IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

(EXERCISING ITS ADMIRALTY JURISDICTION)

CASE NO: A42/2014

Name of Ship: MV 'Cecilia B'

In the matter between:

Atakas Ticaret Ve Nakliyat AS	Applicant
and	
Glencore International AG	First Respondent
Richards Bay Coal Terminal (Pty) Ltd	Second Respondent
Owners of the MV 'Cecilia B'	Third Respondent

Judgment

Lopes, J

[1] This is an application for joinder in terms of s5 of the Admiralty Jurisdiction Regulation Act, 1983, ('the Admiralty Act') read with uniform rule 10. The applicant is Atakas Ticaret Ve Nakliyat AS ('Atakas'). It instituted an action in personam against Richards Bay Coal Terminal (Pty) Ltd ('RBCT'). The owners of the MV 'Cecilia B' ('the owners') were joined in that action as second defendant. Atakas now seeks an order joining Glencore International AG ('Glencore') as the third defendant in the action.

[2] The background to the action may be summarised as follows:

(a) On the 18th December 2012 Atakas purchased four cargoes of coal from Glencore in terms of a sale agreement.

(b) Atakas chartered the MV 'Cecilia B' ('the ship') from EFE Shipping & Trading Limited of Istanbul ('EFE') to carry the third of the four cargoes of coal, from the Richards Bay Coal Terminal in KwaZulu-Natal, to Turkey.

(c) EFE had in turn charted the ship from Cargill International SA of Geneva, which had in turn chartered it from the owners.

(d) Pursuant to the chartering arrangements, the ship berthed at Richards Bay Coal Terminal, which is operated by RBCT, for the purpose of loading the third cargo of coal. On the 30th October 2013, RBCT completed loading the coal, and the hatch covers were closed and secured. A short while thereafter, an explosion occurred in the number six hold.

(e) The explosion was occasioned by a reaction caused by loading heated coal into a confined space. The cargo of coal was then unloaded, and the voyage abandoned.

(f) Atakas claimed that it had suffered loss and damage, and had incurred the risk of being liable to indemnify other parties in the contractual chartering chain.

(g) On the 26th June 2014, Atakas caused the action in personam to be instituted against RBCT under the above case number. On the 17th December 2015 RBCT delivered its plea in the action, and on the 23rd February 2016, by agreement between Atakas and RBCT, the owners were joined in the action as second defendant. The owners delivered their plea on the 17th May 2016.

[3] On the 28th February 2017 Atakas issued this application to join Glencore as the third defendant in the action. RBCT and the owners initially opposed the joinder

application, but subsequently withdrew their opposition. Glencore persists in its opposition to the joinder, and answering and replying affidavits were delivered in due course. At the outset of the hearing of this application, Atakas sought permission to deliver a fourth affidavit. RBCT had discovered in the action, after Atakas had delivered its founding and replying affidavits in this application. Documents received in the discovery process, and which were not previously available to Atakas, supported the case sought to be proved by Atakas. In my view, a proper case has been established for the admission of the fourth affidavit. There can be no question of any prejudice to any of the respondents, particularly Glencore, which did not seek an adjournment to deal with the fourth affidavit. I accordingly granted an order admitting the fourth affidavit.

[4] Atakas seeks to join Glencore pursuant to the provisions s5(1) of the Admiralty Jurisdiction Regulation Act, 1983 ('the Admiralty Act'), which provides:

'A court may in the exercise of its admiralty jurisdiction permit the joinder in proceedings in terms of this Act of any person against whom any party to those proceedings has a claim, whether jointly with, or separately from, any party to those proceedings, or from whom any party to those proceedings is entitled to claim a contribution or an indemnification, or in respect of whom any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between the party and the person to be joined and which should be determined in such a manner as to bind that person, whether or not the claim against the latter is a maritime claim and notwithstanding the fact that he is not otherwise amenable to the jurisdiction of the court, whether by reason of the absence of attachment of his property or otherwise.'

[5] The action which Atakas brought against RBCT and the owners is founded in delict. Atakas' cause of action against Glencore is founded in contract. There is no reason why both causes of action cannot be dealt with in the same action. The parties were agreed that the test for joinder in terms of s5(1) of the Admiralty Act is that the applicant is required to establish a prima facie case against the person sought to be joined. Convenience may also be a relevant factor. The object of s5(1)

is clearly to avoid a multiplicity of proceedings concerning the same dispute. Otherwise, the undesirable situation could arise of courts in different countries adjudicating the same issues arising out of the same set of facts. A court hearing an application in terms of s5(1), retains a discretion to permit or refuse a joinder. See: MY 'Summit One': *Farocean Maine (Pty) Ltd v Malacca Holdings Ltd* 2005 (1) SA 428 (SCA) para 17–18.

[6] In its opposing affidavit, Glencore raised three defences to the joinder application:

(a) Clause 17 of the sale agreement provides for the referral of disputes to arbitration in the following terms:

'Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration (LCIA), which Rules are deemed to be incorporated by reference into this clause. The seat, or legal place, of arbitration shall be London. The language to be used in the arbitration shall be English…'

As the action will inevitably be stayed in terms of s7(1) of the Admiralty Act, pending the resolution of the arbitration proceedings, it would be futile to order a joinder at this stage.

(b) The provisions of the Prescription Act, 1969 are applicable to Atakas' cause of action. Any joinder of Glencore would be futile, inasmuch as the claim of Atakas against Glencore has prescribed. The three year period of prescription set out in s11(d) of the Prescription Act 1969 expired on the 28th October 2016, and this application for joinder was only launched on the 27th February 2017. Three years' elapsed after the cause of action had arisen, and prior to the institution of the action.

(c) Clause 25 of the sale agreement provides that:

'In no event shall Seller be liable for any indirect, special, incidental or consequential damages (including loss of profits) resulting from Sellers' performance or non-performance of its obligations hereunder or any third party's purchase, use, possession or disposal of any of the Material.'

> The damages claimed by Atakas are too remote, and irrecoverable as they constitute 'indirect, special, incidental or consequential damages' falling within the limitation of clause 25.

[7] In argument, Mr *Wragge* SC, who appeared for Glencore, indicated that he would not rely on (b) and (c) above. Instead he raised a defence which was taken for the first time in his heads of argument. He submitted that clause 17 of the sale agreement falls within the definition of an 'arbitration agreement' as defined in s1 of the International Arbitration Act, 2017 ('the IA Act') which came into force on the 20th December 2017. In terms of the IA Act, read with Article 8 of the Model Law incorporated therein, a court is required to stay proceedings and refer a matter to arbitration if a party so requests, unless it finds the agreement or the referral to be null and void, inoperative or incapable of being performed.

[8] I deal firstly with the applicability of the IA Act, and thereafter, if necessary, the submission that in terms of s7(1) of the Admiralty Act it is inevitable that the action will be stayed pending the outcome of the arbitration.

[9] Mr *Wragge* referred to the following sections of the IA Act:

> '**3. Objects of Act. –** The objects of the Act are to –
>
> (a) facilitate the use of arbitration as a method of resolving international commercial disputes;
> (b) adopt the Model Law for use in international commercial disputes;
> (c) facilitate the recognition and enforcement of certain arbitration agreements and arbitral awards; and
> (d) give effect to the obligations of the Republic under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the text of which is set out in Schedule 3 to this Act, subject to the provisions of the Constitution.
>
> **6. Model Law to have force of law**
>
> The Model Law applies in the Republic subject to the provisions of this Act.

7. Matters subject to international commercial arbitration

(1) For the purposes of this Chapter, any international commercial dispute which the parties have agreed to submit to arbitration under an arbitration agreement and which relates to a matter which the parties are entitled to dispose of by agreement may be determined by arbitration, unless:-

(a) such a dispute is not capable of determination by arbitration under any law of the Republic; or

(b) the arbitration agreement is contrary to the public policy of the Republic.

(2) Arbitration may not be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an arbitration agreement.

20. Transitional provisions

(1) Chapter 2 of this Act applies to international commercial arbitration agreements whether they entered into force before or after the commencement of Chapter 2 of this Act and to every arbitration under such an agreement but this section does not apply to arbitral proceedings which commenced before Chapter 2 of this Act came into force.

(2) For purposes of this section, the date of commencement of the arbitration proceedings is the date upon which the parties agree as the date on which the arbitral proceedings commenced or failing such agreement, on the date of receipt by the respondent of a request for the dispute to be referred to arbitration.'

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[10] Mr *Wragge* submitted that the effect of the IA Act is to curtail the discretion of a court in admiralty with regard to s7(1) of the Admiralty Act. The ambit of a court in admiralty being able to decline to exercise its jurisdiction pursuant to an arbitration agreement as contained in s7(1) of the Admiralty Act, will no longer apply to international arbitration agreements.

[11] Section 1 of the IA Act provides that an 'arbitration agreement' means an arbitration agreement referred to in article 7 of the Model Law (the Model Law refers to the UNCITRAL Model Law on International Commercial Arbitration adopted by the

United Nations Commission on International Trade Law). Mr *Wragge* submitted that the IA Act was applicable, and in support of this submission, he referred to s20 of the IA Act which states that chapter 2 of the IA Act applies to international commercial arbitration agreements whether they were entered into force before or after the commencement of that chapter. Section 20 of the IA Act does not apply to arbitral proceedings which commenced before chapter 2 of the IA Act came into force. It has not been suggested that the arbitration proceeding foreshadowed in clause 17 has commenced.

[12] The logical sequence of Mr *Wragge's* argument is, as I understand it, as follows:

(a) Atakas and Glencore concluded the sale agreement which contained the referral of disputes to arbitration in London.

(b) Section 1 of the IA Act defines an arbitration agreement as 'an arbitration agreement referred to in article 7 of the Model Law;'

Article 7 of the Model Law provides that an arbitration agreement is:

'… an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.'

It is also required that the arbitration agreement shall be in writing.

(c) Section 7 of the IA Act sets out when an arbitration is not applicable, and it is not suggested that s7 is applicable here.

(d) Clause 17 of the agreement between Atakas and Glencore is, therefore, an international arbitration agreement.

(e) Section 6 of the IA Act provides that the Model Law applies in the republic subject to the provisions of the IA Act. Article 8 of the Model Law provides:

> '(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his or her first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that agreement is null and void, inoperative or incapable of being performed.
>
> (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.'

(f) Article 8(1) of the Model Law is peremptory.

(g) The fact that Glencore delivered an answering affidavit without referral to the IA Act does not mean that Glencore had submitted its 'first statement on the substance of the dispute'. An answering affidavit should not be viewed in the same light as, for example, a special plea, which would have constituted a statement on the substance of the dispute.

[13] Mr *Wragge* referred me to a judgment of the Bombay High Court in *Jashu M Patel vs Shivdatta R Joshi* 2003 (1) ALLMR 1080 on the 9th December 2002 where the clause 'first statement of defence' was considered. Rebello J stated:

'The expression, therefore, "first statement on the substance of the dispute" need not necessary mean filing of written statement. It may be a reply other than a written statement though written statement can be said also to constitute first statement on the substance of the dispute as set out earlier. The expression "first statement on the substance of the dispute" must be a statement which would indicate the clear intention of the party not to refer the dispute to arbitration and to proceed with the proceedings before the Judicial authority. The statement or reply could be in interlocutory proceedings. The reply or statement must clearly disclose that the party intends to get its disputes resolved not by the Arbitral Tribunal, but by the Judicial forum and that it waives its right under the contract and acquiesce in the jurisdiction of the judicial authority'

In that case an answer to an interim application was being considered. The court stated that it must be clear that the party is aware of the arbitral clause and yet

intends not to invoke the arbitral clause but acquiesce in the judicial proceedings. It required the intention to do so to be clear and unequivocal. It was necessary that the pleadings and record disclose, that though the party is aware of the arbitral clause and that it covers the dispute, it nonetheless does not elect to invoke the arbitral clause. The court stated further that:

'To be construed as first statement on the substance of the dispute, must mean that the Judicial authority before whom the reply is filed, can from the reply be able to hold that the cause of action of the suit or the entire subject matter is governed by the arbitral clause including the relief sought and yet the party has shown its intention not to invoke the arbitral clause'.

[14] In Clare Ambrose, Karen Maxwell, and Anghard Parry, *London Maritime Arbitration* 3 ed (2009) at 97-99, the concept of a step taken in proceedings to answer a substantive claim was considered. The learned authors were of the view that whether an act amounts to a step in the proceedings to answer a claim, will depend on all the circumstances, and a court must make an objective assessment of whether a party has impliedly affirmed the proceedings and indicated a willingness to defend the claim, rather than merely maintaining the status quo pending the issue of an application for a stay. Reference is made to the decision in *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357 at 361 where Lord Denning MR stated:

'On those authorities, it seems to me that in order to deprive a defendant of his recourse to arbitration a "step in the proceedings" must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration.'

In *Capital Trust Investments Ltd v Radio Design TJ AB & Others* [2002] 2 ALL ER 159 para 57, Clarke LJ, referred to *Patel v Patel* [1999] 1 ALL ER (Comm) 923 at 925 where Lord Woolf MR set out the old law as summarised in Mustill & Boyd *Commercial Arbitration* 2nd edn (1989), at 472 as follows

'The reported cases are difficult to reconcile, and they give no clear guidance on the nature of a step in the proceedings. It appears, however, that two requirements must be satisfied.

First, the conduct of the applicant must be such as to demonstrate an election to abandon his right to stay, in favour of allowing the action to proceed. Second, the act in question must have the effect of invoking the jurisdiction of the court'.

Examples given by the learned authors in Ambrose et al *London Maritime Arbitration* at 96-97, maintain that a step in a proceeding would probably not include pre-trial procedural steps designed to maintain the status quo, for example, an application for an extension of time within which to serve a defence, or an application to set aside the service of proceedings, or an agreement to put up security for a ship.

[15] Mr *Wragge* also referred me to the decision of *Nanisivik Mines Ltd v F.C.R.S. Shipping Ltd* [1994] 2 FC 662, Federal Court of Appeal, Canada. In this matter Nanisivik and Canarctic Shipping Company Ltd had concluded a charter party containing a clause referring disputes to arbitration in London. The cargo was lost when the ship sank en route from Nanisivik, Canada to the United States of America. Canarctic relied on the arbitration clause in the charter party and article 8 of the Commercial Arbitration Code (being a schedule to the Commercial Arbitration Act, R.S.C, 1985 (2nd Supp.), C.17, seeking an order referring the matter to arbitration. Article 8 of the Commercial Arbitration Code is identical in wording to article 8 of the Model Law (presumably having been based on it). The appeal court dealt with the fact that the chambers judge had decided that because of a prospect of inconveniently overlapping litigation and the risk of conflicting decisions, that he should refuse to refer anything to arbitration. The appeal court stated:

'The international community has arrived at a consensus that compliance with commercial arbitration agreements is to be enforced by the courts provided they are in writing, not null and void nor inoperative nor incapable of performance. Canada and its provinces have given that consensus the force of domestic law. If there had otherwise being any arguable question as to the mandatory character of a court's duty when article 8 is duly invoked, subsection 4(1) of the Act removes it. In both its ordinary meaning and in light of the object and purpose of the Act, "shall" clearly means "must" not "may". In my opinion, the Motions Judge had no discretion in the circumstances but to refer the claim of Nanisivik against Canartic to arbitration …'

The reference to subsection 4(1) of the Commercial Arbitration Act provided that:

'This Act shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.'

After referring to various authorities, the court stated:

'As stated, the choice is between the stay of proceedings as between the parties to the arbitration ensuing upon the reference without an exercise of judicial discretion, or granting a discretionary stay unless they are "strong reasons" not to. All of the policy considerations that militate in favour of the mandatory legislative requirement that a dispute subject of an arbitration agreement be referred to that arbitration seem to me also to militate conclusively in favour of the staying of the litigation of the same issues until the arbitration award has been made. It seems far more likely that otherwise that disposition of those issues will resolve the entire litigation, if not among all the parties at least among those party to the arbitration.

I conclude that, once a reference to arbitration has been made, there is no residual discretion in the court to refuse to stay all proceedings between the parties to the arbitration even though there may be particular issues between them not subject of the arbitration'.

[16] In the course of its judgment the appeal court referred to *Seapearl (The Ship M/V) v Seven Seas Dry Cargo Shipping Corporation of Santiago, Chile* [1983] 2 F.C. 161 (CA) at 176-177, where the court, in dealing with a matter antedating the coming into force of the Commercial Arbitration Act, held:

'*Prima facie,* an application to stay proceedings commenced in the Federal Court in defiance of an undertaking to submit a dispute to arbitration or to a foreign court must succeed because, as a rule, contractual undertakings must be honoured. In order to depart from that *prima facie* rule, "strong reasons" are needed, that is to say reasons that are sufficient to support the conclusion that it would not be reasonable or just, in the circumstances, to keep the plaintiff to his promise and enforce the contract he made with the defendant. This is the principle which is now applied in England and in the United States; that is also, in my opinion, the principle that should be applied in this Court.'

In *Nanisivik*, the appeal court referred to suggestions by the lower court that the inherent jurisdiction of the court may occasion a departure from this approach. This was eschewed by the appeal court.

[17] Mr *MacWilliam* SC, who appeared together with Mr *Wallis* for Atakas, submitted that Atakas had invoked its right to joinder in 2017, when it had issued the application for joinder. He submitted that Atakas is entitled to apply for the order it seeks because it had already invoked its right to do so in terms of ss5(1) and 7(1) of the Admiralty Act. Once it had invoked the right to claim in terms of those subsections, the IA Act could not interfere with the rights of Atakas.

[18] Mr *MacWilliam* submitted that with regard to Glencore's right to apply for a stay of the proceedings and a referral to arbitration, Glencore was in breach of the article 8 of the Model Law because it had already submitted its 'first statement on the substance of the dispute'. That first statement came about when Glencore delivered its answering affidavit in the joinder application. At that stage the IA Act had not yet commenced, and had it been of force, Glencore would no doubt have invoked it in its answering affidavit. What Glencore is attempting now to do is to apply the provisions of the IA Act retrospectively, because it was not available when its answering affidavit was delivered. This is simply a matter of bad luck because of the timing, and there is nothing which can now be done by Glencore to remedy the position.

[19] Mr *McWilliam* also submitted that the effect of the submission on behalf of Glencore meant that the IA Act has in part repealed the provisions of s7(1) of the Admiralty Act. This is because the discretion which vested in the court with regard to international arbitrations is now removed. In this regard Mr *McWilliam* pointed to s4 of the IA Act which provides that the Arbitration Act, 1965 is no longer applicable to an arbitration agreement which falls within the ambit of the IA Act. This was a specific revocation of the authority vested in the Arbitration Act. In order to have done the same to s7(1) of the Admiralty Act, it had to be specifically referred to in the IA Act, which it is not.

[20] This is an application to join Glencore in the action instituted by Atakas. That action is to proceed in this court. Mr *Wragge* submits that the IA Act is binding on this court, and it excludes the court's jurisdiction because Atakas and Glencore agreed to have their disputes referred to arbitration. The wording of the clause referring disputes to arbitration is peremptory – ie 'shall be referred and finally resolved…'. No relief has yet been sought by Glencore in terms of s7 of the Admiralty Act, staying the action pending the determination of the arbitration. It is submitted, however, that joinder would be futile if a s7 order would inevitably be made in favour of Glencore.

[21] On Glencore's own case, the provisions of the IA Act cannot be invoked by it if Glencore has submitted its 'first statement on the substance of the dispute'. In Glencore's answering affidavit it dealt extensively with its right to arbitrate its dispute with Atakas. Clearly it could not, and had not, anticipated the enactment of the IA Act. Glencore, however, did not demonstrate before this court, any intention to proceed on the substance of the dispute. There is no abandonment of its right to rely on the referral of its disputes to arbitration. That is in fact the substance of its answering affidavit.

[22] The application to join is a procedural step taken by Atakas. Glencore sought, in its answering affidavit, to block that step by averring that the parties agreed to their disputes being arbitrated, and not be decided by a court of law. Its defence amounted to no more than that, and did not purport to deal with the various defences on the merits.

[23] The Bombay High Court in *Jashu M Patel* went so far as to suggest that the 'first statement on the substance of the dispute' must have the effect of a waiver of the parties rights to arbitration and an acquiescence in the court's jurisdiction. Waiver is contractual in nature and in accordance with our common law, must be done expressly or by conduct plainly inconsistent with an intention to enforce the right

allegedly waived. See: *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 436. That is precisely what Glencore did not do.

[24] If Glencore did not submit its 'first statement on the substance of the dispute' it is not prevented from invoking the provisions of the IA Act. This is not a case of Glencore seeking to apply the provisions of the IA Act retrospectively. The fact that it had not submitted its 'first statement on the substance of the dispute' in its answering affidavit accords with the wording of the IA Act. The provisions of the IA Act accord with the conduct of Glencore in the action thus far, and its opposition to the joinder application.

[25] Mr *MacWilliam* submitted that if the IA Act was not available when Glencore's answering affidavit was drafted, it is not available to it now. I do not agree with that submission because the transitional provisions contained in s20 of the IA Act provide that chapter 2 of the IA Act is applicable to international commercial arbitration agreements whether entered into force before or after the commencement of chapter 2 of the Act. Section 6 of chapter 2 renders the Model Law applicable in the Republic. Article 8 of the Model Law provides that a court shall, if a party so requests, stay the proceedings and refer the parties to arbitration. This is an application for joinder. Glencore is not, as yet, part of the action. Accordingly, when Glencore delivered its answering affidavit, it did no more than set out some defences, which may be seen as 'the dispute' justifying the referral to arbitration. They cannot be construed as a step in the proceedings to enforce the claim by Atakas, nor do they constitute a 'first statement on the substance of the dispute'. There is no doubt, that were I to grant the joinder, Glencore would apply to refer the action to arbitration in terms of the IA Act.

[26] The fact that a specific reference is made in the IA Act to provisions of the Arbitration Act, 1965 and not to the Admiralty Act is logical. The provisions of s7 of the Admiralty Act will not be rendered nugatory by the introduction of the IA Act. It

will still apply to arbitrations to be conducted in the Republic. It would therefore be inappropriate to repeal s7, and that is probably why there is no reference to the Admiralty Act in the IA Act.

[27] There is, accordingly, no need for me to consider or resolve the other arguments raised regarding the applicability of the IA Act in this action. As I am of the view that the IA Act will be binding on the parties and it is applicable in the proposed action between Atakas and Glencore, I agree that it would be futile to order the joinder of Glencore in the action. I see no reason why costs should not follow the result.

[28] In the circumstances, I make the following order:

> The application for the joinder of Glencore International AG is dismissed with costs, such costs to include those consequent upon the employment of senior counsel.

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Graham Lopes J

Dates of hearing:	9th March 2018.
Date of Judgment:	20th April 2018.
Counsel for the Plaintiff:	Mr R W F *MacWilliam* SC and Mr P J *Wallis* (instructed by Webber Wentzel c/o Goodrickes).
Counsel for the Defendant:	Mr M *Wragge* SC (instructed by Clyde & Co c/o Livingston Leandy).