspension of court proceedings.

3. Risk of Anarchy

- Lack of or delay or suspension of access, or resort of litigants to FHC to resolve their claims, denied them justice as justice delayed is justice denied.
- Reduced confidence in courts by parties and resort to self-help for resolution of maritime claims/disputes.

4. Lawyers, paralegal staff and Judges were healthier.

- Those having work to do, worked from home or remote areas with less stress and pressure of work than usual.
- Those with pressure-induced ailments (high blood pressure, high blood sugar, diabetes etc) rested well because they caught up with lost sleep, and took time out to exercise their bodies more.
- They ate and relaxed well, watched movies they never before made out time or were able, to watch, had no visitors or parties (social activities) to attend, and were not in a hurry to rush to court to conduct or hear maritime cases.
- They became more health-conscious and more hygiene-conscious than the pre-Covid-19 era, due to WHO's Protocol on how to prevent infection by and spread of Corona virus.

5. Increased defaults and breaches of maritime contracts

- Inability to perform or breaches of maritime contracts (eg charterparties, ship purchase MOA, shipbuilding, ship delivery, ship finance contracts etc); defaults in paying for maritime services, recession, insolvency and restructuring of shipping companies and their ship mortgages and ship finance contracts due to 'lockdown' and non-access to business premises leading to increased disputes and claims.
- Potential work for lawyers, corporate insolvency and restructuring practitioners, and the FHC.

- **Force majeure** clauses in charter parties and other maritime contracts and frustration may have to be invoked in appropriate cases as defences due to delays or impossibilities of performances created by COVID-19 Pandemic and Government measures introduced to curb the spread of C-virus.

6. Resort to Virtual Hearing & Electronic filing

(i) **Virtual hearing of cases by video** conferencing coming to the rescue. See the **FHC OF NIGERIA PRACTICE DIRECTIONS 2020 FOR THE COVID-19 PERIOD ('COVID-19 PD')** made on **18 May 2020** by the Hon. Chief Judge (CJ) of the FHC.

- Covid-19 PD validly made because the CJ FHC has powers to issue Practice Directions for the realization of speedy, just and effective administration of justice. See Order 57 rules 3 & 4 Federal High Court (Civil Procedure) Rules, **2019** ("FHC Rules").

(ii) **Electronic filing of court processes**

- (a) Order 58 FHC Rules has made provisions for it but it is not yet implemented or fully implemented. Communication and Service Centre, E-Filing Unit and E-Filing Registrar to take charge of it as required by Order 58 FHC Rules, not yet in place.
- (b) E-filing is faster, cheaper, and more convenient, and will quicken the prosecution and determination of maritime claims or disputes.
- (c) By Part C paragraph 1 COVID-19 PD, '**parties shall** adopt the e-filing provisions as contained in the FHC Rules.' The word 'shall', is usually mandatory but can be interpreted as discretionary in some cases.
- (d) By O. 58 rr 4 and 6 FHC Rules, the **Plaintiff determines** the appropriate method of filing to adopt and if he files the matter electronically, he shall continue with the same method until the determination of the matter. **So, in effect from the combined reading of Covid 19 PD and O. 58 FHC Rules,, if the Plaintiff adopts e-filing, the Defendant(s) shall adopt it too and no party can change it to, or resort to, physical filing, throughout the case.**

(iii) **Comments on some provisions of the COVID-19 PD**

- Physical documents filed along with e-documents shall be kept in isolation ('quarantined') for a period of 5 days: **Part C 2(b) COvid-19 PD**. So, it not only human beings that now go for quarantine due to COVID-19; physical documents must also go for it.
- It implies that in an admiralty action in rem accompanied by a Motion ex parte for the arrest of a ship or other property and an urgency affidavit based on electronic and physical documents, the application for arrest will not be heard and determined until after 5 days by which time the ship or other property would have escaped from the jurisdiction of the FHC.
- It destroys the time gained by a Plaintiff in an admiralty action in rem to effect arrest of ship or other property by Order 3 rule 3 AJPR, that dispenses with witness statement on oath, list of witnesses and documents at the time of filing an action in rem but allows them to be filed within 7 days of filing the writ of summons.
- I believe the reason for the 5-day quarantine of the physical documents filed along with e-documents is to prevent physical documents that are infected by Corona-virus from infecting judicial officers and staff with Covid-19 as the corona virus cannot survive a long period of time. However, the protection of judicial officers and staff can be achieved by using modern technology to disinfect or decontaminate the physical documents before their use. This is

done using a special Microwave that dries and disinfects paper documents in a short time. Please see

https://www.worldscientific.com/doi/pdf/10.1142/9789812771957_0139

- (a) By Part D paragraphs 1 and 2 of the COVID -19 PD, the service of court processes and hearing notices may be effected by email, WhatsApp or as may be directed by the Court.
- It is impracticable to serve a writ of summons and statement of claim etc in an admiralty action in rem on a ship or cargo or freight by email or WhatsApp when by Order 6 AJPR they are either to be affixed on the mast of a ship or attached to a conspicuous part of the ship or affixed on the cargo or delivered to the Master by hand
 - If such processes shall be served 'as may be directed by the Court', it would entail delay in preparing, filing an application for, arguing, and obtaining, the court's directives for how they should be served. In my view, to retain the speed required in admiralty proceedings, COvid-19 PD should have retained the mode of service in the AJPR without requiring going back to Court to seek the Court's directives for how to serve them after AJPR has specified the mode of their service.
 - No provision as to which should prevail in the event of a conflict between AJPR and the COVID-19 PD, since both of them have equal force and effect as subsidiary legislations of the FHC.
 - No provision for audio conferencing or teleconferencing or webcam in hearing and determining urgent maritime applications.
- (c) Parties and their counsel are to agree on virtual proceedings and liaise with the Registrar of the Court to schedule the hearing. See Part F paragraph 3 Covid -19 PD.
- The drawback in this rule is that a Defendant who does not want the speedy and efficient virtual hearing mode to be applicable to the recovery of the debt he is owing or who want the case against him to be delayed, will refuse the request for virtual hearing made by the Plaintiff.
 - The Plaintiff should have been left alone to initiate virtual hearing with the Court's Registrar and when the Defendant is served with processes showing that it is a case that would be virtually heard and determined, he would not have no other choice than to follow suit.
- (d) Judge and counsel shall be properly robed for virtual proceedings.
- Is proper robes full robes as when appearing in court in physical hearing with gowns and wigs or gowns without wigs or just business suits and ties?. Would counsel bow to the Judge or be standing or sitting to address the Court or when being addressed by the Court? Proper robing and sitting or standing should have been defined for avoidance of doubt.
- (e) Access to justice by the poor who do not have access to the technology driving Zoom WhatsApp and Skype not addressed.

- Access to justice should not be dependent on access to high quality technology.² There are still some areas in Nigeria which are so remote that Internet connectivity and power supply are either non-existent or erratic or the cost of Internet data are not affordable by litigants, which are bound to affect their ability to connect or have access to virtual proceedings. Poverty, infrastructural deficiency, illiteracy, fraud and forgeries in documents uploaded, may also be drawbacks and deny access to justice.
- Many of the courts in the FHC still lack the technological or digital infrastructure to conduct virtual hearing of cases. At the Webinar organised by NBA Lagos last week, Liman J of the FHC said the FHC had had for 3 years infrastructure for virtual hearing in 7 of FHC (courts 2,4,5,6,7,9 and 11). In my view, this is a very infinitesimal number to be able to have effective virtual hearing by the Court considering that it has 64 Judges as stated on its website. Question begging for an answer is how soon would it install similar infrastructure in the remaining other 57 Courts for the benefit of litigants?
- There should be a provision that where it is impossible for some people to take part because of a lack of access to reliable internet connection or the technology platform chosen; in the interest of fair hearing, the Judge may direct in-person hearing.
- In order to make virtual proceedings accessible and open, members of the public and the media wishing to observe a virtual hearing should have been given an opportunity to complete and return online, the appropriate registration form (in respect of each case to be heard). Thereafter, he will be sent a link to the proceedings on the day before hearing is scheduled to proceed but without being allowed to use Zoom camera and microphone functions during the hearings.

(iv) The National Assembly has considered a Bill to amend the 1999 Constitution to specifically provide for virtual court proceedings by adding to Section 36(3) the following proviso:-

“Provided that nothing in this subsection shall invalidate proceedings of a court or proceedings of a tribunal relating to matters mentioned in subsection (1) of this section (including the announcement of the decisions of court or tribunal) where same is held by remote hearing or any virtual means now in existence or yet to be developed.

Section 36 subsection (4) is hereby amended by addition of subparagraph (c) as follows:-

- (b) nothing in the foregoing paragraph shall invalidate proceedings of a court or the proceedings of a tribunal relating to matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal) where same

² See Richard Butt *et al*, **COVID-19 Disputes: Zooming ahead - the challenges of virtual hearings in international arbitration** available at <https://www.clydeco.com/insight/article/covid-19-disputes-zooming-ahead-the-real-life-challenges-of-virtual-hearing> accessed on 3 May 2020.

is held by remote hearing or any virtual means now in existence if yet to be developed.

Section 36 subsection of (1) is hereby amended by addition of the following subsection 13: In this section, 'remote hearing' means proceedings or hearings of a court conducted via Zoom, Skype, Whatsapp video or any other social platform, or technological innovation."

- (v) The AG Lagos State recently filed a suit against the Attorney-General of the Federation & the National Assembly to determine inter alia:
- (i) "whether in view of the powers conferred on the Chief Judge of a State under Section 274 of the Constitution, and in particular, the Chief Judge of Lagos State having exercised such power to regulate the practice and procedure of the High Court of Lagos State through the issuance of Practice Directions for Virtual Hearings dated 4th and 15th May 2020, the National Assembly can usurp the powers of the Chief Judge of Lagos State under Section 274 of the Constitution by commencing the process for the amendment of Section 36(3) and (4) of the Constitution to include virtual or remote hearings?"
 - (ii) A declaration that extant provisions of the Constitution especially Sections 36(3) and (4) are adequate to accommodate virtual or remote hearings of any kind whether by way of Zoom, Microsoft Teams, WhatsApp, Skype or any other audio visual or video-conference platform as provided for in Practice Directions issued by the Chief Judge of Lagos State Stated dated 4th and 15 May 2020.
 - (iii) Declaration that the Bill presented before the 2nd Defendant seeking to specifically include remote hearing in the Constitution constitutes a usurpation of judicial function."
- (vi) Due to this case, the constitutionality of virtual hearing is subjudice, I will not want to comment or offer any opinion on the constitutionality of virtual hearing here.

SUGGESTIONS ON WAY FORWARD

- (1) Virtual hearing should be permanent in the FHC and applied in all its proceedings henceforth and not just for the period of the COVID-19 Pandemic as revealed by the Covid-19 PD, due to its merits and be run side-by-side with in-person or physical hearing. It has come to stay as a part of 'the new normal' all over the world.
- The **Justice Reform Project** in its letter to the CJN dated 14 April 2020 requested for a temporary deployment and subsequent permanent technological upgrade of technology for the hearing and determination of case.
 - On 6 May 2020, it was revealed³ that the Committee set up by the Chief Justice of Nigeria to come up with urgent practical strategic measures to ensure courts continued to function despite the lockdown and COVID-19 challenges, submitted its report on 5 May 2020. By that account, the Committee recommended the adoption of remote hearing by courts in view of the reality of the pandemic and adopted the

³ www.barrister.ng.com

Circular No. NJC/CIR/HOC/H/656 dated 6 May 2020 of the National Judicial Council ("NJC") recommending that all heads of courts and judicial bodies 'continue to include the use of appropriate technology on virtual or remote hearings' and provide strategic measures and guidance for courts.

- If the non-resolution of maritime disputes resolution or non-resolution by the FHC of maritime disputes due to the COVID-19 induced intervening actions, had not been addressed by the FHC Practice Directions 2020 for the Covid-19 Period; more losses would have been incurred, confidence lost in the FHC, self-help resorted to that could have led to anarchy.
 - Now that the FHC is fully prepared for virtual hearing and e-filing, it should proceed with their permanent and continuous use in maritime claims/despise without further delays.
 - Whether virtual proceedings are introduced by the amendment of the 1999 Constitution as proposed in the Bill before the National Assembly, or by the FHC Covid-19 PD, virtual hearing has come to stay as a part of the 'new normal' in our maritime proceedings and should be used in all maritime claims and disputes.
 - Virtual hearing in Nigeria is still a work-in-progress which would need some more time especially for the provisions of digital infrastructure, to find its feet and its benefits attained.
 - FHC started well but should fine-tune and improve on the provisions of the Covid-19 PD already highlighted in this presentation.
- (2) FHC should urgently fully implement Order 58 of the FHC on e-filing in all its courts, so that all maritime litigants and courts can start using same and enjoying its benefits.
- (3) FHC should be sufficiently funded to allocate enough funds to acquire the hi-tech needed for virtual hearing infrastructure since it is the way to go in the 'new normal' age.
- (4) There is urgent need to reform of the Admiralty Jurisdiction Act (AJA) 1991 & Admiralty Jurisdiction Procedure Rules (AJPR) 2011 to quicken administration of justice in maritime claims and disputes.
- **Nigerian Maritime Law Association (NMLA)** set up **The Admiralty Law and Procedure Reform Committee** to review the AJA, AJPR and their problem areas including difficult court cases hampering the quick determination of maritime claims/disputes. The Committee submitted its report to NMLA's EXCO last month. Even though I am the 2nd VP of NMLA, I am unable to make the contents of the report public until its EXCO has taken a final decision on the report.
 - AJA is 29 years old and has never been amended since it was enacted. AJPR is 9 years old. They are both long overdue for amendment to meet modern trends, international best practices that considers our local circumstances, enhance international trade and fast and efficient maritime dispute resolution.
 - In making Rules, it would be necessary for the FHC to take the legal practitioners along to enable them make inputs.
- (5) Fast-Tracking of hearing and determination of maritime claims/disputes and appeals.
- Need to attract to the FHC, lawyers that are educated and trained on maritime law because it is a specialized area of law that is sui generis.
 - Regular and continuous training of FHC Judges on maritime law apart from the trainings organized by Nigerian Shippers Council and Nigerian Maritime Administration and Safety Agency. NMLA has already offered to conduct such training to strengthen the maritime capacity of Judges of FHC.

- A Judge of the FHC or JCA or JSC trained or educated or experienced in maritime law, will quickly determine maritime claims/disputes and enhance the administration of justice therein.
- Foreign direct investment (which Nigerian economy needs so much to grow), considers as a paramount consideration, the nature and speed of dispute resolution mechanism in a country.
- With the introduction of e-filing and virtual hearing in the FHC, the time has come for the introduction of teleconferencing in the hearing and determination of urgent maritime applications. For instance, an applicant for the ex parte arrest of ship or other property or interim application for mareva injunction, should after e-filing the processes, be able to make from his office or home, an audio or telephone conference with the Judge of the Federal High Court in his office or home, during which the application can be heard and determined one way or the other.

I thank you for listening.

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10 June 2020

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