UNIVERSITY OF KWAZULU-NATAL
SCHOOL OF LAW, HOWARD COLLEGE

Gone Overbroad?
Critically Examining the Classification of Maritime Claims by South African Courts

Amy Garnett Harpur Gevers
205500664

Submitted to the School of Law at the University of KwaZulu-Natal in fulfillment of the requirements of the degree *Master of Laws* in Maritime Law

Supervisor: Dr V Surbun

January 2021

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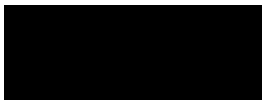
Signed: 

Date: 27 January 2021

ACKNOWLEDGMENTS

I would like to acknowledge my parents; my Dad, whose enduring passion for the law has inspired my own, and my Mom, who encouraged me to write this thesis (and to finish it).

I would also like to thank Christopher, who created space for me to think out loud, never complaining when talk of maritime claims consumed our long drives down the coast. His patience and support is the reason that producing this work has been such an enjoyable endeavour.

ABSTRACT

South African courts are empowered, in the exercise of their admiralty jurisdiction, to provide 'far-reaching and even revolutionary methods to prevent recalcitrant debtors from evading their legal debts'. These 'revolutionary' remedies are not reserved for South African claimants alone, but are potentially available to the 'wandering maritime litigants of the world'. The catch, as it were, is that only certain types of claims qualify to benefit from this specialised jurisdictional regime. To qualify, a claim must fall within the definition of 'maritime claim' in s 1(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983.

Through a critical analysis of the reasoning followed in *Peros v Rose*, *The Mineral Ordaz* and *Kuehne & Nagel*, this study will highlight the challenges and pitfalls of classifying a maritime claim under the Act, such as taking into account a future *defence* to a claim in the process of classifying a claim; conflating the process of classifying a maritime claim with the process of categorizing a 'marine or maritime matter' in terms of s 1(1)(*ee*) of the Act; conflating the contents of an underlying 'maritime agreement' with the provisions of a 'maritime topic' set out in s 1(1) of the Act, and confusing the policy considerations that justify the exercise of admiralty jurisdiction.

Having done so, this study will then propose the adoption of a three-stage approach to the maritime-claim enquiry; namely, (a) the clear identification of the *claim*, (b) the articulation of the relevant *maritime topic* and (c) the establishment of a *maritime connection* between the two. In particular, as to (b), this study will explore the factors that may be relevant to the categorisation of a settlement agreement as a 'marine or maritime matter' in terms of s 1(1)(*ee*) of the Act. In addition, as to (c), a test for establishing a *direct* maritime connection will be formulated for borderline cases, and a modified version of the 'legally relevant connection' test developed in *Kuehne & Nagel* will be proposed as a tool to establish an *indirect* maritime connection, where appropriate.

Keywords: *Admiralty Jurisdiction Regulation Act; maritime claim; maritime topic; maritime activities; guarantee; settlement agreement; maritime agreement; maritime object; legally*

relevant connection; reasonably direct connection; maritime matter; nature or subject matter; Kuehne; Peros; Mineral Ordaz; *Galaecia*; *El Shaddai; Minesa Energy*.

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CHAPTER ONE: INTRODUCTION

1.1. Background

South African courts[1] are empowered, in the exercise of their admiralty jurisdiction, to provide 'far-reaching and even revolutionary methods to prevent recalcitrant debtors from evading their legal debts'.[2] These 'revolutionary' remedies are not reserved for South African claimants alone, but are potentially available to the 'wandering maritime litigants of the world'.[3] The catch, as it were, is that only certain types of claims qualify to benefit from this specialised jurisdictional regime.[4] To qualify, a claim must fall within the definition of 'maritime claim' in s 1(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the Act').

The Act defines a 'maritime claim' in s 1(1) as 'any claim for, arising out of or relating to' any one of a list of various 'maritime topics'[5] which are described in paras (*a*) to (*ff*) of s 1(1). This list of maritime topics has been said to create a *numerous clausus*,[6] meaning that all the various types of maritime topics to which a claim must be connected, if it is to be classified as a maritime claim, are described therein. However, in reality this 'closed' list has the potential to be opened up by two important features of the definition. The *first* is the definition's 'introductory phrase'[7] 'for, arising out of or relating to' which describes the *degree of connection* required between a claim and a maritime topic, and which has been said to permit of both a narrow and a broad construction.[8] Thus, depending on the interpretation given to that phrase, it is possible to use it as either a wide or a narrow lens through which to view the list of maritime topics that follow it, thereby either extending or reducing the scope of the type of claims that qualify as maritime

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[1] The exercise of admiralty jurisdiction is limited to superior courts, with the result that magistrates' courts can
[2] D B Friedman 'Maritime Law in the Courts after 1 November 1983' (1986) 103 *SALJ* 678, 679.
[3] Ibid 681. This notion was used in a pejorative sense in *Katagum Wholesale Commodities Co Ltd v The Mv* Paz 1984 (3) SA 261 (N) 263H.
[4] See M Wagener 'South African Admiralty and its English Origins- Will it Jump or Must it be Pushed?' (2005) 36 *Journal of Maritime Law & Commerce* 61, 65-66 for a list of some of the 'procedural advantages of classification as a maritime claim'.
[5] The term 'maritime topic' is used in *Peros v Rose* 1990 (1) SA 420 (N) 425 and is used throughout this study to describe the list of topics described in paras (*a*) to (*ff*) of the definition of 'maritime claim' in s 1(1) of the Act.
[6] J Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (2009) 53; Hofmeyr (note 1 above) 23.
[7] The court in *The Mineral Ordaz, The Mineral Ordaz v Ostral Shipping Co Ltd* SCOSA D41 (D) D47A referred to it as the 'introductory part'.
[8] *MVF El Shaddai, Oxacelay and another v MFV El Shaddai and others* 2015 (3) SA 55 (KZD) 13*; Mak Mediterranee Sarl v The Fund Constituting The Proceeds of The Judicial Sale of MC Thunder (S D Arch, Interested Party)* 1994 (3) SA 599 (C) 605-606.

claims.[9] The *second* is the catch-all provision para (*ee*) which provides that a maritime claim is 'any claim for arising out of or relating to-':

> [A]ny other matter which, by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs.

The inclusion of para (*ee*) into the definition means that there are notionally a number of additional 'matters' that qualify to be categorised as a maritime topic,[10] however, there is no indication from the provisions of para (*ee*), as to how to categorise a matter as a 'marine or maritime matter' within the meaning of that paragraph. In this regard, the provisions of para (*ee*) only make it clear that 'the meaning of the expression marine or maritime matter' is *not* 'limited by reason of the matters set forth in the preceding paragraphs' (that is, the other maritime topics).[11] It has been said that para (*ee*) gives 'true generality to the meaning of the term maritime claim'.[12] In doing so, the inclusion of this catch-all provision could be said to beg the very question to which the definition of 'maritime claim' seeks to provide an answer.

The two features of the definition discussed above have caused the enquiry into whether a claim is a maritime claim ('the maritime-claim enquiry') to be raised in several instances where the 'quest to categorise' a claim has been drawn 'into unchartered waters'.[13] It is the task of the court

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[9] To illustrate the difference between a *narrow* and a *broad* construction of the definition of 'maritime claim', it is useful to consider the facts in *The Mineral Ordaz* (note 7 above), in which it was contended that a claim to enforce a settlement agreement, that novated an underlying charter party claim, was a maritime claim in terms of s 1(1)(*j*) of the Act, which refers to any claim 'for, arising out of or in respect of . . . any charter party.' In classifying the claim to enforce the settlement agreement as a maritime claim, the court could be said to have construed the provisions of para (*j*) *broadly* since the claim did not *directly* 'arise' out of the charter party, but could be said to have *indirectly* arisen. Had the court adopted a *narrow* construction, on the other hand, it might have concluded that the claim to enforce the settlement agreement was too distantly removed from the charter party and was thus *not* a claim 'for, arising out of or relating to' the charter party as contemplated in para (*j*). The facts in this matter are more fully set out in Chapter Two.

[10] See Hofmeyr (note 1 above) 23 fn 18: '[i]n one sense . . . the category of claims that can be brought in admiralty is open-ended, having regard to the provisions of s 1(1)(*ee*)'.

[11] Section 1(1)(*ee*) of the Act. See also Hofmeyr (note 1 above) 59.

[12] Hare (note 6 above) 53.

[13] *d'Amico Dry Limited v. Primera Maritime (Hellas) Limited* 886 F.3d 216 (2018) 223.

seized with the matter, to 'forthwith decide that question'[14] as soon as it is raised.[15] If a claim is found to be a maritime claim, it must be heard by a court exercising admiralty jurisdiction, and cannot (bar certain exceptions)[16] be heard by a court exercising its ordinary jurisdiction.

These elements of uncertainty in the definition of 'maritime claim' complicate the judicial enquiry in what is termed 'borderline cases', being those matters where it is not immediately clear from the facts, whether the requirements of the definition of 'maritime claim' have been met. The focus of this study are those types of borderline cases where the facts reveal that the claim before the court has some connection to an *underlying* maritime claim or '*underlying* maritime agreement', which is *not* being directly enforced. In this study, the term 'underlying maritime agreement' will be used to refer to a contract that *could have* given rise to a maritime claim (had the obligations therein been directly enforced) but instead gave rise to a second agreement which forms the basis for the claim before the court ('the claim being made'). It is this association that the claim being made has with the *underlying* maritime agreement, or the *underlying* maritime claim (not being directly enforced), that has presented a particular challenge to courts in their interpretation of the definition of 'maritime claim'. This is best demonstrated in three matters that will form the focus of this study, namely, *Peros v Rose*,[17] *The Mineral Ordaz*[18] and *Kuehne & Nagel.*[19] In each of those matters, it was contended that the claim being made was a maritime claim by virtue of its connection to an underlying maritime claim or agreement: in both *Peros v Rose* and *Kuehne & Nagel* the claim being made was to enforce a guarantee that

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[14] In terms of s 7(2) of the Act, if the court seized with the matter is a high court. Section 7(2) does not apply where the maritime-claim question is raised in a magistrates' court (*World Net Logistics* (note 1 above), para. 26) but that court is, nevertheless, required to 'determine whether the claim is based on a maritime claim, and if so, the action must be dismissed for want of jurisdiction' (*World Net Logistics* (note 1 above), para. 28(b)).

[15] The question of whether a claim is a maritime claim may be raised by one of the parties (either to justify in papers commencing proceedings why the claim has been instituted in a court exercising admiralty jurisdiction, or it may be raised in opposition to contend that the claim is either a maritime claim or is not a maritime claim, and has been brought in the wrong jurisdiction) or it may be raised by the court *mero motu* – see *The Wave Dancer: Nel v Toron Screen Corporation (Pty) Ltd and another* 1996 (4) SA 1167 (A) 1176G.

[16] See Hofmeyr (note 1 above) 24: '. . . a court exercising its ordinary jurisdiction may hear a maritime claim where the question of whether the claim is a maritime claim does not arise in the proceedings, either because it is not raised by the court *mero motu* or is not raised by the parties.' See also *The Wave Dancer* (note 15 above) 1189B. See further *World Net Logistics* (note 1 above), para. 28(*a*), where the court held that a magistrates' court is not precluded from deciding a maritime claim 'if nothing at all is raised concerning the jurisdiction of the court on the basis that a plaintiff's claim is a maritime claim as defined by the Act'.

[17] *Peros v Rose* (note 5 above).

[18] *The Mineral Ordaz* (note 7 above).

[19] *Kuehne & Nagel (Pty) Ltd v Moncada Energy Group SRL* 2016 JDR 0312 (GJ).

related to an underlying maritime agreement, being a construction contract,[20] and a forwarding services agreement, respectively,[21] and in *The Mineral Ordaz*, the claim was to enforce a settlement agreement that related to an underlying maritime agreement, being a charter party.[22] Despite this similarity in the maritime-claim questions before each of the courts, the manner in which each court went about determining the *first* feature of the definition, being the proximity of the connection between the relevant claim and maritime topic appears, at first glance, to be distinctly different. What distinguishes the decision in *Kuehne & Nagel* from the other two decisions is the courts' formulation of what could be termed a *practical* (as opposed to an abstract) approach to the problem of testing the proximity of the connection between the relevant claim and the maritime topic in the form of a test that will be referred to herein as the 'legally relevant connection' test. The court in *Kuehne & Nagel* explained that what it meant by a 'legally relevant connection' was the following:[23]

> By "legally relevant connection" in this sense I mean that the claim and its object . . . must be connected in such a way that either in procedural or substantive law the determination of the one could be influenced, legally, by the determination of the other.

The 'legally relevant connection' test developed in *Kuehne & Nagel* is significant because it represents the first time a court has attempted to articulate, in any comprehensive manner, how to go about determining whether a connection between a claim and a maritime topic is close enough in order to render the claim a maritime claim, by giving direction to the process of interpreting the introductory phrase 'for, arising out of or relating to'. That this test has the potential to have a significant impact on the delineation of the boundaries of South Africa's admiralty jurisdiction is demonstrated by the fact that it has already been directly relied upon in the subsequent decision of *Twende.*[24] However, on close consideration, it will be shown that the reasoning followed by

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[20] The construction of a ship was listed as a maritime topic in terms of s 1(1)(*m*) of the Act at the time that *Peros v Rose* (note 5 above) was heard, which was prior to the Act's amendment by the Admiralty Jurisdiction Regulation Amendment Act 87 of 1992 ('the Amendment Act'); see Appendix II. This maritime topic is now listed in s 1(1)(*q*) of the Act, as amended.

[21] The remuneration of, *inter alia*, a forwarding agent is listed as a maritime topic in s 1(1)(*p*)(i) of the Act. The obligation to remunerate the forwarding agent was an obligation under the forwarding services agreement.

[22] Section 1(1)(*j*) of the Act, refers to 'any charter party' as a maritime topic.

[23] *Kuehne & Nagel* (note 19 above) 30.

[24] *Twende Africa Group (Pty) Ltd v MFV Qavak* 2018 JDR 0238 (ECP).

the court in *Kuehne & Nagel*, in applying the 'legally relevant connection' test, suffers from a number of flaws, which raises doubts about whether this test offers a sound approach to the classification of maritime claims.[25] Notwithstanding these flaws, or perhaps, because of them, *Kuehne & Nagel* is an important decision for admiralty jurisprudence because it indicates that there is a jurisprudential gap when it comes to the approach to be taken when classifying a maritime claim, and it highlights the need for guidance on this issue.

There has been no similar attempt made by courts, in relation to the *second* feature of the definition, to articulate the factors that are relevant to the process of categorising a 'matter' as a 'marine or maritime matter' in terms of para (*ee*). In *The Mineral Ordaz* (which is the only one of the three decisions mentioned above that considered the provisions of para (*ee*)) the court used hypothetical narrative,[26] in the form of analogy to a hypothetical set of facts, to assist it in its enquiry into whether the 'matter' to which the claim was connected (i.e. the settlement agreement), could be categorised as a 'marine or maritime matter' in terms of para (*ee*);[27] however, as will be demonstrated in this study, this abstract approach has its limitations and does little to promote certainty in the interpretation of this part of the definition. The implication of the conclusion reached in *The Mineral Ordaz*, which is that a settlement agreement that has, as its subject matter, a compromised maritime claim qualifies to be categorised as a new maritime topic in terms of para (*ee*), is significant because it means that maritime-claim litigants will not forfeit the benefits of pursuing their claims in admiralty jurisdiction in the event that they decide to settle their dispute out of court. It is accordingly an important exercise to consider whether the court's reasoning and its ultimate conclusion withstand scrutiny.

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[25] The flaws in the 'legally relevant connection' test will be discussed in Chapter Three.

[26] M Del Mar 'The legal imagination, Hypotheticals, fantastical beings, and a fictional omnibus: legal reasoning is made supple by its use of the imagination' (28 March 2017) https://aeon.co/essays/why-judges-and-lawyers-need-imagination-as-much-as-rationality, last accessed on 21 January 2021.

[27] Reasoning by hypothetical analogy to determine whether a 'matter' could be categorised as a 'marine or maritime matter' in terms of para (*ee*) was also followed in *The Galaecia; Vidal Armadores SA v Thalassa Export Co Ltd* (2006) SCOSA D252 (D) D261C-D, which was heard subsequent to *The Mineral Ordaz* (note 7 above). The shortcomings of this mode of reasoning are considered and discussed in Chapter Three.

1.2. Problem statement

In order to benefit from the extended jurisdiction that admiralty jurisdiction affords, a litigant must establish that its claim falls within the definition of a maritime claim in terms of s 1(1) of the Act. However, the elasticity of the wording in the definition can create unpredictability and uncertainty for claimants in borderline cases. What compounds the lack of clarity in the meaning of these words is a paucity of any comprehensive judicial comment on both the manner of testing the *proximity of a connection* between a claim and a maritime topic as contemplated in the introductory phrase in the definition, and on the manner of categorising a matter as a *'marine or maritime matter'* in terms of para (*ee*) of the definition, which is the catch-all provision of the definition. The reason for this may be partly due to the operation of s 7(4) of the Act which provides that a decision as to whether a claim is a maritime claim is not appealable, [28] which has resulted in there being no Supreme Court of Appeal decision to clarify what general principles should be applied in borderline cases. This uncertainty is undesirable, considering the urgency often associated with maritime litigation[29] and the implications that proceeding in the wrong jurisdiction can have for maritime litigants.[30] It is also a problem when understood in the context of the fact that 'the Act is, and is intended to represent, a pragmatic approach to the real problems of real people in the actual world of shipping'[31]and thus should operate in a way that is reasonably predictable.

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[28] This is subject to the exception, as noted by Hare (note 6 above) 54, that: '[a]n *ex parte* order for attachment resting on an incorrect conclusion that a plaintiff has a maritime claim does not enter the merits of the matter and is appealable.' See also *Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) 939G-940I.

[29] SA Law Commission Project 32 *Report on the Review of the Law of Admiralty* (1982), para. 6.3.

[30] These implications include the wasted legal and commercial costs of proceeding in the wrong jurisdiction. These implications are particularly acute where an action has been instituted by way of arrest or attachment. As stated in *Katagum* (note 3 above) 269H, to interrupt the voyage of a ship 'can have and usually has consequences which are commercially damaging to its owner or charterer'. As to whether the institution of proceedings in the wrong jurisdiction (for example, in a court's ordinary jurisdiction, where the claim is a maritime claim), has implications for the running of prescription, see the discussion in *Columbus Stainless (Pty) Ltd v Kuehne & Nagel (Pty) Ltd* 2014 JDR 1127 (KZD), para. 25 where Ploos van Amstel J noted that: '[there may be] an interesting debate with regard to prescription where an action which relates to a maritime claim is instituted in the ordinary jurisdiction of the High Court, which then directs in terms of s 7(2) that it be proceeded with in a court competent to exercise its admiralty jurisdiction. Did the court in which the action was instituted only lose its jurisdiction to adjudicate on the matter when a decision was made as contemplated in s 7(2)? Can it be said that the action was instituted in a court which did not have jurisdiction?'.

[31] Friedman (note 2 above) 678.

1.3. Purpose of this study

The purpose of this study is to examine and synthesise the reasoning followed by judges in three maritime-claim question cases, namely, *Peros v Rose*, *The Mineral Ordaz* and *Kuehne & Nagel*. These decisions have been selected both because of their significance for South Africa's admiralty jurisdiction jurisprudence and because a similar problem arose in each, which was whether a claim to enforce an agreement was a maritime claim by virtue of its relationship to either an *underlying* maritime claim, or maritime agreement. The overall aim of this study is to formulate an approach to the process of classifying a maritime claim that will operate to guide courts in the maritime-claim enquiry, particularly in matters where a claim being made relates to an underlying maritime claim or agreement.

Thus, this study is concerned with the manner in which the boundaries of South Africa's admiralty jurisdiction are delineated by courts by the process of judicial reasoning. The history of the exercise of admiralty jurisdiction is accordingly of minimal interest in this study, and it has in any event been the subject of study elsewhere.[32] As stated by the Supreme Court of the United States in the 1858 matter of *Jackson v The Magnolia*: [33]

> Antiquity has its charms, as it is rarely found in the common walks of professional life; but it may be doubted whether wisdom is not more frequently found in experience and the gradual progress of human affairs; and this is especially the case in all systems of jurisprudence which are matured by the progress of human knowledge. . . . Every one is more interested and delighted to look upon the majestic and flowing river, than by following its current upwards until it becomes lost in its mountain rivulets.

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[32] M Stiebel 'Section 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983 - An Analysis, Comparison and Examination of the Case Law: Part 1' (2001) 13 *SA Mercantile LJ* 226, 227-234; G Hofmeyr 'Admiralty Jurisdiction in South Africa' (1982) *Acta Juridica* 30; H Staniland 'Developments in South African Admiralty Jurisdiction and Maritime Law' (1984) *Acta Juridica* 271, 273-274; D J Shaw QC *Admiralty Jurisdiction and Practice in South Africa* (1987) 2-24; Hare (note 6 above) 27-29 and 52-71; Hofmeyr (note 1 above) 1-19. For background to the definition of 'maritime claim' in s 1(1) of the Act see in particular SA Law Commission Project 32 (note 29 above), and, further, the explanatory memorandum to the South African Law Commission on a first draft of the Act, pages 4-5 (included as Appendix I in M J D Wallis *The Associated Ship and South African Admiralty Jurisdiction* PhD thesis (University of KwaZulu-Natal) (2010)).

[33] *Jackson v. The Magnolia* 61 U.S. 20 How. 296, 307 (1857).

The origins of South Africa's admiralty jurisdiction do however, form a component of the process of interpreting the definition of 'maritime claim', and are briefly considered below under 'literature review'.

1.4. Research questions

This study will seek to answer the following questions:

(a) How did the courts in *Peros v Rose*, *The Mineral Ordaz* and *Kuehne & Nagel* approach the problem of classifying the claims before them as maritime claims?

(b) What are the similarities and differences in these approaches, and can these be accounted for by considering the cases in their context?

(c) Do any of the courts' approaches present a legally sound method of classifying a maritime claim in terms of s 1(1) of the Act?

(d) Having considered the approaches taken by each of the courts, is it possible to formulate a general approach that should be followed by future courts confronted with a maritime-claim question?

1.5. Importance of topic

While the stakes involved in determining whether a claim is a maritime claim are perhaps not as high as they were in England during the reign of Henry IV where incorrectly proceeding in admiralty could cost a plaintiff double damages,[34] the question of whether a claim is a maritime claim remains an important issue to determine correctly, both for the litigant and for its legal counsel, because it dictates important aspects of the litigation – it determines the geographical location of where the proceedings are instituted,[35] the parties that may be sued,[36] and the system of law that will apply.[37] It is also oftentimes a question which a legal practitioner should be able to answer quickly (to take advantage of the debtor's ship docked in port, for example) and it is always a question that should be able to be answered with a reasonable degree of certainty (to avoid unnecessary litigation and costs). The importance of certainty on this issue is amplified by the consideration that the Act allows, in certain circumstances, the deprivation of property

[34] Stiebel (note 32 above) 230.
[35] See s 3(3) of the Act.
[36] See s 3(2)(*a*)-(*e*) of the Act.
[37] See s 6(1)(*a*) and (*b*) of the Act.

without a court order – a procedure which the court in *The Galaecia* was concerned might not 'pass constitutional muster'.[38] As noted by Didcott J in *Katagum*:[39]

> It is a serious business to attach a ship. To stop or delay its departure from one of our ports, to interrupt its voyage for longer than the period it was due to remain, can have and usually has consequences which are commercially damaging to its owner or charterer, not to mention those who are relying upon its arrival at other ports to load or discharge cargo.

Since the definition of the term 'maritime claim' is the gatekeeper to a court's exercise of admiralty jurisdiction, and unlocks the 'far-reaching and even revolutionary methods'[40] available to maritime claimants, it is critical that the process of classifying a maritime claim is one that is certain and predictable. As stated by Friedman, 'if any forum is to achieve recognition and popularity for the resolution of maritime disputes . . . it must be a forum which acts predictably and with a fair degree of certainty'.[41] Of the judicial role, it has been said that 'a judge's most important objective in deciding cases should be to decide them with consistency and certainty, thus yielding some degree of predictability in the outcome'[42] and that legal practitioners ought to able 'to safely predict the outcome of litigation or advise their clients on their legal rights in the light of these decisions'.[43]

1.6. Theoretical Framework and Research Methodology

This study will be a non-empirical study, taking a doctrinal approach to the topic by studying and interpreting case law, legislation, and academic commentary. It will be a conceptual analysis and will involve a literature review. Qualitative research will be conducted by way of a desktop analysis. Primary sources available in the public domain will be considered and analysed, in

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[38] *The Galaecia* (note 27 above) D255G. Significantly, the right to arrest a ship extends to an 'associated ship' in terms of s 3(7) of the Act. For a discussion on the constitutionality of s 3(7)(*a*)(ii) of the Act, see V Doble *Do the provisions of section 3(7)(a)(ii) read with section 3(7)(b)(i) of the Admiralty Jurisdiction Regulation Act 105 of 1983 infringe the substantive requirements of section 25(1) of the Constitution of the Republic of South Africa Act 108 of 1996?* Mini thesis (University of Cape Town) (2015).
[39] *Katagum* (note 3 above) 269G-H.
[40] Friedman (note 2 above) 679.
[41] Ibid 681.
[42] M B Harding 'Judicial Decision-Making Analysis of Federalism Issues in Modern United States Supreme Court Maritime Cases' (2001) 75 *Tulane LR* 1517, 1520-1521.
[43] M Wallis 'Commercial certainty and constitutionalism: Are they compatible?' (2016) 133 *SALJ* 545, 547.

particular, case law and legislation available predominately on electronic databases. This study will also consider secondary sources in the form of academic commentary in textbooks and journal articles.

1.7. Literature Review

This section is composed of four parts: the first is an introduction to the academic commentary that has been made on the Act; the second is a look at the historical exercise of admiralty jurisdiction in South Africa; the third is an overview of the interpretation that has been given by courts to the introductory phrase in the definition; and the fourth is an overview of the interpretation that has been given to para (*ee*) in the definition.

1.7.1 Overview of academic commentary

The main sources of commentary on the Act which include commentary on the definition of 'maritime claim', are found in the following textbooks: D J Shaw QC *Admiralty Jurisdiction and Practice in South Africa* (1987), J Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (2009) and G Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* 2 ed (2012).[44] Unfortunately, the most recent version of the three of these books was published in 2012 (the second edition of Hofmeyr's book) which is prior to the decision in *Kuehne & Nagel*. While in Hare and Hofmeyr reference is made to *Peros v Rose* and *The Mineral Ordaz*, there is very little critical analysis on those cases. There is, similarly, an absence of any comprehensive analysis in academic articles on these cases, and there is a lack of analysis of the approach that courts have taken to classifying maritime claims in borderline cases, in general. This reinforces the need for a study which provides comprehensive analysis of the manner in which our courts approach the maritime-claim question.

A significant amount of academic energy has been spent considering the functioning of s 6(1)(*a*) of the Act, which provides that a court exercising admiralty jurisdiction must apply 'English admiralty law, as it existed in 1983 . . . if the claim before it concerned a matter in respect of

[44] Older commentary on South Africa's admiralty jurisdiction include Bamford *The Law of Shipping and Carriage in South Africa* 3 ed (1983); C Dillon and J P van Niekerk *South African Maritime Law and Marine Insurance: Selected Topics* (1983), and A Waring *Charterparties: A Comparative Study of South African, English and American Law* (1983) which were all written before the Act was passed.

which the Colonial Court of Admiralty had jurisdiction'.[45] Section 6(1)(*b*) provides that, in respect of 'any other matter' Roman-Dutch law as it applies in South Africa is applicable.[46] The claims that fall to have English law applied to them in terms of s 6(1)(*a*) of the Act have been referred to as claims falling under the 'old jurisdiction' and all other claims has falling into the 'new jurisdiction'.[47] The provisions of this section are not unrelated to the definition of 'maritime claim' although the extent of this section's influence on the process of classifying a maritime claim is controversial. The manner in which the definition of 'maritime claim' and the provisions of s 6 of the Act work together was explained in *MV Silver Star* as follows:[48]

> [T]hose provisions [in 6 of the Act] only apply to fix the law applicable in the adjudication of claims ('in the exercise of its admiralty jurisdiction'), *after the prior question* whether the court has jurisdiction has been resolved.

Thus, the provisions of s 6 of the Act are to be engaged with only *after* a claim has been classified as a 'maritime claim'. This particular feature of the manner in which the Act functions has been considered to be a shortcoming. Stiebel criticises this failure to directly link the definition of 'maritime claim' to the provisions of s 6 of the Act and suggests that a better option would be to structure the definition of 'maritime claim' in such a manner that all the claims falling into the 'old jurisdiction' are listed separately from the claims falling into the 'new jurisdiction', so that it is known from the outset – ie at the stage when jurisdiction is being determined – which claims will have English law applied to them.[49] The court in *Peros v Rose* considered the definition of 'maritime claim' in light of the provisions of s 6 of the Act by taking into account, first, whether a claim before it fell within the 'old jurisdiction' or the 'new jurisdiction' as described in s 6, and then used the outcome of that exercise (which was that the

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[45] Stiebel (note 32 above) 238. The manner in which s 6 of the Act functions in practice has been criticised for, *inter alia*, the 'almost impossible task' (Hare (note 6 above) 21) of ascertaining 'exactly what the jurisdiction of the High Court of Admiralty in England was in 1890' (Stiebel (note 32 above) 238). There is a discussion on the functioning of s 6 of the Act in, *inter alia*, the following: H Staniland 'What is the Law to be Applied to a Contract of Marine Insurance in Terms of Section 6 (1) of the Admiralty Jurisdiction Regulation Act 105 of 1983?' (1994) *6 SA Mercantile LJ* 16; G Girdwood 'An Analysis of Law Applicable to Charterparty Disputes in Terms of Section 6(1) of the Admiralty Jurisdiction Regulation Act' (1995) 7 *SA Mercantile LJ* 301; Stiebel (note 32 above).

[46] The provisions of s 6(1)(*a*) and (*b*) of the Act are to be read with s 6(2) and (5).

[47] *Peros v Rose* (note 5 above) 424E and 425F.

[48] *MV Silver Star Owners of the MV Silver Star v Hilane Ltd* 2015 (2) SA 331 (SCA) 31 (emphasis added).

[49] Stiebel (note 32 above) 239-240.

claim fell into the 'old jurisdiction) to justify why the definition of 'maritime claim' should be narrowly construed. This approach was met with criticism, being described by Hare as drawing 'an unnecessary distinction between new and old jurisdiction, interpreting the latter more restrictively than the former.'[50] This manner of reasoning adopted by the court in *Peros v Rose*, in directly linking the enquiry between the definition of 'maritime claim' and the provisions of s 6, has not been followed by courts in subsequent decisions that have been confronted with the task of classifying a maritime claim.[51]

There are also several academic articles that discuss the history of the exercise of admiralty jurisdiction in South Africa,[52] as do the books referred to above by Shaw,[53] Hare[54] and Hofmeyr.[55] In addition, the report by the South African Law Commission, published prior to the promulgation of the Act, provides useful insight into the Act's background,[56] and the book by M J D Wallis[57] includes a comprehensive history of the associated ship jurisdiction in South Africa. Any interpretation of the definition of 'maritime claim' should be done against an understanding of the changes to the exercise of admiralty jurisdiction in South Africa brought by the Act, as well as the changes introduced by the amendment to the Act in 1992.[58] This is because any interpretation of a statute should be done 'in the light of its historical background',[59] and interpreting a particular provision should be done 'having regard to the purpose of the provision and the background to the preparation and production of the document.'[60] These changes will briefly be considered below.[61]

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[50] Hare (note 6 above) 71 fn 8.
[51] See the discussion at 2.7 below.
[52] See the texts cited in note 32 above.
[53] Shaw (note 32 above) 1-8.
[54] Hare (note 6 above) 2-16.
[55] Hofmeyr (note 1 above) 1-19.
[56] SA Law Commission project 32 Report (note 29 above).
[57] M J D Wallis *The Associated Ship & South African Admiralty Jurisdiction* (SiberInk, South Africa, 2010). This book was the author's PhD thesis (see note 32 above).
[58] The Amendment Act (note 20 above).
[59] *Peros v Rose* (note 5 above) 425D. See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ('*Endumeni*') para. 18: '[w]hatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production'.
[60] *Endumeni* (note 59 above), para. 18.
[61] For a summary of the 'more important features of the Act', that brought about reform to South Africa's admiralty jurisdiction, see the list in the first edition of Hofmeyr's book, G Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* 1 ed (2006) 12-13.

1.7.2 Legislative development

Prior to the promulgation of the Act, admiralty jurisdiction in South Africa was exercised in terms of the Colonial Courts of Admiralty Act of 1890. The 'heads of jurisdiction'[62] that applied in South Africa's admiralty courts were those set out in 'two inelegant English Acts of 1840 and 1861 which had long since been repealed in England'.[63] South Africa's admiralty law was the admiralty law as practiced in England as at 1891, and remained tethered to that antiquated law 'for nearly a century'.[64] The promulgation of the Act is considered by Staniland to have brought 'several important and long-overdue developments'[65] to South African admiralty law.

One such development was the removal of the 'jurisdictional conflict which existed between the Admiralty Court and the ordinary courts',[66] which put an end to the possibility of forum shopping by litigants, who could pick between instituting their claim in a court exercising ordinary jurisdiction, or a court exercising admiralty jurisdiction, depending on which of the two jurisdictions would apply the law most favourable to their claim, thereby effecting the outcome of the case.[67] A further significant development was the inclusion in the Act of 'some novel and far-reaching provisions'.[68] One such provision is the associated ship procedure[69] which permits the arrest of a ship 'other than the ship in respect of which the maritime claim arose'.[70] Another is s 5(3) of the Act, which in its most extreme application, permits a court 'to arrest, at the instance

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[62] Staniland (note 32 above) 273.
[63] Ibid 273.
[64] Ibid 271.
[65] Ibid 271.
[66] Ibid 274.
[67] Prior to the promulgation of the Act, a litigant whose claim qualified to be heard by a court exercising its admiralty jurisdiction had a choice to proceed in a court exercising its admiralty jurisdiction, or a court exercising its ordinary (or parochial) jurisdiction. This choice determined what law governed the dispute: in the exercise of the court's admiralty jurisdiction the court applied the admiralty law that applied in England as at 1890; in the exercise of its ordinary jurisdiction it applied Roman-Dutch law (Hofmeyr (note 1 above) 13). The promulgation of the Act in 1983 meant the end of this system of two separate jurisdictions applying different law to the same subject matter (*Peros v Rose* (note 5 above) 424A-B) and maritime claims now fall within the exclusive jurisdiction of high courts exercising their admiralty jurisdiction, subject to the fact that such a court exercising its ordinary jurisdiction can hear and determine a maritime claim if the court is ignorant as to its being a maritime claim (see *The Wave Dancer* (note 15 above) 1189B). On whether magistrates' courts have jurisdiction to hear maritime claims, see *World Net Logistics* (note 1 above), para. 28.
[68] Staniland (note 32 above) 273; *Katagum* (note 3 above) 263A-B.
[69] Staniland (note 32 above) 276. See further Wallis (note 32 above) 8-9.
[70] Section 3(7) of the Act.

of a foreigner, a ship, owned by a foreigner, as security for a claim pending in some foreign country which is based on a foreign cause of action and is subject to a foreign law'.[71] Staniland describes this as 'one of the most novel provisions' of the Act.[72] An additional break away from South Africa's past admiralty jurisdiction regime was the expansion of the types of claims over which a court could exercise admiralty jurisdiction, extending the 'heads of jurisdiction' (or maritime topics as they are referred to in this study) that existed under the previous jurisdictional regime.[73]

Subsequent to the Act's promulgation, various amendments were made to it. Of interest to this study are two changes to the definition that were introduced by the substitution of the definition of 'maritime claim' by s 1(d) of Admiralty Jurisdiction Regulation Amendment Act No. 87 of 1992 ('the Amendment Act'), being the inclusion of what is described in this study as the 'introductory phrase'[74] in the definition of 'maritime claim', and the addition of para (*ee*) to the definition. The court in *Mak Mediterranee*[75] explained that, prior to the substitution of the definition, the list of maritime topics grew from 26 categories to 32. In addition:[76]

> In the previous definition the words "any claim" were repeated in each category and were linked to the subject-matter of that category by one of various prepositions or prepositional phrases such as "to", "for", "relating to", "in respect of", "arising out of", "in the nature of" and "in regard to". In the new definition the words "any claim" are not repeated in each category and the same preposition and prepositional phrases now apply to each category of

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[71] *Katagum* (note 3 above) 263D-E.
[72] Staniland 'Is the Admiralty Court to be Turned into a Court of Convenience for the Wandering Litigants of the World?' (1986) 103 *SALJ* 9, 9.
[73] Staniland (note 32 above) 273. The 'heads of jurisdiction' which existed in England as at 1891, were 'retained, extended . . . and, sometimes qualified' by the Act (Staniland (note 32 above) 273). The template for the extended heads of jurisdiction was the International Convention for the Unification of Rules Relating to the Arrest of Sea-Going Ships, 1952 ('the Convention'), and to it, certain new heads of jurisdiction were added, such as marine insurance over which Scottish and American (but not English) courts exercise admiralty jurisdiction (Staniland (note 32 above) 273). See also Hofmeyr (note 1 above) 59-60. The decision to specifically enumerate the types of claims that are classified as maritime claims in the Act was preferable to the 'more general method such as the one applying, for instance, in the United States of America' (Shaw (note 32 above) 8) because it was considered best to imitate the formulation that already had international approval.
[74] The court in *The Mineral Ordaz* (note 7 above) D47A-B referred to the phrase 'for, arising out of or relating to' as the '*introductory part* to section (1) defining maritime claims' (emphasis added).
[75] *Mak Mediterranee* (note 8 above) 602G-I.
[76] Ibid 602G-I.

> claim. The definition at present thus begins - 'maritime claim means any claim for, arising out of or relating to' - and is followed by the 32 categories which, as I have said, are lettered (a)-(ff).

The introduction of para (*ee*) into the definition is significant because of the potential for it being widely construed, given that it is 'designed to bring into the net of maritime claims any matter not covered' in the other maritime topics listed in the definition but 'which should, by reason of its nature or subject matter, fall to be dealt with by a court exercising its admiralty jurisdiction'.[77]

Recognition that these changes to the definition of 'maritime claim', and the Act's 'novel and far-reaching provisions',[78] are a significant departure from the historical boundaries of South Africa's admiralty jurisdiction has caused courts in certain matters[79] to exercise restraint in construing the provisions of the definition of 'maritime claim' and they have justified that restraint by citing the following 'cautionary note' by Hofmeyr:[80]

> The Act, and more particularly a series of amendments to the Act, have served to expand the boundaries of the admiralty jurisdiction further that other jurisdictions which have inherited the philosophy from English admiralty law. This enthusiasm to extend the scope of admiralty jurisdiction must not, it is submitted, be allowed to result in the abrogation of principle and the inclusion of claims which do not properly fall within the purview of admiralty proceedings. If the boundaries of jurisdiction are stretched too far, well-recognised principle will be diluted and the rationale for a separate admiralty jurisdiction will be undermined.

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[77] Hofmeyr (note 1 above) 58. A similar (but not quite the same) version of para (*ee*) was included as para (*z*) in the Admiralty Courts Act 1983, Bill, GN 258, *GG* 8168, 23 April 1982 ('Admiralty Courts Act Bill') however para (*z*) was not included the Act when it was promulgated in 1983.
[78] Staniland (note 32 above) 273.
[79] *El Shaddai* (note 8 above), paras. 14-15; *Repo Wild CC v Oceanland Cargo Terminal (Pty)* Ltd 2013 JDR 2644 (GNP), para. 15; *Kuehne & Nagel* (note 19 above), para. 29.
[80] Hofmeyr (note 1 above) 21.

As stated above, the focus of this study is the manner in which courts have approached the interpretation of the definition in borderline cases, in particular the introductory phrase to the definition, and the maritime topic described in the catch-all provisions of para (*ee*).

1.7.3 Interpretation of the introductory phrase

Shaw notes[81] that courts have interpreted the introductory phrase 'for, arising out of or relating to' as denoting a causal relationship between the claim being made, and a maritime topic, albeit that it is a loose and indirect relationship. In *Mak Mediterranee* the court, referring to the meaning of the words 'for, arising out of or relating to', stated that they are 'expressions of the kind . . . not readily capable of precise definitions, and have meanings which by their very nature are less than definite' and that in 'borderline cases' (where classification is difficult) it is necessary to give 'particular regard' to 'the context in which they are used in the statutory provision in question as well as any other indications . . . which may present themselves'.[82] For the court in *Continental*,[83] the words used in the definition to describe the connection between the claim and the maritime topic 'are all expressions of wide import and are used merely to relate the claim to the description of it.'[84] Thus, the context of the words used in the definition as well as the factual context of the claim are an important part of the process of interpreting the provisions of the definition.[85] For the court in *Peros v Rose*, the relevant context was 'the statute concerned, seen as a whole and in the light of its historical background'.[86] The relevant context in *Kuehne & Nagel*, was described as 'the milieu in which the applicant's claim. . . fits'.[87]

Given the historical background of the Act, and the influence of English law thereon, a consideration of the manner in which English courts, as well as those foreign jurisdictions that

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[81] Shaw (note 32 above) 8. It should be noted that Shaw's book was published in 1987, which is prior to a number of cases that have interpreted the definition of 'maritime claim'.
[82] *Mak Mediterranee* (note 8 above) 606F-G. This is echoed by Hofmeyr (note 1 above) 26, who states that the phrases 'arising out of' or 'relating to' are: 'phrases which are not capable of precise definition, and when it becomes necessary to determine the limits of the relationship which they describe, regard may have to be had to the context, which may include the historical background of the claim in question'.
[83] *Continental Illinois National Bank and Trust Co of Chicago v Greek Seamen's Pension Fund* 1989 (2) SA 515 (D).
[84] Ibid 528F.
[85] The consideration of context is in line with the 'proper approach' to interpretation, see *Endumeni* (note 59 above), para. 18.
[86] *Peros v Rose* (note 5 above) 425D.
[87] *Kuehne & Nagel* (note 19 above), para. 19.

have 'inherited the philosophy of English admiralty law'[88] have interpreted phrases such as 'arising out of' and 'relating to' has also been considered to be a useful exercise.[89] In *Gatoil*[90] the issue before the House of Lords was the meaning of the phrase 'any agreement *relating to* the carriage of goods in any ship whether by charterparty or otherwise'.[91] It is evident from the manner in which Lord Wilberforce framed the issue, that the question of the ambit of the words used to describe the proximity of a connection between a claim and a maritime topic has also vexed English courts:[92]

> Taking the statutory words by themselves, it is obvious enough that they are, in a legal sense, ambiguous, or as I would prefer to state it, loose textured. It is not possible to ascribe a precise or certain meaning to words denoting relationships without an indication what the criterion of relationship is to be. Must the agreement be directly 'for' carriage of goods in a ship, or is it enough that it involves directly or indirectly, or that the parties contemplated that there would be, such carriage as a consequence of the agreement? How close, in such a case, must the relationship be between the agreement and the carriage? Is any connection of a factual character between the agreement and some carriage in a ship sufficient? If not, what is the test of relevant connection? Even when paragraph (e) is read in conjunction with the other paragraphs in s 47(2), the statute provides no guidance: the courts are left with a choice of a broad or a narrow interpretation.

Given the lack of guidance afforded by the words themselves, it is arguable that South African courts are also 'left with a choice of a broad or a narrow interpretation.'[93] As stated by the court in *El Shaddai*:[94]

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[88] Hofmeyr (note 1 above) 21.
[89] Hofmeyr (note 1 above) 33.
[90] *Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co* [1985] 1 All ER 129; also reported as *The Sandrina* (1985)1 Lloyd's Rep 181 (HL).
[91] As it appeared in s 47(2)(*e*) of the (UK) Administration of Justice Act 1956. *Gatoil* (note 90 above) 131 (emphasis added).
[92] *Gatoil* (note 90 above) 131.
[93] Ibid 131.
[94] *El Shaddai* (note 8 above), para. 13.

> In construing the provisions of s 1 of the Act it is necessary to decide whether the expressions "arising out of" and "relating to" are to be regarded as indicating "a loose or indirect relationship" and hence be broadly interpreted, or whether the expressions are to be narrowly construed to mean "having some direct or causal relationship with".

However, framing the question that has to be answered in every maritime-claim enquiry as the binary consideration of whether the introductory phrase must be 'broadly' or 'narrowly' construed, carries with it the danger that those decisions that are considered to 'narrowly' construe the provisions are dismissed out of hand when a court considers the particular claim before it as necessitating a broad construction of the definition. To illustrate this point, the approach taken in *Peros v Rose* has been branded as 'unduly narrow' by the learned author Hare,[95] and in *El Shaddai* the court treated it with caution, noting that the court's approach to the interpretation of the definition was 'restrictive', and that it had been decided prior to the introduction of the catch-all provisions of para (*ee*) into the definition.[96] In *MV Madiba,*[97] the court declined to follow the reasoning in *Peros v Rose* at all, stating that 'that case was considered before the extension of the definition of a maritime claim'.[98] The court in *Kuehne & Nagel* also failed to examine the findings reached in *Peros v Rose*, and only referred to it in a footnote.[99] This, as will be examined in this study, may have been a missed opportunity for the court in *Kuehne & Nagel* which would have benefitted from a closer analysis of that court's reasoning.[100]

Various courts have, over the years, attempted to re-articulate the words used in the definition to describe a connection between a claim and a maritime topic in order to assist in the process of

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[95] *Hare* (note 6 above) 71 fn 8.
[96] *El Shaddai* (note 8 above), para. 19.
[97] *MV Madiba 1: Van Niekerk v MV Madiba 1* 2019 (6) SA 551 (WCC).
[98] Ibid para. 31.
[99] *Kuehne & Nagel* (note 19 above) fn 14.
[100] It will be shown in Chapters Three and Four that, had the court paid closer attention to the approach taken in *Peros v Rose* (note 5 above), it may have focused on the nature of *obligation being enforced*, not the *defences* that may be raised to the claim. This may have led the court in *Kuehne & Nagel* (note 19 above) to follow a far simpler line of reasoning by finding that the obligation being enforced was in fact *the same* as the obligation in the underlying maritime agreement (the obligation being the remuneration of the forwarding agent), and that the claim was, accordingly, a maritime claim.

classifying maritime claims. The test of a 'reasonably direct connection'[101] developed in House of Lords in *Gatoil*,[102] has, according to Hofmeyr, 'been adopted in other jurisdictions'.[103] This test was relied on in the South African decision of *Repo Wild*.[104] There is also notable trend in South African courts using metaphorical language to describe the sufficiency of a connection between a claim and a maritime topic. In *Minesa Energy*[105] the court reasoned that because the claim did not 'touch' the carriage by sea, it was not a maritime claim. The court stated the following:[106]

> I cannot believe that the mere claim for the purchase price of goods, which happen to be delivered by sea, can constitute a maritime claim. It must surely be a claim at least *touching* the carriage by sea in order to fall within subpara (h), and here it is not the claim but the probable defence which *touches* the carriage by sea".

The court in *El Shaddai* reasoned that despite the contractual relationship that was the subject of that matter having 'a maritime *flavour*',[107] the claim was not a maritime claim. There, apparently, the claim did not 'taste' *enough* like a maritime claim, even though it had the 'flavour' of one. In *Peros v Rose*, the court described the connection required in terms of s 1(1) as one that must be 'sufficiently intimate'.[108] This, again, is an expression by a court that refers to a connection as being something that is tangible. The court in *Kuehne & Nagel's* description of the connection as being a 'legally relevant connection'[109] is markedly different from the above descriptions, because it lacks the use of metaphorical language to describe the maritime connection.[110] The

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[101] Hofmeyr (note 1 above) 33.
[102] *Gatoil* (note 90 above) 137.
[103] Hofmeyr (note 1 above) 33.
[104] *Repo Wild* (note 79 above) 14. In *Repo Wild*, the issue was whether a claim for damages arising out of the defendant's breach of an agreement to insure certain goods, which were stored in a container, was a maritime claim. The court concluded that there was no 'reasonably direct connection' between the claim and the container with the result that the claim was not a maritime claim. The court in *Kuehne & Nagel* (note 19 above), para. 29, in the process of considering that 'there must be some limitation' to the types of claims admitted into admiralty jurisdiction, also referred to the test developed in *Gatoil* (note 90 above).
[105] *Minesa Energy (Pty) Ltd v Stinnes International AG* 1988 (3) SA 903 (D).
[106] Ibid 907A-B.
[107] *El Shaddai* (note 8 above), para. 14.
[108] *Peros v Rose* (note 5 above) 425E.
[109] *Kuehne & Nagel* (note 19 above), para. 30.
[110] That is not to say that the use of metaphor is not a useful tool in legal reasoning – see, in general, M Del Mar *Artefacts of Legal Inquiry The Value of Imagination in Adjudication* (2020).

court's explanation that what a 'legally relevant' connection means in that context is that 'the claim and its object . . . must be connected in such a way that *either in procedural or substantive law* the determination of the one could be influenced, *legally*, by the determination of the other'[111] demonstrates that the test developed in *Kuehne & Nagel* is a decided break away from the metaphorical language that had been used in previous decisions to describe the connection, with its focus being on *practical* considerations of what factors are relevant to the maritime-claim enquiry.

*1.7.4 Interpretation of para (*ee*)*

As noted above, while several courts have attempted to describe what degree of connection is required between a claim and a maritime topic in order for a claim to be classified as a maritime claim, there are a limited number of cases in which the provisions of para (*ee*) have been considered in any detail. The reason for this may be because, while it is common practice for litigants to allege that a claim falls within the provisions of para (*ee*), it is often relied on in addition to one or more other maritime topics and it is not always necessary for a court to go into a detailed analysis of para (*ee*) if it is evident that the claim is related to another maritime topic.[112] However, if it is not clear whether a claim falls into one of the paragraphs, the temptation may be to rely on para (*ee*) as a useful fail-safe. In *The Mineral Ordaz* the court reasoned that 'if there is some doubt that it falls under [(*j*)] then certainly, in my view it falls under the catchall provisions of (*ee*) which deals with *all claims* which by virtue of their *nature* or *subject matter* being a marine or maritime matter.'[113]

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[111] *Kuehne & Nagel* (note 19 above), para 30.

[112] Hare (note 6 above) 54, states that: '[t]he plaintiff must aver a specific maritime claim (albeit the generalised claim of para (*ee*)). It is quite possible, and very likely, that certain claims will overlap various definitions of a maritime claim. . . Having a maritime claim as defined however, is an essential averment, and a claimant should aver alternative maritime claims should they be appropriate to its cause of action.' In *Jacobs v Blue Water & others* (11755/2005) [2016] ZAWCHC 17 (1 March 2016), para. 17, the court noted that a finding that a claim falls into one of the paragraphs other than (*ee*) automatically excludes a finding that the claim falls within para (*ee*), stating that this 'follows necessarily from the qualifying effect of the phrase "any other matter" at the beginning of paragraph (ee)'.

[113] *The Mineral Ordaz* (note 7 above) D46I-47A (emphasis added).

Another matter in which the provisions of para (*ee*) were applied is *The Galaecia*.[114] Like *The Mineral Ordaz*, the court in *The Galaecia* relied on hypothetical analogy to justify its conclusion that the claim was not a maritime claim. The claim in *The Galaecia* was for damages that arose from the purchase of a consignment of fish that had been harvested in a ship, and which was subsequently seized by the relevant government authority. The court reasoned that 'the mere fact that the subject matter of the claim is fish caught by a fishing vessel in the sea cannot in my view bring the respondent home under the provision of subsection (ee)', on the basis that '[i]f this same consignment of fish were to have been destroyed in a collision while being conveyed by road. . . the claim against the driver who negligently caused the collision could surely not be classified as a maritime claim'.[115] The court did not make explicit the factors that it considered relevant in reaching that conclusion, and the reader of the judgment is left to do the work of deciding what principles justify the conclusion. This shortcoming in the mode of reasoning followed in *The Galaecia* is one that it shares with *The Mineral Ordaz*, which will be explored further in Chapter Three.

A relatively recent case in which a court considered the provisions of para (*ee*) is the decision of *El Shaddai*.[116] In that matter, a loan had been given to a company to enable it to 'conduct a commercial fishing enterprise'.[117] An acknowledgment of debt was concluded to schedule the repayment of the loan in terms of instalments. The instalments 'were calculated by reference to the income received . . . from the proceeds of the sale of fish sold pursuant to the fishing enterprise'.[118] The court concluded that the claim was not a maritime claim in terms of para (*ee*) for the following reason: 'the underlying nature of the claim is a loan of moneys' and the fact 'that the loan may have been intended to enable [the company] to carry out a fishing venture . . . does not render the nature and purpose of that loan a *maritime matter'*.[119] Unfortunately, the court did not make explicit *why* the fact that the purpose of the loan was 'intended to enable [the

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[114] *The Galaecia* (note 27 above).
[115] Ibid D261.
[116] *El Shaddai* (note 8 above).
[117] Ibid para. 3(b).
[118] Ibid para. 3(d).
[119] Ibid para. 24.

company] to carry out a fishing venture'[120] was not enough to render the loan a 'maritime matter' within the meaning of para (*ee*).

In 2019, a similar set of facts to those in *El Shaddai* arose before the court in *MV Madiba.*[121] The question was whether a claim for repayment of a loan to a bareboat charterer, to be used to covert a vessel into a passenger ferry, qualified as a maritime claim. The purpose of the loan was for 'improvements to the Vessel' and to provide 'working capital',[122] and the 'capital amount of the loan was to be repaid from the proceeds of the trading income generated from the operations' of the vessel.[123] The court concluded that the claim was a maritime claim. Unfortunately, para (*ee*) was not relied upon in *MV Madiba* which makes a direct comparison of the two cases difficult, despite the similarity in facts. Given the different outcomes of these two cases, it will be challenging for a future claimant, who seeks repayment of a loan used to fund a 'maritime venture' (such as fishing, or ferrying as in the two cases discussed) to know with any degree of certainty whether it should institute its claim in a court's admiralty or ordinary jurisdiction. Together, these two judgments reveal what appears to be a rather smudged boundary of admiralty jurisdiction which is inimical the interests of a forum which aims to act 'predictably and with a fair degree of certainty'.[124]

Academic commentary on the provisions of para (*ee*) does not elucidate any further on the types of factors a court might take into account in determining whether a claim falls to be classified as a maritime claim in terms of para (*ee*).[125] In line with his 'cautionary note' referred to above, Hofmeyr specifically cautions that 'the phrase "marine or maritime matter"' in para (*ee*) 'creates the impression that two separate categories are included and may lead to the inclusion in

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[120] Ibid para. 24.
[121] *MV Madiba* (note 97 above).
[122] Ibid paras. 7-8.
[123] Ibid para 10. The court found that the claim was a maritime claim on the basis of the provisions of s 1(1)(*c*) (employment or earnings of a ship) and 1(1)(*q*) (design, construction and repair of a ship) of the Act.
[124] Friedman (note 2 above) 681.
[125] In respect of para (*ee*), Hare (note 6 above), 53 states that, 'where the court regards a matter as essentially a common law cause, without its nature or subject matter being marine or maritime, the court should disallow jurisdiction in admiralty'.

admiralty jurisdiction of matters which should not be included',[126] but the learned author does not go as far as to explore what may be meant by that phrase in practical terms.

The lack of clarity on how to categorise a 'matter' as a 'marine or maritime matter' is unfortunate considering that, as the author Hare states that 'in view of the broad scope of para *(ee)*, the South African High Court in Admiralty may be considered to have jurisdiction limited only by the requirement that the claim be by its nature or subject matter, marine or maritime'.[127] If this is the case then, given the lack of guidance in categorising a 'matter' as a 'marine or maritime matter' in terms of para (*ee*), it could be argued that the boundaries of South African admiralty jurisdiction are not very clearly drawn.

1.8. Outline/Structure of the study

This study will be made up of five chapters, including this chapter. A summary of is set out below.

1.8.1 Chapter One: Introduction and overview

This chapter has introduced the reader to this study. It has described the problem that this study seeks to address, which is the lack of certainty in how courts are to go about classifying a claim as a maritime claim as defined in s 1(1) of the Act, which can cause confusion in borderline cases. This confusion is particularly acute in those borderline cases where the question arises whether a claim, that is connected to an *underlying* maritime claim or maritime agreement, *itself* falls to be classified a maritime claim. It has explained that the lack of certainty in the process of classifying a maritime claim stems from two features of the definition, being the 'introductory phrase' and the provisions of para (*ee*), respectively, that have operated to open up the 'closed' list of maritime topics in the definition. The different methods that have been used by courts to assist in the process of classifying maritime claims were discussed and it was shown that the decision of *Kuehne & Nagel* is the first time a court has attempted to give practical guidance to the process of classification, in the form of the 'legally relevant connection' test, which the court developed and applied to the facts before it. It was pointed out that no court has similarly

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[126] Hofmeyr (note 1 above) 58.
[127] Hare (note 6 above) 53.

attempted to articulate the factors that should be taken into account in the process of interpreting the provisions of para (*ee*).

This Chapter has also set out the questions that this study seeks to answer which promote the overall aim of this study, which is to formulate a general approach to the process of classifying a claim as a maritime claim to assist courts in borderline cases, in particular, those borderline cases where the claim is contended to be a maritime claim by virtue of its connection to an *underlying* maritime claim or maritime agreement. It has stated that this purpose will be achieved by analyzing the reasoning followed in three borderline cases, being *Peros v Rose*, *The Mineral Ordaz* and *Kuehne & Nagel*. The importance of the process of classifying a maritime claim has been established by referencing the fact that the definition of 'maritime claim' is the gatekeeper to the exercise of a court's admiralty jurisdiction, and that the maritime-claim question dictates important aspects of the manner in which the litigant's claim is instituted.[128]

The final part of this Chapter is a literature review, in which the following has been set out: academic commentary on the Act in general; the historical exercise of admiralty jurisdiction in South Africa which places the definition in its historical context; the manner in which courts have interpreted the introductory phrase in the definition and the different methods that have been formulated to assist in that process of interpretation; and lastly, the manner in which courts have interpreted para (*ee*) in the definition.

1.8.2 Chapter Two: The cases

This Chapter will serve to lay the foundation for the work that will be done in this study. The facts, arguments raised and the judicial reasoning followed in *Peros v Rose*, *The Mineral Ordaz* and *Kuehne & Nagel* will be set out and discussed. Thereafter, these decisions will be placed in the context in which they were decided, that is, the changing legal framework of the definition of 'maritime claim', as well as academic commentary on the definition of 'maritime claim'.

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[128] It dictates the geographical location of the court in which proceedings may be instituted, the parties that may be sued, and the system of law that will apply to the dispute. See notes 35-37 above.

A summary of the facts in *Peros v Rose* is as follows. A claim was made in terms of a 'contractual guarantee' that secured the repayment of a sum of money that had been paid in terms of an *underlying* contract that concerned the construction of a ship. It was argued that the claim for payment under the contractual guarantee was 'in respect of' the construction of a ship, and it was thus a maritime claim in terms of s 1(1)(*m*) of the Act, on the basis that there was a close connection between the claim to enforce the contractual guarantee and the provisions of the *underlying* construction contract. The court found that the claim was not a maritime claim on the basis that the connection between the claim and the maritime topic of construction was not 'sufficiently intimate'.[129] The court appeared to reach this conclusion by focusing on the nature of the *obligation* that gave rise to the claim, and assessing the degree of its connection to underlying construction agreement. Focusing on the *obligation being enforced* will be demonstrated in Chapters three and four to be the proper place to commence every maritime-claim enquiry.

The facts in *The Mineral Ordaz* are briefly as follows. The claim was to enforce a settlement agreement that had been concluded to settle a claim arising out of an *underlying* charter party dispute. It was argued that the claim to enforce the settlement agreement was a claim 'for, arising out of or relating to' the charter party, and was thus a maritime claim in terms of s 1(1)(*j*), alternatively s 1(1)(*ee*) of the Act. The court concluded that the claim was a maritime claim because the claim that originally arose out of the underlying charter party did not lose its '*essential character*'[130] when the settlement agreement was concluded. In arriving at this conclusion, the court reasoned by way of analogy to a hypothetical set of facts: it imagined that if two people had concluded an acknowledgement of debt to settle a claim for damages caused to a motor vehicle, they would consider that the nature of the obligation to be unchanged by the conclusion of the acknowledgment of debt. While employing 'hypothetical narrative' may be a useful rhetorical device, it is debatable whether it provides a legally sound approach to the classification of a maritime claim. This will be discussed further in Chapter Three.

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[129] *Peros v Rose* (note 5 above) 425E.
[130] *The Mineral Ordaz* (note 7 above) D47C.

Finally, *Kuehne & Nagel* will be examined. The facts in *Kuehne & Nagel* are similar to those in *Peros v Rose*: in both matters the claims being made were to enforce guarantees that related to underlying maritime agreements. In *Kuehne & Nagel*, the applicant's claim was for the enforcement of two guarantees that had been concluded in terms of an obligation to do so in terms of two *underlying* forwarding services agreements which provided for the remuneration of the applicant as a forwarding agent, being the maritime topic described in 1(1)(*p*)(i) of the Act. To assist it in its determination of whether the claim was a maritime claim, by virtue of its connection to the *underlying* forwarding services agreements, the court developed the 'legally relevant connection' test.[131] In applying that test, the court concluded that the claim was a maritime claim.

The remainder of the first part of this Chapter will involve a comparison of the differences in each courts' approach to the maritime-claim question before it. This exercise will reveal that the court *Peros v Rose* was influenced by considerations of the historical exercise of admiralty jurisdiction in South Africa, which resulted in it taking a *narrow* approach to the classification of the claim before it, whereas in *Kuehne & Nagel* the court was influenced by considerations of policy that justify the exercise of admiralty jurisdiction, which resulted in it taking a *wide* approach.[132] By way of contrast, the court in *The Mineral Ordaz* was not influenced by either historical or policy considerations, but justified its wide approach by referring to the broadly-couched provisions of para (*ee*).

The second part of this chapter will contextualise each of the decisions by considering the academic commentary on the definition of 'maritime claim', as well as the amendments that have been made to the definition since the Act's inception. It will be revealed that both have served to shape the respective courts' approaches.

1.8.3 Chapter Three: Deconstructing a 'maritime claim'

In Chapter Three, the different approaches followed by each of the courts in *Peros v Rose*, *The Mineral Ordaz* and *Kuehne & Nagel* will be critically examined in the context of the definition of

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[131] *Kuehne & Nagel* (note 19 above), para. 30.
[132] It will be argued in Chapters Two and Three that it was an *overbroad* approach.

'maritime claim' in s 1(1) of the Act, which will be disaggregated into its constituent parts being: (a) *the claim* (ie the claim before the court) (b) the *maritime topic* (being one of the listed maritime topics in the definition, to which the claim is to be connected) and (c) a *maritime connection* (within the meaning of the phrase 'for, arising out of or relating to') between the claim and the maritime topic. The reasoning followed in each of the above three decisions will be resituated in the context of these three elements of the definition, and analysed. This process will limn the requirements that need to be met in order to classify a maritime claim. It will further illustrate how the failure to either properly identify each of these three elements, or to keep them distinct from one another, can result in an interpretation of the definition that is either overbroad, or unduly narrow, and thus inconsistent with the requirements of the definition of 'maritime claim'.

This chapter will commence by examining the *first* element of the definition that needs to be properly identified in every maritime-claim enquiry, which is 'the claim'. It will be shown that the reasoning followed in *Peros v Rose* could be said to be exemplary of the proper application of this element but that the courts in *Kuehne & Nagel* and *The Mineral Ordaz* each followed a similar erroneous line of reasoning by considering the effect that a future *defence* to the claim had on the nature of the 'issues' that a court needs to consider in adjudicating the dispute. It will be shown that the focus of the maritime-claim enquiry ought to be the *claim*, not matters external thereto.[133] This conclusion will be buttressed by common sense considerations, as well as by considering the different implications that would follow if potential defences to a claim were used to determine the nature of claim. This analysis will reveal why it is important to properly identify this element of the definition at the outset of every maritime-claim enquiry.

In respect of the *second* element, being the identification of a 'maritime topic', it will be shown that in some maritime-claim enquiries it will be necessary to establish the *existence* of a maritime topic, as listed in the definition. However, in each of the three matters this was not in issue,[134]

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[133] See 3.2.1(*a*) below for a discussion on the reasoning followed in *Minesa Energy* (note 105 above) 905D, in particular the court's statement that 'it is in regard to the *claim* that jurisdiction must exist, not in regard to the *defence* which notionally might never be pleaded.' (emphasis added).

[134] In *Peros v Rose* (note 5 above) it was undisputed that the maritime topic to which the claim was purported to be connected was the construction of a ship (listed in s 1(1)(*m*) of the Act prior to its amendment by the Amendment

except for the court in *The Mineral Ordaz*, which had to establish the existence of the maritime topic described in para (*ee*).[135] It will be shown that establishing the existence of the maritime topic described in para (*ee*) will be necessary in every maritime-claim enquiry where a claim is purported to be connected to a 'marine or maritime matter' described in para (*ee*), given that the words used to describe that maritime topic are indeterminate. The manner in which the court in *The Mineral Ordaz* approached this task will be analysed, and be shown to be flawed.[136] A proper approach to the categorisation of the maritime topic described in para (*ee*) will be set out (which will be elaborated on in Chapter Four).

It will be demonstrated that it is also necessary to properly *identify* the relevant maritime topic, even where the existence of the maritime topic is not in dispute. As an example, it will be shown that the court in *Peros v Rose* placed too much emphasis, in its analysis, on the maritime connection that the claim had to the underlying maritime *agreement*, and that this prevented the court from properly considering whether the claim had a maritime connection with the relevant maritime topic in *general*, unlimited by the provisions of the underlying maritime agreement.[137]

In respect of the *third* and final element of the definition, namely establishing a 'maritime connection', it will be shown that the approach taken in *The Mineral Ordaz*, which was to reason by hypothetical analogy to determine whether a maritime connection was established on the facts, offered little more than its rhetorical appeal. As to *Kuehne & Nagel*, it will be shown that, while the 'legally relevant connection' test offers an approach to the classification of a maritime claim

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Act (note 20 above)), and in *Kuehne & Nagel* (note 19 above) it was undisputed that the maritime topic was the underlying maritime claim in the form of the forwarding agent's fees (s 1(1)(*p*)(i) of the Act). In *The Mineral Ordaz* (note 7 above) it was also undisputed that one of the maritime topics to which the claim was purportedly connected was the charter party (described in s 1(1)(*j*) of the Act), however it was disputed whether the maritime topic described in para (*ee*) was established.

[135] The court in *The Mineral Ordaz* (note 7 above) also had to consider whether the claim could be classified as a maritime claim in terms of s 1(1)(*j*) of the Act.

[136] It will be shown, in Chapter Three, that the court in *The Mineral Ordaz* (note 7 above) conflated the process of establishing the existence of the *maritime topic* described para (*ee*) (the second element of the definition) with the process of establishing whether there was a *maritime connection* between the claim and the relevant maritime topic in para (*j*) (the third element in the definition).

[137] It will be explained that reference to the provisions of an underlying maritime agreement can sometimes be a useful proxy for the maritime topic, but that this exercise must be done with caution, since the provisions of an underlying maritime agreement may be narrower than the maritime topic.

that aligns with the policy considerations that justify the exercise of admiralty jurisdiction[138] and has the potential to offer a sound approach to the process of classifying a claim in terms of the definition, the manner in which this test was applied by the court suffers from a number of flaws. The primary flaw in the court's reasoning will be shown to be its consideration of the effect that a future defence to the claim might have on the 'issues'[139] a court has to decide in the maritime-claim enquiry, and its failure to give proper consideration to whether a maritime connection exists between the facts giving rise to the *claim* (as opposed to the 'issues' before the court) and the maritime topic. The application of the 'legally relevant connection' test in the subsequent decision of *Twende*, will also be briefly examined in order to demonstrate that the 'legally relevant connection' test is capable of being applied in a manner that is both productive in the maritime-claim enquiry and legally sound. Next, the reasoning followed in *Peros v Rose*, as well as a minor line of reasoning followed in *The Mineral Ordaz*, will be examined which will reveal surprising similarities with the reasoning that underlies the 'legally relevant connection' test, which supports the finding that the reasoning that underlies the 'legally relevant connection' test presents a useful manner of approaching a maritime-claim enquiry.

1.8.4 Chapter Four: A new approach

In Chapter Four a new approach to the classification of maritime claims in terms of s 1(1) of the Act will be formulated, in the form of a three-part approach which requires the clear identification of each of the three elements in the definition, the first part being the identification of the *claim*, the second the identification of the *maritime topic* and third the process of testing whether a *maritime connection* exists between the claim and the maritime topic. Two further sub-parts will also developed: namely a two-stage enquiry to be applied in the second part, and a two-step enquiry to be applied in the third part.

The two-stage enquiry to be applied in the *second* part is applicable in cases where the maritime topic identified is that in para (*ee*). Given the shortcomings of the manner in which the court in

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[138] The policy consideration being that admiralty jurisdiction should not be extended 'to matters which can otherwise easily be dealt with within the usual jurisdiction of the high court', see *El Shaddai* (note 8 above) para. 15. See also Hofmeyr (note 1 above) 21 fn 8.

[139] See *Kuehne & Nagel* (note 19 above), para. 27 where the court stated that: 'as a matter of policy *all issues* that are connected with an admiralty issue should be decided by those courts that are seized with admiralty jurisdiction.' (emphasis added).

The Mineral Ordaz approached the task of categorizing the settlement agreement as a maritime or maritime matter, which was to reason by hypothetical analogy, alternative lines of reasoning will be explored which raise additional considerations relevant to that enquiry that should be considered by future courts confronted with a similar question.

The two-step enquiry to be applied in the *third* part is applicable in every maritime-claim enquiry, but will be shown to be particularly useful in those borderline cases where the claim being made purports to be connected to an underlying maritime claim agreement. The first step is to determine whether a *direct* maritime connection can be established, and a test will be proposed. The second step is to determine whether an *indirect* maritime connection can be established, and the 'legally relevant connection' test, with certain modifications that were set out and discussed, will be proposed to be a useful manner of testing an indirect maritime connection.

1.8.5 Chapter Five: Summary of findings and conclusion

This chapter will conclude the study, by answering each of the research questions posed in Chapter One.

CHAPTER TWO: THE CASES

2.1 Introduction

In this Chapter, the decisions in *Peros v Rose*, *The Mineral Ordaz* and *Kuehne & Nagel* will be considered. In the first part of this chapter the facts of each case, as well as the approach taken and reasoning followed by each court will be examined and distinguished. In the second part, the context in which each of these three decisions were made will be examined, being the legislative context, and the academic commentary that has influenced courts' approaches to the interpretation of the definition.

2.2 Peros v Rose

2.2.1 Facts

In *Peros v Rose* the issue was whether a claim arising out of a contractual guarantee was a maritime claim in terms of s 1(1)(*m*) of the Act.[140] That guarantee had been issued in connection with an agreement to build a yacht. At the time, s 1(1)(*m*) of the definition provided that a 'maritime claim' was 'any claim in respect of the design, construction, repair or equipment of any ship. . .'.[141]

The background to this matter is as follows. The plaintiff entered into a contract with Rosa Marine CC, a close corporation of which the defendant was the sole member, in terms of which Rosa Marine agreed to construct a yacht for the plaintiff for the sum of R400 000 ('the construction agreement'). It was agreed that the plaintiff would pay Rosa Marine in installments, the first portion being paid on signature of the agreement, the second on a specified date, and the third on the installation of the engine and completing of the plating.

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[140] Prior to its amendment in terms of the Amendment Act (note 20 above).

[141] Notably, the definition of 'maritime claim', prior to its amendment by the Amendment Act (note 20 above) did not contain the introductory phrase 'any claim for, arising out of or relating to' which currently describes the relationship between the claim being made and the maritime topics listed in the various subsections of the definition. See Appendix II.

Simultaneously with the conclusion of the construction agreement, the plaintiff concluded a 'contractual guarantee'[142] with the defendant, in terms of which the defendant agreed to repay the plaintiff 'an amount equal to the aggregate of such sums as shall have been paid' by the plaintiff to the builder, Rosa Marine, if Rosa Marine had not, within six months from the 'laying of the keel', completed the construction of the yacht up until the stage described as 'installation of engine, completion of plating'.[143] This obligation to 'repay' the plaintiff was 'against cession' of the defendant's 'right, title and interest in, and to, the yacht'.[144] An additional agreement was concluded, two days later, between the plaintiff and Rosa Marine, in terms of which Rosa Marine agreed to exonerate the plaintiff from all further obligations in terms of the construction agreement, in the event that the plaintiff elected to enforce the guarantee against the defendant.[145]

Rosa Marine failed to install the engine and complete the plating within six months, which resulted in the plaintiff instituting proceedings to claim payment from the defendant under the guarantee. The defendant asserted that the court lacked jurisdiction because the claim was in fact a maritime claim and the action ought to have been instituted in the court exercising its admiralty jurisdiction. The issue for the court was whether the plaintiff's claim for payment in terms of the guarantee was a claim 'in respect of the . . . construction . . . of any ship. . .', as contemplated in s 1(1)(*m*) of the Act.

2.2.2 Arguments raised

The plaintiff contended that its claim did not relate to the design or construction of the yacht, as described in para (*m*) of the definition of 'maritime claim', because, being a claim to enforce the guarantee, it was nothing more than a claim for the 'contractual obligation to pay a sum of money'.[146] It further contended as follows:[147]

> [T]he only *connection* between [the guarantee] and the construction of the ship is that those obligations *become enforceable if* a certain stage in the construction of the yacht is not

[142] *Peros v Rose* (note 5 above) 423D.
[143] Ibid 422G.
[144] Ibid 422G.
[145] Ibid 422H-I.
[146] Ibid 423E.
[147] Ibid 426C-D.

> reached by a certain time. The reaching of that stage at that time is *not an obligation* which rests on the builder under the construction contract, which contains no stipulations as to time limits.

What was more, the plaintiff argued, the question which was undeniably a 'maritime matter', which was whether the 'construction of the yacht proceeded according to the [construction] contract' was 'not germane to [the plaintiff's] claim'.[148] What *was* germane to the plaintiff's claim was 'the determination of whether or not the stage in question had been reached by the stipulated time' and this was not, so the argument went 'an enquiry of a sufficiently maritime nature to characterise the claim as a maritime claim.'[149]

The defendant, on the other hand, argued that the fact that both the construction contract and the guarantee made reference to the reaching of certain stage in the construction of the yacht (the completion of the plating) meant that there was a close connection between the construction of the yacht and the guarantee. An additional connection was that the builder, Rosa Marine, undertook in a separate agreement to release the plaintiff from all further obligations under the construction contract should the plaintiff elect to enforce the guarantee. In furthering its argument, the defendant referred to (but did not rely on) the provisions of s 1(1)(*y*),[150] which provided that a maritime claim was also 'any claim to an indemnity with regard to or arising out of any of the aforesaid claims and any claim in respect of any matter ancillary to or arising out of any of the aforesaid claims' to illustrate that 'it was not necessary for a claim to be *directly* related to a maritime matter before it qualified as a maritime claim'[151] and to support his position that para (*m*) should be broadly construed.

After considering the parties' arguments, the court found in favour of the plaintiff by concluding that the claim was not a maritime claim.

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[148] Ibid 426E.
[149] Ibid 426E.
[150] Prior to the amendment of the definition by the Amendment Act (note 20 above).
[151] *Peros v Rose* (note 5 above) 425I.

2.2.3 Court's reasoning

The court approached the maritime-claim question before it by considering the wording of the provision in its context as well as the historical background of the Act. In examining the meaning of the words 'in respect of' as they are used in para (*m*), the court found little guidance from previous decisions (outside the admiralty jurisdiction context) where the meaning of this phrase was considered, and stated that '[t]hese cases establish that whilst the expression "in respect of" may indicate a causal relationship, this is not necessarily so: which is hardly a helpful proposition for any purpose other than to show that it is ambiguous.'[152]

As to the context of para (*m*), the court noted that it was evident from s 6(1)(*a*) of the Act[153] that the legislature considered it to be important that, in respect of matters arising out of the 'old jurisdiction'[154] (being those claims in respect of which a court of admiralty had jurisdiction under the Colonial Courts of Admiralty Act, 1890), the law a South African court is obliged to apply to the matter is not South African common law, but the law that would have been applied by English courts in the exercise of their admiralty jurisdiction in terms of that Act. The court reasoned that the purpose of applying 'English maritime law', being 'that "special body of legal principles and practice"',[155] to the determination of maritime claims arising under the 'old jurisdiction' is because that law 'is peculiarly adapted to the resolution of maritime claims'[156] and furthermore that 'it is only in the case of such claims that there exists any justification for not deciding them in accordance with the common law.'[157] In concluding, the court made the following findings:[158]

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[152] Ibid 425C.
[153] Section 6(1)(*a*) of the Act provides the following: '(1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall - (a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied.'
[154] *Peros v Rose* (note 5 above) 424E.
[155] Ibid 423I-J.
[156] Ibid 424A.
[157] Ibid 424D.
[158] Ibid 425D-F (emphasis added).

> [T]he intention of the Legislature in using the expressions under consideration, was, at least when referring to matters arising out of the old jurisdiction, to convey thereby a relationship between the claim and the maritime topic to which it is related, *sufficiently intimate* to impart to the claim a maritime character which would render it appropriate for the claim to be adjudicated in accordance with maritime law. Nothing short of such a relationship would justify the application to the claim of that system of law.

Regarding those matters that fall under the 'new jurisdiction', the court commented that it is not 'as readily apparent' why the legislature included 'a number of entirely new matters' in the definition of a maritime claim thereby 'exclud[ing] such matters from the ordinary jurisdiction of the Supreme Court'[159] but providing in s 6(1)(*b*) that they are nevertheless to be decided in accordance with Roman-Dutch Law (as opposed to the 'English maritime law').

In applying its findings to the issue to be decided, that is, whether the plaintiff's claim was a claim in respect of the construction of a ship in terms of s 1(1)(*m*) the court stated that, while it agreed that the references to the construction of the yacht in the guarantee do indeed establish some sort of a connection between the construction of the yacht and the guarantee, the court ultimately found that they do not 'establish a connection of such a nature as to render a claim for specific performance of the guarantee a claim in respect of the construction of the yacht'.[160]

2.3 The Mineral Ordaz

2.3.1 Facts

The question that arose in this matter was whether a claim for payment in terms of a settlement agreement, which was concluded to settle a claim under a charter party, was a maritime claim.

The facts are briefly as follows. The mv *Mineral Ordaz* was arrested pursuant to an action in *rem*, instituted in the court's admiralty jurisdiction by Ostral Shipping Co Ltd ('Ostral'). Ostral's claim was to enforce a settlement agreement that it had concluded with Bocimar NV ('Bocimar'), which settlement agreement had been concluded after a charter party dispute between Ostral, as

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[159] Ibid 424E-F.
[160] Ibid 426G-H.

owner, and Bocimar, as charterer, had been referred to arbitration in London, but before the arbitrators had delivered their decision. The action to enforce the settlement agreement was not defended, with the result that default judgment was granted. The application before the court was for the rescission of that default judgment.

The applicant in the rescission application was the mv *Mineral Ordaz*, and the intervening applicant was Ordaz Shipping Co Ltd, the owner of that vessel. One of the grounds on which the applicant sought rescission of the default judgment was that the claim was not a maritime claim and thus the court, which had exercised admiralty jurisdiction in granting the default judgment, did not have jurisdiction.[161] In its summons, on which default judgment had been granted, Ostral had submitted that its claim was a maritime claim in terms of s 1(1)(*j*) of the Act, which provides that a maritime claim is a claim 'for, arising out of or relating to . . . any charter party for the use, hire, employment or operation of a ship' and in the alternative, that it was a maritime claim in terms of the 'catch-all' provisions of s 1(1)(*ee*) of the Act.[162]

In its application for rescission of the default judgment, the applicant stated that, if the judgment were to be rescinded, its defence to the main action would be that the settlement agreement was void because it had been induced by fraud. This fact was important for the court in making its maritime-claim determination, as will be discussed below.

2.3.2 Arguments raised

According to the applicant, the claim to enforce the settlement agreement was not a maritime claim because it was not based on the charter party. In this regard, the applicant referred to the fact that the settlement agreement had been concluded in England,[163] and cited English authority for its argument that a settlement agreement is considered to be a 'new agreement' which

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[161] Since the settlement agreement was concluded in England, and the parties were *peregrini*, this meant that the court had no ordinary jurisdiction to hear the matter, and thus in order to establish jurisdiction, it was necessary to bring it in the court's admiralty jurisdiction.

[162] Section 1(1)(*ee*) of the Act provides that a maritime claim is any claim 'for, arising out or relating to 'any other matter which by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs'.

[163] The court stated that it assumed that the applicant's position was that the English law it referred to should be followed in that matter. The court did not, however, consider itself bound to follow English law in determining the nature of the claim.

'supercedes the original cause of [action] altogether', meaning that Ostral's claim under the settlement agreement was therefore 'no longer a maritime claim' and that 'the court [would have] no further jurisdiction in respect of the original cause'.[164] The applicant also referred to the English decisions of *The Beldis*[165] and *The St Anna*[166] to demonstrate that it had been the subject of debate for some time in England whether a claim for the enforcement of an arbitration award – 'let alone a settlement or compromise'[167] – that arose out of a charter party, was a maritime claim, and that the South African legislature had made a choice to expressly include in the definition of 'maritime claim' a claim arising out of an arbitration award that related to an underlying maritime claim (in para (*aa*)), but it had not included a claim arising under a settlement agreement in similar circumstances. The applicant also argued that the ambit of the definition of a maritime claim should be limited so as to confine the far-reaching effects of the associated ship procedure set out in the Act, in terms of which a claim against ship A could be enforced against ship B, 'thereby dragging in someone else who was not in law liable.'[168]

The respondent, on the other hand, justified its submission that the claim was a maritime claim, by referring the court to the analogous and hypothetical situation of a claim to enforce an acknowledgement of debt where the subject matter was an undertaking to pay an agreed amount of damages arising from one party's motor vehicle having negligently caused damage to another party's motor vehicle. It was argued that, if one were to pose the following question to the parties: 'What is this claim?' they would say 'this is the agreed amount which is due in respect of the damages caused to the motor vehicle'.[169] This analogy demonstrated, according to the respondent, that the *nature* of the charter party obligation was not destroyed by the conclusion of the settlement agreement.

The court ultimately agreed with the respondent, and concluded that the claim to enforce the settlement agreement was a maritime claim.

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[164] *The Mineral Ordaz* (note 7 above) D45F-H, citing *Green v Rozen* [1955] 2 All ER 797 (QBD) 797.
[165] *The Beldis* [1935] 760 (CA).
[166] *The St Anna* [1983] All ER 691 (QBD).
[167] *The Mineral Ordaz* (note 7 above) D45C.
[168] Ibid D47D-E.
[169] Ibid D46G.

2.3.3 Court's reasoning

In finding that the claim was a maritime claim, the court took into account the fact that the applicant's intended defence to the claim, if the judgment were to be successfully rescinded, was that the settlement agreement had been induced by fraud, and that to prove this defence it would need to refer to the underlying charter party. The court considered that it was inconsistent for the applicant, on the one hand, to argue that the claim lost its maritime nature when the settlement agreement was concluded, and, on the other hand, when disputing liability under the settlement agreement, to rely on the circumstances surrounding the conclusion of the underlying charter party to support its version that the settlement agreement was concluded due to a fraud.[170] The court stated that, accordingly, 'the essential character of the claim remains a maritime claim for the respondent in as much as it remains as such for the applicant'.[171]

The court also reasoned that while the parties were prevented, by virtue of the conclusion of the settlement agreement, from suing on the charter party, it was 'a different matter altogether to say that the claim [had] lost its maritime character or nature'.[172] The court adopted as its own the analogical argument made by the respondent that a hypothetical party suing on an acknowledgement of debt, relating to a motor vehicle dispute, would describe the claim as 'the agreed amount which is due in respect of the damages caused to the motor vehicle'[173] which, for the court, meant that the conclusion of the settlement agreement similarly had not 'destroy[ed] the underlying obligation'[174] in the charter party. The court accordingly found that the words 'for, arising out of or relating to' were 'sufficiently wide to cover a settlement agreement arising under a charter party *even under* (ee)'[175] and stated that it had 'difficulty in accepting that the settlement agreement is anything but one which arose out of the charter party'.[176]

In reaching these findings the court rejected the argument made by the applicant that definition should be narrowly construed given the consequences of the associated ship procedure and

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[170] Ibid D46D-E.
[171] Ibid D47C-D.
[172] Ibid D46E.
[173] Ibid D46G.
[174] Ibid D46F.
[175] Ibid D47E.
[176] Ibid D47B.

explained that it had 'difficulty . . . in placing a restrictive interpretation of what constitutes a maritime claim'[177] given the provisions of para (*ee*). In this regard, the court found that the purpose of para *(ee)* was to cover 'anything which per omissio is not covered in the preceding list of definitions' and that 'any other construction' of para (*ee*) would render it 'futile'.[178] In examining the provisions of para (*ee*) the court considered the dictionary definitions of the words 'nature' and 'subject matter', and found that the former referred to 'the essential qualities of a thing, the inherent and inseparable combination of properties pertaining to anything and giving it its fundamental character', and that the latter referred to 'a thing affording action of a specified kind, a ground, motive or cause'.[179]

The court concluded that the settlement agreement, reflecting a compromise on amount only,[180] 'maintains its marine or maritime character' because you cannot simply 'wish away the underlying cause of the settlement agreement'.[181] It also stated that the settlement agreement was 'so closely connected to a marine or maritime claim that it qualifies as such for the purposes of endowing this court with the necessary maritime jurisdiction'.[182]

2.4 Kuehne & Nagel

2.4.1 Facts

The issue before the court was whether claims to enforce two demand guarantees ('the guarantees') were maritime claims in terms of s 1(1)(*p*)(i) of the Act, in that they were claims relating to the remuneration of a forwarding agent. The guarantees had been issued pursuant to two underlying forwarding services agreements ('the forwarding agreements'), in terms of which the applicant had performed certain services as a clearing and forwarding agent. Since the guarantees had been issued by an Italian company, Moncada Energy Group SRL ('the respondent'), the applicant was obliged to first apply to court for edictal citation and substituted service in respect of its intended claim for payment under the guarantees. The applicant made this application in the Gauteng Local Division, exercising its ordinary (not admiralty) jurisdiction.

[177] Ibid D47E.
[178] Ibid D47H.
[179] Ibid D47.
[180] Ibid D47H-I.
[181] Ibid D47H.
[182] Ibid D48A.

The respondent opposed the application for edictal citation and substituted service on the basis that the applicant's intended claim, which was for payment in terms of guarantees, was a maritime claim which meant that the court did not have jurisdiction.[183]

The facts leading up to the application are as follows: the respondent's local subsidiary, Construczioni Moncada South Africa (Pty) Ltd ('the subsidiary') concluded the forwarding agreements with the applicant, in terms of which the applicant would act as a forwarding agent for the subsidiary.[184] The respondent was not a party to the forwarding agreements; however, each of the forwarding agreements stipulated that the subsidiary would provide the applicant with a 'parent company guarantee' – to be issued by the respondent – in order to warrant the subsidiary's payment of the applicant's fees under the forwarding agreements.[185] As contemplated, the respondent issued the guarantees, expressly guaranteeing as principal obligator 'the due and punctual performance by. . . the subsidiary. . . of all its payment obligations' to the applicant.[186]

The guarantees provided that the respondent would perform the subsidiary's obligations within seven days of receiving written demand by the applicant stating that the subsidiary had failed to comply with its payment obligations; further, it provided that the respondent would not 'determine the validity of the demand or the correctness of the amount demanded or become a party to any claim or dispute of any nature which any party may allege'.[187]

Following the apparent failure by the subsidiary to pay the applicant in terms of the forwarding agreements, the applicant made demand for payment from the respondent under the guarantees. The respondent failed to accede to the applicant's demand, which resulted in the application for edictal citation and substituted service.

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[183] It was accepted that the intended claim was the type of maritime claim that the South Gauteng High Court (as it was then named) did not have jurisdiction to hear (the court's area of jurisdiction *not* being adjacent to the territorial waters of the Republic, and the claim not falling into one of the exceptions in terms of s 3(3) of the Act).
[184] It is not clear from the judgment what the terms of the forwarding agreements were but presumably they provided that applicant would provide the type of services that a forwarding agent would usually provide, in exchange for fees which were to be paid by the subsidiary.
[185] *Kuehne & Nagel* (note 19 above), para. 22.
[186] Ibid para. 8.
[187] Ibid para. 9.

The court found that the applicant's claims under the guarantees were maritime claims as contended by the respondent, which meant that the court lacked jurisdiction.[188]

2.4.2 Arguments raised

According to the respondent, the applicant's intended claims for payment under the guarantees were maritime claims as defined in s 1(1)(*p*)(i) of the Act in that they were 'for, arising out of or relating to':

> *(p)* the remuneration of, or payments or disbursements made by, or the acts or omissions of, any person appointed to act or who acted or failed to act-
> …
> (i) as an agent, whether as a ship's, clearing, forwarding or other kind of agent, in respect of any ship or any goods carried or to be carried or which were or ought to have been carried in a ship.

While the applicant accepted that its claims against the *subsidiary* to enforce payment under the underlying forwarding agreements would fall within the definition of a maritime claim, the applicant disputed that its intended claims against *the respondent* for payment under the guarantees were maritime claims. The basis for this distinction, according to the applicant, was that the guarantees were demand guarantees, which by their very nature are wholly independent from any underlying agreement. The applicant relied on Supreme Court of Appeal decisions[189] that stressed the 'autonomous nature of letters of credit'[190] and argued that it was important, in assessing the nature of the claims to enforce the guarantees, that mere formal compliance with the requirements set out in the demand guarantees entitled it to payment, and there was no entitlement on the part of the respondent to challenge the merits of the applicant's underlying claims against the subsidiary under the forwarding agreements. It followed, according to the

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[188] The applicant's alternative argument (which is irrelevant for present purposes) also failed, and its application was accordingly dismissed.
[189] *Coface SA v East London Own Haven* 2014 (2) SA 382 (SCA), paras. 12-13; *State Bank of India and another v Denel Soc Limited and others* [2015] 2 All SA 152 (SCA), para. 16.
[190] *Kuehne & Nagel* (note 19 above), para. 13.

applicant, that it was not the case that its claim under the guarantees was a claim 'arising out of or relating to the remuneration of a forwarding agent', but rather it was a claim arising out of or relating to the *guarantees*. Thus, its claims under the guarantees were not maritime claims. The respondent, on the other hand, contended that it was irrelevant, for the purposes of classifying the claims, that the claims were made under demand guarantees, since the applicant's claims under the guarantees could still be said to be claims that 'arose out of or related to the remuneration of a forwarding agent'.[191]

To put the parties' respective arguments simply, the respondent's interpretation of the definition of 'maritime claim' as it applied to the facts was that *both* of the applicant's claims – i.e., its claims against the subsidiary under the forwarding agreements *and* its claims against the respondent under the guarantees, were maritime claims, while the applicant contended that only its claims against the subsidiary under the forwarding agreements were maritime claims.

While the court ultimately found in favour of the respondent, that the claim was a maritime claim and thus that the court lacked jurisdiction, the court differed from the respondent in its reasoning.

2.4.3 Court's reasoning

In interpreting the definition of 'maritime claim', the court noted that 'not unexpectedly, the two parties' submissions were rather on the opposing ends of the ostensibly elastic 'relating to'.[192] The point of departure for the court was the context of the applicant's claim. It stated that 'context is crucial, and one must, I suggest, accept that the ordinary grammatical meaning of a word in an enactment, such as "relating to", may have different applications if its milieu shifts'.[193]

The 'milieu' was found to be the guarantees. The court referred to the fact that the guarantees and the forwarding agreements made reference to each other, and that they were 'issued pursuant to

[191] Ibid para. 16.
[192] Ibid para. 18.
[193] Ibid para. 18.

the subsidiary's undertaking to do so, as a warranty for the payment of the forwarding agents (the applicant's) fees'.[194]

Viewed against this background, the court stated that the applicant's claim did 'relate', in accordance with the ordinary grammatical meaning of that word, to the remuneration of the applicant as the forwarding agent, and as such the applicant's claims were maritime claims. The court proceeded to give five 'reasons' for this conclusion. *First*, the dictionary definition of the term 'relate to' was considered and it was concluded that the words are of 'wide meaning',[195] although it was noted that, while 'the wideness of the meaning'[196] is a legitimate starting point, it should be borne in mind that words in legislation should be interpreted purposively. This led to the learned judge's *second* reason, which was that, in framing the definition in the manner in which it did, the legislature must have been 'intent on casting the proverbial net wide'.[197] The reason for this, so the court explained, was because the legislature must have 'acknowledged that admiralty jurisdiction imports a specialised field of the law' and that 'as matter of *policy* all *issues* that are connected with an admiralty issue' should be heard by courts exercising admiralty jurisdiction.[198]

Third, taking into account the views of Hofmeyr[199] that the boundaries of admiralty jurisdiction have been expanded 'further than other jurisdictions which have inherited the philosophy from English Admiralty law',[200] the court accepted that there must be some limitation to the wideness of the phrase 'relating to'. The court explained that this consideration followed from the same policy consideration the court mentioned in its second reason, which is that 'issues that are *unconnected* with [. . .] *admiralty issues* should not be decided by courts in the exercise of their admiralty jurisdiction'.[201]

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[194] Ibid para. 25.
[195] Ibid para. 26.
[196] Ibid para. 26.
[197] Ibid para. 27.
[198] Ibid para. 27 (emphasis added).
[199] Hofmeyr (note 1 above) 21.
[200] *Kuehne & Nagel* (note 19 above), para. 28.
[201] Ibid para. 28 (emphasis added).

The court's *fourth* reason consisted of the formulation of a set of issues to be considered in determining the reach of the words 'relating to', which were framed as follows:[202]

> [I]t must be accepted that there has to be at least a legally relevant connection between, on the one hand, the claim being made and, on the other hand, the object to which the claim is required to relate for purposes of the definition of *"maritime claim"*. By *"legally relevant connection"* in this sense I mean that the claim and its object, in this case the applicant's intended claim against the respondent and its object, being the applicant's claim against the subsidiary for fees, must be connected in such a way that either in procedural or substantive law the determination of the one could be influenced, legally, by the determination of the other. Such a connection would explain why a court hearing a claim in admiralty would want to be able, if called upon by the parties, to deal with all issues that are legally relevant to that claim, but with no issues that are legally irrelevant to that claim.

The *fifth* point made by the court took the form of the application of the above considerations to the facts before the court. In applying those considerations, the court stated that it accepted, in favour of the applicant, that the guarantees were in fact demand guarantees 'in the strict sense, i.e. no defences arising from the underlying agreement are permitted'.[203] Despite having made this finding, the court proceeded to reason that '…it is still not possible to immunise the claim under the demand guarantee from the underlying agreement and a claim for fees under it'.[204] The explanation given by the court as to why it is still not possible to 'immunise the claim' was made in reference to the situation where a beneficiary fraudulently makes a call on a guarantee. The inspiration for this line of reasoning appears to arise from the respondent's answering affidavit, which the learned judgment quotes as follows:[205]

> In paragraph 37.4 of its answering affidavit, the respondent says:
> "Furthermore, I am advised that (irrespective of the terms of the guarantee) where a beneficiary who makes a call on a guarantee does so with knowledge that it is not entitled

[202] Ibid para. 30.
[203] Ibid para. 32.
[204] Ibid para. 32.
[205] Ibid para. 33.

> to payment, our courts will step in to protect the guarantor and decline enforcement of the guarantee in question."

Duly inspired, the court reached the pinnacle of its reasoning when it states following:[206]

> [T]he possibility of fraud being alleged and, if it is alleged, its consequence, is relevant, because it illustrates that the claim made by the applicant against the respondent under the demand guarantee is not so remote from the underlying agreement as to render the underlying agreement legally irrelevant to the claim under the demand guarantee. Depending on the defences yet to be raised, note *not the claim*, the claim under the demand guarantee and the underlying agreement may therefore potentially stand in a direct legally relevant relationship.

Having classified the claim as a maritime claim and justified that conclusion with the above five reasons, the court proceeded to test the cogency of its reasoning by comparing it with that followed in two other maritime-claim question matters, being *Repo Wild* and *El Shaddai*. The court found that these cases supported the reasoning it had followed, which was that there must be a 'legally relevant connection' between 'a claim and its object'[207] in order for the claim to qualify as a maritime claim.

In conclusion, the main reason the court gave for its conclusion that the claim was a maritime claim was that the possibility of fraud being raised as a defence to the claim meant that there was potential for a 'direct legally relevant relationship'[208] between the claim under the guarantees and the underlying agreement.

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[206] Ibid para. 34 (emphasis added).
[207] Ibid para. 30.
[208] Ibid para. 34.

2.5 Comparison of the approaches

2.5.1 An overview

Having examined the facts and reasoning in each of the decisions, the approaches will now be compared.

It is evident that, in each of the three matters considered above, the overriding concern for the courts was to establish whether there was a close enough connection between the claim and the relevant maritime topic that would justify the classification of the claim as a 'maritime claim' in terms of the definition. Each court took a different approach to the consideration of how close that connection ought to be. In both *Peros v Rose* and *Kuehne & Nagel* the courts approached the task of classifying the claims before them by first considering the meaning of the words used to describe the relationship between the claim and the relevant 'maritime topic'.[209] In *Peros v Rose*, which was decided prior to the amendment of the definition by the Amendment Act, the phrase used in the definition to describe that relationship was 'in respect of', and in *Kuehne & Nagel*, it was the phrase 'any claim for, arising out of or relating to'. Both courts found little guidance in the meaning of the words themselves, with both concluding that the context in which the claim occurs is a critical part of the enquiry.

It was also important for both courts to consider the historical or policy considerations that were relevant to task before them. In *Peros v Rose*, the court was of the opinion that, insofar as claims that fall into the 'old' heads of jurisdiction are concerned, only claims that are sufficiently intimately connected to a maritime matter justify the application of 'English maritime law' as opposed to South African common law. This resulted in the court claiming to take a narrow approach to the maritime-claim enquiry before it, by describing the connection between the claim and the maritime topic as being one that is '*sufficiently intimate* to impart to the claim a maritime character which would render it appropriate for the claim to be adjudicated in accordance with maritime law'.[210] This approach to the definition of 'maritime claim' has been described by Hare

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[209] Or, as the court in *Kuehne & Nagel* (note 19 above) para. 30 referred to it, the 'the object to which the claim is required to relate for the purposes of the definition of "maritime claim"'.
[210] *Peros v Rose* (note 5 above) 425E.

as being 'unduly narrow'.[211] This could be said to be the exact opposite of the manner in which the court in *Kuehne & Nagel* justified its approach, which was to state that 'the legislature was intent on casting the proverbial net *wide'* and that 'as a matter of policy *all issues* that are connected with an admiralty issue should be decided by those courts that are seized with admiralty jurisdiction'.[212]

The court in *The Mineral Ordaz*, unlike the courts in *Peros v Rose* and *Kuehne & Nagel*, did not engage in an interpretation of the words 'for, arising out of or relating to', with the court merely concluding that the words in the introductory phrase were 'sufficiently wide to cover a settlement agreement arising out of a charter party' even under (ee)'.[213] The court also did not, unlike the courts in both *Kuehne & Nagel* and *Peros v Rose*, cite any policy considerations for the approach it took. Instead, it justified its wide approach by referring to the provisions of para (*ee*) which it considered to be 'a catch-all phrase . . . intended to cover anything which is not encompassed by the proceeding definitions of a maritime claim'[214] and stated that the 'difficulty [it had] in placing a restrictive interpretation of what constitutes a maritime claim is what construction [it] should place on section (1)(*ee*)'.[215]

The approaches that each of the courts took to the interpretation of the definition of 'maritime claim' (the court in *Peros v Rose* taking a narrow approach, and the courts in *The Mineral Ordaz* and *Kuehne & Nagel* taking wide approaches), and the reasons or justifications they gave for those approaches affected, in turn, how each court approached the task of testing the degree of connection between the claim and the maritime topic. The manner in which each court approached this task will be considered below.

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[211] See Hare (note 6 above) 71 fn 8, stating that this approach draws 'an unnecessary distinction between new and old jurisdiction, interpreting the latter more restrictively than the former.'
[212] *Kuehne & Nagel* (note 19 above), para. 27.
[213] *The Mineral Ordaz* (note 7 above) D47E.
[214] Ibid D47F-G.
[215] Ibid D47E.

2.5.2 Establishing a connection between the claim and the maritime topic

(a) Peros v Rose

The court in *Peros v Rose*, having found that the degree of connection between the claim and the maritime topic should be 'sufficiently intimate' did not make explicit its manner of 'testing' whether this was established on the facts. Upon close consideration, however, it appears that, in finding for the plaintiff, the court impliedly also endorsed the plaintiff's argument[216] which could be summed up as follows: because the obligation being enforced (payment in terms of the guarantee) was triggered by the failure to reach a certain stage in construction by a certain date, *and* because the reaching of that stage was not an obligation in the underlying construction contract, there was not a 'sufficiently intimate' connection between the claim and the maritime topic of construction. Another way of articulating this reasoning is to say that, because the *obligation being enforced* was not '*influenced'* by anything done or not done in the *underlying* construction contract, no 'sufficiently intimate' connection had been established. In reasoning in this manner, the court had to first isolate the *obligation being enforced*, and thereafter test the proximity of its connection to the maritime topic of construction. This approach can be contrasted to that followed in *Kuehne & Nagel* in which matters *external* to the facts giving rise to the claim were taken into account, such as the possible future defences that may be raised to the claim, with the nature of the obligation being enforced not being properly examined. However, the method of 'testing' the proximity of the connection impliedly endorsed in *Peros v Rose*, which was to consider the extent of the underlying construction contract's 'influence' on the determination of the obligation being enforced, arguably shares a surprisingly resemblance to the 'legally relevant connection' test that was subsequently developed in *Kuehne & Nagel.* This similarity in reasoning will be further explored in Chapter Three.[217]

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[216] See *Peros v Rose* (note 5 above) 426C-E, where the plaintiff's argument is set out as follows: 'Counsel for the plaintiff has submitted that it is essentially a claim for the performance by the defendant of his contractual obligations under the guarantee, annexure "A". The only connection between annexure "A" and the construction of the ship is that those obligations become enforceable if a certain stage in the construction of the yacht is not reached by a certain time. The reaching of that stage at that time is not an obligation which rests on the builder under the construction contract, which contains no stipulations as to time limits. The issue of whether the construction of the yacht proceeded according to the contract (which would be a maritime matter) is consequently not germane to the plaintiff's claim. The determination of whether or not the stage in question had been reached by the stipulated time is not, in itself, an enquiry of a sufficiently maritime nature to characterise the claim as a maritime claim.

[217] See 3.2.3(*a*)(iii) below.

(b) Kuehne & Nagel

In interpreting the definition of 'maritime claim' broadly, the court in *Kuehne & Nagel* applied its 'legally relevant connection' test to determine the sufficiency of the connection between the claim and the relevant maritime topic, being payment of a forwarding agent's fees. The court reasoned that if fraud were raised as a defence to the claim, the *underlying* forwarding agreement would not be so 'remote'[218] from the claim under the guarantee (presumably because the provisions of the underlying forwarding agreement, and thus the underlying maritime claim for fees, may then become relevant), and thus, a 'legally relevant connection' had been established.[219]

Despite the influence that the possibility of fraud being raised as a defence had on the court's ultimate conclusion, it must be borne in mind that fraud had not even been alleged by the respondent. The learned judge was careful to note that 'no-one has suggested in this matter that the respondent has . . . already alleged fraud on the part of the applicant'.[220] Indeed, reference is made by the court to only the *potential* of there being a legally relevant relationship 'depending on the defences yet to be raised'.[221] The reference to a *potential* relationship appears to stem from the portion of the test that states that the intended claim and its object must be connected in such a way that one 'could be' influenced by the other. This reliance on the hypothetical is problematic, and the court's reasoning suffers for it, as will be demonstrated in Chapter Three. In finding that the claim was a maritime claim because of the *potential* of a 'legally relevant connection' being established, the court's approach could be described as *overbroad*.

(c) The Mineral Ordaz

The court framed its enquiry into establishing the degree of connection between the claim to enforce the settlement agreement and the relevant maritime topic, being the charter party, by considering whether the underlying maritime claim arising out of the charter party had lost its

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[218] *Kuehne & Nagel* (note 19 above), para. 34.
[219] The court accepted that the nature of demand guarantees (out of which the claim arose) 'permit of no defences that arise from the underlying agreement, except fraud', see *Kuehne & Nagel* (note 19 above), para. 43.
[220] *Kuehne & Nagel* (note 19 above), para. 34.
[221] Ibid para. 34.

'maritime character or nature'[222] when the settlement agreement was concluded. This enquiry was used to 'test' whether the claim fell into *both* para (*j*) of the definition, as well as para (*ee*). In failing to meaningfully engage in *separate* enquiries into whether the claim fell within para (*j*) and para (*ee*) respectively, the court's enquiry appears to be over-determined by the provisions of para (*ee*). This is demonstrated by the following statement by the court: '[the claim] falls under the catchall provisions of (ee) which deals with *all claims* which by virtue of their *nature* or their *subject matter* being a marine or maritime *matter*'. [223]

In referring to 'all claims' in the above statement the court appears to be referring to the 'claim' contemplated in the introductory phrase of the definition, namely, '"maritime claim means *any claim*. . .' (ie the claim being made), and not to the *underlying* maritime claim (not being enforced) which arose out of the charter party. In doing so, the court appears to conflate an enquiry into nature of the *claim being made*, with an enquiry into the nature of the *'matter'* described in para (*ee*) (which must, by *its nature*, be 'a marine or maritime matter'). It will be demonstrated in Chapter Three that, properly construed, what is required from the court in terms of para (*ee*) is a determination of whether the claim being made is *connected* to[224] the 'marine or maritime matter' described in para (*ee*), and *not* that the *claim being made* is, *itself*, 'marine or maritime' in nature.[225]

The 'test' that the court used to establish whether the claim had lost its maritime 'nature' when the settlement agreement was concluded was to reason by analogy to a hypothetical set of facts involving a dispute over damages for negligent driving of a motor vehicle. The relative strengths and weaknesses of reasoning by hypothetical analogy will be further explored in Chapter Three. In addition to its reliance on the outcome of the hypothetical analogy, the court further justified its conclusion on the basis that fraud would be raised as a defence to the claim.[226] This feature of

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[222] *The Mineral Ordaz* (note 7 above) D46E.
[223] Ibid D46I–D47A (emphasis added).
[224] In the sense of being 'for, arising out of or relating to'.
[225] It is only by virtue of a *connection* to a maritime topic, that a claim is a maritime claim, rather than by virtue of its *essential nature*, see further the discussion at 3.2.2(*b*)(ii).
[226] *The Mineral Ordaz* (note 7 above) D47C-E.

the court's reasoning is similar to that followed in *Kuehne & Nagel*,[227] and will be critically analysed in Chapter Three.

Having given an overview of each courts' approach to the maritime-claim question before it, and having briefly discussed the merits and the flaws thereof (which will be explored in further detail in Chapter Three) an attempt will now be made to provide an explanation for the differences in these approaches by considering the context in which each of these matters were decided, which differed according to the legislative amendments to the definition of a maritime claim, as well as shifting ideas of what policy considerations were relevant to the classification of maritime claims. These are outlined below.

2.7 The context of the cases

In comparing the approaches followed in *Peros v Rose*, *The Mineral Ordaz* and *Kuehne & Nagel*, and in seeking an explanation for their differences, an appropriate point of departure is to take account of two opposing forces that appear to have influenced the courts' respective approaches to the interpretation of the definition. The first is the introduction of para (*ee*) into the definition in 1992.[228] This occurred two years too late for it to be relied on in *Peros v Rose*, but it arguably played a significant role in the court's reasoning in *The Mineral Ordaz*, which will be discussed below. The second is the publication of Hofmeyr's book wherein the learned author warns against the over-expansion of the boundaries of admiralty jurisdiction.[229] Hofmeyr's book was published after both *Peros v Rose* and *The Mineral Ordaz* were decided,[230] but his cautionary note has been referred to in several decisions since, including, importantly for the purposes of this study, *Kuehne & Nagel*.

These two factors could be said to have pulled courts in opposite directions when it comes to the question of how close a connection between a claim and a maritime topic ought to be. It will be argued below that para (*ee*) served to justify the wide approach taken by the court in *The Mineral Ordaz* to the interpretation of the words in the definition, whereas Hofmeyr's warning has

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[227] *Kuehne & Nagel* (note 19 above), para. 34.
[228] The Amendment Act (note 20 above).
[229] Hofmeyr (note 1 above) 21.
[230] This being the second edition, in which the cautionary note appears (Hofmeyr (note 1 above)).

resulted in other courts questioning the appropriateness of such an approach.[231] In tracking how these two factors have influenced courts' approaches to the maritime-claim question over the years, it is appropriate to begin with the consideration of the context in which the decision of *Peros v Rose* was decided, which was prior to both the introduction of para (*ee*) into the definition, as well as the publication of Hofmeyr's cautionary note.

However, before doing so, mention should also be made of another difference in the context in which *Peros v Rose* was heard, which is the amendment of the definition to include the 'introductory phrase' in the definition, which occurred by way of the Amendment Act after *Peros v Rose* was decided, and prior to the decisions in the other two matters. The insertion of the introductory phrase in the definition resulted in the degree of connection between a claim and each maritime topic being described by the same phrase, 'for, arising out of or relating to'. At the time *Peros v Rose* was heard, the definition did not contain that introductory phrase, instead, each maritime topic was prefaced with its own word or phrase to describe the type of connection it must have with the claim, in order to qualify as a maritime claim.[232] In *Peros v Rose*, the question was whether the claim was 'in respect of' the construction of a yacht. Other maritime topics were prefaced with words such as 'relating to', 'for', 'arising out of', amongst others.[233] As to whether this difference in description of the relationship between the claim and the maritime topic, prior to and after the amendment to the definition, had any influence on the approach each court took to the maritime-claim question before them is unclear. The court in *Peros v Rose* stated that it was 'unable to discern any logical pattern which would explain the difference in the expressions employed'[234] to describe 'the relationship between the claim and the subject'[235] which varied

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[231] In *Repo Wild* (note 79 above), para. 15, Wepener J noted that: 'I also heed the cautionary note expressed by Hofmeyr at p. 21'; and *El Shaddai* (note 8 above), para. 14(c) Lopes J stated: 'I have also borne in mind . . . the views of Gys Hofmeyr. . .'. See also *Mv Madiba* (note 97 above), para. 12, where Hofmeyr's caution was relied on by the defendant.

[232] The court in *Mak Mediterranee* (note 8 above) 602G-I, explained the effect of the inclusion of the introductory phrase in the following manner: 'In the previous definition the words "any claim" were repeated in each category and were linked to the subject-matter of that category by one of various prepositions or prepositional phrases such as "to", "for", "relating to", "in respect of", "arising out of", "in the nature of" and "in regard to". In the new definition the words "any claim" are not repeated in each category and the same preposition and prepositional phrases now apply to each category of claim. The definition at present thus begins - 'maritime claim means any claim for, arising out of or relating to' - and is followed by the 32 categories which, as I have said, are lettered (a)-(ff).' See the definition of 'maritime claim' prior to its amendment in Appendix II.

[233] Such as 'to', 'for', 'relating to', 'in respect of', 'arising out of', 'in the nature of' and 'in regard to'.

[234] *Peros v Rose* (note 5 above) 425A.

from paragraph to paragraph in the definition prior to its amendment. The court in *Kuehne & Nagel* was of a similar opinion, and acknowledged the elasticity of the word 'relating to' used in the introductory phrase.[236] Thus, both courts considered the meaning of the words used to describe the relationship between the claim and the maritime topic as flexible and dependent on the *context* of the facts before them; and it is accordingly unclear if the insertion of the introductory phrase into the definition had any effect on the approaches each court took to the maritime-claim questions before them.

The relevant context for the court in *Peros v Rose* included the history of the exercise of admiralty jurisdiction in South Africa. This led to the court to reason that, since a court, in the exercise of its admiralty jurisdiction, applies the law that is 'peculiarly adapted to the resolution of maritime claims',[237] it is appropriate that only those claims that have a '*sufficiently intimate*' connection with a maritime topic are made subject to that court's admiralty jurisdiction. The court acknowledged that this consideration was only applicable to claims falling under the 'old jurisdiction' because it is only in respect of those claims that the specialised 'English maritime law' is applicable, in terms of s 6(1)(*a*) of the Act.[238] The court could not offer an explanation for why the legislature would choose to introduce new claims that would be subject into admiralty jurisdiction, but apply Roman-Dutch law, instead of the specialised English maritime law to those claims. If there was a policy or reason for the legislature in removing these claims from the courts' ordinary jurisdiction it was 'not . . . readily apparent' to the court.[239]

While the distinction drawn by the court in *Peros v Rose* between the 'new' and 'old' jurisdiction, interpreting 'the latter more restrictively than the former'[240] has been criticized,[241] Hofmeyr expresses a concern, which has been referred to above as his 'cautionary note', that is

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[235] Ibid 424I.
[236] *Kuehne & Nagel* (note 19 above), para. 18.
[237] *Peros v Rose* (note 5 above) 424A.
[238] Ibid 424C-F.
[239] Ibid 424E-F.
[240] Hare (note 6 above) 71 fn 8.
[241] Ibid 71 fn 8.

reminiscent of the court's reasoning in *Peros v Rose*, but, importantly, does not reflect the same narrow considerations. Hofmeyr states:[242]

> The Act, and more particularly a series of amendments to the Act, have served to expand the boundaries of the admiralty jurisdiction further than other jurisdictions which have inherited the philosophy from English admiralty law. This enthusiasm to extend the scope of admiralty jurisdiction must not, it is submitted, be allowed to result in the abrogation of principle and the inclusion of claims which do not properly fall within the purview of admiralty proceedings. If the boundaries of jurisdiction are stretched too far, well-recognised principle will be diluted and the rationale for a separate admiralty jurisdiction will be undermined.

Hofmeyr elaborates, in a footnote, that:[243]

> [T]he special rules and procedures relating to the exercise of admiralty jurisdiction are justified by, and intended to accommodate, the particular needs associated with maritime matters. There is in general no justification for the extension of admiralty jurisdiction to matters having no meaningful maritime connection.

Thus, for both Hofmeyr, and the court in *Peros v Rose*, the guiding principle to be applied in a maritime-claim enquiry, is that a court must be careful not to undermine the 'rationale for a separate admiralty jurisdiction'.[244] However, what distinguishes Hofmeyr's caution from the policy expressed in *Peros v Rose* is the rationale. For Hofmeyr, the reason that the exercise of a court's admiralty jurisdiction should be limited to only those matters that are sufficiently closely connected to maritime matters is because admiralty jurisdiction imports specialised *procedural* law that is 'intended to accommodate, the particular needs associated with maritime matters'[245] whereas for the court in *Peros v Rose* it is because different *substantive* law is applied to maritime claims falling into the old jurisdiction that a close connection between the claim and the

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[242] Hofmeyr (note 1 above) 21.
[243] Ibid 21 fn 8.
[244] Ibid 21. See *Peros v Rose* (note 5 above) 424A.
[245] Ibid 21 fn 8.

relevant maritime topic is required.[246] The result of the policy expressed in *Peros v Rose* is that a court is required to consider whether the claim being made would have been included as a maritime claim in English law, and if so, to restrictively interpret the ambit of the definition of 'maritime claim', whereas for Hofmeyr the question the court is required to consider is more general – that is, whether the claim being made 'properly falls within the purview of admiralty proceedings'.[247]

Thus, because Hofmeyr's caution does not distinguish between claims falling into the 'old jurisdiction' and the 'new jurisdiction', it offers a broad brushstroke approach applicable to all claims, unlike that in *Peros v Rose* which only provides a rationale for the exercise of admiralty jurisdiction in respect of claims arising under the 'old jurisdiction'. There is good reason to consider the policy expressed in *Peros v Rose* to be misguided.[248] Indeed, when courts have looked to a guiding principle, they have cited Hofmeyr's cautionary note, as a check on what may be other indications that the definition should be broadly interpreted,[249] and have ignored the considerations expressed in *Peros v Rose.*[250]

Hofmeyr's caution should be understood against the background that the definition of 'maritime claim', had, by the time Hofmeyr's book was published, been amended to include para (*ee*). The introduction into the definition of this 'catch-all' provision could well have been one of the

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[246] See *Peros v Rose* (note 5 above) 424C-E: '[i]n the light of this background it seems clear that it was the intention of the Legislature, insofar as the matters falling within s 6(1)(a) of the Act are concerned, to confer upon the Supreme Court, exercising its admiralty jurisdiction, exclusive jurisdiction to adjudicate upon such claims in accordance with maritime law because these were, by their nature, peculiarly suited to be determined according to that law. It follows further that the Legislature intended this jurisdiction to be limited to such claims since it is only in the case of such claims that there exists any justification for not deciding them in accordance with the common law'.

[247] Hofmeyr (note 1 above) 21.

[248] See the criticism of Page J's reasoning in this regard in Hofmeyr (note 1 above) 90 fn 32; see also Hare (note 6 above) 71 fn 8.

[249] See *El Shaddai* (note 8 above), para. 15; *Repo Wild* (note 79 above), para. 15; and *Kuehne & Nagel* (note 19 above), para. 28, where Hofmeyr's caution was cited (however, as will be demonstrated below, it was not heeded).

[250] In *Kuehne & Nagel* (note 19 above), paras. 28-29, the court refers to Hofmeyr's caution, and largely ignores the reasoning in *Peros v Rose* (note 5 above), referring to it only in footnote (see fn 14 in *Kuehne & Nagel*); see also *MV Madiba* (note 97 above), para. 31: 'The judgment in *Peros v Rose* is of no assistance to the defendant's primary argument in the present instance. That case was considered before the extension of the definition of a maritime claim'. See further *Repo Wild* (note 79 above) above, para. 15 and *El Shaddai* (note 8 above), paras. 14 and 19.

factors that motivated Hofmeyr's caution.[251] Thus, to understand the decision in *The Mineral Ordaz* is to recognise that it was decided *after* the amendment of the definition to include para (*ee*) but *prior* to the publication of Hofmeyr's cautionary note. It may be for this reason that the 'permission' given by para (*ee*) to include within the ambit of admiralty jurisdiction a broader category of claims than was previously subject to admiralty jurisdiction went relatively unchecked in that matter, with the court failing to consider, in its process of reasoning, whether, from the historical context of the Act, and taking into account the purpose of the exercise of admiralty jurisdiction, there may be factors that weigh against a wide construction of the definition. This is evidenced by the fact that the court's reasoning appeared to be over-determined by the provisions of para (*ee*) – with the court failing to give adequate attention to the separate question of how to interpret the provisions of para (*j*) of the definition in the context of the facts before it, and reasoning that '[t]he difficulty I have in placing a restrictive interpretation of what constitutes a maritime claim is what construction should I place on section (1)(ee).'[252] However, had Hofmeyr's concerns already been expressed at the time that this matter was decided, it may have caused the court to question whether it was necessary or appropriate for a claim to enforce a settlement agreement to be subject to those 'special rules and procedures'[253] available in admiralty jurisdiction, given that a claim on a settlement agreement could be said to be 'easily' dealt with by a court exercising its ordinary jurisdiction.[254] While there were policy considerations that had been expressed in the prior matter of *Peros v Rose* which could have been drawn on by the court in *The Mineral Ordaz*, these may have been (correctly) considered to draw an 'unnecessary distinction' between claims arising under the 'old' and 'new' jurisdictions.[255]

To further demonstrate that Hofmeyr's cautionary note may have caused the court in *The Mineral Ordaz* to approach the question before it more cautiously is demonstrated by the number of times that Hofmeyr's caution has been referenced in subsequently decided maritime-claim question

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[251] Hofmeyr (note 1 above) 21, refers to '[t]he Act, and more particularly a *series of amendments* to the Act' to justify his comment that the boundaries of admiralty jurisdiction have been expanded 'further than other jurisdictions' (emphasis added).
[252] *The Mineral Ordaz* (note 7 above) D47E-F.
[253] Hofmeyr (note 1 above) 21 fn 8.
[254] *El Shaddai* (note 8 above), para. 14(c). The policy consideration by Hofmeyr is interpreted by Lopes J in *El Shaddai* (note 8 above), para. 15, as being that admiralty jurisdiction should not be extended 'to matters which can otherwise easily be dealt with within the usual jurisdiction of the high court'.
[255] Hare (note 6 above) 71 fn 8.

matters; it was cited with approval in *Repo Wild*,[256] *El Shaddai*[257] and *Kuehne & Nagel*.[258] It is thus arguable that the policy consideration[259] that underlies Hofmeyr's caution, has become a permanent feature of the jurisprudence on the maritime-claim question.[260] This is not to say that the court in *The Mineral Ordaz* would have reached a different conclusion had Hofmeyr's caution been considered, but only that the court might have done more to *justify* its conclusion in light of the concern over the over-expansion of the boundaries of admiralty jurisdiction, which would have made the conclusion reached in that matter more persuasive.[261]

It could be argued that, in essence, where a court is floundering in the murky waters of the maritime-claim question the policy that underlies Hofmeyr's caution presents a simple solution: a court must err on the side of favouring the exercise of a court's ordinary jurisdiction, to avoid the unnecessary expansion of admiralty jurisdiction.[262] The advantage of such a general approach is, however, also its limitation – it offers no real guidance to a court as to how go to about determining whether a claim 'properly falls within the purview of admiralty proceedings'.[263] It is this particular limitation that may have been the reason behind the development of the 'legally relevant connection' test in *Kuehne & Nagel*, and which, ironically, resulted in that court taking an *overbroad* approach to the maritime-claim question before it, and ultimately turning Hofmeyr's caution on its head. Before considering the manner in which the court in *Kuehne & Nagel* dealt with Hofmeyr's caution, the effort made in *El Shaddai* to give practical meaning to Hofmeyr's caution must first be considered. In that matter, which was heard prior to *Kuehne & Nagel*, the issue was whether a claim for the repayment of a loan that was used to finance the operations of a fishing vessel, was a maritime claim in terms of para (*ee*). The court stated that, in

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[256] *Repo Wild* (note 79 above), para.15.
[257] *El Shaddai* (note 8 above), para. 14(c). See also note 251 above.
[258] *Kuehne & Nagel* (note 19 above), para. 28.
[259] Being that 'the special rules and procedures relating to the exercise of admiralty jurisdiction are justified by, and intended to accommodate, the particular needs associated with maritime matters' and there is 'no justification for the extension of admiralty jurisdiction to matters having no meaning maritime connection' (Hofmeyr (note 1 above) 21 fn 8).
[260] It was also raised by the defendant's counsel in *Mv Madiba* (note 97 above), para. 12.
[261] In Chapter Four, the lines of reasoning that the court could have explored in justifying its conclusion, but did not, will be discussed and considered (see 4.2.2(*a*) below).
[262] It is not suggested, however, that such a simplistic approach be adopted. The point made is merely that Hofmeyr's caution presents a useful way to justify a narrow interpretation of the definition.
[263] Hofmeyr (note 1 above) 21.

its opinion, what is meant by Hofmeyr when he refers to matters having 'no meaningful maritime connection'[264] being excluded from admiralty jurisdiction is that: [265]

> [T]here is no need, nor should there be any desire, to extend admiralty jurisdiction to matters which . . . can otherwise easily be dealt with within the usual jurisdiction of the high court.

The court concluded by finding that the claim was not a maritime claim in terms of para (*ee*) because it would be 'both unnecessary and undesirable to extend the jurisdiction of the admiralty court to include claims of this nature'.[266] Thus, for the court in *El Shaddai*, Hofmeyr's caution involves the consideration of whether it is possible in the exercise of a court's ordinary jurisdiction, to 'easily' deal with the claim in the sense that it is unnecessary and undesirable for the claim to be heard in a court's admiralty jurisdiction. Unfortunately, the court in *El Shaddai* went no further in explaining how a court may go about making that determination. This challenge was taken up in *Kuehne & Nagel*. The court acknowledged the importance of Hofmeyr's warning, but used it as a counterweight to what it understood to be the legislature's intention regarding the scope of admiralty jurisdiction – which it considered to be 'deliberately widely cast'.[267] The court stated that:[268]

> [T]he statutory enumeration of what is included in a "*maritime claim"* is comprehensive. Matched with the wideness of *"relating to"*, it seems evident that the legislature was intent on casting the proverbial net *wide*. I suggest the reason for this and so the purpose for which the language was so cast, is that the legislature acknowledged that admiralty jurisdiction imports a specialised field of the law.

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[264] Ibid 21 fn 7.
[265] *El Shaddai* (note 8 above), para. 15.
[266] Ibid para. 25.
[267] *Kuehne & Nagel* (note 19 above), fn 14.
[268] Ibid para. 27.

According the court, these two considerations – the one being the court's opinion that 'the legislature was intent on casting the proverbial net wide'[269] and the other being Hofmeyr's warning of the dangers of expanding the boundaries of admiralty jurisdiction too wide – arise out of the *same* policy consideration, which is that 'admiralty jurisdiction imports a specialised field of the law'.[270] The court restated the relevant policy consideration that it considered to underlie Hofmeyr's caution, in the following, attractively simple, manner:

> [a]ll *issues* that are connected with an admiralty issue should be decided by those courts that are seized with admiralty jurisdiction.[271]

and

> *[I]ssues* that are unconnected with admiralty issues should not be decided by courts in the exercise of their admiralty jurisdiction.[272]

However, by restating the relevant policy in the above manner, the court overlooked the fact that it is clear from the wording used in s 1(1) of the Act that a court is required to consider whether '*the claim*' is 'connected to an admiralty issue' (ie, a 'maritime topic'), and not whether there are '*issues*' that are so connected. The latter undoubtedly encompasses a wider set of facts than the former, since it is possible for 'issues' to include allegations made by the defendant in defence to the claim, while the term 'claim' should, it is submitted, be limited to facts constituting, or relating to, the claimant's cause of action, and thus it is only the *facta probanda* and at most the *facta probantia* that are relevant in any maritime-claim enquiry.[273] Thus, with respect, the court's attempt to restate the policy considerations that underlie Hofmeyr's caution resulted in a misstatement thereof. The influence of this is reflected in the 'legally relevant connection' test

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[269] Ibid para. 27.
[270] Ibid para. 27.
[271] Ibid para. 27 (emphasis added).
[272] Ibid para. 28 (emphasis added).
[273] For the meaning of the terms '*facta probanda'* and '*facta probantia*' see *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation & others* 2020 (1) SA 327 (CC), para. 52 citing *McKenzie v Farmers Co-Operative Meat Industries Ltd* 1922 AD 16. The proper interpretation of the term 'claim' is discussed in further detail in 3.2.1(*a*) below.

formulated by the court in terms of which the claim and the maritime object are required to have a 'legally relevant connection', in other words, that:[274]

> [T]he claim and its object. . . [are] connected in such a way that either in procedural or substantive law the determination of the one *could be* influenced, legally, by the determination of the other.

The use of the words 'could be' in the test justified the court shifting its focus from the facts giving rise to the *claim*, as pleaded by the claimant, and allowed it to consider whether, in the future litigation of the matter, there may be facts external to the claim which become relevant and may influence the nature of the 'issues' to be decided by the court – such as potential defences to the claim. Thus, what was intended by Hofmeyr to be a warning to courts not to over-enthusiastically 'expand the boundaries of admiralty jurisdiction'[275] wider than they ought to be, was (unintentionally) misused by the court in *Kuehne & Nagel* to formulate a test that has, in theory, the potential to include a vast number of claims that could 'easily' be dealt with by the court exercising its *ordinary* jurisdiction and would be 'unnecessary and undesirable'[276] to be heard in admiralty. This and other criticisms of the test formulated in *Kuehne & Nagel* are discussed in further detail in Chapter three.[277]

2.8 Conclusion

In the first part of this chapter, the approaches taken in *Peros v Rose*, *Kuehne & Nagel* and *The Mineral Ordaz* were discussed and compared. In the second part, the legislative context of each decision was examined. It was shown that the differences in each court's approach may be explained by considering the legislative amendments that have been made to the definition of a

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[274] *Kuehne & Nagel* (note 19), para. 30.
[275] Hofmeyr (note 1 above) 21.
[276] *El Shaddai* (note 8 above), para. 15.
[277] It will be demonstrated in Chapters Three and Four, that, with important modifications (which will be proposed), the test formulated in *Kuehne & Nagel* (note 19 above) has the potential to guide courts in the process of interpreting the definition of 'maritime claim' in a legally sound manner. It will also be shown, in Chapter Three, that the conclusion reached in *Kuehne & Nagel*, that the claim was a maritime claim, was the right answer for the wrong reason.

maritime claim as well as shifting ideas of what policy considerations are relevant to the classification of maritime claims.

It was shown that an important legislative amendment was the introduction of para (*ee*) into the definition of 'maritime claim', which may account for the wide approach taken in *The Mineral Ordaz* (contrasted with the narrow approach purportedly[278] taken in *Peros v Rose*). It was also shown that the policy considerations expressed in *Peros v Rose*, which justified that court taking a narrow approach to the interpretation of the definition, only provide guidance in respect of claims falling into the 'old jurisdiction'. This may explain why these considerations were ignored by the court in *The Mineral Ordaz*. The court in *The Mineral Ordaz* also failed to consider any other relevant policy concerns that could have had a bearing on the maritime-claim question before it, and this may be attributed to the fact that the matter was heard *prior* to the publication of Hofmeyr's cautionary note, which (unlike the policy expressed in *Peros v Rose*) is applicable to all claims, regardless of their pedigree. It was shown that Hofmeyr's caution has been referred to by a number of courts, with the court in *El Shaddai* offering its own gloss thereon, by reasoning that the manner in which the policy considerations expressed by Hofmeyr may be served is to consider whether a court exercising its *ordinary* jurisdiction could 'easily' deal with the claim. The court in *Kuehne & Nagel* gives further meaning to the policy expressed by Hofmeyr and elaborated on in *El Shaddai*, by reasoning that a court exercising its ordinary jurisdiction cannot 'easily' deal with the matter where the court will have to take into account 'admiralty *issues*' in determining the claim. This restatement of the policy that underlies Hofmeyr's cautionary note is in fact a misstatement, which (unintentionally) turns Hofmeyr's caution on its head by expanding the boundaries of admiralty jurisdiction wider than contemplated in the definition of 'maritime claim'.

[278] It will be demonstrated in Chapter Three that, contrary to the criticism of the unduly restrictive approach taken in *Peros v Rose* (note 5 above), the reasoning in that matter remains sound (even if its justification is not), and is defensible even on a wider construction of the definition.

CHAPTER THREE: DECONSTRUCTING A 'MARITIME CLAIM'

3.1 Introduction

In the previous chapter, the approaches that the courts in *Peros v Rose*, *The Mineral Ordaz* and *Kuehne & Nagel* took to the maritime-claim questions before them, were considered and compared. While each court's primary concern was to establish whether there was a connection between the claim and the maritime topic, what differed was each court's conception of how close that connection should be, as well as the reasoning followed by each court in establishing whether the connection was close enough. The differences in the approaches have been referred to in Chapter Two, which explored the reasons for these differences by considering the context in which each matter was decided.

It was shown that, in *Peros v Rose*, the court found that the connection between the claim and the maritime topic must be 'sufficiently intimate'[279] and in *Kuehne & Nagel,* the court found that the connection must be 'legally relevant'.[280] In *The Mineral Ordaz*, the court found that the connection between the claim and the maritime topic would be established if it could be said that the underlying maritime claim had not 'lost its maritime character or nature'[281] when the settlement agreement was concluded. Having articulated what type of connection would be sufficient for the purposes of classifying the claims before them as 'maritime claims', each court proceeded to consider whether that connection had been established. The court in *Peros v Rose* reasoned that while the obligation being enforced was connected to the construction of a yacht, this was not a 'sufficiently intimate' connection.[282] The court in *Kuehne & Nagel*, found a 'legally relevant connection' to exist between the claims to enforce the guarantees and the underlying claims for remuneration of a forwarding agent, and it explained this to mean that 'the claim and its object … [were] connected in such a way that either in procedural or substantive law the determination of the one could be influenced, legally, by the determination of the other.'[283] In *The Mineral Ordaz* the court arrived at its conclusion that the maritime nature of the

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[279] *Peros v Rose* (note 5 above) 425E.
[280] *Kuehne & Nagel* (note 19 above), para. 30.
[281] *The Mineral Ordaz* (note 7 above) D46E.
[282] *Peros v Rose* (note 5 above) 425E.
[283] *Kuehne & Nagel* (note 19 above), para. 30.

underlying maritime claim had not been 'lost' when the settlement agreement was concluded by reasoning by hypothetical analogy which involved considering how ordinary people would view the nature of an apparently analogous obligation (a claim for motor vehicle damages) that had been novated or compromised by way of a subsequent agreement.

While, in Chapter Two, brief mention was made of the problems present in the approaches taken by each of those decisions, these were not elaborated on. The aim of this chapter is to critically examine each of the different approaches followed by the courts in the context of the definition of 'maritime claim' in s 1(1) of the Act. In order to do so the elements of the definition will be disaggregated into its constituent parts, and the reasoning followed in each of the above three decisions will be resituated in the context of these disaggregated elements, and critically analysed with a view to determining whether the approaches taken by each of the courts are legally sound.

3.2 Definition of maritime claim

The definition of 'maritime claim' is set out in s 1(1) of the Act. It commences with the statement that '"maritime claim" means any claim for, arising out of or relating to - . . . '. Immediately thereafter various 'maritime topics' are listed and described in thirty-two paragraphs, lettered (*a*) to (*ff*).[284]

A close consideration of the structure of the definition of 'maritime claim' reveals that it is comprised of three main parts. The first part is the 'introductory phrase', which is the phrase which reads: 'maritime claim means any claim for, arising out of or relating to'. The introductory phrase can divided into two sub-parts, the first being the term 'any claim' and the second being the words 'for, arising out of or relating to'. The third part is the list of 'maritime topics' included in paras (*a*) to (*ff*). The list of maritime topics can be further broken down into two sub-parts, one being those topics that are specifically enumerated[285] and the other being those that are referred

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[284] The maritime topics that are relevant for the three matters that are the focus of this study are the following: para (*m*) of the definition of 'maritime claim' prior to its amendment by the Amendment Act (note 20 above) (*Peros v Rose* (note 5 above)); paras (*j*) and (*ee*) (*The Mineral Ordaz* (note 7 above)), and para (*p*)(i) (*Kuehne & Nagel* (note 19 above)).

[285] Hofmeyr (note 1 above) 26, refers to paras (*a*) to (*ff*) as being maritime claims as 'specifically defined'.

to more generally in paras (*dd*),[286] (*ff*)[287] (neither of which are of direct interest in this study) and (*ee*), which is referred as the 'catch-all provision'.[288] Thus, in every process of classification, the definition directs an enquirer to establish the existence of (a) a *claim*, (b) a *maritime topic* to which the claim is required to be connected, and (c) a *connection* between (a) and (b) in the manner contemplated by the definition (that is, in a way that can be said to be either 'for, arising out of or relating to'). The term '*maritime connection*' will be used to refer to the connection completed in (c) above.

The proper application of these three elements is critical in every maritime-claim enquiry, since a failure to do so may result in a flawed process of reasoning which may in turn result in confusion as to the proper classification of a claim. It is accordingly necessary to consider each of these elements in further detail. As part of this process, the manner in which the courts in *Peros v Rose*, *The Mineral Ordaz* and *Kuehne & Nagel* approached the task of classifying the claims before them as maritime claims will be critically analysed. In the process, findings made in other important maritime-claim question cases will also be considered.

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[286] As noted by Hofmeyr (note 1 above) 57, para (*dd*) 'serves to incorporate any admiralty jurisdiction existing in the Republic immediately before the commencement of the Act'.

[287] The maritime topic in para (*ff*) is described as follows: 'any contribution, indemnity or damages with regard to or arising out of any claim in respect of any matter mentioned in the preceding paragraphs or any matter ancillary thereto, including the attachment of property to found or confirm jurisdiction, the giving or release of any security, and the payment of interest'. It is noteworthy that a guarantee, like the demand guarantee in *Kuehne & Nagel* (note 19 above), is not expressly referred to in para (*ff*) and no attempt appears to have been made in that matter to classify the claim to enforce the guarantee as a maritime claim in terms of s 1(1)(*ff*), presumably because the demand guarantee in question was not considered to be an 'indemnity', nor 'ancillary' to the underlying maritime claim, given the unique nature of a demand guarantee (*Coface SA* (note 189 above) paras. 12-13); *State Bank of India* (note 189 above) para. 16). It is possible, that a future court may be asked to consider whether a 'guarantee' falls within the provisions of para (*ff*), and that determination would need to be made by closely considering the wording used in the relevant document, viewed in its context, given that the meaning of the terms 'indemnity' and 'guarantee' depends on the context in which they are used, see *Jonnes v Anglo American Shipping Co* 1972 (2) SA 827 (A) and *Peter Cooper & Company (Previously Cooper and Ferreira) v De Vos* [1998] 2 All SA 237 (E). Since the question whether the demand guarantee could be classified in terms of s 1(1)(*ff*) was not discussed in *Kuehne & Nagel*, and the terms of the demand guarantee were not investigated by the court with that question in mind, that issue has not been considered in this study. It may have been wise for the allegation to have been made in *Kuehne & Nagel* that the claim to enforce the guarantee was a maritime claim in terms of *both* para (*p*)(i) and (*ff*), since it is possible for a claim to fall into more than one maritime topic (Hare (note 6) above) 54). As an aside, this does not apply in respect of para (*ee*): if a claim falls into one or more maritime topics listed in s 1(1) it could *not also* be classified as a maritime claim in terms of para (*ee*) – see *Jacobs* (note 112 above), para. 17, where the court noted that a finding that a claim falls into one of the paragraphs other than (*ee*) automatically excludes a finding that the claim falls within para (*ee*), stating that this 'follows necessarily from the qualifying effect of the phrase "any other matter" at the beginning of paragraph (*ee*)'.

[288] Hofmeyr (note 1 above) 58.

3.2.1 The claim

The meaning of the term 'claim' is generally not a contentious issue in matters concerning the classification of maritime claims, and it was not expressly considered in any of the three decisions that are the focus of this study.[289] It is, however, an important feature of the definition because it is the *subject* to which a maritime topic must have a maritime connection. It was understood by the court in *Continental*[290] to mean 'a judicial demand that something be paid or rendered as being legally due, or a demand for the recognition of some right.'[291]

The process of identifying the claim should involve the consideration of the facts giving rise to the claim, which include the obligation being enforced,[292] and thereafter to assess the link that that obligation has with the relevant maritime topic. By way of example, in all three matters that form the subject of this study, the obligation being enforced, and giving rise to the claim, was the payment of a sum of money described in the respective contracts, being the demand guarantees in *Kuehne & Nagel*, the settlement agreement in *The Mineral Ordaz*, and the contractual guarantee in *Peros v Rose*. The manner in which the court in *Peros v Rose* approached the classification of the claim before it could be said to be exemplary of the proper place to start any maritime-claim enquiry. The court's focus on the obligations giving rise to the claim is evident from its summary of the respective party's arguments. It relayed the plaintiff's argument as follows:[293]

> Counsel for the plaintiff has submitted that it is essentially a claim for the performance by the defendant of his contractual *obligations* under the guarantee, annexure "A". The only connection between annexure "A" and the construction of the ship is that *those obligations* become enforceable if a certain stage in the construction of the yacht is not reached by a

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[289] In addition, it was also not directly considered in *El Shaddai* (note 8 above), *Repo Wild* (note 79 above), or *Twende* (note 24 above).
[290] *Continental* (note 83 above).
[291] Ibid 529B; Hofmeyr (note 1 above) 26.
[292] An obligation has been defined as 'a legal tie which binds us to the necessity of making some performance', see N Jansen 'The idea of a legal obligation' 2019 *Acta Juridica* 35, 37 quoting a translation of Justinian *Institutiones* III.13 pr. by P Birks & G McLeod *Justinian's Institutes* (1987).
[293] *Peros v Rose* (note 5 above) 426C-E.

> certain time. The reaching of that stage at that time is *not an obligation* which rests on the builder under the construction contract, which contains no stipulations as to time limits.

It is important for a maritime-claim enquirer to focus on the nature of the *claim* being made, and the *obligation* being enforced, because there is otherwise the temptation to take into account facts outside the claim in the process of classifying the claim, such as future defences that may be raised to the claim. This is precisely the error in reasoning that occurred in *The Mineral Ordaz* and *Kuehne & Nagel*: both courts reasoned that the possibility that the defence of fraud may be raised in future pleadings meant that the claim was a maritime claim because the defence of fraud would provide the necessary link between the claim being made, and the underlying maritime claim (and thus, maritime topic). The court in *Kuehne & Nagel* justified that approach by citing the 'policy' consideration that 'all *issues* that are connected with an admiralty issue should be decided by those courts that are seized with admiralty jurisdiction',[294] which resulted in it shifting its focus from the facts giving rise to the *claim*. The court's reasoning was summed up in the below statement:[295]

> Depending on the *defences yet to be raised*, note *not the claim*, the claim under the demand guarantee and the underlying agreement may therefore potentially stand in a direct legally relevant relationship.

Similarly, in response to the statement made by the applicant in *The Mineral Ordaz*[296] that it intended raising fraud as a defence to the enforcement of the settlement agreement on the basis that it had been fraudulently induced, the court in that matter reasoned follows: [297]

> The applicant cannot on the one hand say, that because of the settlement agreement, the claim loses its maritime nature and, on the other hand, when challenging the settlement agreement, it claims the right to make reference to the charter party and the circumstances

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[294] *Kuehne & Nagel* (note 19 above), para. 27.
[295] Ibid para. 34 (emphasis added).
[296] The consideration of fraud as a defence arguably played a less significant role in the conclusion reached in *The Mineral Ordaz* than it did in the conclusion reached in *Kuehne & Nagel*. The former court's main reason for concluding that the claim was a maritime claim appeared to be the result of its reasoning by hypothetical analogy.
[297] *The Mineral Ordaz* (note 7 above), D46C-D.

surrounding it to support the claim that it was fraudulently led into concluding a settlement agreement or compromise.

That a proper interpretation of the definition of 'maritime claim' requires the focus in every maritime-claim enquiry to be on the facts giving rise to the *claim*, and not matters external to it, is demonstrated by a number of cascading considerations, which are highlighted hereunder (and discussed in further detail below). First, this is evident from the wording of the definition itself, which states that it must be a 'claim' that is connected to a maritime topic – it does not refer to the 'issues'[298] that may be before the court for determination, nor the 'defences' that may be raised. This is supported by case law, and it is, in turn, reinforced by the fact that it is evident from the Act and the Admiralty rules[299] that it must be possible to establish whether a claim is a maritime claim from the moment proceedings are instituted, and if it were possible for a future *defence* to a claim to determine the nature of that claim, then it would not be possible to determine the nature of a claim at the commencement of the proceedings. This point in turn is buttressed by common sense considerations. Lastly, a consideration of the implications of allowing possible future defences to a claim to determine the nature of claim demonstrates the undesirable consequences that would follow if defences to a claim could influence or determine the nature of the claim. Each of these points will be considered in further detail below.

(a) The 'claim' properly construed

It is apparent from the use of the words 'any claim' in the introductory phrase in the definition, that it must be *the claim*, as opposed to defences or 'issues'[300] before the court, that is connected to a maritime topic. This interpretation is consistent with the ordinary meaning of the word 'claim',[301] and, as will be demonstrated below, a consideration of the relevant context supports this interpretation.[302] In commencing the maritime-claim enquiry, the court's task is to focus on

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[298] See the (flawed) reasoning in *Kuehne & Nagel* (note 19 above), para. 27 where the court stated that: 'as a matter of policy all *issues* that are connected with an admiralty issue should be decided by those courts that are seized with admiralty jurisdiction' (emphasis added).
[299] Rules Regulating the Conduct of the Admiralty Proceedings of the Several Provincial and Local Divisions of the Supreme Court of South Africa, GNR.571, GG 17926, 18 April 1997.
[300] *Kuehne & Nagel* (note 19 above), para. 27.
[301] *Continental* (note 83 above) 529B.
[302] *Endumeni* (note 59 above) para. 18.

the essential facts in the claimant's cause of action, in other words, the *facta probanda*[303] because it is those facts that make up the claim. In addition, it is arguable that, in engaging in a maritime-claim enquiry, reference may also be made to the *facta probantia*, being 'the evidence which the plaintiff must advance'[304] in establishing the material facts it is required to prove to sustain its cause of action. The relevance of the *facta probantia* to a maritime-claim enquiry will become apparent in the discussion below regarding the process of establishing an indirect maritime connection.[305] By focusing on the facts giving rise to the *claim*, including, in certain circumstances, the evidence supporting those facts, no reference may be made the *issues* that are before the court for determination, which may be a combination of those facts that have been pleaded by the claimant but placed in dispute, together with the facts pleaded in defence or opposition to the claim. To demonstrate why a court should not, as part of the maritime-claim enquiry, consider the 'issues' that require determination, consideration should be given to the scenario where certain essential facts supporting the claimant's cause of action are excluded from the 'issues' to be determined due to those facts having been admitted by the defendant. If one of those admitted facts, not in dispute, provides the necessary link to a maritime topic, it may be doubted whether the 'issues' before the court are connected to 'admiralty issues',[306] and thus whether the claim is properly subject to admiralty jurisdiction. Thus, it is not a sensible interpretation of the term 'claim' to include facts relating to the 'issues' before a court, because that interpretation conflicts with the ordinary meaning of the term 'claim', and the result would be to deny litigants who have maritime claims (properly construed) from recovering those claims by way of the specialised procedures available in admiralty jurisdiction.[307]

That the focus of the maritime-claim enquiry must be the claim, and not the defences raised to the claim, is also supported by the reasoning followed in *Minesa Energy*.[308] The facts and findings in this matter will be briefly set out below.

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[303] *Minister of Law and order v Thusi* 1994 (2) SA 224 (N), 226F-I.
[304] *Ascendis Animal Health* (note 273 above), para. 52.
[305] See the discussion in 4.2.3(b) below.
[306] *Kuehne & Nagel* (note 19 above), para. 27
[307] As stated by Friedman (note 2 above) 679, 'the Act provides far-reaching and even revolutionary methods to prevent recalcitrant debtors from evading their legal debts. . .'.
[308] *Minesa Energy* (note 105 above).

The applicant, Minesa Energy (Pty) Ltd ('Minesa') sought confirmation of the attachment of certain property belonging to Stinnes International AG ('Stinnes') pursuant to its claim for payment of the purchase price for the sale of two cargoes of coal. The issue was whether the court had the power, either in the exercise of its common law jurisdiction, or alternatively, in the exercise of its admiralty jurisdiction, to attach property belonging to Stinnes. In support of its submission that the court had admiralty jurisdiction, Minesa argued that its claim fell within the provisions of s 1(1)(*h*) of the Act.[309]

The difficulty for Minesa in establishing common law jurisdiction was that the sale agreement provided that payment was to be made at a location that was outside of the court's jurisdiction, which meant that the breach occurred there, and not at a place within the court's jurisdiction. In an attempt to circumvent this obstacle, Minesa contended that 'in reality'[310] the dispute was not about the purchase price, which was in fact agreed, but it was about Stinnes' right to make deductions from it. It argued that this right stemmed from the delays in loading the vessels which occurred in Durban, and therefore the cause of the dispute did in fact occur within the jurisdiction of the court. This argument was rejected by the court which reasoned as follows:[311]

> These submissions must be viewed in the light of the fact that the applicant's claim is for payment. The questions of demurrage and damages relate to the respondent's defence to the claim, which would presumably take the form of a confession and avoidance. Now it is in regard to the *claim* that jurisdiction must exist, *not in regard to the defence* which notionally might never be pleaded.

Thus, Minesa's argument that the court could have regard to 'the *facts giving rise to a probable defence*'[312] in determining whether the court has jurisdiction, was rejected by the court which found that that would amount to 'putting the cart before the horse'.[313] In its attempt to establish

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[309] This matter was heard prior to the introduction of para (*ee*) into the definition, however, it is submitted that the inclusion of that subsection into the definition would not have altered the reasoning followed in this matter (see further the discussion in note 451 below).
[310] *Minesa Energy* (note 105 above) 905B.
[311] Ibid 905C-D (emphasis added).
[312] Ibid 905E (emphasis added).
[313] Ibid 905E.

that the claim was a maritime claim, Minesa was confronted by the same problem that it had experienced in its effort to establish common law jurisdiction, which was that it was the *defence* to the claim, rather than the claim itself, that had the necessary components to establish admiralty jurisdiction. The court stated that '[i]t must surely be a claim at least touching the carriage by sea in order to fall within subpara *(h)*, and here it is *not the claim but the probable defence* which touches the carriage by sea.[314]

This statement by the court in *Minesa Energy* appears, at first glance, to be a direct contradiction to the reasoning followed in both *Kuehne & Nagel* and *The Mineral Ordaz* which involved taking into account that a future defence (of fraud) may provide the necessary maritime connection between the claim and the relevant maritime topic. As to whether there may be grounds on which to distinguish the reasoning in *The Mineral Ordaz* and *Kuehne & Nagel* on the one hand, from the reasoning in *Minesa Energy* on the other hand, will be explored in (*e*) below.

(b) Admiralty rules

A claimant must be in a position to establish jurisdiction at the *outset* of the proceedings, that is, before (and regardless of whether) the matter is opposed or defended, which means that the classification of the claim cannot depend on matters external to it. That the claim must be capable of classification at the outset is evident from a consideration of the term 'any claim' in the context of the Act as a whole read with the Admiralty rules. In this regard, Admiralty rule 2(1) provides the following:

> (a) A *summons* shall … contain a clear and concise statement of the nature of the claim and of the relief or remedy required and of the amount claimed, if any.
>
> (*b*) The statement referred to in paragraph (*a*) shall contain sufficient particulars to enable the defendant to identify the facts and contentions upon which the claim is based. (emphasis added)

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[314] Ibid 907A (emphasis added).

Admiralty rule 4(3) states:

> Save where the court has ordered the arrest of property, the registrar shall issue a warrant only if summons in the action has been issued and a certificate signed by the party causing the warrant to be issued is submitted to him or her stating—
>
> (a) that the *claim is a maritime claim* and that the claim is one in respect of which the court has jurisdiction . . . (emphasis added)

Furthermore, in terms of Admiralty rule 5(2), an applicant for the attachment of property to found or confirm jurisdiction must 'satisfy the court *mutatis mutandis* with regard to the facts and matters referred to in paragraph (a) and (c) of rule 4(3)', in other words, that the applicant's claim is, inter alia, a 'maritime claim'. As stated by the court in *Galsworthy*,[315] in the context of an arrest of a vessel pursuant to a summons *in rem*, '(i)n the absence of a maritime claim the Court cannot exercise its admiralty jurisdiction. It flows from this that the arrestor *has to show the existence of a maritime claim'*.[316] The requirement that a litigant must articulate the facts on which its claim is based is such an important part of the institution of *in rem* proceedings in terms of Admiralty rule 4(3) that, without it, the process of arrest in terms of that rule may not have passed 'constitutional muster'.[317] That a maritime claim must be established at the outset, regardless of any defences that may be raised to the claim, is also confirmed by the below statement of Lopes J in *El Shaddai*:[318]

> In establishing a maritime claim it is not a question of whether that claim is "prima facie established" in the sense of the strength or quality of the claim, but rather whether, given the subject-matter of the claim, it is *in fact* a "maritime claim".

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[315] *Galsworthy Limited v Pretty Scene Shipping SA & another* [2019] 2 All SA 355 (KZP).
[316] Ibid para. 22 (emphasis added).
[317] *The Galaecia* (note 27 above), para. 4; *Galsworthy* (note 305 above) para. 19.
[318] *El Shaddai* (note 8 above), para. 6.

The requirement that a maritime claim must be established as a matter of fact, would seem to exclude an approach that accepts that a claim *could* be a maritime claim *depending* on a defence that might be raised in future pleadings filed in the matter.

(c) Common sense

The point made immediately above, that it is evident from the Act and the Admiralty rules that the claim must be capable of classification at the outset of proceedings (ie prior to any defences being declared), is buttressed by common sense considerations.

In this regard, it is useful to consider, as an analogy, the paradox of 'Schrödinger's cat'. This thought experiment contemplates that a cat is placed in a sealed box with poison that will be released if a subatomic event occurs (which would kill the cat). There is, roughly, a fifty percent chance of the subatomic event occurring. Erwin Schrödinger came up with this thought experiment in 1935 to illustrate 'the flaws of the "Copenhagen interpretation" of quantum mechanics, which states that a particle *exists in all states* at once until observed'.[319] According to the Copenhagen interpretation, after a period of time, the subatomic event would have both occurred, and *not* occurred, but that, *upon observation*, *only one* of those events can be seen to have occurred. According to Schrödinger's critique of this interpretation, this would mean that the cat that was placed in the box would be simultaneously both dead *and* alive, until such time as the lid of the box is lifted and the cat is observed to be in either one of those states. The point made by Schrödinger is that, upon observation of the cat (by lifting the lid of the box) the cat will be in either one of those states, not both, and that common sense dictates that the cat could not have been, as a matter of *fact*, both dead and alive, immediately prior the lid having been lifted. For Schrödinger, this demonstrated that the Copenhagen interpretation led to absurd results and therefore should be rejected. It is also, for present purposes, a useful analogy to the manner in which the court reasoned in *Kuehne & Nagel*. In terms of that reasoning, whether the claim is maritime or not maritime (whether the cat is alive or dead) is determined by the nature of the potential defences to the claim (whether or not the subatomic event occurs which releases the poison), but because the nature of the claim cannot be determined until those defences to the

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[319] T Merz 'Schrödinger's Cat explained' (11 August 2013) https://www.telegraph.co.uk/technology/google/google-doodle/10237347/Schrodingers-Cat-explained html, last accessed on 23 January 2021 (emphasis added).

claim become known, i.e. until the court postulates as to what defences may be raised, or until opposing papers are filed (until the lid to the box is lifted), it means that the claim is simultaneously both maritime and *not maritime* when the claimant institutes its proceedings, and is only determined to be one or the other depending on whether the claim is defended, and it becomes apparent what the possible defences may be. As was demonstrated by Schrödinger, common sense dictates that this type of reasoning is flawed.

(d) Implications of considering defences

Considering the implications of allowing possible future defences to a claim to determine the nature of a claim demonstrates that there are several undesirable consequences that would follow such an approach. For one, it would place the claimant in the position that it would, at the commencement of its proceedings, have to theorise as to what defences may be raised, and then make a determination as to whether its claim may be held to a maritime claim depending on the nature of those imagined defences. This makes it difficult for a claimant, as *dominus litis*, to steer its own course in the litigation.[320]

In the context of an *ex parte* arrest in terms of Admiralty rule 4(3), the practice of allowing the nature of a defence to a claim to determine the nature of the claim, may have constitutional implications in that it may well be considered to be an 'arbitrary deprivation of property'[321] for a creditor to obtain the arrest of a vessel without a court order on the basis of a set of facts which are only relevant on a hypothetical or speculative basis. Yet, this is arguably the effect of the manner in which court in *Kuehne & Nagel* reasoned.

In addition, this approach would mean that there would be no consistency in what our courts consider to be a maritime claim if the nature of the claim depended 'on the defences yet to be

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[320] This is not to say that a claimant may not later change its mind about what exactly its maritime claim is. See *Transol Bunker BV v MV Andrico Unity & others; Grecian-Mar SRL v MV Andrico Unity and others* [1989] 2 All SA 303 (A) 799I-J, where the court held that '[i]t would serve no good purpose to set aside an arrest, knowing full well that a sound basis for the arrest does indeed exist, merely because the party who obtained the order failed to rely upon it initially.' That is a different issue to the point being made here. See also *Cargo Laden and Lately Laden on Board The MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) 831G-832C.

[321] Section 25(1) of the Constitution of the Republic of South Africa.

raised'.[322] Notionally it is possible that litigant A and litigant B, who each have claims on the same type of agreements and institute separate proceedings to enforce their respective claims, could have their claims heard in different jurisdictions (one in a court exercising its ordinary jurisdiction and the other, in admiralty jurisdiction) – all depending on what type of defences are raised to those claims. This situation would be disconcertingly similar to the situation that prevailed prior to the promulgation of AJRA in that there would be two separate jurisdictions potentially applying different law to the same subject matter.[323] What is more, it would introduce an unacceptable degree of unpredictability for litigants and their legal counsel.

If the notion that a defence to a claim can determine the nature of a claim is not outright rejected by South African courts, it may encourage claimants to structure the relief they seek by incorporating an anticipated defence into their claim, with the aim of supplementing what is otherwise a weak factual basis on which to classify their claim as a maritime claim. For example, a claimant, who seeks payment for goods sold and delivered, may decide to structure its relief in the form of a declaratory order that the defendant is not entitled to rely on a particular defence to that claim.[324] If that defence relates to a maritime topic, the question may arise as to whether the claim is 'for, arising out of or relating to' that maritime topic. This practice should not be permitted since, properly understood, '[t]he purpose of such a declarator would be only to enable the applicant to pursue its *real claim* which is for payment of the unpaid balance of the purchase price. That is, and it would remain the substance of the claim'.[325]

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[322] *Kuehne & Nagel* (note 19 above), para. 34.
[323] *Peros v Rose* (note 5 above) 424A-B; see also note 66 above.
[324] See for example the court's approach to this type of scenario in *Minesa Energy* (note 105 above) 905F-G.
[325] *Minesa Energy* (note 105 above) at 905F-G (emphasis added). The court in *Minesa Energy* made this statement regarding the exercise of the court's ordinary (not admiralty) jurisdiction, however it is submitted that the same reasoning was applied by the court in respect of establishing the court's admiralty jurisdiction (see the judgment at 907A). Interestingly, there is a large body of jurisprudence on an analogous problem experienced by American courts in determining whether there is 'federal subject matter jurisdiction' over civil cases "*arising under*" federal law' (R D Freer 'Of Rules and Standards: Reconciling Statutory Limitations of "Arising under" Jurisdiction' (2007) 82 *Indiana LJ* 309, 309). A consideration of this jurisprudence may, in future research, yield interesting insights into how to address some of the problems experienced by South African courts in assessing whether a claim *'arises out of'* a maritime topic in terms of s 1(1) of the Act. One rule that has been developed by American courts to assist in making this determination, is the 'well-pleaded complaint' rule in terms of which a court 'is compelled to view only the plaintiff's claim, and *not material extraneous to the claim (such as an anticipated federal defense)* to determine whether the case arises under federal law. One of the things the court *ignores* . . . is *litigation reality* - that is, an assessment of the *issues* that actually must be addressed' (Freer (note 325), 317-318 (emphasis added)). The American 'well-pleaded complaint' rule appears to be very similar to the approach proposed in this study - that is, that a claim must be assessed for its maritime nature on the facts giving rise to the claim, not on the 'issues' that arise

(e) Two exceptions: a 'maritime claim' defence, and fraud as a future defence?

Having established above that the proper approach to the classification of a maritime claim is to consider the facts which make up the claim, and not matters external thereto, it is important to consider whether the reasoning followed in *The Mineral Ordaz* and *Kuehne & Nagel*, in taking into account a future defence of fraud to the claim, is distinguishable from the reasoning followed in *Minesa Energy* that jurisdiction cannot be established with reference to a '*defence* which notionally might never be pleaded'.[326]

The first possible basis for a distinction to be drawn between these cases is that in both *The Mineral Ordaz* and *Kuehne & Nagel* the court was concerned with the *effect* that the defence of fraud would have on the 'issues' to be decided by the court. In this regard, the *consequence* of that defence being raised is that the court would have had to consider an underlying maritime claim. For *Minesa Energy* on the other hand, the 'probable defence' was *itself* a maritime claim – ie a claim for demurrage falling within s 1(1)(*h*) of the Act.[327] The second is that in *Kuehne & Nagel* there was in fact no indication that the defence of fraud would ever be raised in future proceedings – it was entirely a matter of speculation by the court,[328] whereas for both *Minesa Energy* and The *Mineral* Ordaz, it appeared to be common cause that the defences, relating to demurrage, and fraud, respectively, would be raised in future pleadings.[329] The third basis for distinction is that in *The Mineral Ordaz* and *Kuehne & Nagel* the potential defence was not any defence – it was fraud.

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for consideration before the court. Of further interest is the decision by the US Supreme Court in *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667 (1950) – the court found that a claimant cannot, by seeking declaratory relief, dress up its claim as something that it is not in an attempt to establish jurisdiction. The court stated at 674 that courts should not 'sanction suits for declaratory relief as within the jurisdiction of the [federal] District Courts merely because. . *artful pleading anticipates a defense* based on federal law. . .' (emphasis added). It is submitted that very similar reasoning was followed by the court in *Minesa Energy* (905F-G) in rejecting the notion that the claim would be a maritime claim if the relief were to be reformulated as a declaratory order.

[326] *Minesa Energy* (note 105 above) 905D.

[327] Prior to its amendment by the Amendment Act (note 20 above).

[328] *Kuehne & Nagel* (note 19 above), para. 34, the court noting that '[n]o-one has suggested in this matter that the respondent has . . . already alleged fraud on the part of the applicant'.

[329] Although in *The Mineral Ordaz* (note 7 above) D46A, the court doubted the seriousness of the intention to raise fraud as a defence.

A close inspection of the first two points reveal that they are distinctions without a difference: a proper interpretation of the definition of 'maritime claim' requires the court's focus in the jurisdictional enquiry to be on the nature of the claim, and the facts giving rise to it, not matters external to it. It must follow that it is inappropriate for courts to cure any jurisdictional shortcoming in the claimant's claim as pleaded, by incorporating the facts giving rise to a defence to the claim – either actual defences (which might occur where the maritime-claim question is raised after defences have been pleaded), anticipated defences (such as those in *Minesa Energy* and *The Mineral Ordaz*), or hypothetical defences (such as the speculative defence in *Kuehne & Nagel*) and regardless of whether the defence *itself* is a maritime claim or the defence has the effect of establishing the necessary maritime connection between the claim and a maritime topic.

At best, the solution to the problem presented in *Minesa Energy* (which is that the anticipated defence *itself* was a maritime claim) lies in s 7(2) of the Act, and not in the definition of 'maritime claim'. In this regard, s 7(2)(*a*) provides that where 'the question arises as to whether a matter pending or proceeding before [a] court is one relating to a maritime claim, the court shall forthwith decide that question', and if 'the matter is one relating to a maritime claim, it shall be proceeded with in a court competent to exercise its admiralty jurisdiction'.[330] The important difference between s 7(2) of the Act, and the definition of 'maritime claim' in s 1(1), is that the former requires the consideration of whether '*the matter*' relates to a maritime claim, whereas the latter enquiry is whether the '*claim*' is a maritime claim. It is arguable that s 7(2) is capable of being construed to allow a defendant (or respondent) to request that an order be made that the matter proceed in a court competent to exercise its admiralty jurisdiction, in order that its defence that relates to a maritime claim may be heard according to the Act and Admiralty rules, but since this question was not raised in any of the decisions considered herein, no view is expressed

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[330] A court *not* competent to exercise admiralty jurisdiction would be a court described in s 3(3) of the Act (ie, an 'inland' court) in respect of certain claims in *personam*. A court competent to exercise admiralty jurisdiction would be a court whose area of jurisdiction is adjacent to the territorial waters of the Republic, contemplated in s 3(3) of the Act. See *Columbus Stainless* (note 30 above), para. 13. Where an order is made in terms of 7(2) of the Act, that the matter 'shall be proceeded with in a court competent to exercise its admiralty jurisdiction', and the court making the order cannot, itself, exercise admiralty jurisdiction, an application to transfer the matter to a court that is competent to exercise admiralty jurisdiction may have to be made, in terms of s 27 of the Superior Courts Act 10 of 2013. See, in general, the facts in *Columbus Stainless* (note 30 above).

thereon,[331] except to suggest that the more likely interpretation of s 7(2) is that it applies *only* in two circumstances: the first is where the claim (in convention) is a maritime claim, and the second is where a maritime *counter*claim is made. Since a counterclaim is 'convenient surrogate for an independent action',[332] it is a sensible interpretation of s 7(2) of the Act to interpret the word 'claim' as including a claim in *reconvention*. It would also give effect to the 'apparent purpose'[333] of the Act which is to avoid two separate jurisdictions potentially applying different law to the same subject matter, which would otherwise occur if a maritime claim in *reconvention* was prevented from being heard in a court's admiralty jurisdiction, and thus treated differently from the same maritime claim being made in *convention*.[334] One possibility as to how the matter would proceed once an order is made in terms of s 7(2)(*a*) is that that court would notionally 'wear two hats': in determining the (non-maritime) claim in convention, the court would exercise its ordinary jurisdiction, and in determining the maritime *counter*claim, it would exercise its admiralty jurisdiction.[335] The benefit for the defendant of an order being made in terms of s 7(2)(*a*) is that its maritime counterclaim would be decided in accordance with the Act and Admiralty Rules. Importantly, however, the scenarios explored above are something different from the facts in each of the three decisions discussed herein: in those matters the question before the respective courts was whether the *claim was a maritime claim* in terms of s 1(1) of the Act,

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[331] This situation may present complications: would the court competent to exercise its admiralty jurisdiction determine the claim in terms of its ordinary jurisdiction, and the defence, in terms of its admiralty jurisdiction?

[332] According to D E van Loggerenberg *Erasmus: Superior Court Practice* OS, 2015, D1-311 '[a] claim in reconvention is. . . a convenient surrogate for an independent action'. It is accordingly different to a defence to a claim.

[333] *Endumeni* (note 59 above), para. 18.

[334] *Peros v Rose* (note 5 above) 424A-B; see also note 66 above.

[335] Importantly, in terms of s 5(2)(*a*) of the Act, 'a court may in the exercise of its admiralty jurisdiction – (a) consider and decide any matter arising in connection with any maritime claim, notwithstanding that any such matter may not be one which would give rise to a maritime claim.' As to whether such a court should apply the Uniform rules of court, or the Admiralty rules to the non-maritime claim, see the discussion in Friedman (note 2 above) 682. There, the learned author, and former judge, considers whether a *non*-maritime counterclaim should be governed by the Admiralty Rules (note 301 above) or the Uniform rules where the proceedings have been instituted in a court exercising its admiralty jurisdiction. Friedman opines that the solution is straightforward, 'since, from a practical point of view it matters little whether the court was dubbed an admiralty court or a provincial or local division exercising its ordinary jurisdiction – the *same judge* can easily, and at one and the same time, adjudicate on both claim and counterclaim.' (at 682, emphasis added). It is submitted that the same principles would apply where a maritime *counter*claim is made, in response to a non-maritime claim, although, if the proceedings have been instituted in a court *not* competent to exercise its admiralty jurisdiction, the matter would first need to be transferred to a court competent to exercise admiralty jurisdiction, probably in terms of s 27 of the Superior Courts Act, 10 of 2013 (regarding transfer, see the facts in *Columbus Stainless* (note 30 above)).

and whether the respective claims had been brought in the appropriate jurisdiction.[336] The issue was *not* whether an order in terms of s 7(2) of the Act could be made on the basis that a defence to the claim related to a maritime claim, or that a maritime counterclaim had been raised. It bears repeating that the manner in which the Act has been structured is that admiralty jurisdiction is determined with reference to the 'subject matter of *the claim*',[337] and it has been demonstrated by the cascading considerations set out above that any interpretation of the word 'claim' in s 1(1) to include 'defences' is inconsistent with the wording of the definition of 'maritime claim' viewed in its context,[338] and would have the consequence that a claimant with a *non-maritime* claim would benefit from the 'far-reaching'[339] remedies available in admiralty jurisdiction, merely because the *defence* to that claim relates to a maritime topic.

As to the third point of distinction, it is worth considering whether the defence of *fraud* might be an exception to the general position discussed above, given that fraud 'unravels all'[340] and thus may operate to establish connections between a claim and a maritime topic that otherwise would not exist. If this were an exception, however, it would be necessary for courts to ensure that the defence of fraud is properly pleaded, and it is not merely raised as a hypothetical. This is because taking a *speculative* defence of fraud into account in the maritime-claim enquiry would be at odds with the attitude taken by our courts to allegations of fraud.[341] As stated by the court in *Nedperm Bank Ltd*[342] in the context of a summary judgment application:[343]

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[336] In *Kuehne & Nagel* (note 19 above) the respondent opposed the relief that was brought in a court exercising its ordinary jurisdiction on the basis that the 'applicant's *claims [were] "maritime claims"* (see paras. 3 and 5 – emphasis added); in *The Mineral Ordaz* (note 7 above) D44E-F the contention was made that the vessel had been wrongly arrested since *the claim* was not a maritime claim; in *Peros v Rose* (note 5 above) the defendant argued that the court, which was exercising its ordinary jurisdiction, could not hear the matter on the basis that the *plaintiff's claim was a maritime claim.* In *Minesa Energy* (note 105 above) the question was whether the court had jurisdiction to order an attachment in terms of s 4(4)(*a*) of the Act, but to do so, *the claim* had to be classified as a maritime claim in terms of s 1(1) of the Act (see 906A-H).

[337] Hofmeyr (note 1 above) 21.

[338] *Endumeni* (note 59 above), para. 18.

[339] Friedman (note 2 above) 679.

[340] The maxim 'fraud unravels all' should be understood in the context of the following statement by the Constitutional Court in *Absa Bank Ltd v Moore & another* 2017 (1) SA 255 (CC), para. 39: '[t]he maxim is not a flame-thrower, withering all within reach. Fraud unravels all directly within its compass, but only between victim and perpetrator, at the instance of the victim. Whether fraud unravels a contract depends on its victim, not the fraudster or third parties'.

[341] *Loomcraft Fabrics CC v Nedbank Ltd and another* 1996 (1) SA 812 (A) 822H.

[342] *Nedperm Bank Ltd v Verbri Projects CC* 1993 (3) SA 214 (W).

> [I]t is trite that fraud is a most serious matter and the type of allegation which is not lightly made and which is not easily established. What is important is that a *factual basis* must be laid for an allegation of fraud, and it is not sufficient, particularly in an affidavit resisting summary judgment, merely to put up *speculative propositions* or to raise submissions or to advance arguments of probabilities which might indicate a fraud. What is essential is that there should be *hard facts*, as it were, upon which the Court can exercise the discretion which it is given in terms of the Rule relating to summary judgment.

While the above statement was made in the context of fraud being alleged in the substantive determination of rights, and not the determination of jurisdiction, the point being made applies equally to support the proposition that it is inappropriate for a court to consider the *possibility* of fraud being raised as a factor that provides a maritime connection between a claim and a maritime topic. If it were otherwise, where the issue before a court is whether a claim is connected to an underlying maritime claim[344] the spectre of the possible defence of fraud would *always* be determinative of that enquiry, which demonstrates the absurdity of that approach. It is submitted that, if the defence of fraud (properly pleaded) is found to 'unravel' a claim to reveal the existence of maritime connection to a maritime topic, this maritime connection should be clearly discernable. That was not the case, on the facts in *Kuehne & Nagel*: it was not clear how the defence of fraud would have provided the necessary maritime connection even if that defence had been pleaded.

3.2.2 Maritime topic

(a) General considerations

The determination of the existence of a maritime topic is a necessary component in the maritime-claim enquiry because 'it is *the object* to which the claim is required to relate for the purposes of

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[343] Ibid 220B-C (emphasis added). This extract was recently cited in *Van der Merwe NO and Others v Moodliar NO and another*; [2020] 1 All SA 558 (WCC), para. 27.

[344] Such as was the case in each of the three matters that are the focus of this study, namely *Peros v Rose* (note 5 above), *The Mineral Ordaz* (note 7 above) and *Kuehne & Nagel* (note 19 above).

the definition of "maritime claim"'.[345] In other words, the claim must have a maritime connection to a *maritime topic* before it can be classified as a maritime claim.

Depending on the nature of the dispute between the parties, establishing the existence of a maritime topic may be central to the maritime-claim enquiry.[346] This may involve, in certain circumstances, the consideration of foreign law.[347] In the three matters that form the subject of this study, establishing the existence of a maritime topic was, however, an uncontentious issue. In each of those matters there existed an underlying maritime agreement or 'maritime activity' and the question was whether the claims had a *maritime connection* to thereto. The term 'maritime activity' will be used in this study to refer to the conduct that is contemplated in the relevant maritime topic as described in the definition. Thus, in *Peros v Rose*, the relevant maritime activity was the construction of a yacht, in *The Mineral Ordaz* it was the charter party obligation to pay a sum of money, and in *Kuehne & Nagel* it was the remuneration of a forwarding agent.[348]

However, even where there is no dispute as to the *existence* of a maritime topic, it remains important to properly *identify* that maritime topic during the maritime-claim enquiry. If the maritime topic is not properly identified, this can cause the enquiry to be either unduly narrowed or widened. The enquiry in *Peros v Rose* could be criticised in this regard, for the emphasis the court placed on establishing that the claim had a maritime connection to the underlying maritime *agreement*, as opposed to considering whether the obligation being enforced had a maritime connection to a maritime topic in general, irrespective of the lack of connection to the underlying agreement. This is because, while it is possible to source a maritime topic in an underlying

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[345] *Kuehne & Nagel* (note 19 above), para. 30.

[346] To cite one example where the determination of a maritime topic was central to the dispute, see *Jacobs* (note 112 above) in which the issue was whether the maritime topic described in s 1(1)(*f*) of Act existed on the facts. In considering whether this maritime topic had been established, the court considered the ordinary grammatical meaning of the words used in para (*f*), as well as similar provisions contained in other instruments, both foreign and international, in its attempt to understand what is contemplated by that maritime topic.

[347] According to the court in *MV Silver Star* (note 48 above), para. 31, 'foreign law' can be used to 'determine the nature of a particular claim in order to decide whether it comes within the scope of one of the defined maritime claims'.

[348] To illustrate the meaning of this term further, while the relevant maritime activity in *The Mineral Ordaz* (note 7 above) was the charter party obligation to pay a sum of money, it is possible that in a different dispute, the relevant maritime activity may be the payment of demurrage arising out of the charter party, or an obligation to complete the charter of a vessel for the agreed period of time, or notionally a number of other obligations in the charter party that give rise to the particular claim before the court.

maritime agreement (if the agreement contemplates the performance of 'maritime activities' contemplated in the relevant maritime topic) the maritime topic may in many instances be broader than the provisions of the underlying maritime agreement. In this regard, a criticism of *Peros v Rose* might be that the court failed to consider whether, since the obligation to pay in terms of the guarantee was 'triggered' by the failure to install the engine and lay the keel, which are two activities that could arguably be described as the 'maritime activities' contemplated in the maritime topic in para (*m*),[349] the claim could be said to have a maritime connection to that maritime topic, irrespective of the fact that those maritime activities were not also obligations contained in the underlying construction contract.

However, it should be noted that the process of considering whether the obligations of the underlying construction contract were relevant to the determination of the claim, was a legitimate starting point, given that it was uncontroversial that the activities in the underlying construction contract were 'maritime activities' contemplated in the relevant *maritime topic*, being construction of a ship. It would accordingly follow that, if the obligation to perform in terms of the guarantee was 'triggered' by the performance or non-performance of one of those maritime activities in the underlying construction contract, that would establish a 'maritime connection' between the claim and the relevant maritime topic that was 'sufficiently intimate'.[350] In this way, the provisions of the underlying maritime agreement stood as a useful proxy for the maritime topic, albeit in a narrow sense.

While the existence of a maritime topic was undisputed in *The Mineral Ordaz*, this was only true for the contention that the claim had a maritime connection with the maritime topic described in para (*j*) (being the charter party). The court was, however, also concerned with whether the claim could be classified as a maritime claim in terms of para (*ee*), and to do this the court had to establish that the settlement agreement could be said to be a 'matter', which was 'by virtue of its nature or subject matter . . . a marine or maritime matter'. In fact, establishing the existence of the

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[349] Prior to the Act's amendment by the Amendment Act (note 20 above). As to whether only one activity usually associated with the construction of a ship, such as laying the keel, is sufficient to establish the existence of the maritime topic of ship construction, will depend on the interpretation given to that maritime topic by the relevant court.

[350] *Peros v Rose* (note 5 above) 425E.

maritime topic as it is described in para (*ee*) will inevitably be a necessary task in *every* dispute where the question arises whether a claim can be classified as a maritime claim in terms of para (*ee*) due to the imprecise manner in which this maritime topic has been described[351] and the unlikelihood that the existence of this maritime topic would be objectively discernible.[352] Through an analysis of *The Mineral Ordaz*, several important points are revealed about the proper approach to the classification of a maritime claim in terms of para (*ee*). These will be discussed and explored below.

(b) Identifying a maritime topic described in para (ee)

Upon examination of the structure of the provisions para (*ee*), the enquiry that must be followed in order to categorise a matter as a 'marine or maritime matter' in terms of para (*ee*) becomes clear.

(i) Structure of para (ee)

Section 1(1)(*ee*) states the following:

> "maritime claim" means any claim for, arising out of or relating to –
>
> . . .
>
> (*ee*) any other matter which by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs.

It is apparent from the above that, in order for a claim to be a maritime claim in terms of para (*ee*), the claim must be connected to a *matter* which can be described as a *'marine or maritime matter'*. It is only once the existence of a 'marine or maritime matter' has been established, that an enquiry can occur into whether the claim has a *maritime connection* with that (newly established) marine or maritime matter. Thus, it is evident, from the manner in which para (*ee*) has been constructed, that it is meant to serve as an entirely new category of maritime topic.

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[351] As it was stated in Chapter 1, the manner in which this maritime topic has been described seems to beg the very question to which the definition of 'maritime claim' seeks to provide an answer.

[352] Unlike, for example, the relatively easier task of establishing the existence of a charter party described in para (*j*).

The manner in which para (*ee*) is structured differs in this important respect from earlier formulations of a 'catch-all' provision in draft versions of the definition prior to the Act's promulgation. In this regard, s 3(1) of the Admiralty Courts Act Bill,[353] published in April 1982, set out a list of different claims that qualified as maritime claims. Each paragraph commenced with the words 'any claim'[354] which was followed by the words 'for', 'arising out of', 'relating to', 'with regard to', amongst others, followed by a description of a maritime topic. Notably, there was no general 'introductory phrase'. Section 3(1)(*z*) provided the following:

> 3. (1) The following *claims* shall be maritime claims:
>
> . . .
>
> '(z) *any other matter* which . . . by virtue of its nature or subject matter *is a maritime claim*, without limiting the meaning of the expression "maritime claim" by reason of the matters set forth in the preceding paragraphs'.

It is evident from the above that in establishing whether a claim arose out of a maritime topic described in para (*z*) in the Admiralty Courts Act Bill, the phrase 'any other matter' was a reference to the '*claim*' being made, which must 'by virtue of its nature or subject matter' have been a '*maritime claim*'. This is an important difference from the current formulation of para (*ee*) in the Act, in terms of which the phrase 'any other matter' refers to the *object* to which the claim must be connected.

It was discussed in Chapter Two that it is unclear whether it was appreciated, at all stages of the court's enquiry in *The Mineral Ordaz*, that what is required in order to find that a claim is a maritime claim in terms of para (*ee*) is that the claim is *connected* to a *matter* which has a marine or maritime nature or subject matter, and not that the court be satisfied that the *claim itself* be marine or maritime in its nature or subject matter. In doing so the court appeared to conflate an enquiry into the *nature of the claim* (being what is referred to in the introductory phrase in the

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[353] Admiralty Courts Act Bill (note 77 above).
[354] Except for paras (*t*) and (*u*) which commenced with 'proceedings', and para (z) which commenced with 'any other matter'.

definition as 'any claim') with the *nature of the matter* (being what is referred to in para (*ee*) as 'any other matter'). This confusion is evident in the following statement by the court:[355]

> [i]n my view [the claim] certainly falls under the catchall provisions of (*ee*) which deals with *all claims* which by virtue of their *nature* or their *subject matter* being a *marine* or *maritime matter*.

Thus, had the court in The *Mineral Ordaz* been interpreting the 'catch-all' provision in the Admiralty Courts Act Bill,[356] it would have been correct in its assertion that that the catch-all provision is concerned with 'all *claims*' that are 'by virtue of their nature or their subject matter' maritime matters. This was not a correct statement, however, in relation to the definition in its current formulation.

(ii) Enquiry in terms of para (ee)

The above discussion demonstrates that the process of determining whether a claim is a maritime claim in terms of para (*ee*) involves distinguishing between the words 'any claim' as they appear in the introductory phrase in the Act from the words 'any other matter' as they appear in para (*ee*), and engaging in two separate enquiries. The first can be thought of as an enquiry that is *internal* to the provisions of para (*ee*), which is described above as involving the consideration of whether the particular 'matter' is, by virtue of its 'nature or subject matter' closely enough *connected* to marine or maritime concerns to qualify it as a 'marine or maritime matter'. This process could be thought of as 'categorisation', since it functions to categorise an object as the maritime topic described in para (*ee*). The second maritime connection enquiry is what has been described above as establishing that the claim being made has a *maritime connection* (in the sense that is 'for, arising out of or relating to') with what has by that stage been established to be a maritime topic described in para (*ee*), when serves to classify the claim as a maritime claim.

In the latter regard, courts have, over the years, relied on broad principles or 'tests' to assist them in the determination of whether there is a maritime connection between a 'claim' and a maritime

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[355] *The Mineral Ordaz* (note 7 above), D46-47 (emphasis added).
[356] Admiralty Courts Act Bill (note 77 above).

topic,[357] however, no court has yet articulated a test or set of principles relevant for the purpose of categorizing an object as the maritime topic described in (*ee*). There is nothing in the definition of 'maritime claim' that suggests what types of matters might qualify as a 'marine or maritime matter' and the only indication is the statement in para (*ee*) that the expression 'marine or maritime matter' is *not* 'limited by reason of the matters set forth in the preceding paragraphs'. What is made clear by the provisions of para (*ee*), however, is that a matter can only be said to be a 'marine or maritime matter' by virtue of its '*nature or subject matter*'. Thus, the 'matter' must, by virtue of its '*essence'*,[358] be maritime.

As stated above, the court in *The Mineral Ordaz* did not keep the two enquiries separate. In this regard, it is difficult to distinguish the court's reason for finding that the claim was a maritime claim in terms of para (*j*), from its reason for finding that the claim was a maritime claim in terms of para (*ee*). The court approached the maritime-claim enquiry in terms of *both* para (*j*) and para (*ee*) by asking the same question – which is how hypothetical parties in an analogous situation would view the nature of the claim. One reason for the conflation of these two inquiries was suggested in Chapter Two to be as a result of the court being over-determined by the provisions of para (*ee*).[359] However, in fairness to the court, what this conflation may also reveal is the recognition that these two questions are very similar: in establishing the *existence of the maritime topic* in para (*ee*), there will of necessity be an enquiry into the *degree of connection* that the 'matter' has with maritime concerns, such that it can be said that the 'matter' is *essentially* marine or maritime, as required by para (*ee*). So too, when establishing whether a claim is 'for, arising out of or relating to' a charter party in terms of para (*j*) (or another maritime topic), the court's concern is the *degree of connection* between that claim and that maritime topic. Thus, because, on the facts before the court in *The Mineral Ordaz*, the subject matter of the settlement agreement was a novated charter party claim, it is not surprising that the maritime-claim enquiry before the court dissolved into one question, which was whether the obligation to pay the

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[357] The most recent and comprehensive maritime connection test is the 'legally relevant connection' test that was formulated in *Kuehne & Nagel* (note 19 above). The other 'tests' used by courts have been discussed in Chapter 1.
[358] See *The Mineral Ordaz* (note 7 above) D47G, where the court stated that the word 'nature' means 'the essential qualities of a thing . . .'.
[359] See 2.7 above.

compromised claim was closely enough connected to the charter party, to qualify it both as a maritime claim in terms of para (*j*) and para (*ee*).

It is important, however, as a general rule and for the sake of certainty, for courts to be mindful of the differences in these two connection enquiries, and to articulate them separately. The danger in conflating these two enquiries may, in certain circumstances, result in the categorization of certain types of 'matters' as 'maritime matters' in terms of para (*ee*) that should not properly fall within admiralty jurisdiction (in that they could 'easily be dealt with within the usual jurisdiction of the high court').[360] This is illustrated by considering that the degree of connection contemplated in the phrase 'for, arising out of or relating to' is notionally looser[361] than the requirement that the 'matter' be so closely connected to marine or maritime concerns that it can be said to be *essentially* 'marine or maritime' as required in para (*ee*).[362] Similarly, if the narrow connection contemplated in para (*ee*) is applied to all '*claims'* referred to in s 1(1) of the Act, this would entail all claims being *essentially* 'marine or maritime' in nature, and this may improperly *limit* the number of claims that would be classified as maritime claims. In other words, it is by virtue of a *connection* to a maritime topic, that a claim is a maritime claim, rather than by virtue of its *essential nature*. The decision in *Twende*, which will be considered in the section below, provides a useful illustration of this point. In that matter, the claim (a delictual claim for damages) was not 'essentially' maritime in nature, but it was found to be *connected* to an essentially maritime matter (being the maritime topic described in para (*p*)(i), the remuneration of an agent), and it was by virtue of this connection that the claim was classified as a maritime claim. To illustrate the differences in these two enquiries using human relationships, it is one thing to say that a person, Alex, has a legal connection (by way of marriage) to her spouse, Sam, but it is quite another thing to say that Alex is by virtue of her 'nature or subject matter,' Sam.

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[360] *El Shaddai* (note 8 above), para. 15.
[361] See *El Shaddai* (note 8 above), para. 13, where the court refers to the possibility of the words in the introductory phrase as indicating 'a loose or indirect relationship' between a claim and a maritime topic.
[362] *Mineral Ordaz* (note 7 above) D47G.

(iii) Implications for categorization of matters in terms of para (ee)

What is revealed by the court in *The Mineral Ordaz* not properly distinguishing between the two connection enquiries[363] is that the court arguably avoided the more difficult task of determining the precise ambit of the introductory phrase 'for, arising out of or relating to' in the context of the claim's connection to the underlying charter party in para (*j*), by directing its efforts at establishing that the settlement agreement was a *new category* of maritime topic, described in para (*ee*). The court did not have to grapple with the ambit of the introductory phrase insofar as the claim's connection to the settlement agreement was concerned, given that it was indisputable that the claim was 'for, arising out of or relating to' the settlement agreement (because it directly arose therefrom). What is more, the task of establishing that the settlement agreement was a new maritime topic was arguably made easier than it might have been, considering that the subject matter of the settlement agreement was a maritime claim that had been novated or compromised, and it is this that provided the settlement agreement with its 'maritime flavour'.[364] In other matters, where there is no underlying maritime claim, such as was the case in *El Shaddai*, this task will be considerably more difficult. In fact, the court in *El Shaddai*, distinguished the facts before it (which a claim to enforce a loan used to finance a fishing venture) from those in *The Mineral Ordaz*, on that very basis[365] – namely that the 'the *link* created by the underlying charter-party' in the latter decision 'brought the matter within the definition of a maritime claim'.[366] This led the court in *El Shaddai* to conclude that the fact that 'the loan may have been intended to enable [the debtor] to carry out a fishing venture in South Africa does not render the nature and purpose of that loan a *maritime matter*.'[367] This reasoning might indicate a concerning trend for courts to be disinclined to extend the boundaries of admiralty jurisdiction in categorising a new maritime topic in terms of para (*ee*), unless there is a 'link' created by an underlying maritime agreement or maritime claim. The apparent justification for the conclusion reached in *El Shaddai* was that the court was giving effect to the policy consideration that admiralty jurisdiction should

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[363] That is, the process of categorizing the settlement agreement as a 'marine or maritime matter' in terms of para (*ee*), on the one hand, and establishing that there is a maritime connection between a claim and a maritime topics in (*j*) and (*ee*), on the other.
[364] This term was used in *El Shaddai* (note 8 above), para. 14(*a*).
[365] The court stated the following: 'the fact remains that the underlying nature of the claim is a loan of moneys. That the loan may have been intended to enable [the debtor] to carry out a fishing venture in South Africa does not render the nature and purpose of that loan a *maritime matter'*, see *El Shaddai* (note 8 above), para. 24 (emphasis added).
[366] *El Shaddai* (note 8 above), para. 20.
[367] Ibid para. 24.

not be extended to matters that can 'easily' be dealt with by a court exercising its ordinary jurisdiction.[368] However, what is not clear from *El Shaddai* is the reason *why* a party who has loaned a sum of money to be used to operate a vessel used in a commercial fishing venture (arguably an 'essentially' maritime concern)[369] should not benefit from the 'special rules and procedures relating to the exercise of admiralty jurisdiction'.[370] This is especially so, given that the apparent effect, and thus the apparent purpose, of para (*ee*) is to expand the categories of maritime topics that were previously subject to admiralty jurisdiction,[371] and thus the types of claims that will be classified as maritime claims in terms of para (*ee*) will necessarily be those that did not previously benefit from the advantages of admiralty's specialised jurisdiction, and may otherwise have been dealt with by a court exercising its ordinary jurisdiction. For this reason, admiralty jurisdiction jurisprudence would benefit from a discussion by courts as to what types of factors are relevant in categorising a 'matter' as a 'marine or maritime matter' in terms of para (*ee*).[372]

Similarly, given the significance for maritime litigants of the implication of the conclusion reached in *The Mineral Ordaz*, which is that settlement agreements that have, as their subject matter, *compromised* maritime claims, qualify as 'marine or maritime matters' in terms of para (*ee*), it might have been expected that the court would have bolstered the conclusion it reached in

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[368] *El Shaddai* (note 8 above), para. 15.

[369] It might be argued that that, given the proximity of the fishing venture to maritime commerce, the fishing venture is a 'marine or maritime matter'. Proximity to maritime commerce is a factor that is considered relevant to American courts in classifying a 'maritime contract': the United States Court of Appeals for the Second Circuit recently noted that 'the appropriate inquiry is whether the principal objective of the agreement is maritime commerce' (*d'Amico* (note 13 above), 222). However, it should be borne in mind that this requirement gives effect to the policy consideration relevant to American admiralty jurisdiction which is to 'protect maritime commerce' (*d'Amico* (note 13 above), 223).

[370] *El Shaddai* (note 8 above), para. 15.

[371] As stated by the court in *MV Yu Long Shan: Drybulk SA v MV Yu Long Shan* 1998 (1) SA 646 (SCA) 651H-I: '[i]t is unquestionably so, and counsel for plaintiff did not contend otherwise, that the 1992 amendments broadened the categories of persons who might incur liability arising from a maritime claim, and also made ships amenable to arrest which had not previously been liable to arrest'.

[372] It is unfortunate that in *El Shaddai* (note 8 above), which is one of a few decisions subsequent to *The Mineral Ordaz* (note 7 above) that directly engaged with the provisions of para (*ee*), the court did not articulate any general factors that were relevant to its determination. In *MFV Logan Ora; R D Summers Fisheries CC v Viking Fishing Co (Pty) Ltd* 1999 (4) SA 1081 (SE) the argument was made that a claim for repayment of a loan was a maritime claim in terms of, inter alia, para (*ee*), however this issue was never decided by the court which dismissed the application on different grounds, namely because it had not been established that the *owner* of the vessel, which had been arrested, was liable to the creditor.

respect of para (*ee*) beyond merely reasoning by way of analogy to a hypothetical set of facts.[373] That this mode of reasoning (by hypothetical analogy) suffers from shortcomings will be demonstrated below.

(iv) Using hypothetical analogy to test for 'marine or maritime' essence

The court in *The Mineral Ordaz* reached its conclusion that the claim to enforce the settlement agreement was a maritime claim in terms of para (*ee*)[374] by imagining a hypothetical set of facts in terms of which a claim is made on an acknowledgment of debt in the context of a motor vehicle accident. In this imagined scenario, Party A undertakes to pay Party B an agreed sum of money as settlement for a claim for damages that Party A negligently caused to Party B's vehicle. When Party A fails to pay, Party B makes a claim to enforce the acknowledgment of debt. In its attempt to understand the nature of that claim, the court incorporates into this imagined scenario something akin to the 'officious bystander' test, in terms of which a third party asks the parties the question 'what is this claim?' to which the parties reply with an answer that demonstrates that they both consider the claim to be for an agreed amount due in respect of damages caused to the motor vehicle.[375] For the court, since both of the parties would consider the claim to have retained its essential quality as a claim for damages arising from damage to a motor vehicle, this meant that, by analogy, the same could be said about the claim to enforce the settlement agreement – that is – the settlement agreement retained its essential quality as a claim for payment under a charter party.

It will be demonstrated below that the application of an 'officious bystander' type test to the maritime-claim question is an inappropriate manner of interpreting the provisions of the definition, in the absence of a purposive interpretation of the definition. What is more, the mode

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[373] The considerations that the court in *The Mineral Ordaz* (note 7 above) might have taken into account, but did not, are considered in Chapter Four (see 4.2.2(*a*)).

[374] It was discussed above (see 2.5.2(*c*)) that the court in *The Mineral Ordaz* (note 7 above) used the same hypothetical analogy to assist it with *both* the task of establishing whether the claim was a maritime claim in terms of para (*j*), as well as para (*ee*), despite the fact that, properly construed, the maritime connection contemplated in para (*ee*) requires a more intimate degree of connection between the 'matter' and 'marine or maritime' concerns, than the degree of connection between the 'claim' and the relevant maritime topic, contemplated in the introductory phrase, which is arguably capable of both a narrow and a broad construction.

[375] *The Mineral Ordaz* (note 7 above) D46G.

in which this test was applied – by imagining a hypothetical analogous scenario – has several shortcomings.

As to the first point, the purpose of the 'officious bystander' test as it is used in the law of contract is for a court to better understand whether the parties probably intended to include a term into a contract but simply forgot to, because it was so obvious, 'so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!"'.[376] The purpose of a court imagining how the parties to a contract would answer a question posed by this hypothetical 'nosy busy-body'[377] is an essentially *different* type of enquiry from that which a court is engaged in when determining whether a claim falls into the definition of 'maritime claim': the latter enquiry involves the process of statutory interpretation in light of the facts, and not whether the claim is a maritime claim in terms of the unexpressed intention of the parties.

That is not to say, however, that the reliance on a modified officious bystander test by the court is not a useful exercise. To use the phraseology in *Endumeni*[378] the seminal judgment on the proper or 'modern' approach to statutory interpretation, it could be said that by enquiring how an 'ordinary' person would understand the meaning of the words used in the definition, this allowed the court in *The Mineral Ordaz* to consider what a 'sensible meaning'[379] of those words might be, so as to avoid a meaning 'that leads to insensible or unbusinesslike results'.[380] A similar method was employed in the English decision of *The Tesaba*[381] in an attempt to classify a maritime claim.

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[376] *Shirlaw v Southern Foundries* (1926) Ltd [1939] 2 KB 206 referred to in *Airports Company South Africa Limited v Airport Bookshops (Pty) Ltd t/a Exclusive Books* [2015] 3 All SA 561 (GJ), para. 31.
[377] M Del Mar (note 26 above).
[378] *Endumeni* (note 59 above).
[379] Ibid para. 18.
[380] Ibid para. 18.
[381] *The Tesaba* [1982] 1 Lloyd's Rep 397, 401: the court asked the following question in an attempt to give meaning to the words "any claim arising out of any agreement relating to the carriage of goods in any ship or to the use or hire of a ship": "If the ordinary businessman were to be asked "Is that an agreement relating to the carriage of goods in Tesaba?", the answer would undoubtedly be "No".' See also Shaw (note 32 above) 9.

What prompted the court in *The Mineral Ordaz* to consider how two 'ordinary' parties to a dispute would view the nature of the claim was a suggestion to that effect by Adv *Wallis SC* (as he then was), and it is noteworthy that this modified officious bystander test has made another appearance in a recent judgment – which is the work of Wallis JA (as he presently is) – in *MV Silver Star*.[382] The issue in *MV Silver Star* is not dissimilar from the issue in *The Mineral Ordaz* in that it considered the effect of an arbitration award on an underlying claim,[383] in particular, whether an arrest of an associated ship could be set aside on the basis that the claim could no longer be said to relate to the 'guilty ship' due to the claim having been extinguished by an arbitration award.[384] The court succinctly framed the issue as follows:[385]

> The first issue thus resolves itself into the question whether, *on a proper interpretation of the Act*, a claim in respect of an arbitration award relating to a maritime claim is a claim in respect of the ship in respect of which the original maritime claim lay.

The court's answer to that question was the following: 'Any practical person engaged in the maritime world would answer "*of course it is*" to that question.'[386] This question and answer exchange is reminiscent of that in *The Mineral Ordaz*, however, it is not irrelevant that the court in *MV Silver Star* directed its enquiry at how a 'practical person *engaged in the maritime world*'[387] (as opposed to victims of a crash-and-bash) would understand the situation. Given that the Act 'is, and is intended to represent, a pragmatic approach to the *real problems of real people in the actual world of shipping*',[388] the hypothetical scenario in *MV Silver Star* is a more appropriate enquiry because it occurs in the maritime context. The failure to situate the enquiry in its appropriate context is a significant shortcoming of the court's reasoning in *The Mineral*

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[382] Incidentally, it was also Wallis JA (as he now is) who penned the judgment in *Endumeni* (note 59 above), para. 18, in which the learned judge states that '[a] sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results'.
[383] In *The Mineral Odaz* (note 7 above) the issue was the effect of a settlement agreement on the underlying claim.
[384] The argument was that the effect of the arbitration award 'was to extinguish the underlying claims on which the award was based and to replace those claims with a claim based on the award itself', *MV Silver Star* (note 48 above), para. 19.
[385] *MV Silver Star* (note 48 above), para. 32 (emphasis added).
[386] Ibid para. 32 (emphasis added).
[387] Ibid para. 32 (emphasis added).
[388] Friedman (note 2 above) 678.

Ordaz.[389] In this regard, given that the apparent *purpose* of the definition of 'maritime claim' is to delineate the boundaries of admiralty jurisdiction by specifying the types of matters over which a court is entitled to exercise admiralty jurisdiction, it would have been more appropriate for the court in *The Mineral Ordaz* to query what two ordinary maritime merchants would think if they were told that agreeing to a compromise on the underlying charter party obligation would result in the claimant losing access to admiralty jurisdiction, and any breach of the new agreement would be heard by a court exercising its ordinary (not admiralty) jurisdiction: – would their response be '*oh, of course* that would be the result', or would they express surprise? One reason for the former reaction might be that by agreeing to a compromise, the obligation being enforced becomes something distinct from its maritime origin, and becomes merely an obligation to pay an agreed sum of money, and no recourse to the specialised admiralty procedures is therefore necessary or appropriate;[390] on the other hand, they may express surprise that by agreeing to settle the dispute out of court – a policy encouraged by South African courts[391] – the claimant should be denied its right to proceed in admiralty should the debtor subsequently default. These hypothetical answers raise additional questions that should have been explored in *The Mineral Ordaz*, and will be considered in further detail in 4.2.2(*a*) below. This relates to another important distinction between the reasoning in *MV Silver Star* and *The Mineral Ordaz* which is the relative influence that the answer to the hypothetical question had on the court's reasoning in the *MV Silver Star*. In that matter, Wallis JA considered a number of other factors in the process of giving meaning to the provisions in question[392] whereas in *The Mineral Ordaz*, the reliance on the modified officious bystander test played a prominent role in the court's reasoning, and thus, in its ultimate conclusion.

This leads to the second reason why the court's reliance on the outcome of the modified officious bystander test is problematic, which is that the *form* the court's reasoning takes is reasoning by

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[389] This is in accordance with the proper approach to interpretation of a statute - see *Endumeni* (note 59 above) para. 18.
[390] Considering that, in those circumstances, the matter could 'easily be dealt with within the usual jurisdiction of the high court' (*El Shaddai* (note 8 above), para. 15).
[391] See the cases cited in note 501 below.
[392] Ibid para. 30, where the learned judge gives consideration to both the position in England, and the history and apparent purpose behind the inclusion of the relevant provision in the definition of 'maritime claim', as part of his reasoning.

analogy. As it will be discussed below, reasoning by analogy is one of the weakest forms of 'rational' argument,[393] especially, it is contended, in circumstances where the basis for comparison is an imagined set of facts. The analogy used by the court takes the typical form in terms of which a 'source' set of facts (the hypothetical claim on an acknowledgment of debt concerning motor vehicle damage) and a 'target'[394] (the claim to enforce the settlement agreement relating to a charter party dispute) are shown or assumed to have several 'shared characteristics'[395] (one being that the claim, in both scenarios, is to enforce a contract which was concluded to settle an underlying claim). Since the 'source' has an additional characteristic (the nature of the underlying debt not being altered by the conclusion of the new agreement) the court infers that the 'target' also shares the 'source's' additional characteristic.[396] In essence, the analogy used by the court follows the below 'simple structure': [397]

> (1) *A* has characteristic *X*; (2) *B* shares that characteristic; (3) *A* also has characteristic *Y*; (4) Because *A* and *B* share characteristic *X*, we conclude what is not yet known, that *B* shares characteristic *Y* as well.

Reasoning by analogy is commonly employed in legal reasoning with the most common form being the use of precedent. By finding a 'relevantly similar'[398] set of facts that has been treated in a particular way in law (the known), a court is able to reason that the facts before it (the unknown) should be treated the same.[399] However, the court's analogy in *The Mineral Ordaz* did not involve a comparison of the facts of the matter before it to a prior decided case (a known); rather it compared the facts before it to an imagined set of facts (which is itself an unknown). This puts a limit on the persuasiveness of the court's reasoning by analogy because the outcome in the imagined scenario is just as much 'up for grabs' as the outcome in the matter before the

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[393] See B N Larson 'Law's Enterprise: Argumentation Schemes & Legal Analogy' (2019) 87 *University of Cincinnati LR* 663, 674 where the author notes that 'the skeptics reject legal analogy because it does not have the rational force of logical deduction.' For a defence of the 'rational force' of analogical argument see S Brewer 'Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy' (1996) 109, No. 5 *Harvard LR* 923, 966.
[394] Brewer (note 393 above) 966.
[395] Ibid 967.
[396] Ibid 967.
[397] C R Sunstein 'On Analogical Reasoning' (1993) 106 *Harvard LR* 741, 743.
[398] Ibid 773.
[399] Ibid 745.

court. The problem is demonstrated by considering that there is, in fact, no court that exercises exclusive jurisdiction over claims that arise out of motor vehicle disputes. If there were, the manner in which such a court had *actually* determined its jurisdiction in respect of claims to enforce agreements that have as their subject matter a novated or compromised underlying motor vehicle claim, may have been a good basis for comparison. A criticism of reasoning by analogy, that is true for the reasoning followed in *The Mineral Ordaz*, is that:[400]

> [A]nalogical reasoning can distract attention from the particular matter at hand by persuading judges to grapple with other cases and hypothetical examples that actually raise quite different issues.

Thus, the court's mode of reasoning by analogy was made weaker by the fact that the analogical set of facts were entirely hypothetical. Having said that, reasoning by hypothetical analogy can be a useful aid to statutory interpretation, when there is little guidance from the words used in the statute, or from past decisions, such as was the case in *The Mineral Ordaz*. This is because 'imagined scenarios': [401]

> [O]ffer an entirely different experience to reading accounts of real events. Hypotheticals invite us to experiment, to think up variations, to offer counter-examples. We make and unmake tapestries of facts, both actual and impossible, and use them to test our intuitions and glean insight.

Employing hypothetical analogies as a way to interpret the ambit of s 1(1) of the Act is not unique to *The Mineral Ordaz*. In *The Galaecia*, imagining a hypothetical scenario allowed the court to test the boundaries of admiralty jurisdiction. In that matter, an associated ship had been arrested in respect of a claim for damages arising from the purchase of a consignment of Patagonian Tooth Fish that had been harvested in a ship, and which consignment of fish had been seized and declared forfeit by the relevant government authority as a result of the submission of faulty import documentation. The court found that the claimant was unable to show that its claim

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[400] Ibid 757 fn 61.
[401] M Del Mar (note 26 above).

was 'for, arising out of or relating to' the ship that had actually harvested the fish. Since the claim was not related to that ship, the associated ship arrest was set aside. The court reasoned as follows:[402]

> The contract was simply one of purchase and sale of frozen fish. That the fish had been harvested by a certain vessel is neither here nor there. The mere fact that the subject matter of the claim is fish caught by a fishing vessel in the sea cannot in my view bring the respondent home under the provision of subsection (*ee*). If this same consignment of fish were to have been destroyed in a collision while being conveyed by road. . . the claim against the driver who negligently caused the collision could surely not be classified as a maritime claim.

The above extract demonstrates how the 'hypothetical narrative'[403] of a consignment of fish being damaged in a vehicle collision enabled the court to consider what the implications of an over-broad approach to the boundaries of admiralty jurisdiction might mean. According to Del Mar, this is the desired effect of an imaginative enquiry in that '[b]y pushing hypotheticals to extremes, judges and lawyers can see if their intuitions are consistent in a number of different scenarios', however, as also noted by Del Mar, the court must '*then reason backwards to discover the best principle to apply to the present case*.'[404] With respect, the problem with the 'hypothetical narrative'[405] used in *The Mineral Ordaz* is that the court did not go as far as 'discover[ing] the best principle to apply to the . . . case',[406] with the court placing too much emphasis on the outcome of its reasoning by hypothetical analogy without articulating what general principle guided it. In the absence thereof, what underpinned the court's reasoning was, in effect, the following premise: 'if you agree that the underlying obligation in the hypothetical analogy retains its essential nature despite it having been compromised, then you must also agree that the obligation presently being enforced retains its essential maritime nature despite it having

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[402] *The Galaecia* (note 27 above) D261B-D.
[403] M Del Mar (note 26 above).
[404] Ibid (emphasis added).
[405] Ibid.
[406] Ibid; see also Sunstein (note 397 above) 757.

been compromised'.[407] Sunstein describes this type of reasoning as 'spurious classification, or bad formalism',[408] and explains the problem with this to be the following:[409]

> Sometimes people believe that case A is analogous to case B, and attribute the belief to pure deduction, when a supplemental judgment of some kind is necessary. They find similarities between the two cases, ignore possible differences, and then announce the outcome of the case. In doing so, they fail to identify and defend the requisite supplemental judgment.

The 'supplemental judgment' that is being made by the court in *The Mineral Ordaz* is that the similarity between the 'source' (a hypothetical claim made outside the admiralty context) and the 'target' is self-evidently true, without providing any justification therefor. The court ignores other 'relevant differences' such as the history and background of the promulgation of the Act (ie 'the circumstances attendant upon its coming into existence'),[410] as well as the broader context of the definition of a 'maritime claim' in the Act, and 'the apparent purpose'[411] of the exercise of admiralty jurisdiction in terms of the Act. These factors, upon proper examination, may direct a finding that a compromised maritime claim does *not* in fact retain its maritime character, even though it may correctly be said that, in the hypothetical example used by the court, the compromised claim retained its original 'motor vehicle' character.

Thus, it could be argued that the reasoning by the court in *The Mineral Ordaz* was too heavily influenced by the analogy it imagined, and at most, the outcome of the analogy is its rhetorical appeal. Had the reasoning followed in that matter been buttressed by additional considerations, such as 'the context in which [para (*ee*)] appears; the apparent purpose to which it is directed and the material known to those responsible for its production'[412] this may have led the court to

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[407] The court in *The Mineral Ordaz* (note 7 above) appeared to accept that the effect of the conclusion of the settlement agreement was a *compromise*, in respect of the amount, see the judgment at D47I.
[408] Sunstein (note 397 above) 756.
[409] Ibid 756.
[410] *Endumeni* (note 59 above), para. 18; see also *Peros v Rose* (note 5 above), 423F: 'I find it necessary to have regard to the context in which it occurs as well as to the history of the Act and the intention of the Legislature in enacting it in so far as this can be gathered from its contents.'
[411] *Endumeni* (note 59 above), para. 18.
[412] Ibid para. 18.

explore the implications of the legislature including in the definition claims to enforce arbitration awards and judgments that relate to an underlying maritime claims (in para (*aa*)), but not explicitly including settlement agreements (or similar instruments in terms of which a maritime claim is compromised or novated) that relate to underlying maritime claims. This may have resulted in the finding that the claim to enforce the compromised maritime claim was *not* itself a maritime claim. An argument based on this distinction was in fact made by the applicant in *The Mineral Ordaz* but it was not fully explored by the court. Another consideration that points to the opposite conclusion is the general judicial policy favouring settlement.[413] These additional lines of reasoning will be considered in Chapter Four.

3.2.3 Maritime connection

The final part of the definition requires a court to establish whether there is a *maritime connection*, in order words, whether the claim is one that is 'for, arising out of or relating to' a maritime topic. This is the linchpin of the definition, and operates to connect the claim with a maritime topic.[414]

(a) Analysis of maritime connection enquiries

Each court's approach to the classification of the maritime claim before it will be considered below. This analysis will begin with the 'legally relevant connection' test, developed in *Kuehne & Nagel* which will be compared and contrasted with the approach taken in *Peros v Rose*, as well as the aspects of the reasoning followed *The Mineral Ordaz* that are similar to elements of the 'legally relevant connection' test. The decision in *Twende*, will also be briefly examined, since

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[413] As stated earlier in this section, the general policy favouring settlement of disputes out of court is arguably not served by a finding that, by agreeing to compromise a maritime claim in terms of a settlement agreement, a claimant loses access to admiralty jurisdiction if the debtor should subsequently default. See the cases cited in note 501 below.

[414] In Chapter One, it was suggested that it is due the lack of guidance that the words in the introductory phrase offer to the classification of a maritime claim that various courts have, over the years, articulated different ways of 'testing' the proximity of the connection between a claim and a maritime topic. Most of these tests functioned only to give semantic guidance to courts, in that they offered alternate ways of articulating the degree of connection between a claim and a maritime topic to that offered by the phrase 'for, arising out of or relating to'; other tests employed metaphor or 'hypothetical narrative' to guide the process of testing whether a maritime connection had been established: in *Peros v Rose* (note 5 above) 425E, the court relied on metaphor in describing the maritime connection as one that must be 'sufficiently intimate' and in *The Mineral Ordaz* (note 7 above) the court relied on a hypothetical narrative. The 'legally relevant connection' test developed in *Kuehne & Nagel* (note 19 above) is markedly different from previous courts' attempts at describing the proximity of a connection, because, it offers *practical*, rather than rhetorical guidance to the process of establishing a maritime connection.

this is the first matter since *Kuehne & Nagel* that has directly applied the 'legally relevant connection' test.

(i) Kuehne & Nagel

It will be recalled that the claims in *Kuehne & Nagel* were to enforce two demand guarantees that had been issued pursuant to two underlying forwarding services agreements. It was common cause that the underlying agreements gave rise to maritime claims by the forwarding agent, in terms of s 1(1)(*p*)(i), but that these maritime claims were not being directly enforced, and were independent of the forwarding agent's claims arising out of the guarantees. The question before the court was whether the claims arising out of the guarantees were also maritime claims in terms of s 1(1)(*p*)(i). The court articulated the 'legally relevant connection' test as follows: [415]

> I suggest that it must be accepted that there has to be at least a legally relevant connection between, on the one hand, the claim being made and, on the other hand, the object to which the claim is required to relate for purposes of the definition of *"maritime claim"*. By *"legally relevant connection"* in this sense I mean that the claim and its object, in this case the applicant's intended claim against the respondent and its object, being the applicant's claim against the subsidiary for fees, must be connected in such a way that either in procedural or substantive law the determination of the one could be influenced, legally, by the determination of the other. Such a connection would explain why a court hearing a claim in admiralty would want to be able, if called upon by the parties, to deal with all issues that are legally relevant to that claim, but with no issues that are legally irrelevant to that claim.

It should be noted that, while the court was reluctant to suggest that the 'legally relevant connection' test had universal application (with the court stating that 'it is difficult, and probably inappropriate, to try defining universal boundaries to the reach of these words')[416] the court did appear to treat the principles expressed therein as if they were of general application. In this regard, the court applied its newly formulated test to the facts and reasoning followed in two

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[415] *Kuehne & Nagel* (note 19 above), para. 30.
[416] Ibid para. 30.

other decisions, being *Repo Wild*[417] and *El Shaddai*[418] and found that the conclusions reached in those decisions were consistent with the court's 'legally relevant connection' test. What is more, the 'legally relevant connection' test has already been cited and relied upon once in a subsequent decision, *Twende*, which will be discussed below. It is thus clearly capable of application to facts outside the context of the facts in *Kuehne & Nagel*.

An examination of the test reveals that it has a number of strengths and weaknesses. A strength is that the underlying premise of the test arguably aligns with the policy consideration that underlies the exercise of admiralty jurisdiction that 'there is no need, nor should there be any desire, to extend admiralty jurisdiction to matters which have . . . "no meaningful maritime connection",[419] meaning 'the extension of admiralty jurisdiction to matters which can otherwise easily be dealt with within the usual jurisdiction of the high court.'[420] The test aligns with this policy consideration because it assumes that, if a court, in the process of adjudicating the claim, is required to 'determine' a maritime topic (or a maritime activity contemplated therein), it is more appropriate for a court exercising admiralty jurisdiction to adjudicate that claim than a court exercising its ordinary jurisdiction. In other words, it would *not* be as simple as saying, in those circumstances, that the claim could 'easily be dealt with' by a court exercising its ordinary jurisdiction, and it would arguably be fair for a claimant to expect, in those circumstances, to benefit from the 'far-reaching' relief afforded by admiralty jurisdiction in enforcing its claim.[421]

The weaknesses of the test are manifested in the court's application of that test. In this regard, the error made by the court was that it not only took into account a potential *defence* to the claim, in

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[417] Of *Repo Wild* (note 79 above), the court in *Kuehne & Nagel* (note 19 above), para. 38, stated that the conclusion reached in that matter 'fits with the approach that I have adopted here, being the requirement for a legally relevant connection between the claim and its object. The plaintiff's claim was not connected in a legally relevant way to the defendant's container'.

[418] Of the reasoning followed by Lopes J in *El Shaddai* (note 8 above) the court in *Kuehne & Nagel* (note 19 above), para. 42, stated the following: 'There was in the matter before Lopes J, no legally relevant connection between the claim – repayment of the loan – and the fishing venture. The repayment of the loan was not contractually dependant on the success of the fishing venture. With respect to the learned judge, I therefore agree with his conclusion'.

[419] Hofmeyr (note 1 above) 21 fn 8.

[420] *El Shaddai* (note 8 above), para. 15.

[421] Friedman (note 2 above) 679.

determining the nature of the claim, but an entirely *hypothetical* defence.[422] It has been demonstrated above[423] that this is a legally flawed manner of reasoning. Moreover, despite the court's statement that 'the possibility of fraud being alleged' *illustrated* that the claim was 'not so remote' from the maritime topic, the court's treatment of that possibility reveals that the court *actually* used the possibility of fraud being raised to conclude that a maritime connection had been established. That this was undoubtedly a *practical* consideration, is confirmed by the judge's statement that a 'legally relevant connection' would 'explain why a court hearing a claim in admiralty would want to be able, if called upon by the parties, to deal with all issues that are legally relevant to that claim, but with no issues that are legally irrelevant to that claim.'[424]

What is more, it is apparent that when the court referred to 'defences', it was referring to fraud, since the court had accepted that fraud was the only real defence that could be raised to a claim on a demand guarantee.[425] This reasoning runs counter to the manner in which courts generally approach the possibility of fraud being raised as a defence to a claim, which is that it is 'not sufficient . . . merely to put up speculative propositions or to raise submissions or to advance arguments of probabilities which might indicate a fraud'.[426] In allowing any possible future defence to the claim to determine the nature of claim, (regardless of the nature of that defence)[427] the court's approach to the classification of the claim as a maritime claim could be described as *overbroad*, and inconsistent with the definition of 'maritime claim' in s 1(1) of the Act.

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[422] The court in *Kuehne & Nagel* (note 19 above) reasoned as follows, in para. 34: '[n]o-one has suggested in this matter that the respondent has . . . already alleged fraud on the part of the applicant. But the possibility of fraud being alleged and, if it is alleged, its consequence, is relevant, because it illustrates that the claim made by the applicant against the respondent under the demand guarantee is not so remote from the underlying agreement as to render the underlying agreement legally irrelevant to the claim under the demand guarantee. Depending on the defences yet to be raised, note not the claim, the claim under the demand guarantee and the underlying agreement may therefore potentially stand in a direct legally relevant relationship'.

[423] See 3.2.1 above.

[424] *Kuehne & Nagel* (note 19 above), para. 31.

[425] See *Kuehne & Nagel* (note 19 above), para. 43: '[f]or the reasons I advanced earlier, I have come to the conclusion that the claims based on the demand guarantees, *accepting in the applicant's favour that they permit of no defences that arise from the underlying agreement, except fraud,* are nonetheless "maritime claims" as envisaged in the Act' (emphasis added).

[426] *Nedperm Bank Ltd* (note 340 above) 220B-C.

[427] See the discussion at 3.2.1(*e*) above.

The problems with the application of the 'legally relevant connection' test in *Kuehne & Nagel* appear to stem from the part of the test that provides that the determination of the claim (or the maritime topic) '*could be*' influenced by the determination of the other. The use of the words 'could be' invites speculation. This is arguably what led the court to consider whether there were facts that were *yet to be pleaded* (i.e. defences) which may result in the determination of the claim being 'influenced' by the determination of a maritime topic. In this regard, the court appears to have been influenced by its finding that the underlying policy consideration for the exercise of admiralty jurisdiction is that 'all *issues* that are connected with an admiralty issue'[428] should be heard by courts exercising admiralty jurisdiction, which shifted its focus from the facts giving rise to the cause of action (in other words, the *facta probanda*).[429]

Despite the flaws in reasoning followed by the court in *Kuehne & Nagel* in applying the 'legally relevant connection' test to the facts before it, this test is arguably a useful tool in determining whether a maritime connection exists between a claim and a maritime topic, since it provides *practical* guidance to the process of determining whether a claim is a maritime claim in a borderline case. The decision in *Twende*, which was decided two years after *Kuehne & Nagel*, and which applied the 'legally relevant connection' test to the facts before it, demonstrates this. The facts and reasoning in *Twende* are considered below.

(ii) Twende

In this matter, the plaintiff, a ship broker, arrested The MV Qavak ('the vessel'), pursuant to an *ex parte* order, and issued a summons *in rem* against the purchaser of the vessel ('the applicant'), claiming *inter alia* delictual damages on the basis that the applicant, as purchaser of the vessel, had unlawfully interfered with the plaintiff's contractual relationship with the seller of the vessel, in terms of which contract the plaintiff had agreed to act as a broker for the sale of the vessel. The applicant applied to have the arrest reconsidered and set aside. The plaintiff contended that, since its contractual claim against the seller was a maritime claim as defined in s 1(1)(*p*)(ii) of the Act (its claim being for remuneration as a broker for the sale of the vessel)[430] this meant that its

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[428] *Kuehne & Nagel* (note 19 above), para. 27 (emphasis added).
[429] See the discussion above at 3.2.1(*a*) on the meaning of the term 'claim'.
[430] Section 1(1)(*p*)(ii) refers to:

delictual claim for damages against the purchaser 'related to' a maritime claim defined in s (1)(*p*)(ii), and thus was itself a maritime claim. After considering the manner in which the words in the introductory phrase 'for, arising out of or relating to' had been considered in previous decisions, including *Peros v Rose* and *El Shaddai*, the court ultimately found guidance in the 'legally relevant connection' test that had been formulated in *Kuehne & Nagel*. The court applied that test to the facts before it, and reasoned as follows:[431]

> The "object to which the claim is required to relate" for present purposes is the agreement regulating the remuneration of the plaintiff, as broker, in the sale of the vessel. For the purposes of the plaintiff's claim against the applicant, it seems to me, the plaintiff will necessarily have to establish that it would have earned commission but for the alleged unlawful interference. The substantive determination of damages in its claim against the applicant will be determined with reference to its maritime claim as against [the seller]. This being so, I consider that the plaintiff's alternative delictual claim is "sufficiently closely connected" to a maritime matter. Put differently, I consider that there is a "*legally relevant connection*" between the claim, as formulated, and the object to which it relates, namely the remuneration of a broker as provided in an agreement for the sale of a ship.

It is apparent from the above that, in applying the 'legally relevant connection' test, the court reasoned that, since it would, in the adjudication of the plaintiff's claim for delictual damages, inevitably have to refer to the plaintiff's underlying maritime claim against the seller, it meant that the claim had a maritime connection to the relevant maritime topic, being remuneration of a broker. This reasoning could be said to be exemplary of the legally sound application of the 'legally relevant connection' test because the court avoided the errors that were made in *Kuehne & Nagel* in the application of that test. In this regard, the court in *Twende* took into account only

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'(p) the remuneration of, or payments or disbursements made by, or the acts or omissions of, any person appointed to act or who acted or failed to act—
(i) . . ..
(ii) as a broker in respect of any charter, sale or any other agreement relating to a ship or in connection with the carriage of goods in a ship or in connection with any insurance of a ship or any portion or part thereof or of other property referred to in section 3 (5). . .'.

[431] *Twende* (note 24 above), para. 66.

the *facts giving rise to the claim* – or, in the court's words, 'the claim, as formulated'[432] – in making its determination as to whether the claim had a 'legally relevant connection' to the remuneration of a broker. Thus, the court's focus in its maritime-claim enquiry was on the *facta probanda*, or, at most, the *facta probantia*,[433] and, importantly, no consideration was given to facts that related to any speculated defence to the claim. It is evident that the 'legally relevant connection' test offered the court *practical* guidance in answering the maritime-claim question because it articulated for the court what it needed to take into account – that is, whether the determination of the claim would be influenced by the determination of the underlying maritime agreement. In this regard, while the court cited the general guiding principles formulated in previous decisions, the court referred to these semantic guidelines merely to justify its conclusion,[434] rather than to provide practical guidance to its process of reasoning.[435]

(iii) Peros v Rose

It will be recalled that the facts in *Peros v Rose* were that a claim was made to enforce a guarantee to pay a sum of money in the event that the construction of a yacht had not reached a certain stage by a certain time. The court found that the relationship between the claim to enforce the guarantee, and the maritime topic of construction, was not 'sufficiently intimate',[436] with the result that the claim was not a maritime claim. However, the court spent relatively more time on interpreting the definition (which is what led it to conclude that the relationship between the claim and the construction of the yacht must be 'sufficiently intimate')[437] than on the process of

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[432] Ibid para. 66.

[433] As an essential part of its cause of action, the plaintiff had to prove the existence of the underlying brokerage agreement, which gave rise to the plaintiff's underlying maritime claim against the seller. Thus, it could be said that the underlying maritime claim was a part of the *facta probanda*, or at least the *facta probantia* of the claim for delictual damages. See the Supreme Court of Appeal's judgment in this matter, *Twende Africa Group (Pty) Ltd v MFV Qavak* 2019 JDR 0518 (SCA), para. 27. See also *Lanco Engineering Cc v Aris Box Manufacturers (Pty) Ltd* 1993 (4) SA 378 (D) and *Masstores (Pty) Ltd v Pick N Pay Retailers (Pty) Ltd* 2017 (1) SA 613 (CC) which discuss the essential elements (*facta probanda*) for a claim for unlawful interference in another's contractual relationship.

[434] *Twende* (note 24 above), paras. 63-64.

[435] Note that the judgment of the court *a quo* was taken on appeal to the Supreme Court of Appeal (*Twende Africa Group* (note 433 above)). Unfortunately, the issue of whether the claim for delictual damages was a maritime claim was not decided by the court on appeal, with the court merely noting that 'it is less clear that a claim for damages for interference with the broker's contract with a third party is a maritime claim' and not engaging at all with the court *a quo*'s reasoning (see para. 7).

[436] *Peros v Rose* (note 5 above) 425E.

[437] Ibid 425E.

reasoning *why,* on the facts, the maritime connection was not 'sufficiently intimate',[438] and it is not immediately clear from the judgment what factors the court took into account in this regard. It is accordingly necessary to consider *Peros v Rose* more closely. The high-water mark of the court's reasoning appears in the below two sentences:[439]

> These references to the construction undoubtedly establish that there is a connection between the construction and the contractual guarantee: but do not, to my mind, do any more than that. They certainly do not establish a connection of such a nature as to render a claim for specific performance of the guarantee a claim in respect of the construction of the yacht.

The 'references to the construction' mentioned in the above extract were the references in both the guarantee and the construction contract to the same *stage of construction* (ie completion of the plating), as well as the provision, in the 'further agreement'[440] that the yacht builder would 'exonerate the plaintiff from all further obligations *under the construction contract* in the event of his exercising his rights under the contractual guarantee.'[441] It is evident from the above that the court found that 'these references to the construction'[442] meant that there was *some* type of connection between the guarantee and the construction of the yacht; however, this was apparently not a 'connection of such a nature'[443] as to qualify the claim as a maritime claim, because it was not 'sufficiently intimate'.

It is suggested that the court's reasons for concluding that the connection was not 'sufficiently intimate' may have been along the lines of the argument presented by the plaintiff, since the court ultimately ruled in favour of the plaintiff in finding that the claim was not a maritime claim and did not, explicitly, criticise its line of reasoning. The plaintiff's argument is set out above,[444]

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[438] Ibid 425E.
[439] Ibid 426G-H.
[440] Ibid 422H.
[441] Ibid 422I.
[442] Ibid 426E.
[443] Ibid 426H.
[444] See 2.2.2 above. The plaintiff's argument is set out by the court in *Peros v Rose* (note 5 above) 426C-E, as follows: 'Counsel for the plaintiff has submitted that it is essentially a claim for the performance by the defendant of his contractual obligations under the guarantee, annexure "A". The only connection between annexure "A" and the

where it was noted that close attention was paid to the *obligation* being enforced, and the connection that that obligation had with the obligations in the underlying construction contract. In this regard, the plaintiff argued that its claim was 'essentially . . . for the performance by the defendant of his contractual obligations under the guarantee',[445] which was the payment of money upon the happening of a certain event (ie the failure to reach a certain stage in the construction of the yacht by a certain time). Having identified the obligation, being the payment of a sum of money, the plaintiff 'tested' the proximity of the connection between that obligation and the construction of the ship by asking whether the obligation to perform was 'triggered' by an obligation in the underlying construction contract. The plaintiff argued as follows:[446]

> [T]he only *connection* . . . is that those obligations *become enforceable if* a certain stage in the construction of the yacht is not reached by a certain time. The reaching of that stage at that time is *not an obligation* which rests on the builder under the construction contract, which contains no stipulations as to time limits.

Since the obligation being enforced was not triggered, or 'influenced' by anything done or not done in the underlying construction contract, the plaintiff concluded that the underlying construction contract did not have to be considered all when determining the merits of the plaintiff's claim:[447]

> The issue of whether the construction of the yacht proceeded according to the [underlying construction] contract (which would be a maritime matter) is consequently not germane to the plaintiff's claim.

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construction of the ship is that those obligations become enforceable if a certain stage in the construction of the yacht is not reached by a certain time. The reaching of that stage at that time is not an obligation which rests on the builder under the construction contract, which contains no stipulations as to time limits. The issue of whether the construction of the yacht proceeded according to the contract (which would be a maritime matter) is consequently not germane to the plaintiff's claim. The determination of whether or not the stage in question had been reached by the stipulated time is not, in itself, an enquiry of a sufficiently maritime nature to characterise the claim as a maritime claim.

[445] *Peros v Rose* (note 5 above) 426C.

[446] Ibid 426D-E (emphasis added).

[447] Ibid 426D-E.

It is worth noting that, in engaging in the enquiry immediately above, both the *facta probanda* and the *facta probantia* are considered, because the enquiry goes beyond merely a consideration of the facts necessary to sustain the cause of action on the guarantee (the *facta probanda*), and includes a consideration of the evidence (i.e. the terms of the underlying contract) necessary to support the factual allegations essential to the cause of action (the *facta probantia*).[448] The conclusion reached in the above extract is noteworthy for another reason, which is that it has surprising similarities with the 'legally relevant connection' test developed in *Kuehne & Nagel*. In this regard, another way of presenting the above line of reasoning followed in *Peros v Rose* is to say the following:

> Since the 'determination of the claim' is not influenced by the determination of the obligations in the underlying construction contract (the issue of whether 'the construction of the yacht proceeded according to the contract' not being relevant to the plaintiff's claim), there is no 'legally relevant connection' between the claim and the maritime topic of construction.

The resemblance between the premise that underlies the plaintiff's argument in *Peros v Rose* (which appears to have been accepted by the court) with the 'legally relevant connection' test is unexpected given that the decision in *Peros v Rose* has generally been treated with caution for the reason that it was decided prior to the amendments that were made to the definition (in terms of the Amendment Act) implying that the court's approach was narrow and 'outdated'. This raises the question whether *Peros v Rose* has been unfairly overlooked by courts and academic commentators alike.[449] Thus, it is evident that, had the 'legally relevant connection' test been applied in *Peros v Rose*, this would not have changed the outcome of that decision, and that, accordingly, the reasoning impliedly endorsed by the court resonates with the most recent

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[448] *Afgri Bedryfs Beperk v Merwede Boerdery BK & others* [2014] JOL 31697 (FB), para. 22. See also *Minister of Law and order v Thusi* (note 273 above) 226G-I.

[449] See the criticisms in Hare (note 6 above) 69 fn 8. In *Kuehne & Nagel* (note 19 above), fn 14, the court largely ignores the reasoning in *Peros v Rose* (note 5 above), referring to it only in footnote; see also *MV Madiba* (note 97 above), para. 31: 'The judgment in *Peros v Rose* is of no assistance to the defendant's primary argument in the present instance. That case was considered before the extension of the definition of a maritime claim'.

jurisprudence on the process of classifying a maritime claim.[450] What might have changed the outcome is if the court had explored whether, in the process of adjudicating the claim under the guarantee, it would be necessary to adjudicate the performance of maritime activities that comprise the maritime topic of construction, *regardless* of whether reference would need to be had to the underlying construction contract.[451] This criticism of the reasoning in *Peros v Rose* has been discussed above.[452]

(iv) The Mineral Ordaz

It will be recalled that the issue before the court was whether a claim to enforce a settlement agreement had a maritime connection to the underlying charter party in terms of para (*j*), alternatively whether the settlement agreement could be categorised as a 'marine or maritime matter' in terms of para (*ee*). In addition to the court reasoning by hypothetical analogy in its attempt to answer that question (which mode of reasoning has been discussed extensively above)[453] the court also took into account that the applicant intended raising as a defence, in future proceedings, that the repudiation of the underlying charter party had been fraudulently made, and that the settlement agreement had been induced by fraud. The court considered that the practical effect of the defence of fraud being raised would be that the 'charter party and the circumstances surrounding it'[454] would need to be referred to support its defence of fraud and that this demonstrated that 'the essential character of the claim remains a maritime claim for the respondent in as much as it remains for the applicant'.[455]

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[450] Being *Kuehne & Nagel* (note 19 above) in which matter the 'legally relevant connection' test was developed and *Twende* (note 24 above) which is the first court to directly apply that test.

[451] On the other hand, it is arguable that the court did, in fact, engage with an enquiry into whether the obligations in the guarantee were connected to maritime activities associated with construction *irrespective* of whether they were the same as obligations in the underlying construction contract, and that the outcome of this consideration was that they were *not* so connected. In this regard, the court impliedly accepted the plaintiff's reasoning that the obligation being enforced related only to questions of *timing*, not construction, and that: 'The determination of whether or not the stage in question had been reached by the stipulated time is not, in itself, *an enquiry of a sufficiently maritime nature* to characterise the claim as a maritime claim.' (*Peros v Rose* (note 5 above) 426E). What is more, this reasoning may also indicate that the outcome in *Peros v Rose* would not necessarily have been different had the provisions of para (*ee*) been relied on, because it is arguable that the guarantee, which had as its 'subject matter' the payment of a sum of money payable by a certain date – an issue relating to *timing* not construction, was not of a '*sufficiently maritime nature*' (426E) to characterise it as a 'marine or maritime matter' in terms of para (*ee*).

[452] See 3.2.2(*a*) above.

[453] See 3.2.2(*b*)(iv) above.

[454] *The Mineral Ordaz* (note 7 above) D46D-E.

[455] Ibid D47C.

This is noteworthy, for present purposes, because this line of reasoning has similarities with the 'legally relevant connection' test, and with the manner in which it was applied in *Kuehne & Nagel*.[456] It has been discussed above, however, that taking into account an anticipated defence to a claim in the process of classifying a claim is a flawed process of reasoning, and it is an overbroad application of the 'legally relevant connection' test.[457] Importantly, facts that support a *defence* to a claim cannot be said to be part of the essential averments necessary to sustain the claimant's cause of action (*facta probanda*), nor the facts that prove those facts (*facta probantia*), and thus should be excluded to any maritime-claim enquiry.

(b) Summary and comparison of the maritime connection enquiries

An analysis and comparison of the reasoning followed in *Peros v Rose*, *Kuehne & Nagel*, and *The Mineral Ordaz* reveals that in each of the three matters it was considered relevant to the maritime-claim enquiry that, in the process of determining the claim, reference would need to be made to an underlying maritime claim, or to an underlying maritime agreement that gives rise to maritime activities that are not being directly enforced. What emerges from this analysis is that the same premise appears to have been accepted by each of the courts, which could be articulated as follows:

> *If* the claim being made is to enforce an agreement that has some connection[458] to an underlying 'maritime agreement' *and*, in the process of adjudicating that claim, it will be necessary to determine any of the obligations in that underlying maritime agreement that constitute maritime activities, *then* there is a maritime connection between the claim and the relevant maritime topic.[459]

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[456] *Kuehne & Nagel* (note 19 above), para. 34.
[457] See 3.2.1(*e*) above.
[458] Not necessarily a maritime connection in the sense of being 'for, arising out of or relating to' as contemplated in the introductory phrase of the definition of 'maritime claim'.
[459] The manner in which this was applied in *Kuehne & Nagel* (note 19 above) was to reason that the determination of the underlying forwarding agreement *did* have the potential to influence the claim made on the guarantee, and in *Peros v Rose* (note 5 above) the argument was that the determination of the underlying construction contract did *not* have the potential to influence the claim made on the guarantee. Despite the courts reaching opposite conclusions, the underlying premise was arguably the same.

It was not until *Kuehne & Nagel* that this process of reasoning was articulated in the form of the 'legally relevant connection' test. The court in *Twende* was the first court to directly apply this test. The fact that the courts in *Peros v Rose* and *The Mineral Ordaz* applied reasoning similar to that of the 'legally relevant connection' test, prior to its creation, is strongly persuasive of the cogency of the reasoning that underlies that test. The court in *Kuehne & Nagel* appeared to be unaware of this similarity in reasoning when it formulated the 'legally relevant connection' test.

However, it is important to note that, despite the court in *Kuehne & Nagel* being the architect of the 'legally relevant connection' test, the application of that test to the facts before it resulted in that court following a flawed process of reasoning, which has been examined above. It could be said that the court in *Kuehne & Nagel* 'made a labyrinth and got lost in it'.[460] The reasoning followed in *The Mineral Ordaz* is not immune from this same criticism, with both courts classifying the claims as maritime claims by taking into account possible defences to the claims. This is an indication that the reasoning that underlies the 'legally relevant connection' test might encourage a shift in focus from the facts giving rise to the claim 'as formulated',[461] (that is, the *facta probanda*, or even *facta probantia*), to matters *external* to the claim. If so, this is an overbroad approach to any maritime-claim enquiry. Notably, the reasoning followed in *Peros v Rose* does not suffer from this same flaw, despite the court applying similar reasoning. This can be ascribed to the fact that the focus of the court's enquiry throughout was on the *obligation* being directly enforced, and the connection that that obligation had with the maritime topic of construction.[462]

There is another flaw in the manner in which the reasoning that underlies the 'legally relevant connection' test was applied by the courts, which was an undue emphasis on the importance of

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[460] This phrase is borrowed from decision by the United States Court of Appeals for the 7th Circuit, *Johnson v. John F Beasley Construction Company* 742 F. 2d 1054, 1985 A.M.C. 369, 26, where the court, referring to the criticism of the convoluted manner in which the United States Supreme Court had approached the problem of classifying a person as a 'seaman' (which qualified that person for certain statutory rights upon injury) noted: 'Diderot may very well have had the previous Supreme Court cases in mind when he wrote, "We have made a labyrinth and got lost in it. We must find our way out"'. See also J E Holloway 'Judicial Activism in Maritime Cases,' (2018) 43 *Tulane Maritime LJ* 21, 22.

[461] *Twende* (note 24 above), para. 66.

[462] This focus meant that future possible defences to the claim (which may well have made the provisions of the underlying construction contract relevant to the 'issues' that the court needed to adjudicate) could play no role in the court's enquiry.

establishing a connection to the provisions of the underlying maritime *agreement*. As stated above,[463] while the consideration of the relevance of the provisions of the underlying agreement is a useful manner of 'testing' the proximity of a connection (as is demonstrated in *Twende*), it is important that this enquiry is not *limited* thereto, and that the enquirer also considers that the maritime topic as it is described in the definition of 'maritime claim' will notionally encompass a wider range of 'maritime activities' than those maritime activities found in the relevant underlying agreement.

3.3 Conclusion

In this chapter, the reasoning followed in *Peros v Rose*, *The Mineral Ordaz* and *Kuehne & Nagel,* was considered in detail in the context of the structure of the definition of 'maritime claim' in s 1(1) of the Act. It was established that a proper approach to the classification of a maritime claim involves the clear identification of each of the three main elements of the definition of 'maritime claim', being the claim, the maritime topic, and a 'maritime connection' between the two. On close examination it was discovered that in each of the decisions there were flaws in reasoning, and it was established that what led to these flaws was the failure to either properly identify each of these three elements, or to keep them distinct from each other.

As to the *first* element in the definition, the importance of clearly identifying the facts giving rise to the *claim*, and not shifting focus to matters external to the claim, such as defences that may be raised to the claim, regardless of whether these are 'actual', 'anticipated' or 'hypothetical' defences, was demonstrated by considering the flawed lines of reasoning followed in both *The Mineral Ordaz* and *Kuehne & Nagel*. The reasoning followed in *Peros v Rose* was said to be exemplary of the proper application of this first element in the definition, with the court properly maintaining its focus on the facts giving rise to the claim, by considering the *facta probanda* and *facta probantia*, and paying close attention to the obligation being enforced.

As to the *second* element in the definition, which is the relevant maritime topic, it was shown that it is necessary to ensure that it is the *maritime topic* that is the object to which the claim is

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[463] See 3.2.2(*a*) above.

connected, and not to limit the enquiry to an object that may fall within the maritime topic but which does not embody it, such as an underlying 'maritime' agreement, which is what could be said to have occurred in *Peros v Rose*. Thus, it is important to properly *identify* what the relevant maritime topic is, at the commencement of every maritime-claim enquiry, being the relevant maritime activities contemplated in the maritime topic. It was also shown that, where the claim is sought to be classified as a maritime claim in terms of para (*ee*), it will be necessary to first establish the *existence* of the maritime topic described in para (*ee*) which will involve, first categorising the 'matter' identified, as a 'marine or maritime matter' as contemplated in para (*ee*), and only thereafter, assessing whether that newly established 'marine or maritime matter' has a *maritime connection* with the claim being made (being the third element of the definition). It was demonstrated how the court in *The Mineral Ordaz* conflated the process of establishing the existence of the *maritime topic* described in para (*ee*) with the process of establishing whether there was a *maritime connection* between the claim and one of the other maritime topics, being that listed in para (*j*). The difficulty in categorising a matter as a 'marine or maritime matter' in para (*ee*) was demonstrated by considering the shortcomings of the reasoning by hypothetical analogy followed in *The Mineral Ordaz*.

Finally, as to the *third* element in the definition, which is the *maritime connection* between the claim and a maritime topic, it was shown that, while the courts in *Peros v Rose*, *The Mineral Ordaz* and *Kuehne & Nagel* each appeared to have taken different approaches to the problem of ascertaining whether there was a maritime connection on the facts before them, there is, in fact, a line of reasoning common to each of them, which is the reasoning implicit in the 'legally relevant connection' test which was developed in *Kuehne & Nagel* subsequent to the previous two matters being decided. This finding is significant, considering that the conclusion reached by the court in *Peros v Rose* has been criticised as being the result of an 'unduly narrow view of the extent to which the Act extended South African admiralty jurisdiction'[464] and it has now been shown that, had the 'legally relevant connection' test been applied to the facts in *Peros v Rose*, to 'test' for an indirect maritime connection, this would not necessarily have changed the outcome in that matter.

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[464] Hare (note 6 above) 71 fn 8.

An analysis of the reasoning followed in each of the above three decisions in their attempts to establish a maritime connection between the respective claims and maritime topics, revealed that various errors in reasoning were made, which arose out of the respective courts' failure to identify each of the three elements of the definition and to keep them distinct from each other. Since establishing a maritime connection is the linchpin in the definition, it is important that whatever test is used by courts to determine whether a maritime connection exists is one that guides a court to reach a conclusion consistent with the provisions of s 1(1) of the Act, properly interpreted.

In the next chapter, an attempt will be made to formulate an approach to be used as a framework in borderline maritime-claim question cases to guide courts in the process of classifying maritime claims. As part of this approach, suggestions will be made to the modifications that should be made to the 'legally relevant connection' test to remove the elements that caused the courts in *Kuehne & Nagel* and *The Mineral Ordaz* to follow similar erroneous lines of reasoning.

CHAPTER FOUR: A NEW APPROACH

4.1 Introduction

In this Chapter, a new approach to the classification of maritime claims in terms of s 1(1) of the Act will be formulated. This approach emerges from the consideration of the failure by the courts in the matters discussed in this study to identify each of the three disaggregated elements of the definition and to keep them distinct from one another. In addition, it will be recommended that certain modifications be made to the 'legally relevant connection' test so that it can be used as a reliable tool to guide courts in the process of classifying a maritime claim within the framework of that new approach. Lastly, given the finding made in Chapter Three that the reasoning by hypothetical analogy followed in *The Mineral Ordaz* in its attempts to categorise the settlement agreement as a 'marine or maritime matter' in terms of para (*ee*) had several shortcomings, consideration will be given to the several other factors that the court in that matter might have taken into account, and factors that future courts might consider in the process of categorising a settlement agreement as 'marine or maritime matter'.

4.2 New approach: a three-part enquiry

The new approach to the classification of a maritime claim that is hereby proposed follows from the analysis in Chapter Three regarding the structure of the definition of 'maritime claim', and requires the following three steps to be followed in this order: *firstly*, the claim being made must be clearly identified. S*econdly*, the maritime topic must be identified; this will involve a two-stage enquiry when the maritime topic relied upon is para (*ee*). *Thirdly*, a maritime connection must be established, which should be done by way of a two-step enquiry to test for both a direct and an indirect connection.

4.2.1 The first part of the three-part enquiry

As to the *first* part, the identification of the claim requires the consideration of the facts that give rise to the claim as pleaded, being the *facta probanda*. This involves identifying the obligation being enforced. Caution must be taken to separate the claim being made from the facts giving rise to a possible defence to that claim to avoid the flaws in the reasoning followed in *Kuehne & Nagel* and *The Mineral Ordaz*.

4.2.2 The second part of the three-part enquiry

In the *second* part, the maritime topic, or topics, that are alleged to be connected to the claim, must be identified. To assist in this process, the court should specify the relevant maritime activities that make up the maritime topic and enquire whether those maritime activities are present on the facts before the court.[465] If there is an underlying maritime claim or agreement, caution must be taken not to conflate the obligations in that underlying maritime claim or agreement with the maritime topic as it is described in the definition, to avoid unduly narrowing the enquiry as was arguably the case in *Peros v Rose*.[466]

(a) Two-stage enquiry for para (ee)

Where the relevant maritime topic is para (*ee*), an additional two-stage enquiry needs to be followed: the *first* is to *identify* what is contended to be the 'matter' that is referred to in para (*ee*), and the *second* is to establish whether that 'matter' is a 'marine or maritime matter'. The facts in *El Shaddai* offer a useful illustration as to how this two-stage enquiry might work in practice. It will be recalled that the issue in *El Shaddai* was whether a claim to enforce an acknowledgment of debt, which secured the repayment of a loan, which had been used to finance a fishing venture, was a maritime claim in terms of para (*ee*). Had the court followed the proposed two-stage enquiry, it would first have had to identify whether the acknowledgment of debt, or the underlying loan, or indeed the fishing venture, was the 'matter' referred to in para (*ee*). Once the 'matter' had been identified, the *second* step would have been to consider whether that matter could be categorised as a 'marine or maritime matter'.[467] Only once that two-stage enquiry had been followed should the court have proceeded to the *third* part of the enquiry (which is dealt with below), which would be to consider whether there is a *maritime connection* between the

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[465] See note 348 above regarding the meaning of the term 'maritime activity'.

[466] As discussed in Chapter Three, it would have assisted the court in *Peros v Rose* (note 5 above) in its maritime-claim enquiry if it had specifically considered, and made a finding on the question whether the activities of laying the keel, and installing the engine, were maritime activities contemplated in the description of the maritime topic in para (*m*) (prior to the Act's amendment by the Amendment Act (note 20 above)). If they were, the court could have focused its attention on whether there was a maritime connection between the claim and *those maritime activities* (rather than focusing on establishing a maritime connection with the underlying maritime agreement). However, see also the discussion in note 451 above.

[467] As discussed in Chapter Three, there has been no attempt by South African courts to articulate what factors ought to be taken into account when categorizing a 'matter' as a 'marine or maritime matter' in terms of para (*ee*).

claim and the newly categorised 'marine or maritime matter'. The difficulty of establishing a maritime connection will depend on what has been identified as the 'matter' in the second stage of the two-stage enquiry. In this regard, it might be an easier task to find that the 'fishing venture' is by 'virtue of its nature or subject matter . . . a *marine or maritime matter*'[468] than to find the same for the acknowledgement of debt.[469] However, it would be more difficult to establish a *maritime connection* between the claim and the fishing venture[470] than it would be to establish a maritime connection with the acknowledgment of debt.[471] This analysis reveals the importance of the clear articulation of the 'matter' that is purported to be the 'marine or maritime matter' in the second part of the enquiry, given the impact of that finding on the third part of the enquiry.

Special consideration will now be given to the circumstances in which a settlement agreement that has as its subject matter a compromised maritime claim may qualify to be categorised as the maritime topic described in para (*ee*). This question is an example of the type of 'borderline case'[472] that requires certainty, given that the decision in *The Mineral Ordaz* is the only reported matter in which this question has been raised, and, as demonstrated in Chapter Three, the reasoning followed by the court suffers from a number of shortcomings. In light of thereof, the alternative lines of reasoning that might have been followed in *The Mineral Ordaz* in categorising the settlement agreement as a 'marine or maritime matter' (and which may be considered in future decisions) will be explored further below.

To commence this analysis, consideration will be given to the reasoning followed by a court in an analogous decision, *Weltmans,*[473] which dealt with the interpretation of the provisions of s 34 of the Insolvency Act 24 of 1936 ('the Insolvency Act'). It will be demonstrated that a consideration of the manner in which the court in *Weltmans* justified its conclusion lends further support to the

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[468] A future court might reason that, given the proximity of the fishing venture to maritime commerce, the fishing venture is a 'marine or maritime matter', see further note 369 above.
[469] As it was argued in *El Shaddai* (note 8 above), para. 5, the obligation in the acknowledgment of debt 'is nothing more than the repayment of a commercial loan.'
[470] One construction of the introductory phrase, is that claim cannot be said to be 'for, arising out of or relating to' the fishing venture, considering that the claim arose directly out of the acknowledgment of debt, and it would not be necessary to refer to the fishing venture in adjudicating the claim.
[471] This is because the claim is *directly 'for'* enforcement of the terms of an acknowledgement of debt.
[472] The term 'borderline case' is described in Chapter One (see 1.1 above).
[473] *Weltmans Custom Office Furniture (Pty) Ltd (In Liquidation) v Whistlers CC* 1999 (3) SA 1116 (SCA).

suggestion in Chapter Three that the abstract approach followed in *The Mineral Ordaz* ought to have been buttressed by additional considerations that would have emerged from a purposive interpretation of the definition of 'maritime claim'. These will be considered below.

The facts in *Weltmans* are as follows. Whistlers CC ('the creditor') had sold its business to Weltman, and Weltman defaulted on his payments of the purchase price, which led the creditor to institute proceedings against Weltman. The parties subsequently concluded a settlement agreement. However, unbeknownst to the creditor, Weltman had, in the interim, transferred the business to a third party. When this was discovered, the creditor sought to declare that sale void in terms of s 34 of the Insolvency Act.[474] However, the difficulty for the creditor was that its new claim against Weltman was now in terms of the settlement agreement, and not the original claim in terms of which proceedings had been instituted. According to Melunsky AJA, the issue was 'whether . . . the proceedings instituted before the transfer are *sufficiently closely connected* to the settlement agreement to entitle the [creditor] to contend that the transfer is void in terms of s 34(3).'[475] Melunsky AJA accepted that, as a result of the compromise, in terms of the settlement agreement, the creditor was 'not entitled to fall back on the original agreement'[476] but proceeded to reason as follows:[477]

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[474] The relevant provisions of s 34 of the Insolvency Act 24 of 1936 are set out below:
'(1) If a trader transfers in terms of a contract any business belonging to him, or the goodwill of such business, or any goods or property forming part thereof (except in the ordinary course of that business or for securing the payment of a debt), and such trader has not published a notice of such intended transfer in the Gazette, and in two issues of an Afrikaans and two issues of an English newspaper circulating in the district in which that business is carried on, within a period not less than 30 days and C not more than 60 days before the date of such transfer, the said transfer shall be void as against his creditors for a period of six months after such transfer, and shall be void against the trustee of his estate, if his estate is sequestrated at any time within the said period.
(2) . . .
(3) If any person who has any claim against the said trader in connection with the said business, has before such transfer, for the purpose of enforcing his claim, instituted proceedings against the said trader -
(a) in any court of law, and the person to whom the said business was transferred knew at the time of the transfer that those proceedings had been instituted; or
(b) in a Division of the Supreme Court having jurisdiction in the district in which the said business is carried on or in the magistrate's court of that district,
the transfer shall be void as against him for the purpose of such enforcement.
[475] *Weltmans* (note 473 above), para. 14.
[476] Ibid para. 16.
[477] Ibid para. 16 (emphasis added).

> That submission, as I have pointed out, does not take into account the statutory provisions which have to be construed. On the facts of this case it is clear that the compromise did not change the essential nature of the [creditor's] claim against Weltman for the purposes of the subsection. Both the original and the settlement agreements related to the sale of the same business and the [creditor's] claim, under each agreement, was for payment of the purchase price. The compromise differed from the original agreement in relation to the amount payable and the method of payment but it *did not alter the essence of the respondent's claim or the debtor's obligation*.

The reasoning followed in *Weltmans* shares obvious similarities with the reasoning followed in *The Mineral Ordaz*: in both, while it was acknowledged that the underlying claim had been compromised, it was found that the 'essence' of the claim remained the same given that the compromise was to the amount only.[478] However, it is important to bear in mind that, for the court in *Weltmans*, an important consideration was the purpose of the statutory provisions that were sought to be enforced. Melunsky AJA reasoned that:[479]

> It is, for instance, unthinkable that the mere reduction of the original contract price after the institution of proceedings to enforce the debt would result in the removal of the protection that a creditor had acquired under the subsection. Section 34(3) *was intended*, inter alia, to *benefit a vigilant creditor and not to penalise him* for reducing his claim in order to resolve a festering dispute.

The importance that Melunsky AJA in *Weltmans* placed on the *purpose* of the statutory provision in that matter shares no parallel with the reasoning followed in *The Mineral Ordaz*, the latter court's approach being characterised by its over-emphasis of the provisions of para (*ee*), with the court paying insufficient attention to other factors.[480] In this regard, an important consideration to which the court in *The Mineral Ordaz* failed to pay sufficient attention is the applicant's argument regarding the historical position of the exercise of admiralty jurisdiction, specifically

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[478] See *The Mineral Ordaz* (note 7 above) D47I: 'The claim was compromised solely as to the amount'.
[479] *Weltmans* (note 473 above), para. 13 (emphasis added).
[480] As discussed in Chapter Two (see 2.5.2(*c*) above).

that 'in England even an arbitration award, arising out of a charter party, *let alone a settlement or compromise* was at some stage in the development of the law in that country clouded in controversy',[481] and, while the position in South Africa was settled by the inclusion of para (*aa*) into the definition, the same was not done in respect of settlement agreements.[482] In this regard, the court may have recognised that an important feature of claims to enforce judgments and arbitral awards, for the purposes of a maritime-claim enquiry, is that they are said to be 'entirely derivative causes of action'.[483] The court in *Yu Long Shan* explained this to mean the following:[484]

> [T]hey owe their own existence to the prior existence of some or other antecedent cause of action found to be good in fact and law after being subjected to adjudication. . . . the judgment or award purports to be, and must be regarded as, a binding pronouncement of liability arising from the cause of action ventilated in the judicial or arbitral proceedings.

As explained in *Trust Bank v Dhooma*,[485] judgments are generally considered to have the effect of 'strengthening or reinforcing' the underlying rights and obligations in which event '[t]he right of action will have been replaced by a right to execute, but the enforceable right remains the same'.[486] The effect of compromise on an underlying debt is different: it is not even affected by the invalidity of an underlying contract.[487] Thus, an alternative line of reasoning that might have been explored further in *The Mineral Ordaz* is that while a judgment 'validates' underlying rights and obligations, by finding them 'to be good in fact and law'[488] a settlement agreement (when it

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[481] *The Mineral Ordaz* (note 7 above) D45C-D.
[482] To support this argument the applicant referred to, inter alia, the English decision *The Beldis* (note 165 above), in which the court held that the claim was not a maritime claim because it arose out of arbitration. This argument by the applicant appears to be grounded in sound reasoning, since it has, subsequent to the decision in *The Mineral Ordaz* (note 7 above), been accepted by the Supreme Court of Appeal in *MV Silver Star* (note 48 above), para. 30, that the inclusion of s 1(1)(*aa*) in the Act 'was done deliberately in order to overcome the decision in *The Beldis'*.
[483] *Yu Long Shan* (note 371 above) 653F.
[484] Ibid 653G-H.
[485] *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N).
[486] Ibid 310B-C. See also *Swadif (Pty) Ltd v Dyke, No* 1978 (1) SA 928 (A) 940F-941A, and *MV Silver Star* (note 48 above), para. 22.
[487] L T C Harms, 19 *Lawsa* 2 ed, para. 241.
[488] *Yu Long Shan* (note 371 above) 653G.

takes the form of a compromise) 'materially alters'[489] underlying rights and obligations, and this arguably also 'materially alters' the nature of the comprised maritime claim.

Notably, a similar line of reasoning has been followed by American courts in justifying the rule that excludes claims to enforce settlement agreements from admiralty jurisdiction. This was explained by United States Court of Appeals for the Second Circuit in *D'Amico*[490] as follows:[491]

> There is no telling whether the defendant who agrees to pay money in settlement of the claim is in any way by doing so acknowledging validity of the claim, or in contrast is continuing to deny it categorically while agreeing to pay some money to avoid the inconvenience, expense, and risk of further litigation. The settlement *extinguishes that claim* through private contract *without validating it*. In contrast, where a court has rendered a final judgment on the claim, the claim has been validated. *If that claim was of maritime nature, the maritime nature of the claim has been validated*, furnishing good reason for the dispute over the enforceability of the judgment to be heard as a maritime matter in the admiralty jurisdiction of the federal court.

American courts have identified several exceptions to the general rule that settlement agreements are not maritime contracts, such as where, for example, the primary purpose of the settlement agreement 'besides the "settlement" of the underlying admiralty claim'[492] is to perform a maritime activity,[493] such as the repair to a yacht's port engine as was the case in *F.W.F v*

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[489] *Lawsa* (note 459 above), para. 241.

[490] *d'Amico Dry Ltd. v. Primera Maritime (Hellas) Ltd.,* No. 11-3473-cv, 756 F.3d 151, 2014 WL 2609648 (2d Cir. June 12, 2014) ('*d'Amico 2014*'). See also *The Rice Corporation d/b/a The Rice Company USA v Express Sea Transport Corporation* 14-CV-5671 (VEC) (S.D.N.Y May 26, 2015), where the court, commenting on the decision in *d'Amico 2014*, stated the following: 'The Second Circuit's analysis [in *d'Amico 2014*] suggests that, *without an adjudication on the merits of the underlying claim*, a settlement agreement, or any agreement "to pay to resolve a maritime claim is not itself a maritime contract and does not confer admiralty jurisdiction over a subsequent suit on that agreement to resolve the underlying maritime claim"' (emphasis added).

[491] *d'Amico 2014* (note 490 above) 22-23 (emphasis added).

[492] *F.W.F., Inc. v. Detroit Diesel Corp.,* 494 F.Supp.2d 1342, 1356 (S.D. Fla. 2007), para. 8.

[493] The term 'maritime activity' is used here within the meaning given to it in this study namely, that it is the conduct that is contemplated in the relevant maritime topic as described in the definition (see note 348 above). In this regard, if a claim for the repair to a vessel's engine was brought in a South African court, the claimant would most likely seek to classify the claim in terms of s 1(1)(*q*) of the Act. American courts classify a contract to repair a vessel as a maritime contract (see *F.W.F. v Detroit* (note 492 above), para. 3).

Detroit.[494] Another example is *C. Transport Panamax*[495] where the settlement agreement included 'obligations concerning the payment of demurrage on a *theretofore uncompleted charter*',[496] the payment of demurrage falling into the category of 'maritime service or maritime transactions',[497] thus rendering the agreement 'more than the typical settlement agreement'[498] and accordingly subject to admiralty jurisdiction.

The above line of reasoning is arguably equally applicable in the South African context, both in justifying a general rule that settlement agreements do not qualify to be categorised as 'marine or maritime matters' in terms of para (*ee*), and in justifying the exceptions to that general rule. In this regard, courts may reason along the policy lines expressed in *El Shaddai* that, in *general*, the enforcement of a settlement agreement can 'easily be dealt with'[499] by a court exercising its ordinary jurisdiction, and thus should be excluded from admiralty jurisdiction, *unless* it is 'more than the typical settlement agreement'[500] and creates new obligations for the performance of maritime activities.

However, a general rule that excludes settlement agreements from admiralty jurisdiction might be considered to be antithetical to the 'general judicial policy favouring settlement'[501] recognised by South African courts, and a maritime claimant, who decides to settle a 'festering dispute'[502] out of court should arguably not be penalised[503] by being denied access to admiralty jurisdiction when the debtor subsequently reneges on his obligations in the settlement agreement. Thus, a further exception might be made for maritime claims who settle their claims out of court,

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[494] *F.W.F. v Detroit* (note 492 above).
[495] *C. Transport Panamax, Ltd. v. Kremikovtzi Trade E.O.O.D.,* No. 07 Civ. 893 (LAP) 2008 WL 2546180.
[496] Ibid para. 3 (emphasis added).
[497] Ibid para. 3. If the contract has 'reference to maritime service or maritime transactions' then it is subject to American admiralty jurisdiction, see *Norfolk Southern Railway Company v Kirby*, 543 U.S. 14, 29 (2004), para. 2.
[498] Ibid para. 3.
[499] *El Shaddai* (note 8 above), para. 15.
[500] *C. Transport Panamax* (note 495 above), para. 3.
[501] *PL v YL* 2013 (6) SA 28 (ECG), paras. 34 and 41. See also *Schierhout v Minister of Justice* 1925 AD 417 423; *Ex parte Le Grange and another; Le Grange v Le Grange* 2013 (6) SA 28 (ECG), para. 34: 'The settlement of matters in dispute in litigation without recourse to adjudication is generally favoured by our law and our courts.'
[502] *Weltmans* (note 473 above), para. 13.
[503] Ibid para. 13.

subsequent to the institution of admiralty proceedings.[504] As explained in *PL v YL*,[505] the rationale for the policy favouring settlement is grounded in:[506]

> [T]he benefits it provides to the orderly and effective administration of justice. It not only has the benefit to the litigants of avoiding a costly and acrimonious trial, but it also serves to benefit the judicial administration by reducing over-crowded court rolls, thereby decreasing the burden on the judicial system. . . This gives the court capacity to conserve its limited judicial resources and allows it to function more smoothly and efficiently. To the litigants it has the benefit of reducing expenses and the risks which are associated with litigation.

Notably, the United States District Court[507] in *Pedersen*[508] relied on a similar policy consideration to justify a further exception to the American rule that settlement agreements cannot be enforced in admiralty jurisdiction, with the court reasoning that, while a claim to enforce a settlement agreement cannot be *instituted* in admiralty jurisdiction, if, after institution of a claim properly subject to admiralty jurisdiction the parties *subsequently settle* the matter 'the interests of justice and judicial economy demand that . . . the admiralty court should not abandon the parties by refusing to enforce such a compromise disposition.'[509]

Similar considerations influenced the English judge, D Sheen J, in *The St Anna*,[510] albeit in the context of an arbitration award. In that matter, a claim to enforce an arbitration award was found

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[504] Of course the defendant/respondent would still be entitled to raise the question as to whether the underlying claim (novated by way of settlement) was in fact a maritime claim to begin with.
[505] *PL v YL* (note 470 above).
[506] Ibid para. 36.
[507] The United States District Court for the Western District of Washington.
[508] *Pedersen v. M/V Ocean Leader*, 578 F. Supp. 1534, 1535 (W.D. Wash. 1984), 1535: '[t]his court, in accordance with the policy of federal courts generally, strongly encourages settlement agreements.' In *Pedersen*, proceedings had been instituted in a court exercising admiralty jurisdiction in respect of damages arising from the collision of two vessels. However, the parties decided to settle the matter. When payment in terms of the settlement agreement was only partly made, the plaintiff sought judgment against the defendant for the balance. This request for judgment on the settlement agreement was made in the same court exercising admiralty jurisdiction.
[509] Ibid 1535.
[510] *The St Anna* (note 166 above).

to be subject to admiralty jurisdiction, on the basis that it was not a 'different' claim to the maritime claim to enforce the underlying contract. The judge commented:[511]

> I cannot pretend that it does not give me pleasure to be able to decide this point as I have done, because the result enables this court to do justice in a way which would be denied to it if creditors could not bring proceedings in rem merely because they faithfully honoured their agreement to submit to arbitration a dispute which is clearly within the Admiralty jurisdiction.

Equally, South African courts might reason that it is an 'insensible'[512] construction of para (*ee*) to exclude settlement agreements as 'marine or maritime matters' contemplated therein, otherwise creditors, who decide to settle their claims out of court - a decision that is encouraged in terms of the general policy favouring settlement - will lose the benefit of the specialised procedures available in admiralty jurisdiction, such as being able to bring proceedings in *rem*.

Without a thorough engagement with the issues that have been discussed in this section,[513] *The Mineral Ordaz* leaves open the question of the circumstances in which different types of settlement instruments qualify to be categorised as 'marine or maritime' matters in terms of para (*ee*).[514] This is particularly so since the finding in *The Mineral Ordaz*, was made on the basis that 'the claim was compromised *solely as to the amount'*,[515] and it is accordingly unclear whether the court would have reached a different conclusion had it considered the underlying

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[511] Ibid 696.
[512] *Endumeni* (note 59 above), para. 18.
[513] Notably, the history of the settlement agreement concluded in *The Mineral Ordaz* (note 7 above) was that the claim had commenced with an arrest of a vessel, and thereafter the dispute had been submitted to arbitration, before the settlement agreement was concluded. Accordingly, the issues discussed above, in particular the judicial policy favouring settlement would have been directly relevant to the maritime-claim enquiry before the court.
[514] The starting point would be to assess whether the underlying obligation had been novated or compromised in the settlement instrument. An important distinction between compromise and 'ordinary novation' is that 'the obligations novated by the compromise must previously have been disputed or uncertain, the essence of compromise being the final settlement of the dispute or uncertainty', see *Gracos Brick (Pty) Ltd v Botes* (1531/12) [2014] ZANWHC 28 (11 September 2014), para 27, whereas this is not the case for an ordinary novation. Thus, as reasoned in the American decision of *d'Amico 2014* (note 490 above) 22-23, it could be said that a compromise 'extinguishes [the underlying] claim through private contract without validating it'. This distinction between compromise and ordinary novation may have important implications in determining the extent to which the nature of the compromised or novated debt can be said to have been materially altered and stripped of its maritime character.
[515] *The Mineral Ordaz* (note 7 above), D47I (emphasis added).

claim, and the obligations giving rise to it, to have been *wholly* compromised. Any future court confronted with this question would benefit from a consideration of the issues discussed herein and litigants would, in turn, benefit from the development of a set of guiding principles to assist in this determination, or at least the articulation of the relevant policy considerations applicable in the context of admiralty jurisdiction. Reference to the manner in which foreign courts have dealt with this issue may assist in this process and give insight into some of the factors that may be relevant to the categorisation of a settlement instrument as a 'marine or maritime matter' in para (*ee*).[516] Some of these factors have already been explored above – such as whether the obligation being enforced in the settlement agreement is for the performance of a maritime activity contemplated in the relevant maritime topic, and not merely for payment in settlement of the compromised maritime claim.[517] Another factor is whether the claimant had already instituted proceedings in a court exercising admiralty jurisdiction, prior to settling the dispute.[518] Since these factors have been identified after a consideration of selected foreign cases, it is prudent to mention the caution in *Bernstein v Bester NO* against the 'blithe adoption of alien concepts or inapposite precedents' into South African law.[519] Space constraints do not permit a comprehensive analysis of the similarities and differences between the respective jurisdictions that would serve to justify the arguments made above, and those arguments may, accordingly, be fairly criticised along the lines of the caution in *Bernstein*. However, in respectful defence of this

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[516] Reference has been made to American case law herein, and future research might consider it in further depth. American admiralty jurisprudence would serve as an interesting comparator given that there is no American statute equivalent to the (South African) Act that enumerates the claims that are subject to admiralty jurisdiction, and it has been largely left to judges to delineate the boundaries of admiralty jurisdiction. In this regard, United States federal courts are conferred admiralty jurisdiction in terms of 28 U.S.C. § 1333 which states, *inter alia*, that '[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of (1) Any civil case of admiralty or maritime jurisdiction. . .'. . Because there is no statutory enumeration of matters subject to admiralty jurisdiction, this has resulted in a vast number of cases in which American courts have grappled with determining the factors that are relevant to establishing whether a matter should be classified as being maritime in nature, which may assist South African courts in their application of s 1(1)(*ee*) of the Act. In addition, future research might benefit from a consideration of the manner in which Canadian courts have applied the provisions of s 22 of the Federal Courts Act R.S., 1985, which has been compared to s 1(1)(*ee*) of the (South African) Act, in that it adopts a 'more liberal approach to the conferral of Admiralty jurisdiction' by 'grant[ing] jurisdiction in all cases in which a claim for relief is made or a remedy sought under Canadian maritime law or any law of Canada relating to any matter coming within the class of subject of navigation and shipping' (see S C Derrington and J M Turner*, The Law and Practice of Admiralty Matters* 80-81).

[517] Such as was the case in the American decision of *F.W.F v Detroit* (note 492 above) or *C. Transport Panamax* (note 495 above).

[518] Such as was the case in the American decision of *Pedersen* (see 508 note above). This consideration should be weighed against the policy expressed in *El Shaddai* (note 8 above), para. 15 that admiralty jurisdiction should not be extended 'to matters which can otherwise easily be dealt with within the usual jurisdiction of the high court.'

[519] *Bernstein & others v Bester NO & others* 1996 (4) BCLR 449 (CC), para. 133.

shortcoming, it is submitted that there is an inherent logic in the reasoning followed in the foreign cases referred to above, and that, if applied to the facts in *The Mineral Ordaz*, would offer a useful way to navigate the difficult questions that were raised in that matter, even if no persuasive value is placed on that reasoning having emanated from foreign courts. In this regard, it has been demonstrated that the reasoning followed in those foreign decisions aligns with principles of South African law, and could be justified in accordance with a purposive interpretation of the Act.

4.2.3 The third part of the three-part enquiry

The *third* part of the enquiry is to establish the existence of a *maritime connection* between the claim and the maritime topic within the meaning of the phrase 'for, arising out of or relating to'. In assessing whether a maritime connection has been established, a two-step enquiry should be followed. This two-step enquiry rests on the premise that, depending on the particular context, the definition may be capable of being widely construed to include therein a claim that has an *indirect* connection to a maritime topic, but that, regardless of the potential for a wide construction of the definition, a sensible starting point in every maritime-claim enquiry is first to consider whether there is a *direct* connection between the claim and the relevant maritime topic.

Thus, the *first* step is to consider whether there is a maritime connection in the *narrow* sense, between the claim and the maritime topic, in other words, whether the obligation could be described as being *directly* 'for' the performance of the relevant maritime activity. Only if a direct connection cannot be established, is the enquiry widened, in the second step, to the question whether there is an *indirect* connection between the claim and the maritime topic, in such a manner that the claim to enforce that obligation could be described as 'arising out of or relating to' the maritime topic. In determining the existence of either a *direct* or an *indirect* maritime connection between a claim and a maritime topic (including a maritime topic described in para (*ee*)), it is helpful for a maritime-claim enquirer to 'test' the proximity of a connection. To this end, the methods used by each of the courts in *Peros v Rose*, *The Mineral Ordaz* and *Kuehne & Nagel* in 'testing' the proximity of the connection on the facts before them will be re-considered below.

(a) First step: direct maritime connection

As to the *first* step, which is to establish whether the claim is directly 'for' the relevant maritime topic, it should be noted that none of the courts in the three decisions articulated how to go about 'testing' for the existence of a *direct* connection between the claim and the maritime topic. This may be because in each of the matters it was assumed that the respective claims could only be classified as maritime claims if an *indirect* maritime connection was established (requiring a broad construction of the definition), given that they were 'borderline cases'.[520] This will be shown to be an incorrect assumption, by demonstrating how the claim in *Kuehne & Nagel* was in fact *directly* connected to the maritime topic, and it was unnecessary for the court to broadly construe the definition of 'maritime claim'.

While the court in *Peros v Rose* is said to have taken a narrow approach to the classification of the claim,[521] the court appeared to endorse the reasoning proposed by the plaintiff which has similarities with the 'legally relevant connection' test formulated in *Kuehne & Nagel*, and thus arguably did *not* take a narrow approach.[522] In this regard, it is suggested that a narrow approach to the maritime-claim question presented in *Peros v Rose* would have been to consider whether the obligation being enforced was the *same* as an obligation in the underlying maritime agreement, as opposed to questioning whether it was merely 'influenced' thereby. In reasoning in this way, the underlying maritime agreement would be used as a 'tool' to test for a maritime connection in a *narrow* sense.

American courts, in the classification of what types of contracts qualify to be heard in admiralty jurisdiction, follow a similar line of reasoning. In this regard, where the question arises whether a guarantee, like that in *Peros v Rose* and *Keuhne & Nagel*, is a 'maritime contract', and thus

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[520] As described in Chapter One.
[521] Hare (note 6 above) 71 fn 8.
[522] See this discussion in 3.2.3(*a*)(iii) and note 431 above. The plaintiff's argument amounted to the following: since the obligation being enforced would not be 'influenced' by the determination of an obligation in the underlying maritime agreement, there is no sufficiently intimate connection between the claim and the underlying maritime agreement (and thus, the maritime topic).

subject to admiralty jurisdiction,[523] American courts have enquired whether the promise made by the guarantor is to 'assume the performance of the . . . [underlying maritime contract] to become the principal obligor, to do the very act promised . . . to substitute the promisor's performance for the promisee's.'[524] American courts have drawn a distinction in this regard, between 'an agreement "as surety to 'pay damages for another's breach of a maritime [contract which is] not' a maritime contract"'[525] and 'an agreement to guarantee *the performance* of a maritime contract,' which *is* a maritime contract.[526] This rule is justified by the rationale that a promise to pay contract damages 'neither involves maritime service nor maritime transactions'.[527] An exception is 'where the payment of money is *itself* the performance of a maritime obligation',[528] since this 'does not remove the "maritime flavor" from the obligation'.[529] Thus, the question is whether the obligation being enforced is for the performance of the *same* obligation in the underlying maritime contract. Given that the maritime nature of the underlying obligation is undisputed (as

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[523] The American test for a 'maritime contract' is whether the 'nature and character of the contract' has 'reference to maritime service or maritime transactions', see *Norfolk* (note 497 above), para. 2. See also R Prentiss Pskowski 'A Maritime Perspective on Derivatives' Objective: The Second Circuit Makes Headway towards a Justifiable Maritime Contracts Test in d'Amico II (2018) 43 *Tulane Maritime LJ* 239, 241: 'Federal maritime jurisdiction over contracts will arise when a contract is maritime in nature. The question of whether or not a contract is sufficiently "maritime" is a conceptual inquiry. . .'.

[524] *Compagnie Francaise De Navigation a Vapeur v. Bonnasse*, 19 F.2d 777, 779 (2d Cir.) cert. denied, 275 U.S. 551, 48 S.Ct. 114, 72 L.Ed. 421 (1927) 779. This case has been cited on a number of occasions; a recent citation is in *C. Transport Panamax, Ltd.* (note 495 above) in which the court states the following: '[w]hile courts in this Circuit and elsewhere have long held that an agreement to act as a surety on a maritime contract is not maritime in nature. . . they have recognized that the same is not true of an agreement to guarantee the performance of a maritime contract, see, e.g., *Compagnie Francaise de Navigation a Vapeur v. Bonnasse,* 19 F.2d 777, 779 (2d Cir. 1927) (L. Hand, J.). The rationale for the distinction between the two is as sound now as it was in 1927: whereas a guarantor promises to become the principal obligor and do the very act promised, see id., "a surety on a bond does not promise to perform . . ., but to pay damages in the event of nonperformance. . ."' *Mercator Line, Inc. v. Witte Chase Corp.,* 88 Civ. 8060, 1990 WL 52254, at *3 (S.D .N.Y. Apr. 18, 1990)'.

[525] *Classic Maritime Inc. v. Limbungan Makmur SDN BHD*, 646 F.Supp.2d 364 (S.D.N.Y. 2009), 369 citing *Fednav, Ltd, v. Isoramar, S.A.,* 925 F.2d 599, 601 (2d Cir.1991), quoting in turn, *Kossick v. United Fruit Co.,* 365 U.S. 731, 735, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961).

[526] *Classic Maritime* (note 525 above) 369.

[527] *Pacific Surety Co v Leatham & Smith Towing & Wrecking Co*., 151 F. 440 (1907), 443. See also D Hollowell '1990-91 Survey of International Law in the Second Circuit' (1992) 18 *Syracuse Journal of International Law and Commerce* 141, 178; *Fednav* (note 493 above) 601.

[528] *Classic Maritime* (note 525 above) 369 (emphasis added), referring to, inter alia, *Compagnie Francaise* (note 524 above).

[529] See *Mercator Line, Inc. v. Witte Chase Corp*., No. 88 Civ. 8060, 1990 WL 52254 (S.D.N.Y. Apr.18, 1990), para. 3 where the District Court stated: 'In *Compagnie Francaise de Navigation a Vapeur v. Bonnasse*, 19 F.2d 777 (2d Cir. 1927) (Hand, J.), the Second Circuit distinguished a surety from a guaranty . . . When one has made himself a "surety for a charterer," maritime jurisdiction has been refused because the "surety has not agreed to perform the principal's maritime obligation, but merely to pay a sum of money in case of his default." . . . The fact that the principal's primary obligation of performance is itself the payment of money does not, however, remove the "maritime flavor" from the obligation. A guaranty of full performance of a maritime contract is therefore an obligation enforceable in admiralty'.

was the case in the three South African decisions under study) establishing that the obligation being enforced is the *same* as the underlying obligation indicates that the obligation being enforced is, also, connected to the relevant maritime topic.

Applying the above reasoning to the facts in *Peros v Rose*,[530] it could *not* be said that Rose, the guarantor, had agreed to 'step into' the 'shoes' of Rosa Marine in terms of the underlying construction contract. Thus, since the obligation being enforced – which was for payment of a sum of money upon the happening of a certain event – was *not also* an obligation in the underlying maritime agreement, the outcome of the enquiry in the first step (if it had been applied by the court) would be that the claim is *not* a maritime claim: it did not have a maritime connection to the relevant maritime topic, being construction of a ship.[531] The reasoning actually followed by the court was pitched somewhat wider than a direct enquiry, with the court reasoning that the payment obligation was not triggered by anything done or not done according to the obligations in the underlying agreement, (ie the determination of the claim was not 'influenced' by any determination of the underlying agreement). In considering the *facta probantia* (being the obligations in the underlying agreement) not merely the *facta probanda* (which would be limited to the terms of the guarantee), this type of enquiry is more appropriate in the *second* step of the two-step enquiry, and will be considered below. Before doing so, however, it is necessary to consider the facts in *Kuehne & Nagel* in the context of this *first* step. Had the court in *Kuehne & Nagel* commenced its enquiry with the *first* step of the proposed two-step enquiry, it might have reasoned as follows:

> The demand guarantee provides that, in the event of the subsidiary being 'in default of any of the Fees Payment'[532] in the underlying forwarding services agreement, the guarantor[533]

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[530] See the discussion in the conclusion in para 4.2.2 above, regarding the caution (referred to in *Bernstein* (note 519 above)) to be applied by South African courts when considering the reasoning followed by foreign courts. It is, however, respectfully submitted that the inherent logic in the reasoning followed in the cited foreign decisions may assist South African courts with the difficult questions raised in *Kuehne & Nagel* (note 19 above) even if no weight is attached to that reasoning as representing good foreign authority.

[531] However, since the maritime topic of ship construction is notionally broader than merely the obligations contained in the underlying construction contract, the court might also have considered whether the obligation being enforced could be said to have a direct connection to a maritime activity that has been identified as comprising the maritime topic of ship construction. See a discussion of this alternate line of reasoning in 3.2.2(*a*) above.

[532] *Kuehne & Nagel* (note 19 above), para. 9.

> undertakes to '*perform such obligations*'.[534] Thus, it could be said that the guarantor 'assumed the performance'[535] of the payment obligation in the underlying maritime agreement and undertook to '*do the very act*'[536] that had been promised by the subsidiary in the underlying maritime agreement (to pay the agent's remuneration). Thus, the obligation being enforced was essentially the *same* as the obligation in the underlying maritime agreement.[537] It was, accordingly, also for 'the remuneration of, or payment or disbursements made by . . . an agent'[538] and thus was *itself* a 'maritime obligation', giving rise to a maritime claim.

Accordingly, had the court in *Kuehne & Nagel* followed this reasoning, which commences with the identification of the *obligation being enforced*, it may never have found the need to develop the 'legally relevant connection' test to establish whether the claim had a 'legally relevant connection' to the underlying forwarding agreements, since the court would have been able to classify the claim as a maritime claim on the basis that it had a *direct* maritime connection to the maritime topic in the *first* step of the proposed two-step enquiry. On this reasoning, it is irrelevant whether the determination of the claim could be 'influenced' by the determination of the underlying forwarding agreements, which is a broader enquiry, only appropriate in the second step of the proposed two-step enquiry.

(b) Second step: indirect connection

The second step is to test whether there is an *indirect* connection between the claim and relevant the maritime topic, as contemplated in the phrase 'arising out of or relating to'. In the three matters that are the focus of this study, each court used the underlying maritime agreement to 'test' for an indirect maritime connection, in the manner contemplated in the 'legally relevant connection' test. Notably, the notion that a claim may be classified as a maritime claim depending on the '*influence*' that an underlying maritime agreement may have on the

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[533] The respondent in that matter.
[534] *Kuehne & Nagel* (note 19 above), para. 9.
[535] *Compagnie* (note 524) 779.
[536] Ibid 779.
[537] The forwarding services agreement.
[538] In terms of s 1(1)(*p*)(i) of the Act.

determination of the claim, is *too broad* an enquiry for American courts. As reasoned by the Seventh Circuit[539] in *Pacific Surety*:[540]

> [T]he mere fact that the event and measure of liability are referable to the [underlying] charter party does not make the bond [presently being enforced] a maritime contract, nor make its obligation maritime in the jurisdictional sense.

As demonstrated in Chapter Three, this reasoning (rejected by American courts) was endorsed by each of the courts in *Peros v Rose*, *The Mineral Ordaz* and *Kuehne & Nagel* as a legally sound manner of testing for a maritime connection,[541] and it is accordingly evident that South African courts have accepted that the definition of 'maritime claim' in the Act is capable of being broadly construed in the manner contemplated by the 'legally relevant connection' test,[542] and that it offers a useful tool to test for an indirect maritime connection.[543] An important feature of the 'legally relevant connection' test is that it allows a court to take into account the *facta probantia* (not only the *facta probanda*) in its process of enquiring whether there is a maritime connection between a claim and a maritime topic – in other words, it allows the court to take into account the facts that will need to be proved in order for the claimant to be successful in prosecuting its claim, and if those facts require the determination of a maritime topic, then a maritime connection between the claim and that maritime topic will have been established. The usefulness of that test is best illustrated by the facts in *Twende*. Evidently, in that matter, the court was unable to establish a *direct* maritime connection given that the obligation being enforced could not be said to be *directly 'for'* the remuneration of a broker as contemplated in para (*p*)(ii) of the definition – rather, it was directly 'for' a legal duty not to interfere with a contractual relationship. However, in enquiring whether there was an *indirect* connection, and by applying

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[539] The United States Circuit Court of Appeals, Seventh Circuit.
[540] *Pacific Surety* (note 527 above) 443.
[541] Although on the facts in *Peros v Rose* (note 5 above), neither a direct nor an indirect maritime connection was found to exist.
[542] It was also established in Chapter Three that the core of the reasoning that underlies the 'legally relevant connection' test aligns with the policy justification for the exercise of admiralty jurisdiction, because it operates to include within admiralty jurisdiction those matters that cannot be said to be 'easily dealt with' by a court exercising its ordinary jurisdiction (see *El Shaddai* (note 8 above), para. 15).
[543] This is evidenced by the fact that in each of the three decisions under study the court applied some version of the reasoning that underlies that test. An exemplary application of that test is illustrated by the decision in *Twende* (note 24 above).

the 'legally relevant connection' test, it became apparent that, in adjudicating the claim for delictual damages, it would be necessary to make a determination on the underlying maritime claim for remuneration as a broker (ie the determination of the one, would require the determination of the other),[544] and thus a maritime connection was shown to exist between the claim and the relevant maritime topic.

Despite the application of the 'legally relevant connection' test in *Twende* being exemplary of the proper application of that test, given that certain errors were found to have been made by the courts in *Peros v Rose*, *The Mineral Ordaz* and *Kuehne & Nagel* in the application of the reasoning that underlies that test,[545] it follows that the test should be modified, if it is to be used to test for an indirect maritime connection in future decisions.

The first modification is to remove the words 'the *one*' and 'the *other*' in the part of the test that states 'the *one* . . could be influenced . . . by . . . *the other*', and to replace those words with 'the claim' and 'the maritime object', respectively. The term 'maritime object' refers to what is described in *Kuehne & Nagel* as the 'object to which the claim is required to relate for the purposes of the definition of "maritime claim"',[546] and it is proposed that it be understood to refer to the maritime topic in general, but may also be used to refer, in a more limited sense, to any 'maritime activity'[547] contemplated in the relevant maritime topic (including the maritime activities contemplated in an underlying maritime agreement), or to an underlying maritime claim. Clarifying the meaning of the term 'maritime object' reminds the enquirer that it may be a sufficient, but *not a necessary* condition, that the claim has a maritime connection to an underlying maritime claim, or maritime agreement, but that the enquiry ultimately is whether there is a maritime connection to the relevant *maritime topic* as described in the definition.[548] By removing the words 'the one' and 'the other', it is made clear that the focus of the enquiry is whether the determination of the *claim* is affected by the determination of the maritime topic, and not the other way around.

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[544] *Kuehne & Nagel* (note 19 above), para. 30.
[545] These errors were identified in Chapter Three.
[546] *Kuehne & Nagel* (note 19 above), para. 30.
[547] The term 'maritime activity' was defined in Chapter Three, see note 348 above.
[548] See the discussion in 3.2.2(*a*) above.

Second, the words '*could be influenced*' in the phrase 'the determination of the one *could be influenced*, legally, by the determination of the other'[549] should be replaced with the word 'requires' and the phrase re-worded as follows: 'the determination of the claim *requires* the determination of the maritime object'. This modification results in the removal of the words '*could be* influenced' thus preventing any temptation to speculate as to future 'issues' or *potential* defences to the claim that may influence the determination of the claim. It thus ensures the enquirer's attention is on the facts giving rise to the *claim*, being the *facta probanda* and the *facta probantia*, but not on matters external thereto that may arise for decision in the future conduct of the proceedings. Of course, if the determination of the claim 'requires' the determination of a maritime object, then the claim may still be said to be '*influenced*' thereby, and thus the purpose of the removal of the words '*could be* influenced' is only to remove the temptation to speculate. With these modifications, and some additional minor modifications, the test reads as follows:

> The claim must at least have a legally relevant connection to the maritime object, in the sense that the claim must be connected in such a way that either in procedural or substantive law the determination of the claim requires the determination of the maritime object.

The modified 'legally relevant connection' test above is particularly well-suited to those types of 'borderline cases' considered in this study, that is, where a claim is connected to an underlying maritime claim or agreement not being directly enforced, because it allows for the consideration of whether the determination of the claim will be influenced by the determination of a maritime object, such as the maritime activities that are obligations in the underlying maritime claim or agreement. In this way, the obligations in the underlying maritime agreement stands as a useful proxy for the maritime topic. Where there is no underlying maritime agreement, this test could be applied to the question whether the determination of the claim requires the determination of a maritime activity contemplated in the relevant maritime topic.

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[549] *Kuehne & Nagel* (note 19 above), para. 30.

(c) Advantages and limitations of the two-step enquiry

The advantage of the proposed two-step enquiry is that it gives direction to the maritime-claim enquiry by focusing the court's attention first on whether the claim can be said to *directly* relate to a maritime activity. This would have provided a far simpler approach for the court in *Kuehne & Nagel*, than the one followed. What is more, the application of this approach will serve to keep the court accountable in those cases were only an indirect maritime connection can be established, by requiring a decision to be made *first* on whether the claim *directly* relates to a maritime topic, with the result that any interpretation of the definition that allows a finding that the particular claim *indirectly* arises out of maritime topic would need to be expressly justified.

The facts in *Peros v Rose* illustrate how the application of the two-step enquiry, together with the tests proposed above, may reveal the answer that the claim has neither a direct nor an indirect maritime connection[550] to the relevant maritime topic, and is thus not a maritime claim. If a particular court confronted with this answer remains of the opinion that the claim should nevertheless be subject to admiralty jurisdiction, it would need to provide sound legal reasons therefor. It is hoped that that exercise may yield an additional 'test' or set of methods to determine the proximity of a maritime connection, which would serve to promote certainty in future matters with similar facts.

Further on this point, while the application of the three-part enquiry will aid and simplify a court's maritime-claim enquiry in many borderline cases, as has been demonstrated, additional considerations may be relevant to assist in answering certain maritime-claim questions, such as that raised in *The Mineral Ordaz*. In this regard, in testing for a *direct* maritime connection in applying the *first* step of the two-step enquiry, it is not obvious that the obligation in that matter, being the payment of a compromised or novated charter party claim, could be said to be *directly* 'for' or 'arising out of' a charter party, since there remains the unanswered question of whether the process of novation alters the essential character of the obligation, thus creating an entirely *new* obligation. What is more, the application of reasoning similar to that in the 'legally relevant

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[550] It has been demonstrated above how, on the application of both the first and the second steps of the proposed two-step enquiry, the claim is not a maritime claim: the obligation being enforced was neither the same as an obligation in the underlying construction contract (the first step), and, the determination of the claim would not require the determination of the underlying construction contract (the second step).

connection' test, in the second step of the enquiry, also fails to assist: unlike the facts in *Twende*, the provisions of the underlying maritime agreement (the charter party) were legally *irrelevant* to the settlement agreement (the only way a connection could be established was to follow the erroneous line of reasoning that the defence of fraud would create the necessary link between the claim and the underlying maritime agreement). Given these difficulties, it is not surprising that the court focused its energy on establishing, on an *abstract* as opposed to a practical level, whether the nature of the underlying maritime claim was altered when the settlement agreement was concluded, by reasoning by hypothetical analogy. In light of the shortcomings of reasoning by hypothetical analogy, additional considerations that a court may take into account to assist in the categorisation of a settlement agreement as a 'marine or maritime matter' have been considered in above.[551]

[551] See 4.2.2(*a*) above.

CHAPTER FIVE: SUMMARY OF FINDINGS AND CONCLUSION

5.1 Summary of findings in this study

At the outset of this study, in Chapter One, it was established that the classification of a claim as a maritime claim as contemplated in the definition of 'maritime claim' in s 1(1) of the Act is the gatekeeper to the exercise of a court's admiralty jurisdiction, and is the key to unlocking the 'far-reaching and even revolutionary methods'[552] available to maritime claimants. It follows that it should be possible to classify a claim as a 'maritime claim' with a reasonable degree of certainty and predictability. The definition contemplates that a claim is a maritime claim if it is connected to (in the sense that it is 'for, arising out of or relating to') one of a list of 'maritime topics' in the definition. It was discussed how two features of the definition, namely the introductory phrase 'for, arising out of or relating to', and the maritime topic described in para (*ee*), have served to introduce a degree of unpredictability to the process of classifying maritime claims, and that this is particularly acute in those 'borderline cases' that involves the classification of a claim as maritime claim by virtue of its connection to an *underlying* maritime claim or maritime agreement.

In Chapters Two and Three, the first research question was considered, which was the following: how did the courts in *Peros v Rose*, *The Mineral Ordaz* and *Kuehne & Nagel* approach the problem of classifying the claims before them as maritime claims?

In answering that question, each of those decisions was examined in detail. It was shown that the court's approach in *Peros v Rose* was to interpret the definition of 'maritime claim' in the light of its historical context, which it considered to favour a narrow interpretation of the definition. In *The Mineral Ordaz*, the court placed significant emphasis on the fact that a catch-all provision, being para (*ee*), had been included in the definition, which it considered should weigh against any notion that the provisions of the definition should be narrowly construed. The court in *Kuehne & Nagel* found that the definition should be interpreted in light of the policy consideration that all admiralty 'issues' ought to be heard by a court exercising admiralty jurisdiction.

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[552] Friedman (note 2 above) 679.

This analysis led to the second research question, which is the following: what are the similarities and differences in these approaches, and can these be accounted for by considering the cases in their context?

A comparison of the reasoning followed in each of these decisions revealed that each court was found to have taken what ostensibly was a different approach to the classification of the respective claims as maritime claims, despite having each been confronted with a similar problem. These differences were explained by considering the context in which each of the decisions was heard, which differed according to whether the particular decision was heard before or after the amendments that were made to the definition of 'maritime claim',[553] in particular the inclusion of para (*ee*) into the definition. Another contributing factor was said to be the influence of academic commentary, in particular Hofmeyr's cautionary note,[554] on the courts' approaches to the interpretation of the definition.

In Chapter Three, it was shown that, while each of the courts' approaches was ostensibly different, the courts engaged in similar lines of reasoning in the process of 'testing' the degree of connection between the respective claims and maritime topics. This led to an important finding which was that the reasoning that underlies the 'legally relevant connection' test, which was developed in *Kuehne & Nagel*, had in fact already been impliedly endorsed by the courts in the prior decisions of *Peros v Rose* and *The Mineral Ordaz*. This reveals that, despite the court in *Peros v Rose* claiming to take a narrow approach to the interpretation of the definition, the court arguably took a broad approach by considering whether an *indirect* maritime connection could be established, which it found it could not.

This led to a consideration of the third research question, which is the following: do any of the courts' approaches present a legally sound method of classifying a maritime claim in terms of s 1(1) of the Act?

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[553] In terms of the Amendment Act (note 20 above).
[554] Hofmeyr (note 1 above) 21.

These questions were explored in Chapter Three by disaggregating the definition of 'maritime claim' into its constituent parts, being (a) the claim, (b) the maritime topic, and (c) a maritime connection between the two. Each of the courts engaged in flawed processes of reasoning, which were highlighted in Chapter Two, and were elaborated on in the context of the above three elements of the definition. All of those errors were attributed to the courts' respective failures to properly identify each of the three elements of the definition, and to keep them distinct from each other. An error that was made in both *The Mineral Ordaz* and *Kuehne & Nagel* was to reason that the future defence of fraud would provide the necessary maritime connection between the claim and the relevant maritime topic. This error was reflected in the manner in which the 'legally relevant connection' test was applied in *Kuehne & Nagel*. A possible error made in *Peros v Rose* was to limit the enquiry to whether there was a maritime connection between the claim and the underlying maritime agreement, as opposed to the maritime topic, in general.

However, there were also several aspects of the courts' reasoning that were found to be meritorious. It was shown that *Peros v Rose* could be said to be exemplary of the proper place to commence any maritime-claim enquiry, which is to focus on the facts giving rise to the *claim*, and the *obligation being enforced*. It was also shown that, had the court in *Kuehne & Nagel* focused on the nature of *obligation being enforced*, as opposed to the defences that may be raised to the claim, this may have led the court to find that the obligation being enforced was in fact for the performance of a maritime activity, being the obligation in the underlying maritime agreement (the remuneration of the forwarding agent), and that the claim was, accordingly, a maritime claim. This finding would have meant that there was no need to develop and apply the 'legally relevant connection' test. However, it was also shown that the core of the reasoning that underlies the 'legally relevant connection' test, developed in *Kuehne & Nagel* to test for an *indirect* maritime connection, was found to not only align with the policy justification for the exercise of admiralty jurisdiction, but it has also impliedly been accepted as legally sound by *Peros v Rose* and *The Mineral Ordaz*, given that these latter two matters followed a similar line of reasoning to that which was later articulated in that test. What is more, the test has subsequently been applied in *Twende*. It was suggested that if modifications were made to the 'legally relevant connection' test, to avoid the errors in reasoning encountered in *Peros v Rose*, *The Mineral Ordaz* and *Kuehne & Nagel*, it may serve as a useful tool in testing for the existence

of an indirect maritime connection between a claim and a maritime topic in borderline cases such as the three under study. In addition, since *The Mineral Ordaz* was the only one of the three matters under study in which the court applied the provisions of para (*ee*), the court's reasoning in its attempt to categorise the settlement agreement as a 'marine or maritime matter' in terms of para (*ee*) was closely analysed, which revealed a number of shortcomings. It was suggested that the court should have bolstered its reasoning by engaging with a purposive interpretation of the definition, and taking into account certain policy considerations. The reasoning followed in foreign courts was considered to illustrate the lines of reasoning that might be helpful for South African courts to consider in the context of the Act.

This led to the fourth research question being considered, which is the following: having considered the approaches taken by the courts in *Peros v Rose*, *The Mineral Ordaz* and *Kuehne & Nagel*, what approach should be followed by future courts confronted with a maritime-claim question?

This question was considered in Chapter Four, where the merits and the flaws in each courts' approach were taken together to develop a three-part enquiry that was proposed should apply in every maritime-claim enquiry. This three-part enquiry requires the clear identification and application of each of the three elements in the definition, and is set out below:

- the *first* step is to identify the *claim*, being the facts giving rise to the claim (i.e., the *facta probanda*) and in particular, the obligation being enforced. In certain circumstances, the *facta probantia* may also be relevant.[555] The defences that may be raised to the claim, and the 'issues' that arise for decision before the court, are not relevant.

[555] A consideration of the *facta probantia* would be relevant where the court is considering whether there is an *indirect* maritime connection between a claim and a maritime topic. In exploring whether an *indirect* maritime connection exists, the enquiry goes beyond merely a consideration of the facts necessary to sustain the cause of action (the *facta probanda*), and includes a consideration of the evidence necessary to support the factual allegations essential to the cause of action (the *facta probantia*). If the consideration of the *facta probantia* will involve the consideration of a maritime topic (ie maritime activities, maritime obligations, or a maritime agreement), then it is arguable that a maritime connection between the claim and that maritime topic has been established.

- the *second* step is to identify the *maritime topic*, in particular, the maritime activities that constitute it. A two-stage enquiry is to be applied when the maritime topic is para (*ee*), being:
    - Firstly, to identify the 'matter';

    - Secondly, to establish whether that 'matter' is 'marine or maritime' by 'virtue of its nature or subject matter'. It was pointed out that courts should be wary of imposing the requirement that a 'matter' may only be categorised as a 'marine or maritime matter' if it has a connection to an *underlying* maritime claim, since this would unduly narrow the ambit of that maritime topic.

- the *third* step is to establish whether a *maritime connection* exists between the claim and the maritime topic. Two further sub-parts were developed to test for a maritime connection:

    - First, to assess whether a *direct* maritime connection exists. Where the claim is to enforce a guarantee or similar agreement that relates to an *underlying* maritime agreement,[556] the test to be applied is whether the obligation being enforced is for the performance of the 'maritime obligations' in the underlying maritime agreement (ie those obligations that are for the performance of a maritime activity).[557]

    - Second, if no direct maritime connection exists, to assess whether an *indirect* maritime connection exists. The 'legally relevant connection' test, duly modified

[556] The term 'underlying maritime agreement' has been used in this study to refer to a contract that *could have* given rise to a maritime claim (had the obligations therein been directly enforced) but instead gave rise to a second agreement which forms the basis for the claim before the court.
[557] The term 'maritime activity' has been used in this study to refer to the conduct that is contemplated in the relevant 'maritime topic'. See further note 348 above.

in terms of the amendments proposed, provides a sound test, particularly where the claim is purported to relate to an underlying maritime agreement.[558]

5.2 Conclusion

The problem presented in this study is the lack of guidance in s 1(1) of the Act, and case law, as to the classification of a 'maritime claim' in 'borderline cases'.[559] The aim was to understand how courts in selected cases have approached the classification of maritime claims and to determine whether a uniform approach could be developed. This was done by a critical analysis of the reasoning followed in *Peros v Rose*, *The Mineral Ordaz* and *Kuehne & Nagel*. The result was the formulation of a three-stage approach, applicable in every maritime-claim enquiry. In addition, two sub-parts and a test for each sub-part were developed and recommended for use in those borderline cases where the claim is contended to have a connection to an underlying maritime claim or maritime agreement.

It is suggested that the proposed three-part enquiry, with its two sub-parts and proposed tests, will assist in guiding future courts through the process of classifying maritime claims and will assist in preventing the types of errors in reasoning made in the three matters under study, which resulted in either an unduly narrow or an overbroad construction of the definition of 'maritime claim'. This, in turn, will serve to promote certainty and predictability in the process of classifying maritime claims in terms of s 1(1) of the Act.

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[558] The 'legally relevant connetion' test, duly modified, is as follows: the claim must at least have a legally relevant connection to the maritime object, in the sense that the claim must be connected in such a way that either in procedural or substantive law the determination of the claim requires the determination of the maritime object.
[559] As defined in Chapter 1.

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APPENDIX I: THE ADMIRALTY JURISDICTION REGULATION ACT, 1983

[ASSENTED TO 8 SEPTEMBER 1983] [DATE OF COMMENCEMENT: 1 NOVEMBER 1983]

(Afrikaans text signed by the State President)

published in

GG 8891 of 12 September 1983

as amended by

Admiralty Jurisdiction Regulation Amendment Act 87 of 1992

General Law Amendment Act 139 of 1992

Wreck and Salvage Act 94 of 1996

South African Maritime Safety Authority Act 5 of 1998

Sea Transport Documents Act 65 of 2000

Judicial Matters Amendment Act 66 of 2008

Regulations under this Act — Legislation Judicially Considered

ACT

To provide for the vesting of the powers of the admiralty courts of the Republic in the provincial and local divisions of the Supreme Court of South Africa, and for the extension of those powers; for the law to be applied by, and the procedure applicable in, those divisions; for the repeal of the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, in so far as it applies in relation to the Republic; and for incidental matters.

BE IT ENACTED by the State President and the House of Assembly of the Republic of South Africa, as follows:-

1 Definitions

(1) In this Act, unless the context indicates otherwise-

'admiralty action' means proceedings in terms of this Act for the enforcement of a maritime claim whether such proceedings are by way of action or by way of any other competent procedure, and includes any ancillary or procedural measure, whether by way of application or otherwise, in connection with any such proceedings;

[Definition of 'admiralty action' substituted by s. 1 *(a)* of Act 87 of 1992.]

'container' means a container for the carriage of goods by sea, including any such container which is empty or otherwise temporarily not being used for such carriage;

[Definition of 'container' inserted by s. 1 *(b)* of Act 87 of 1992.]

'fund' means a fund mentioned in section 3 (11);

[Definition of 'fund' inserted by s. 1 *(c)* of Act 87 of 1992.]

'maritime claim' means any claim for, arising out of or relating to-

(a) the ownership of a ship or a share in a ship;

(b) the possession, delivery, employment or earnings of a ship;

(c) any agreement for the sale of a ship or a share in a ship, or any agreement with regard to the ownership, possession, delivery, employment or earnings of a ship;

(d) any mortgage, hypothecation, right of retention, pledge or other charge on or of a ship, and any bottomry or respondentia bond;

(e) damage caused by or to a ship, whether by collision or otherwise;

(f) loss of life or personal injury caused by a ship or any defect in a ship or occurring in connection with the employment of a ship;

(g) loss of or damage to goods (including the baggage and the personal belongings of the master, officers or seamen of a ship) carried or which ought to have been carried in a ship, whether such claim arises out of any agreement or otherwise;

(h) the carriage of goods in a ship, or any agreement for or relating to such carriage;

(i) any container and any agreement relating to any container;

(j) any charter party or the use, hire, employment or operation of a ship, whether such claim arises out of any agreement or otherwise;

(k) salvage, including salvage relating to any aircraft and the sharing or apportionment of salvage and any right in respect of property salved or which would, but for the negligence or default of the salvor or a person who attempted to salve it, have been salved, and any claim arising out of the Wreck and Salvage Act, 1996;

[Para. *(k)* substituted by s. 25 of Act 94 of 1996.]

(l) towage or pilotage;

(m) the supplying of goods or the rendering of services for the employment, maintenance, protection or preservation of a ship;

(n) the rendering, by means of any aircraft, ship or other means, of services in connection with the carrying of persons or goods to or from a ship, or the provision of medical or other services to or in respect of the persons on being taken to or from a ship;

(o) payments or disbursements by a master, shipper, charterer, agent or any other person for or on behalf of or on account of a ship or the owner or charterer of a ship;

(p) the remuneration of, or payments or disbursements made by, or the acts or omissions of, any person appointed to act or who acted or failed to act-

(i) as an agent, whether as a ship's, clearing, forwarding or other kind of agent, in respect of any ship or any goods carried or to be carried or which were or ought to have been carried in a ship; or

(ii) as a broker in respect of any charter, sale or any other agreement relating to a ship or in connection with the carriage of goods in a ship or in connection with any insurance of a ship or any portion or part thereof or of other property referred to in section 3 (5); or

(iii) as attorney or adviser in respect of any matter mentioned in subparagraphs (i) and (ii);

(q) the design, construction, repair or equipment of any ship;

(r) dock, harbour or similar dues, and any charge, levy or penalty imposed under the South African Maritime Safety Authority Act, 1998, or the South African Maritime Safety Authority Levies Act, 1998;

[Para. *(r)* substituted by s. 55 of Act 5 of 1998.]

(s) the employment of any master, officer or seaman of a ship in connection with or in relation to a ship, including the remuneration of any such person, and contributions in respect of any such person to any pension fund, provident fund, medical aid fund, benefit fund, similar fund, association or institution in relation to or for the benefit of any master, officer or seaman;

(t) general average or any act claimed to be a general average act;

(u) marine insurance or any policy of marine insurance, including the protection and indemnity by any body of persons of its members in respect of marine matters;

(v) the forfeiture of any ship or any goods carried therein or the restoration of any ship or any such goods forfeited;

(w) the limitation of liability of the owner of a ship or of any other person entitled to any similar limitation of liability;

(x) the distribution of a fund or any portion of a fund held or to be held by, or in accordance with the directions of, any court in the exercise of its admiralty jurisdiction, or any officer of any court exercising such jurisdiction;

(y) any maritime lien, whether or not falling under any of the preceding paragraphs;

(z) pollution of the sea or the sea-shore by oil or any other substance on or emanating from a ship;

(aa) any judgment or arbitration award relating to a maritime claim, whether given or made in the Republic or elsewhere;

(bb) wrongful or malicious proceedings in respect of or involving any property referred to in section 3 (5), or the wrongful or malicious arrest, attachment or detention of any such property, wherever any such proceedings, arrest, attachment or detention took place, and whether in the Republic or elsewhere, and any loss or damage contemplated in section 5 (4);

(cc) piracy, sabotage or terrorism relating to property mentioned in section 3 (5), or to persons on any ship;

(dd) any matter not falling under any of the previous paragraphs in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890 (53 and 54 Vict c. 27), of the United Kingdom, was empowered to exercise admiralty jurisdiction immediately before the commencement of this Act, or any matter in respect of which a court of the Republic is empowered to exercise admiralty jurisdiction;

(ee) any other matter which by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs;

(ff) any contribution, indemnity or damages with regard to or arising out of any claim in respect of any matter mentioned above or any matter ancillary thereto, including the attachment of property to found or confirm jurisdiction, the giving or release of any security, and the payment of interest;

[Definition of 'maritime claim' substituted by s. 1 *(d)* of Act 87 of 1992.]

'Minister' means the Minister of Justice;

'rules' means the rules made under section 4 or in force thereunder;

'ship' means any vessel used or capable of being used on the sea or internal waters, and includes any hovercraft, power boat, yacht, fishing boat, submarine vessel, barge, crane barge, floating

crane, floating dock, oil or other floating rig, floating mooring installation or similar floating installation, whether self-propelled or not;

'this Act' includes the rules.

(2) *(a)* An admiralty action shall for any relevant purpose commence-

(i) by the service of any process by which that action is instituted;

(ii) by the making of an application for the attachment of property to found jurisdiction;

(iii) by the issue of any process for the institution of an action *in rem*;

(iv) by the giving of security or an undertaking as contemplated in section 3 (10) *(a)*.

(b) An action commenced as contemplated in paragraph *(a)* shall lapse and be of no force and effect if-

(i) an application contemplated in paragraph *(a)* (ii) is not granted or is discharged or not confirmed;

(ii) no attachment is effected within twelve months of the grant of an order pursuant to such an application or the final decision of the application;

(iii) a process contemplated in paragraph *(a)* (iii) is not served within twelve months of the issue thereof;

(iv) the property concerned is deemed in terms of section 3 (10) *(a)* (ii) to have been released and discharged.

[Sub-s. (2) substituted by s. 1 *(e)* of Act 87 of 1992.]

(3) For the purposes of an action *in rem*, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise.

[Sub-s. (3) added by s. 10 of Act 65 of 2000.]

1 The administration and the powers or functions entrusted by legislation to the Minister of Justice and Constitutional Development transferred to the Minister of Justice and Correctional Services - Proc 47 in *GG* 37839 of 15 July 2014

2 Admiralty jurisdiction of Supreme Court

(1) Subject to the provisions of this Act each provincial and local division, including a circuit local division, of the Supreme Court of South Africa shall have jurisdiction (hereinafter referred to as admiralty jurisdiction) to hear and determine any maritime claim (including, in the case of

salvage, claims in respect of ships, cargo or goods found on land), irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner.

(2) For the purposes of this Act the area of jurisdiction of a court referred to in subsection (1) shall be deemed to include that portion of the territorial waters of the Republic adjacent to the coastline of its area of jurisdiction.

3 Form of proceedings

(1) Subject to the provisions of this Act any maritime claim may be enforced by an action *in personam.*

(2) An action *in personam* may only be instituted against a person-

(a) resident or carrying on business at any place in the Republic;

(b) whose property within the court's area of jurisdiction has been attached by the plaintiff or applicant, to found or to confirm jurisdiction;

[Para. *(b)* substituted by s. 2 *(a)* of Act 87 of 1992.]

(c) who has consented or submitted to the jurisdiction of the court;

(d) in respect of whom any court in the Republic has jurisdiction in terms of Chapter IV of the Insurance Act, 1943 (Act 27 of 1943);

(e) in the case of a company, if the company has a registered office in the Republic.

(3) An action *in personam* may not be instituted in a court of which the area of jurisdiction is not adjacent to the territorial waters of the Republic unless-

(a) in the case of a claim contemplated in paragraph *(a)*, *(b)*, *(j)* or *(u)* of the definition of 'maritime claim', the claim arises out of an agreement concluded within the area of jurisdiction of that court;

[Para. *(a)* substituted by s. 21 of Act 139 of 1992.]

(b) in the case of a claim contemplated in paragraph *(g)* or *(h)* of that definition, the goods concerned are or were shipped under a bill of lading to or from a place within the area of jurisdiction of that court;

(c) the maritime claim concerned relates to a fund within, or freight payable in, the area of jurisdiction of that court.

(4) Without prejudice to any other remedy that may be available to a claimant or to the rules relating to the joinder of causes of action a maritime claim may be enforced by an action *in rem*-

(a) if the claimant has a maritime lien over the property to be arrested; or

(b) if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned.

(5) An action *in rem* shall be instituted by the arrest within the area of jurisdiction of the court concerned of property of one or more of the following categories against or in respect of which the claim lies:

(a) The ship, with or without its equipment, furniture, stores or bunkers;

(b) the whole or any part of the equipment, furniture, stores or bunkers;

(c) the whole or any part of the cargo;

(d) the freight;

(e) any container, if the claim arises out of or relates to the use of that container in or on a ship or the carriage of goods by sea or by water otherwise in that container;

[Para. *(e)* added by s. 2 *(b)* of Act 87 of 1992.]

(f) a fund.

[Para. *(f)* added by s. 2 *(b)* of Act 87 of 1992.]

(6) An action *in rem*, other than an action in respect of a maritime claim referred to in paragraph *(d)* of the definition of 'maritime claim', may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.

[Sub-s. (6) substituted by s. 2 *(c)* of Act 87 of 1992 and by s. 20 *(a)* of Act 66 of 2008.]

(7)*(a)* For the purposes of subsection (6) an associated ship means a ship, other than the ship in respect of which the maritime claim arose-

(i) owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose; or

(ii) owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose; or

(iii) owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose.

(b) For the purposes of paragraph *(a)*-

(i) ships shall be deemed to be owned by the same persons if the majority in number of, or of voting rights in respect of, or the greater part, in value, of, the shares in the ships are owned by the same persons;

(ii) a person shall be deemed to control a company if he has power, directly or indirectly, to control the company;

(iii) a company includes any other juristic person and any body of persons, irrespective of whether or not any interest therein consists of shares.

(c) If at any time a ship was the subject of a charter-party the charterer or subcharterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner of the ship concerned in respect of any relevant maritime claim for which the charterer or the subcharterer, and not the owner, is alleged to be liable.

[Sub-s. (7) substituted by s. 2 *(d)* of Act 87 of 1992.]

(8) Property shall not be arrested and security therefor shall not be given more than once in respect of the same maritime claim by the same claimant.

(9) .....

[Sub-s. (9) deleted by s. 20 *(b)* of Act 66 of 2008.]

(10)*(a)*(i) Property shall be deemed to have been arrested or attached and to be under arrest or attachment at the instance of a person if at any time, whether before or after the arrest or attachment, security or an undertaking has been given to him to prevent the arrest or attachment of the property or to obtain the release thereof from arrest or attachment.

(ii) Any property deemed in terms of subparagraph (i) to have been arrested or attached, shall be deemed to be released and discharged therefrom if no further step in the proceedings, with regard to a claim by the person concerned, is taken within one year of the giving of any such security or undertaking.

[Para. *(a)* substituted by s. 2 *(e)* of Act 87 of 1992.]

(b) That security shall for the purposes of sections 9 and 10 be deemed to be the freight or the proceeds of the sale of the property.

(11) *(a)* There shall in any particular case be a fund consisting of-

(i) any security or undertaking given in terms of subsection (10) *(a)*, unless such security or undertaking is given in respect of a particular claim by a particular person;

(ii) the proceeds of the sale of any property mentioned in subsection (5) *(a)* to *(e)*, either in terms of any order made in terms of section 9, or in execution or otherwise.

(b) A fund shall, for all purposes, be deemed to be the property sold or the property in respect of which the security or an undertaking has been given.

(c) If an action *in rem* is instituted against or in respect of a fund in terms of subsection (5), the plaintiff shall give notice of the said action to the registrar of the court or other person holding the fund, and to all persons known by the plaintiff to be interested in the fund.

(d) The interest of any person in, or any claim by any person against, a fund shall be capable of attachment to found jurisdiction.

[Sub-s. (11) added by s. 2 *(f)* of Act 87 of 1992.]

4 Procedure and rules of court

(1) Subject to the provisions of this Act the provisions of the Supreme Court Act, 1959 (Act 59 of 1959), and the rules made under section 43 of that Act shall *mutatis mutandis* apply in relation to proceedings in terms of this Act except in so far as those rules are inconsistent with the rules referred to in subsection (2).

(2) The rules of the courts of admiralty of the Republic in force in terms of the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, immediately before the commencement of this Act, shall be deemed to be rules made under section 43 (2) *(a)* of the Supreme Court Act, 1959, and shall apply in respect of proceedings in terms of this Act.

(3) The power of the Chief Justice to make rules under section 43 of the Supreme Court Act, 1959, shall include the power to make rules prescribing the following:

(a) The appointment of any person or body for the assessment of fees and costs and the manner in which such fees and costs are to be assessed;

(b) measures aimed at avoiding circuity or multiplicity of actions;

(c) the practice and procedure for referring to arbitration any matter arising out of proceedings relating to a maritime claim, and the appointment, remuneration and powers of an arbitrator.

(4) *(a)* Notwithstanding anything to the contrary in any law relating to attachment to found or confirm jurisdiction, a court in the exercise of its admiralty jurisdiction may make an order for the attachment of the property concerned although the claimant is not an *incola* either of the area of jurisdiction of that court or of the Republic.

(b) A court may make an order for the attachment of property not within the area of jurisdiction of the court at the time of the application or of the order, and such an order may be carried into effect when that property comes within the area of jurisdiction of the court.

(c) Subject to the provisions of section 3 (3)-

(i) a court may make an order for the arrest or attachment, to found jurisdiction, of property not within the area of jurisdiction of the court if-

(aa) (aaa) that property is in the Republic or is likely to come into the Republic after the making of the order; and

(bbb) no court in the Republic otherwise has jurisdiction in connection with the claim or can otherwise acquire such jurisdiction by an arrest or attachment to found jurisdiction; or

(bb) other property within the area of jurisdiction of the court has been or is about to be arrested or attached to found jurisdiction in connection with the same claim;

(ii) any such order may be executed and any arrest or attachment pursuant thereto effected at any place in the Republic as contemplated in section 26 (1) of the Supreme Court Act, 1959 (Act 59 of 1959);

(iii) the arrest or attachment of any property pursuant to any such order shall be an arrest or attachment which shall found the relevant jurisdiction of the court ordering the arrest or attachment.

[Para. *(c)* added by s. 3 of Act 87 of 1992.]

(d) A court may make an order for the arrest or attachment, to found jurisdiction, of any ship which, if the action concerned had been an action *in rem*, would be an associated ship with regard to the ship in respect of which the maritime claim concerned arose.

[Para. *(d)* added by s. 3 of Act 87 of 1992.]

5 Powers of court

(1) 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.

[Sub-s. (1) substituted by s. 4 *(a)* of Act 87 of 1992.]

(2) A court may in the exercise of its admiralty jurisdiction-

(a) consider and decide any matter arising in connection with any maritime claim, notwithstanding that any such matter may not be one which would give rise to a maritime claim;

(b) order any person to give security for costs or for any claim;

(c) order that any arrest or attachment made or to be made or that anything done or to be done in terms of this Act or any order of the court be subject to such conditions as to the court appears just, whether as to the furnishing of security or the liability for costs, expenses, loss or damage caused or likely to be caused, or otherwise;

(d) notwithstanding the provisions of section 3 (8), order that, in addition to property already arrested or attached, further property be arrested or attached in order to provide additional security for any claim, and order that any security given be increased, reduced or discharged, subject to such conditions as to the court appears just;

[Para. *(d)* substituted by s. 4 *(b)* of Act 87 of 1992.]

*(d*A*)* on application made before the expiry of any period contemplated in section 1 (2) *(b)* or 3 (10) *(a)* (ii), or any extension thereof, from time to time grant an extension of any such period;

[Para. *(d*A*)* inserted by s. 4 *(c)* of Act 87 of 1992.]

(e) order that any matter pending or arising in proceedings before it be referred to an arbitrator or referee for decision or report and provide for the appointment, remuneration and powers of the arbitrator or referee and for the giving of effect to his decision or report;

(f) make such order as to interest, the rate of interest in respect of any sum awarded by it and the date from which interest is to accrue, whether before or after the date of the commencement of the action, as to it appears just;

(g) subject to the provisions of any law relating to exchange control, order payment to be made in such currency other than the currency of the Republic as in the circumstances of the case appears appropriate, and make such order as seems just as to the date upon which the calculation of the conversion from any currency to any other currency should be based.

(3)*(a)* A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or

any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action *in personam* against the owner of the property concerned or an action *in rem* against such property or which would be so enforceable but for any such arbitration or proceedings.

*(a*A*)* Any property so arrested or any security for, or the proceeds of, any such property shall be held as security for any such claim or pending the outcome of any such arbitration or proceedings.

(b) Unless the court orders otherwise any property so arrested shall be deemed to be property arrested in an action in terms of this Act.

[Sub-s. (3) substituted by s. 4 *(d)* of Act 87 of 1992.]

(4) Any person who makes an excessive claim or requires excessive security or without reasonable and probable cause obtains the arrest of property or an order of court, shall be liable to any person suffering loss or damage as a result thereof for that loss or damage.

[Sub-s. (4) substituted by s. 4 *(e)* of Act 87 of 1992.]

(5)*(a)* A court may in the exercise of its admiralty jurisdiction at any time on the application of any interested person or of its own motion-

(i) if it appears to the court to be necessary or desirable for the purpose of determining any maritime claim, or any defence to any such claim, which has been or may be brought before a court, arbitrator or referee in the Republic, make an order for the examination, testing or inspection by any person of any ship cargo, documents or any other thing and for the taking of the evidence of any person;

(ii) in making an order in terms of subparagraph (i), make an order that any person who applied for such first-mentioned order shall be liable and give security for any costs or expenses, including those arising from any delay, occasioned by the application and the carrying into effect of any such order;

(iii) grant leave to any such person to apply for an order that any such costs or expenses be considered as part of the costs of the proceedings;

(iv) in exceptional circumstances, make such an order as is contemplated in subparagraph (i) with regard to a maritime claim which has been or may be brought before any court, arbitrator,

referee or tribunal elsewhere than in the Republic, in which case subparagraphs (ii) and (iii) shall *mutatis mutandis* apply.

[Para. *(a)* substituted by s. 4 *(f)* of Act 87 of 1992.]

(b) The provisions of this Act shall not affect any privilege relating to any document in the possession of, or any communication to or the giving of any evidence by, any person.

6 Law to be applied and rules of evidence

(1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall-

(a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;

(b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.

(2) The provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph *(a)* or *(b)* of that subsection.

(3) A court may in the exercise of its admiralty jurisdiction receive as evidence statements which would otherwise be inadmissible as being in the nature of hearsay evidence, subject to such directions and conditions as the court thinks fit.

(4) The weight to be attached to evidence contemplated in subsection (3) shall be in the discretion of the court.

(5) The provisions of subsection (1) shall not supersede any agreement relating to the system of law to be applied in the event of a dispute.

7 Disputes as to venue or jurisdiction

(1) *(a)* A court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that any other court in the Republic or any other court or any arbitrator, tribunal or body elsewhere will exercise jurisdiction in respect of the said proceedings and that it is more appropriate that the proceedings be adjudicated upon by any such other court or by such arbitrator, tribunal or body.

[Para. *(a)* substituted by s. 5 of Act 87 of 1992.]

(b) A court may stay any proceedings in terms of this Act if it is agreed by the parties concerned that the matter in dispute be referred to arbitration in the Republic or elsewhere, or if for any other sufficient reason the court is of the opinion that the proceedings should be stayed.

(2) When in any proceedings before a provincial or local division, including a circuit local division, of the Supreme Court of South Africa the question arises as to whether a matter pending or proceeding before that court is one relating to a maritime claim, the court shall forthwith decide that question, and if the court decides that-

(a) the matter is one relating to a maritime claim, it shall be proceeded with in a court competent to exercise its admiralty jurisdiction, and any property attached to found jurisdiction shall be deemed to have been attached in terms of this Act;

(b) the matter is not one relating to a maritime claim, the action shall proceed in the division having jurisdiction in respect of the matter: Provided that if jurisdiction was conferred by the attachment of property by a person other than an *incola* of the court, the court may order the action to proceed as if the property had been attached by an *incola*, or may make such other order, including an order dismissing the action for want of jurisdiction, as to it appears just.

(3) The provisions of subsection (2) shall not affect any other objection to the jurisdiction of any court.

(4) No appeal shall lie against any decision or order made under subsection (2).

(5) The Minister may, on the recommendation of the judge president of any provincial division of the Supreme Court of South Africa, submit the question as to whether or not a particular matter gives rise to a maritime claim, to the Appellate Division of the Supreme Court of South Africa and may cause that question to be argued before that Division so that it may decide the question for future guidance.

8 Arrests

(1) Where property has been attached to found or to confirm jurisdiction at common law, that property may nevertheless be arrested in connection with a maritime claim, subject to such directions as the court thinks fit.

(2) Where property has been attached to found or to confirm jurisdiction relating to a maritime claim, sections 9, 10 and 11 of this Act shall apply as if the property had been arrested in an action *in rem*, whether or not the property has been arrested in terms of this Act.

9 Sale of arrested property

(1) A court may in the exercise of its admiralty jurisdiction at any time order that any property which has been arrested in terms of this Act be sold.
(2) The proceeds of any property so sold shall constitute a fund to be held in court or to be otherwise dealt with, as may be provided by the rules or by any order of court.
(3) Any sale in terms of any order of court shall not be subject to any mortgage, lien, hypothecation, or any other charge of any nature whatsoever.

[S. 9 substituted by s. 6 of Act 87 of 1992.]

10 Vesting of property in trustee, liquidator or judicial manager excluded in certain cases

Any property arrested in respect of a maritime claim or any security given in respect of any property, or the proceeds of any property sold in execution or under an order of a court in the exercise of its admiralty jurisdiction, shall not, except as provided in section 11 (13), vest in a trustee in insolvency and shall not form part of the assets to be administered by a liquidator or judicial manager of the owner of the property or of any other person who might otherwise be entitled to such property, security or proceeds, and no proceedings in respect of such property, security or proceeds, or the claim in respect of which that property was arrested, shall be stayed by or by reason of any sequestration, winding-up or judicial management with respect to that owner or person.

[S. 10 amended by s. 7 of Act 87 of 1992.]

10A Power of court regarding claims against fund

(1) The court may make an order with regard to the distribution of a fund or payment out of any portion of a fund or proof of claims against a fund, including the referring of any of or all such claims to a referee in terms of section 5 (2) *(e)*.
(2) *(a)* If an order is made referring all such claims to a referee or if the court so orders, all proceedings in respect of claims which are capable of proof for participation in the distribution of the fund shall be stayed and any such claim shall be proved only in accordance with such order.
(b) The costs of any proceedings already instituted but which have been stayed in terms of paragraph *(a)* shall be added to any relevant claim proved in accordance with any such order.
(3) *(a)* Notwithstanding the provisions of section 11 (2) and (9), any claimant submitting as proof of a claim a default judgment may be required by the referee or other person to whom the claim is submitted or by any person having an interest in the fund, to furnish evidence justifying the said judgment.

(b) If a claimant is in terms of paragraph *(a)* required to furnish such evidence, the judgment alone shall not be sufficient proof of the claim.

(c) Any person other than a referee so requiring a claimant to furnish such evidence shall be liable for any costs incurred by such claimant in so doing, unless the claimant fails to justify the said judgment or a court otherwise orders.

(4) *(a)* A claim which is subject to a suspensive or resolutive condition or otherwise not yet enforceable or is voidable may be proved, where appropriate, on the basis of an estimate or valuation, but no distribution shall be made in respect thereof until it has become enforceable or no longer voidable.

(b) The court may make an order as to the time when a claim contemplated in paragraph *(a)* which has not become enforceable or is voidable shall no longer be taken into account for the purposes of the distribution in question or no longer be regarded as voidable.

[S. 10A inserted by s. 8 of Act 87 of 1992.]

11 Ranking of claims

(1)*(a)* If property mentioned in section 3 (5) *(a)* to *(e)* is sold in execution or constitutes a fund contemplated in section 3 (11), the relevant maritime claims mentioned in subsection (2) shall be paid in the order prescribed by subsections (5) and (11).

(b) Property other than property mentioned in paragraph *(a)* may, in respect of a maritime claim, be sold in execution, and the proceeds thereof distributed, in the ordinary manner.

(2) The claims contemplated in subsection (1) *(a)* are claims mentioned in subsection (4) and confirmed by a judgment of a court in the Republic or proved in the ordinary manner.

(3) Any reference in this section to a ship shall, where appropriate, include a reference to any other property mentioned in section 3 (5) *(a)* to *(e)*.

(4) The claims mentioned in subsection (2) are the following, namely-

(a) a claim in respect of costs and expenses incurred to preserve the property in question or to procure its sale and in respect of the distribution of the proceeds of the sale;

(b) a claim to a preference based on possession of the property in question, whether by way of a right of retention or otherwise;

(c) a claim which arose not earlier than one year before the commencement of proceedings to enforce it or before the submission of proof thereof and which is a claim-

(i) contemplated in paragraph(s) of the definition of 'maritime claim';

(ii) in respect of port, canal, other waterways or pilotage dues, and any charge, levy or penalty imposed under the South African Maritime Safety Authority Act, 1998, or the South African Maritime Safety Authority Levies Act, 1998;

[Sub-para. (ii) substituted by s. 56 of Act 5 of 1998.]

(iii) in respect of loss of life or personal injury, whether occurring on land or on water, directly resulting from employment of the ship;

(iv) in respect of loss of or damage to property, whether occurring on land or on water resulting from delict, and not giving rise to a cause of action based on contract, and directly resulting from the operation of the ship;

(v) in respect of the repair of the ship or the supply of goods or the rendering of services to or in relation to a ship for the employment, maintenance, protection or preservation thereof;

(vi) in respect of the salvage of the ship, removal of any wreck of a ship, and any contribution in respect of a general average act or sacrifice in connection with the ship;

(vii) in respect of premiums owing under any policy of marine insurance with regard to a ship or the liability of any person arising from the operation thereof; or

(viii) by any body of persons for contributions with regard to the protection and indemnity of its members against any liability mentioned in subparagraph (vii);

(d) a claim in respect of any mortgage, hypothecation or right of retention of, and any other charge on, the ship, effected or valid in accordance with the law of the flag of a ship, and in respect of any lien to which any person mentioned in paragraph *(o)* of the definition of 'maritime claim' is entitled;

(e) a claim in respect of any maritime lien on the ship not mentioned in any of the preceding paragraphs;

(f) any other maritime claim.

(5) The claims mentioned in paragraphs *(b)* to *(f)* of subsection (4) shall rank after any claim referred to in paragraph *(a)* of that subsection, and in accordance with the following rules, namely-

(a) a claim referred to in the said paragraph *(b)* shall, subject to paragraph *(b)* of this subsection, rank before any claim arising after it;

(b) a claim of the nature contemplated in paragraph *(c)* (vi) of that subsection, whether or not arising within the period of one year mentioned in the said paragraph, shall rank before any other claim;

(c) otherwise any claim mentioned in any of the subparagraphs of the said paragraph *(c)* shall rank *pari passu* with any other claim mentioned in the same subparagraph, irrespective of when such claims arose;

(d) claims mentioned in paragraph *(d)* of subsection (4) shall, among themselves, rank according to the law of the flag of the ship;

(e) claims mentioned in paragraph *(e)* of subsection (4) shall, among themselves, rank in their priority according to law;

(f) claims mentioned in paragraph *(f)* of subsection (4) shall rank in their order of preference according to the law of insolvency;

(g) save as otherwise provided in this subsection, claims shall rank in the order in which they are set forth in the said subsection (4).

(6) For the purposes of subsection (5), a claim in connection with salvage or the removal of wreck shall be deemed to have arisen when the salvage operation or the removal of the wreck, as the case may be, terminated, and a claim in connection with contribution in respect of general average, when the general average act occurred.

(7) A court may, in the exercise of its admiralty jurisdiction, on the application of any interested person, make an order declaring how any claim against a fund shall rank.

(8) Any person who has, at any time, paid any claim or any part thereof which, if not paid, would have ranked under this section, shall be entitled to all the rights, privileges and preferences to which the person paid would have been entitled if the claim had not been paid.

(9) A judgment or an arbitration award shall rank in accordance with the claim in respect of which it was given or made.

(10) Interest on any claim and the costs of enforcing a claim shall, for the purposes of this section, be deemed to form part of the claim.

(11) In the case of claims against a fund which consists of the proceeds of the sale of, or any security or undertaking given in respect of, a ship (hereinafter referred to as the ship giving rise to the fund) which is an associated ship in relation to the ship in respect of which the claims arose, the following rules shall apply, namely-

(a) all claims which fall under paragraphs *(b)* to *(e)* of subsection (4) and which arose in respect of a ship in relation to which the ship giving rise to the fund is such an associated ship as is contemplated in section 3 (7) *(a)* (i), shall rank immediately after claims which fall under the said paragraphs and which arose directly in respect of the ship giving rise to the fund concerned and after any claims which fall under paragraph *(f)* of subsection (4) and which arise from, or are related directly to, the operation of (including the carriage of goods in) the ship giving rise to the fund concerned;

(b) all claims which fall under the said paragraphs *(b)* to *(e)* and which arose in respect of a ship in relation to which the ship giving rise to the fund is such an associated ship as is contemplated in section 3 (7) *(a)* (ii) or (iii) shall rank immediately after any claims mentioned in paragraph *(a)* of this subsection or, if there are no such claims, immediately after claims which fall under the said paragraphs and which arose directly in respect of the ship giving rise to the fund concerned; and

(c) the provisions of subsections (5) and (9) shall apply with regard to any claim mentioned in paragraph *(a)* or *(b)*.

(12) Notwithstanding the provisions of this section, any undertaking or security given with respect to a particular claim shall be applied in satisfaction of that claim only.

(13) Any balance remaining after the claims mentioned in paragraphs *(a)* to *(e)* of subsection (4) and the claims mentioned in subsection (11) have been paid, shall be paid over to any trustee, liquidator or judicial manager who, but for the provisions of section 10, would have been entitled thereto or otherwise to any other person entitled thereto.

[S. 11 substituted by s. 9 of Act 87 of 1992.]

12 Appeals

A judgment or order of a court in the exercise of its admiralty jurisdiction shall be subject to appeal as if such judgment or order were that of a provincial or local division of the Supreme Court of South Africa in civil proceedings.

13 Amendment of section 2 of Act 57 of 1951

Amends section 2 (2) of the Merchant Shipping Act 57 of 1951 by substituting the definition of 'superior court'.

14 Jurisdiction of magistrate's courts not affected

This Act shall not derogate from the jurisdiction which a magistrate's court has under sections 131, 136 and 151 of the Merchant Shipping Act, 1951.

15 Act to bind the State

This Act shall bind the State.

16 Repeal of laws

(1) The laws mentioned in the Schedule are hereby repealed to the extent set out in the third column of the Schedule.

(2) Proceedings instituted before the commencement of this Act shall be proceeded with as if this Act had not been enacted.

(3) For the purposes of subsection (2) proceedings shall be deemed to have commenced upon service of the writ of summons.

17 Short title and commencement

This Act shall be called the Admiralty Jurisdiction Regulation Act, 1983, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.

Schedule

Number and year of law	Title of law	Extent of repeal
	UNITED KINGDOM	
Chapter 27, 1890	Colonial Courts of Admiralty Act, 1890	The whole, in so far as it applies in relation to the Republic, except in so far as it relates to prize matters
	REPUBLIC OF SOUTH AFRICA	
Act 57 of 1951	Merchant Shipping Act,	Sections 51A, 329 and 332

	1951	
Act 5 of 1972	Admiralty Jurisdiction Regulation Act, 1972	The whole

APPENDIX II: DEFINITION OF 'MARITIME CLAIM' PRIOR TO AMENDMENT BY ACT 87 OF 1992

Section 1 (1), definition—"maritime claim"

"maritime claim" means—

(*a*) any claim relating to the ownership or possession of a ship;

(*b*) any claim relating to the ownership of a share in a ship or to any dispute between co-owners of a ship as to the ownership, possession, employment or earnings of that ship;

(*c*) any claim in respect of a mortgage, hypothecation, right of retention or pledge of, or charge on, a ship;

(*d*) any claim for damage caused by a ship, whether by collision or otherwise;

(*e*) any claim for damage done to a ship, whether by collision or otherwise;

(*f*) any claim for loss of life or personal injury caused by a ship or any defect in a ship, or occurring in connection with the employment of a ship;

(*g*) any claim for loss of or damage to goods (including the baggage and personal belongings of the master or crew of a ship) carried or which ought to have been carried in a ship, including a claim in terms of section 311 of the Merchant Shipping Act, 1951 (Act No. 57 of 1951);

(*h*) any claim arising out of any agreement for or relating to the carriage of goods in a ship;

(*i*) any claim relating to any charter party or the use or hire of a ship;

(*j*) any claim for or in the nature of salvage, including any claim relating to the sharing or apportionment of salvage and any claim by any person having a right in respect of property salved or which would, but for the negligence or default of the salvor or would-be salvor, have been salved;

(*k*) any claim in the nature of towage or pilotage;

(*l*) any claim in respect of goods supplied or services rendered to a ship for the employment or maintenance thereof;

(*m*) any claim in respect of the design, construction, repair or equipment of any ship or any dock or harbour dues or any similar dues;

(*n*) any claim by a master or member of the crew of a ship arising out of his employment;

(*o*) any claim by a master, shipper, charterer or agent in respect of payments or disbursements made for or on behalf or on account of a ship or any shipowner;

(*p*) any claim relating to general average or arising out of any act claimed to be a general average act;

(*q*) any claim arising out of bottomry or any respondentia bond;

(*r*) any claim relating to marine insurance or any policy of marine insurance, including any claim by or against any association, society or mutual insurance organization concerned mainly with the protection and indemnity of its members in respect of any maritime claim;

(*s*) any claim with regard to the forfeiture of any ship or any goods carried therein or for the restoration of any ship or any such goods forfeited;

(*t*) any claim relating to the limitation of the liability of the owner of a ship or of any other person entitled to any similar limitation of liability;

(*u*) any claim with regard to the distribution of a fund or any portion of a fund paid or to be paid into or to or held or to be held by a court in the exercise of its admiralty jurisdiction or an officer of such a court;

(*v*) any claim relating to any maritime lien, whether or not falling under any of the preceding paragraphs;

(*w*) any claim relating to the pollution of the sea or the seashore by oil or any other similar substance, whether in terms of the Prevention and Combating of Pollution of the Sea by Oil Act, 1981 (Act No. 6 of 1981), or otherwise, and any claim for a refund under that Act;

(*x*) any claim for the enforcement of, or arising out of, any judgment or arbitration award relating to a maritime claim, whether given or made in the Republic or elsewhere;

(*y*) any claim to an indemnity with regard to or arising out of any of the aforesaid claims and any claim in respect of any matter ancillary to or arising out of any of the aforesaid claims, including the attachment of property to found or to confirm jurisdiction, the giving or release of security, and the payment of interest;

(*z*) any claim not falling under any of the previous paragraphs which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890 (53 and 54 Victoria, C.27), of the United Kingdom, could have heard and determined immediately before the commencement of this Act, or relating to any matter in respect of which any court of the Republic is empowered to exercise admiralty jurisdiction;