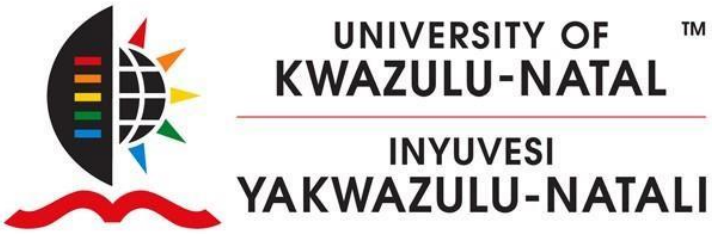

COLLEGE OF LAW AND MANAGEMENT STUDIES
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UNIT OF MARITIME LAW AND MARITIME STUDIES

The enforcement of an arbitration award against an associated ship in South Africa. An analysis of MT Pretty Scene: *Galsworthy Ltd v Pretty Scene Shipping S.A. and Another* 2021 (5) SA 134 (SCA)

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DECLARATION

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To my ancestors – I thank you for shedding light on me and for being my protectors. I hope that I make you all proud and I shall continue to strive to do my best always.

DEDICATION

Maritime Law is an interesting and fascinating area of law which captured my heart as a law student. It is an area of great opportunities globally and I dedicate this work to any young female that wish to add value in this area of law. I hope that this piece of work will be a value add to maritime practitioners globally and that it will contribute to a more active debate on the issue surrounding the arbitration of maritime disputes and the drafting of *in rem* arrest court papers in South Africa.

ABSTRACT

Interpretation of the phrase '*when the maritime claim arose'* has created ambiguity in relation to the claim of an arbitration award as defined in section (1)(aa) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ("AJRA"). This is due to the fact that each matter is adjudicated based on different facts and circumstances presented before the admiralty courts for the determination of when the claim relating to an arbitration award arose and the applicability of enforcement procedures provided in AJRA. In *MT Pretty Scene*, the court provided clarity on the meaning of the phrase "*when the maritime claim arose*" and whether it relates to when the arbitration award is handed down or when the underlying claim under the charterparty arose. The court held that a claim under the arbitration award as defined in AJRA relates to the underlying claim and therefore does not arise when the award is made but it arises at the same time the underlying claim under the charterparty arose.

MT Pretty Scene (SCA) further provided clarity on the drafting of the *in rem* arrest summons. In particular, the SCA, in great detail, provided guidance and clarity on the allegations that must be made by the arresting party in the summons, Rule 4(3) certificate, and clarified how the Uniform Rules of Court differ from Admiralty Rules – thereby guiding practitioners on how the provisions of AJRA should be applied and interpreted.

This dissertation further focused on the proper interpretation of legal principles that were considered to reach a conclusion that an arbitration award is not an entirely separate claim, and hence cannot be detached from the underlying claim. The two are inseparable and are tied together. Thus, it is important to prove that the arbitration award is linked to an underlying maritime claim. The link between the procedure of arresting a ship and determining when a claim in relation to the arbitration award exists on the basis that the determination of when a ship may be arrested as an associated ship depends upon when the underlying claim arose.

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CHAPTER ONE
INTRODUCTION

1.1 BACKGROUND

South Africa is known as one of the world's most 'arrest-friendly' admiralty jurisdictions on account of its admiralty law permitting the arrest of an associated ship for the enforcement of a claim against a reluctant debtor. One of the main purposes of the arrest of ships is to force the defendant to provide security[1] for the claims made against it. As most maritime claimants around the globe rely on the arrest of ships to enforce maritime claims, the law in South Africa is a convenient recourse for creditors.

Section 1 of the Admiralty Jurisdiction Regulation Act[2] (AJRA) sets out a list of claims subject to admiralty jurisdiction for arresting a ship to recover claims. In particular, the AJRA includes an arbitration award as a legally recognised maritime claim.[3] This means that a ruling on an arbitration award made in relation to the underlying maritime claim can be enforced in South Africa as a recognised maritime claim.[4] It is well known that, in practice, arbitration has become a universal option for resolving disputes arising from a contract[5] – rather than court proceedings.[6] Arbitration clauses are not unusual in commercial maritime agreements, by which disputes, including disputes arising from charterparty agreements,[7] are referred to arbitration. The arbitration of maritime disputes is therefore encouraged by clients and practitioners[8] because it can provide swift[9] and efficient relief[10] if properly conducted.

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[1] Gys Hofmeyr, *Admiralty Jurisdiction Law and Practice in South Africa* (2012) at page 96. In actions *in rem* the ship itself is cited as the defendant. While the admiralty jurisdiction is not limited to the *in rem* arrest of ships, the *in rem* arrest procedure is the focus of this dissertation. Attachment procedures and security arrests are beyond the scope of dissertation.
[2] 105 of 1983.
[3] Section 1(1)(aa) of AJRA.
[4] See *MT Pretty Scene*: *Galsworthy Ltd v Pretty Scene Shipping S.A and Another* ZASCA 38; [2021] 3 All SA 115 (SCA); 2021 (5) SA 134 (SCA) (hereinafter the vessel is referred to as "*MT Pretty Scene"* and the judgment as *"MT Pretty Scene (SCA)").* Also see *MV Silver Star* v *Hilane Ltd* 2015 (2) SA 331 (SCA).
[5] Peter Ramsden, *The Law of Arbitration: South African and International Arbitration* (2009) at page 5.
[6] John Hare, *Shipping Law and Admiralty Jurisdiction in South Africa* (2009) at page 43.
[7] Bruce G Paulsen, 'What the General Litigator Needs to Know about Handling a Maritime Case' (2015) 41(3) *Litigation Journal of the American Bar Association* at page 45.
[8] Advocate Michael Wragge SC at the South African Maritime Law Association AGM (2021*)* affirmed the value of arbitration of maritime disputes.
[9] Hare op cit note 6 above at page 43.
[10] Ramsden op cit note 5 above at pages 5–7.

In order to provide an analysis of the *MT Pretty Scene* SCA, it is prudent to briefly discuss the concept of a 'charterparty' and/or 'a charterparty agreement'. This is because most relevant and prominent cases dealing with the determination of the 'time the maritime claim arose' for the enforcement of arbitration awards resulted from the conclusion of a charterparty agreement. For this dissertation, therefore, a brief discussion of charterparties is offered, as opposed to bills of lading, for clarity and ease of reference.

A charterparty agreement is a commonly used form of maritime contract in which a ship owner charters a ship for profit. A charterparty can be defined as 'a contract of lease . . . both where a charterer hires from a ship-owner part or whole of a ship, with or without cargo-carrying space, and with or without master and crew, for a limited time or a voyage, a succession of voyages, or another stated purpose'.[11] There are various types of charterparties, such as time charters (where the owner maintains the operational control of the ship but charters it to a third party),[12] bareboat or demise charters (in which the owner transfers the ship's full control to the charterer and the charterer controls the operation of the ship as if it were the owner),[13] and the voyage charter (where the ship is chartered for a specific voyage, for example, from port A to port B or a series of voyages).[14]

Insofar as charterparty agreements usually include a clause referring a dispute to arbitration, and to reflect the importance of arbitration, the Maritime Law Association of South Africa (MLASA) has noted the importance of arbitrating maritime disputes for providing a swift relief to maritime claimants. In this regard, the MLASA is creating and developing arbitration rules for shipping disputes in South Africa.

The difficulties that may arise when an associated ship is arrested for the enforcement of an arbitration award as a maritime claim in respect of a charterparty agreement were dealt with by the Supreme Court of Appeal (SCA) when it was required to rule on whether an arbitration award granted outside of South Africa was a distinct maritime claim. In adjudicating the issues relating

[11] Hare op cit note 6 at page 730.
[12] Ibid at 746.
[13] Ibid at 738.
[14] Ibid at 751.

to the arbitration award, the SCA further dealt with and provided clarity on certain legal issues. These included:

a) the nature of the arbitration award;

b) the applicable legal principles and requirements for an arrest of an associated ship for the enforcement of arbitration awards against associated ships;

c) the meaning of the phrase 'when a maritime claim arose' in relation to arbitration awards or judgments as defined in terms of section 1(1)(aa) of the AJRA;

d) whether the arbitration award is a distinct maritime claim or whether it is linked to the underlying claim;

e) the required averments required in an admiralty summons;

f) the proper meaning and interpretation of the KwaZulu-Natal Practice Directive 27 of the Practice Manual of the KwaZulu-Natal Division of the High Court;[15] and

g) the allegations concerning the association that must be made in the *in rem* summons for the arrest of an associated ship.

For the sake of completeness, the issues outlined in paragraphs (e), (f) and (g) are discussed in this thesis. This is done in order to outline the applicable requirements and legal principles considered by admiralty courts for adjudicating the issues relating to the arrest of an associated ship for the enforcement of an arbitration award.

1.2 FACTS OF THE *MT PRETTY SCENE*

During 2007, Galsworthy Ltd (Galsworthy) and Parakou Shipping PTE Ltd (Parakou Shipping) entered into a time charterparty agreement for a period of at least five years. Parakou Shipping chartered the *MV Canton Trader* (later named the *Jin Kang*) to Galsworthy, with delivery agreed to be effected in Singapore between March and April 2009. It turned out that Parakou Shipping had no intention of engaging in shipping activities with the *Jin Kang.* Instead, it concluded a charterparty agreement with an entity trading as Ocean Glory for a period of five years, and at a higher charter rate. With the subsequent financial crisis in the shipping trade in 2008, Ocean

[15] Practice Manual of the KwaZulu-Natal Division of the High Court.

Glory was liquidated and Parakou Shipping repudiated the charterparty agreement with Galsworthy by refusing to take delivery of the vessel.[16]

Arbitration took place in London for the damages suffered by Galsworthy due to Parakou Shipping's default and breach of the terms of the charterparty. A first arbitration award was made on 31 August 2010[17] in terms of which it was found that the parties had concluded a legally binding charterparty agreement and that Parakou Shipping was in breach of the charter.[18] Awards of US$2 673 279.15[19] (first award) and US$38 579 000 (second award) with interest and costs were made in favour of Galsworthy.[20] Parakou Shipping however failed to make any payments, consequently, the dispute remained unresolved.

On or about 16 April 2015, in the KwaZulu-Natal High Court Durban, exercising its admiralty jurisdiction, Galsworthy instituted *in rem* proceedings[21] by issuing summons against the vessel *MT Pretty Scene* and the company Pretty Scene Shipping. Summons was issued together with the certificate in terms of rule 4(3) of AJRA. Galsworthy further obtained orders in the Eastern Cape and Western Cape High Courts to protect its rights if the associated vessels were to dock in regional ports.[22] All the processes issued by Galsworthy were protective writs obtained in secret. This was in order to avoid Parakou Shipping redirecting the berthing of any of the ships away from South African ports before an arrest could be effected. Hence, Galsworthy sought a direction of privacy from the court. Justice Mnguni on 16 April 2015, granted the registrar of the court an authority to keep private the *in rem* arrest papers issued against the associated vessels.[23]

The associated vessels did not arrive in the South African ports for at least one year. Consequently, Galsworthy obtained an order on 29 March 2016, extending the period of the validity of the warrant of arrest and the summons for a further period of two years and obtained leave for the same to be served until 15 April 2018.[24] The orders were granted by Radebe J in favour of Galsworthy, in accordance with section 5(2)(dA) of the AJRA .[25]

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[16] *MT Pretty Scene* (SCA) supra note 4 above para 1.
[17] *MT Pretty Scene* (SCA) supra note 4 above para 2.
[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] *Galsworthy Limited v Pretty Scene Shipping and MT Pretty Scene*, Case No. A23/2015 unreported judgment of KwaZulu-Natal Local Division, Exercising its Admiralty Jurisdiction (31 October 2016).
[22] *Galsworthy Limited v Pretty Scene Shipping and MT Pretty Scene* [2019] ZAKZPHC 10; [2019] 2 All SA 355 (KZP), at para 3. (Hereinafter "*MT Pretty Scene KZP*").
[23] Ibid.
[24] *MT Pretty Scene* KZP supra note 21 para 4.
[25] Ibid.

On or about 19 June 2016, the target ship (*MT Pretty Scene)* arrived in the port of Durban and Galsworthy effected an arrest of the ship and served a summons on Pretty Scene Shipping and the target ship.[26] On 1 July 2016, the Pretty Scene Shipping owners launched an application to set aside the arrest of the *MT Pretty Scene*. Galsworthy opposed the application and Judge Vahed, on 31 October 2016, directed the release of the *MT Pretty Scene* on the basis that Galsworthy's summons did not meet the requirements of Admiralty Rule 2(1)(b) and the practice directive 27 of the Practice Manual of the KwaZulu-Natal Division of the High Court.[27] The SCA however noted that Vahed J did not scrutinise all the relevant grounds put up by Galsworthy to oppose the release of the *MT Pretty Scene*.[28]

Galsworthy, anticipating that the arrest of the *MT Pretty Scene* would be set aside, took steps to have a second arrest warrant and *in rem* summons issued against the same ship under case number A65/2016.[29] The summons was issued *ex part*e, without the knowledge of Vahed J and Pretty Scene Shipping or its lawyers. However, Galsworthy only served the summons for the second arrest on the date of delivery of Vahed J's reasons on 31 October 2016.[30]

Pretty Scene Shipping then brought another application to set aside the second successful arrest of the *MT Pretty Scene*, and also sought a counter-application for damages for wrongful arrest.[31] This application was dismissed by Henriques J.

Both parties applied for leave to appeal the respective decisions. Both applications were refused, but leave to appeal to the full bench was granted in both cases on application to the SCA.[32] The appeals were consolidated and heard simultaneously before the full court. The full court, however, upheld the appeal against Henrique's J's judgment but dismissed the appeal against Vahed J's judgment. As a result, the first and the second arrests were both set aside and the counter-application for damages was granted in favour of Pretty Scene Shipping.[33]

Galsworthy then appealed to the SCA against the judgment of the full court. The SCA set aside[34] the order and judgment of the full court and ruled in favour of Galsworthy. The decisions and

[26] Ibid para 5.
[27] Ibid para 6.
[28] *MT Pretty Scene* (SCA) supra note 4 para 3.
[29] *Pretty Scene Shipping SA & MT Pretty Scene v Galsworthy* (Case no: A65/2016) unreported judgment of KwaZulu-Natal Local Division, Exercising its Admiralty Jurisdiction (22 September 2017).
[30] *MT Pretty Scene* (SCA) supra note 4 paras 7-8.
[31] Ibid para 9.
[32] Ibid para 4.
[33] Ibid.
[34] Ibid para 101.

reasoning of the courts of the first instance, the full court (the court from which the appeal was lodged) and the SCA are discussed in more detail in chapters two and three, respectively.

1.3 STATEMENT OF PURPOSE AND RATIONALE

The aim of this dissertation is to provide a critical analysis of the decisions made by the lower courts and the SCA in relation to the *MT Pretty Scene* regarding an action *in rem* arrest of an associated ship in South Africa for enforcing two arbitration awards made outside of South Africa.

The relevant provisions and interpretations that were clarified by the SCA relating to the provisions applicable for an arrest of an associated ship, the effectiveness of the rule 4(3) certificate, and the warrant of arrest in the *in rem* proceedings are analysed in this dissertation, further clarifying that in terms of the provisions of AJRA and South African maritime law, the arbitration award does not form an entirely separate claim.[35] The procedural issues are discussed in detail in so far as the *in rem* papers in action proceedings are primary documents that set out the plaintiff's underlying claim that is linked to an arbitration award. There is a link on the basis that the determination of when a ship may be arrested as an associated ship depends upon when the claim arises. Although an arbitration award is listed as a stand-alone maritime claim, and is enforceable without any proof of the merit of the underlying claim, it continues to relate to the underlying claim upon which the arbitration award was made.[36] Therefore, the arbitration award, as found by Wallis JA, is a maritime claim which arises at the same time that the underlying claim arose.[37]

This dissertation offers value to maritime legal practitioners and legal scholars in so far as it reveals and analyses the relevant admiralty rules for the enforcement of arbitration awards. It aims to provide a clear discussion of the positive practicalities of effectively drafting admiralty arrest papers. It, therefore, addresses a most important aspect of maritime practice and is of practical interest to shipping lawyers in South Africa.

[35] *MT Pretty Scene* (SCA) supra note 4 para 67.
[36] Ibid.
[37] Ibid para 68.

1.4 RESEARCH QUESTIONS

This dissertation will address the following specific questions:

a. What are the legal principles applicable for the arrest of an associated ship in order to give effect to an arbitration award granted in favour of the creditor?

b. What is the proper meaning of the phrase 'when a maritime claim arose' in respect of the arbitration award?

c. To assess the principles applicable to the granting of an arrest warrant and the criticisms of the High Court's reasoning by the court on appeal. The following issues will be considered:

    i. the correct procedure applicable for the *in rem* arrest of an associated ship in South Africa, and what required averments must be in the *in rem* summons;

    ii. the proper approach to and meaning of Admiralty Rule 2(1)(b);

    iii. how are the requirements set out in the Certificate in terms of Rule 4(3) and the Practice Directive 27 of the Practice Manual of the KwaZulu-Natal Division of the High Court to be interpreted; and

    iv. what are the relevant and important provisions relating to the warrant of arrest by the Registrar of the High Court.

1.5 RESEARCH METHODOLOGY

The methodology used in this dissertation is desktop research. The researcher conducted a detailed analysis of case law on the decisions related to and applicable to the *MT Pretty Scene*. The researcher also refers to international conventions, legislation, foreign and local case law, journal articles, maritime law practitioners' commentaries, and academic commentaries.

1.6 CHAPTER BREAKDOWN

Chapter One provides a general introduction to the dissertation and offers detailed facts of the *MT Pretty Scene* case.

Chapter Two discusses the principles applicable in South Africa for arresting an associated ship in order to enforce an arbitration award. It considers the nature of the arbitration award and elaborates on the relevant substantive requirements of a valid arbitration award. It then considers the principles used in maritime law for enforcing a valid arbitration award, in instances where an award is a 'foreign arbitration award'. This chapter also discusses the decisions of the *MV Yu Long Shan*, the *MV Silver Star* and the *MT Pretty Scene*, which deal with the enforcement of arbitration awards, particularly with regard to the arrest of associated ships. Finally, this chapter further considers the issues relating to the enforceability of an arbitration award – including prescription and insolvency.

Chapter Three discusses the nature of the action *in rem* in South Africa and how to bring the action in terms of the Admiralty Rules and AJRA. Moreover, this chapter discusses the legal principles and correct interpretation of the requirements set out in Rule 4(3) and Practice Directive 27 of the Practice Manual of the KwaZulu-Natal Division of the High Court.

Chapter Four sets out the conclusion of the dissertation.

1.7 CONCLUSION

This introductory chapter has provided a detailed overview of the facts of the *MT Pretty Scene* case, so as to create a backdrop for a more detailed discussion of the germane legal issues that were decided in this groundbreaking case. Chapter Two discusses the provisions relating to the content required in the admiralty summons, in order to understand the correct interpretation of Admiralty Rule 2(1), the requirements that must be set out in the arrest warrant, and the certificate in terms of Rule 4(3) that will in turn form the benchmark through which the SCA's decision in *MT Pretty Scene* is analysed.

CHAPTER TWO

THE ENFORCEMENT OF AN ARBITRATION AWARD AGAINST AN ASSOCIATED SHIP

2.1. INTRODUCTION

In many jurisdictions, it is established that arbitration proceedings are preferred to court proceedings. For instance, most charterparty agreements contain an arbitration clause which stipulates the parties' agreement to referring a dispute to arbitration. An arbitration clause usually sets out the number of arbitrators required to hear the matter, the place for arbitration, and the method of appointing arbitrators. The arbitration procedure is an indispensable preferred procedure that the parties adopt in order to obtain a swift and confidential decision.[1]

This chapter analyses the principles applicable in South Africa for arresting an associated ship for the enforcement of an arbitration award. Specifically, it discusses the meaning of the phrase 'when a maritime claim arose' in so far as the arbitration award is concerned. It begins by considering the statutory background to associated ships and maritime claims. In this chapter, the decisions of the *MV Yu Long Shan*,[2] the *MV Silver Star*[3] and *MT Pretty Scene* (SCA) dealing with the enforcement of arbitration awards, particularly with regards to an arrest of an associated ship, are considered.

In addition, this chapter provides an analysis of: (a) what the courts held regarding the crucial question of 'when the maritime claim arose'; (b) what findings in the judgment address the nature of the arbitration award; and (c) how the judgment should be understood in the context of the International Arbitration Act 15 of 2017 (the "IAA"), and the substantive requirements for a valid arbitration award enforceable under the IAA. Finally, this chapter considers the issues that may arise in future relating to the enforceability of an arbitration award, including prescription and insolvency of the ship-owning companies prior to the delivery of an arbitration award.

[1] For further discussion on arbitration in general, see Peter Ramsden *'The Law of Arbitration: South Africa and International Arbitration* (2009).
[2] *MV Yu Long Shan: Drybulk SA v MV Yu Long Shan* 1998 (1) SA 646 (SCA).
[3] *MV Silver Star: Owners of the MV Silver Star v Hilane Ltd* [2014] ZASCA 194; 2015 (2) SA 331 (SCA).

2.2 STATUTORY BACKGROUND TO THE ASSOCIATED SHIP ARREST

Recovering maritime debt has proven to be a 'nightmare' for many maritime creditors.[4] The metaphor is well-founded, considering that maritime business involves the daily movements of ships from one port to another in different jurisdictions. Debtors and creditors are generally located in different jurisdictions, which makes it difficult for the creditor to recover its claim. Thus, the procedure for the effective arrest of a ship remains the primary remedy for the enforcement and recovery of a creditor's claim.

The arrest of an associated ship is exclusively a procedure of South African admiralty jurisdiction and maritime law and is used to enforce a maritime claim by the arrest *in rem* of a ship other than the ship against or in respect of which the claim arose.[5] It is one of the 'novel, unusual and at times far-reaching provisions'[6] of AJRA. Many scholars, and those practising in jurisdictions with only the sister-ship arrest provisions, have encouraged the adoption of the associated ship regime.[7] The associated ship provisions expand the scope and application of the sister-ship provision and were enacted to address the problem of one-ship companies.[8]

[4] J Hare *Shipping Law & Admiralty Jurisdiction in South Africa* (1999) at page 103.
[5] The terminology was developed when the Admiralty Jurisdiction Regulation Act was enacted in 1983.
[6] *Katagum Wholesale Commodities Co Ltd v The MV Paz* 1983(3) SA 261 (N) at 263B.
[7] For further scholarly discussion of the background to the creation of the associated ship-arrest provisions, see MJD Wallis *The Associated Ship and South African Admiralty Jurisdiction* (published PhD thesis, University of KwaZulu-Natal, 2010) at pages 67 to 186 . The author's book of the same title – M Wallis *The Associated Ship & South African Admiralty Jurisdiction* 1 ed (2010) – was not available to the researcher, and page references in this dissertation are to the author's PhD thesis, available at https://researchspace.ukzn.ac.za/xmlui/handle/10413/678, accessed on 11 May 2022. For further discussion see A Rycroft 'Changes in South African Admiralty Jurisdiction' (1984) *LMCLQ* 417; H Staniland 'The Implementation of the Admiralty Jurisdiction Regulation Act in South Africa' (1985) 3 *LMCLQ* at 464; H Staniland & HJS McLennan 'The Arrest of an Associated Ship' (1985) 102 *SALJ* 148; D B Friedman 'Maritime Law in Practice and in the Courts' 1985 *SALJ* 46-47; G Glover 'Sister Ship Arrest and the Application of the Doctrine of Attachment in Australia: A Jurisdictional Comparative Analysis in the Wake of the 1952 Arrest Convention' (2008) 22 *Austl. & N.Z. Mar. L.J.* 107.
[8] MJD Wallis 'Recovery of Maritime Debts and the Role of the Associated Ship' (2012) 28 *Banking and Finance Law Review* 103-116. South African Law Commission *Report on the Review of the Law of Admiralty*, SALC 1982 para. 7.3, stated that 'The International Convention with regard to the Arrest of Sea-going Ships ... makes provision for the arrest to find an action *in rem* of a sister ship, that is to say, a ship in the same ownership as the guilty ship. The provisions of the Bill are an extension of this notion based on the fact that since the conclusion of the Convention, its provisions have been defeated by the proliferation of 'one-ship companies', that is to say, companies owning only one-ship and therefore avoiding the Convention.' Also see MJD Wallis 'Recovery of Maritime Debts and the Role of the Associated Ship' (2012) 28 *Banking and Finance Law Review* 103-116 at 116, where the author states: 'The peculiar nature of maritime trade and the ability of ship owners, by using the institution of the one ship company, to insulate assets from creditors, are not only unusual in any other sphere of economic activity, but also undesirable when they result in legitimate debts not being paid. The associated ship jurisdiction is a small step in the direction of overcoming these difficulties and facilitating the recovery of debts.'

The Admiralty Jurisdiction Regulation Act[9] in section 1(1) provides a comprehensive list of maritime claims which are recognised and may be enforced in South Africa. A '*maritime claim*' includes, among others:

> 'any claim for, arising out of or relating to —
> *(h)* the carriage of goods in a ship, or any agreement for or relating to such carriage;
> *(j)* any charterparty or the use, hire, employment or operation of a ship, whether such claim arises out of any agreement or otherwise;
> *(aa)* any judgment or arbitration award relating to a maritime claim, whether given or made in the Republic or elsewhere;
> *(ff)* any contribution, indemnity or damages with regard to or arising out of any claim in respect of any matter mentioned above …'

According to the AJRA, any foreign or South African judgment or arbitration award '*relating to a maritime claim'* is regarded as a maritime claim.[10] Therefore, the existence of the maritime claim as defined in AJRA is crucial. It not enough that a maritime claim be recognised in foreign law. What is required is that the underlying maritime claim to which the judgment or arbitration award relates must also be recognised in terms of AJRA, and therefore be enforceable in terms of the South African admiralty jurisdiction laws.[11]

In respect of the arrest of an associated ship, section 3(6) of AJRA provides:

> *'*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.'[12]

Section 3(7) provides that:

> '(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

[9] Act No. 103 of 1983 (AJRA).
[10] *The Rosario del Mar* 1995 (1) SA 716 (C) para 724E/F-G.
[11] See the *MV Yu Long Sha*n supra note 2 para 651C-D where Marais JA stated obiter this was the apparent purpose of the words 'relating to a maritime claim' in s 1(1)(aa) of AJRA. Also see Hare op cit note 4 above page 55.
[12] See also s 3(7)(a).

(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 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.'

The associated ship provisions were developed by considering the 1952 Arrest Convention[13] as it permitted only the arrest of the sister ship,[14] which sister ship was owned by the same owner as the guilty ship when the maritime claim arose.[15] Article 3(2) of the Convention further provides that ownership will be established in the circumstances whereby the same person who owned the guilty ship owned all shares of the company owning the sister ship.[16] As the 1952 Convention restricted liability for a maritime claim to the arrest of the sister ship, and was only extended to the claims against a demise[17] charterer,[18] its provisions were too restrictive. The International Convention on the Arrest

[13] International Convention Relating to the Arrest of Sea-Going Ships, 10 May 1952, Brussels. UNTS 439 (the 1952 Convention).

[14] Article 3(1) provided that:

'Subject to the provisions of para 4 of this Article and Article 1, a claimant may arrest either the particular ship in respect of which the maritime claim arose or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship . . . but no ship, other than the particular ship in respect of which the claim arose, may be arrested.'

[15] For further background, see H Staniland & HJS McLennan 'The Arrest of an Associated Ship' (1985) 102 *SALJ* 148.

[16] Berlingieri *et al*, Berlingieri on Arrest of Ships: A Commentary on the 1952 and 1999 Arrest Convention IFL (2011) 100.

[17] A demise charterer is also known as a bareboat charterer. A charter by demise is a contract whereby the possession and control of the ship are transferred entirely to the charterer. The shipowner does not have any duties regarding the ship's operation or any responsibility to provide the crew. The ultimate control rests with the demise charterer, and it assumes all responsibilities as if it was the owner of that particular chartered ship.

[18] Article 3(4) of the 1952 Convention provided that:

'When in the case of a charter by demise of a ship, the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claims.'

of Ships, 1999,[19] expanded the enforcement of the sister ship arrest provisions to permit claims against voyage and time charterers.[20] Therefore, in terms of the respective Conventions, the sister ship arrests were permitted to be made against: (a) the particular ship's owners; (b) the demise charterer; (c) the voyage charterer; and (d) the time charterer on condition that an owner or the charterer was the 'owner' of that particular ship.[21] This would be a major move towards the South African associated ship jurisdiction but only 13 countries[22] have ratified the 1999 Convention and there is no indication that any other country will do so. Although the 1999 Arrest Convention requires a determination of who owned (or chartered) the ship concerned 'when the maritime claim arose', judgments in South Africa clearly warn that it is wrong to regard oneself as bound by such provisions when interpreting words in the AJRA – which is a South African statute. This is especially so as South Africa is not a signatory to either Arrest Convention. Therefore, earlier judgments adopting a different approach are to be treated with caution.[23] The present dissertation will therefore not consider the wording of the Arrest Conventions any further.

The associated ship provisions provided for in section 3(7) of AJRA permit the arrest of ships under common control or ownership of the relevant owner or charterer. Such ships are: (a) the 'guilty ship' or 'ship concerned' (against which the maritime claim arose); and (b) the 'associated ship' which is

[19] The 1999 Arrest Convention – International Convention on Arrest of Ships 12 March 1999, Geneva. UNTS (hereinafter 1999 Convention).

[20] 'Article 3: Exercise of right of arrest provides:

1. Arrest is permissible of any ship in respect of which a maritime claim is asserted if:
   a) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or
   b) the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected; or
   c) the claim is based upon a mortgage or a "hypothèque" or a charge of the same nature on the ship; or
   d) the claim relates to the ownership or possession of the ship; or
   e) the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien which is granted or arises under the law of the State where the arrest is applied for.
2. Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose:
   a) owner of the ship in respect of which the maritime claim arose; or
   b) demise charterer, time charterer or voyage charterer of that ship. This provision does not apply to claims in respect of ownership or possession of a ship.
3. Notwithstanding the provisions of paragraphs 1 and 2 of this article, the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, under the law of the State where the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship.'

[21] For further discussion on the Conventions, see Berlingieri et al 'Berlingieri on Arrest of Ships': A Commentary on the 1952 and 1999 Arrest Convention IFL (2011) 100.

[22] The countries that have ratified the 1999 Arrest Convention are Albania, Algeria, Benin, Bulgaria, Congo, Ecuador, Estonia, Latvia, Liberia, Peru (22 March 2022), Spain, Syrian Arab Republic and Turkey. United Nations Treaty Collection 'status as at 12-07-2022 of the International Convention of the Arrest of Ships 1999' available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XII-8&chapter=12&clang=_en, accessed on 12 July 2022.

[23] See *MV Pretty Scene* (SCA) at para 89 and *MV Silver Star* at para 31. cf *MV Cape Courage: Bulkship Union SA v Quannas Shipping Co Ltd and Another* 2010 (1) SA 53 (SCA) at paras 20-22.

owned or controlled by the same owner or charterer who controlled the guilty ship. The associated ship provisions focus on association by way of controlling interests in a company based on common control.[24] Thus the associated ship provisions allow creditors to go beyond the corporate structure to determine control and the beneficial ownership of companies to effect arrests of ships 'hidden' behind several registered companies that benefit the controlling debtor.[25]

Therefore, and crucially for the focus of this dissertation, AJRA requires that in order to arrest an associated ship and to satisfy the requirements set out in section 3(7)(a), the claimant must identify the ship concerned and the person who owned or controlled the 'ship concerned'[26] *at the time that the maritime claim arose*. An associated ship has common control or ownership by the same person or entity at the time an arrest is made. In other words, the same person who owned or controlled the ship concerned at the time the claim arose (even if they no longer do so) now owns or controls the associated ship being targeted for arrest.

2.3 CHARTERER AS A DEBTOR FOR THE ASSOCIATED SHIP ARRESTS

Associated ship arrest does not exclude the charterer from being liable in terms of associated ship arrest provisions.[27] Generally, charterers provide carriage services in the shipping trade by hiring ships and a charterer assumes this function by hiring the ship in terms of demise, voyage and time charter agreements from the shipowner. The control of the ship by the charterer depends on the type of charter agreement concluded between it and the owner.[28]

Section 3(7)(a) of AJRA was couched to permit the enforcement of a maritime claim against an associated ship, provided that the claim can be pursued in *personam* against the owner of the ship

[24] Section 3(7) of AJRA.
[25] Staniland, op cit note 7 above at 412. The associated ship provisions go further than the well-established principles of company law that: (a) a company is a separate juristic person with a separate and distinct personality separated from its shareholders or members; and (b) that shareholders or members of the company are liable based on the number of shares they own in a particular company, set out in the classic decisions of *Saloman v Saloman* [1987] AC 22 HL and *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530. The provisions also go further than the power of the court to 'pull aside the veil of corporate identity' set out in *Lategan v Boyes* 1980 (4) SA 191 (T) at 200-01, *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790, and s 20(9) of the Companies Act 71 of 2008, as amended. Associated ship arrests are a common feature in admiralty practice in South Africa and unlike the 'drastic' common law remedy there is no need to establish fraudulent or improper conduct. It has been authoritatively held that the purpose of the deeming provisions in s3(7)(b) is 'obviously designed not only to defeat defensive stratagems which ship owners might deliberately deploy to ward off potential arrests of associated ships by disguising their ownership or their control of such ships, but also to allow it to be shown even in a case where no such motive existed where power of control *really* lay'. *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) (Heavy Metal) per Marais J (minority judgment) para 4, cited with approval in the *MV Silver Star* para 40. Also see Wallis op cit note 7 at page 197.
[26] The expression in AJRA, the 'ship concerned', is a reference to the ship against or in respect of which the maritime claim arose.
[27] Gys Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* (2012) 2ed at page 123.
[28] H Staniland op cit note 7 above at 414. See also *The Kyoju Maru* (1984) (4) SA 210 (D).

concerned, or if the claim gives rise to a maritime lien against the ship concerned.[29] However, if the claim is enforceable *in personam* against the charterer of the ship concerned then she cannot be arrested and no associated ship arrest is possible because of no commonality of control or ownership between the ship concerned and the associated ship.[30] The promulgation of section 3(7)(c) of AJRA 'the deeming provision') was to cater for liability of the charterer by deeming the charterer to be the owner of the ship concerned. Section 3(7)(c) of the AJRA provides:

> 'If at any time a ship was the subject of a charter party the charterer or sub charterer, 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 sub charterer, and not the owner, is alleged to be liable.'

The above deeming provision does not exclude any form of charterparty agreement.[31] It allows maritime creditors to target an associated ship controlled by the charterer when the action is commenced for the underlying maritime claim. The claim could arise out of the charterparty agreement. An example would be damages or breach of speed and performance warranties under a charterparty. Another example would be a dispute about payment of hire. However, this section is not limited to charterparty claims. It provides an enforcement mechanism for any claim for which the charterer and not the owner is liable. An example would be in respect of a time charter where the charterer was responsible for providing bunkers and the bunker supplier pursues its claim by the arrest of an associated ship. This is an alternative to attaching property belonging to the charterer to found jurisdiction for an action *in personam*. The deeming provision in section 3(7)(c) can clearly be relied upon only where the charterer is the debtor.

Therefore, this provision summarily states that the charterer steps into the owner's shoes in relation to the ship concerned and not only the associated ship. This enables the parties that have claims against charterers to locate other vessels 'owned by the charterer or owned by companies which are controlled by the charterer to arrest vessels as associated ships in respect of their claims'.[32]

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[29] See s 3(4)(a) and (b) of AJRA.

[30] *MV Silver Star* supra note 3 at para 15.

[31] In *NYK ISABEL: Northern Endeavour Shipping PTE LTD v The Owners of the 'NYK ISABEL' and Bippon Yusen Kabashuki Kaisha (''NYK Line')* 2017 (1) SA 25 (SCA) at para 30, the court held that a slot charterer is a charterparty for the purposes of AJRA, having found that AJRA would apply to any 'charterparty' (widely defined), as the AJRA is 'not concerned to restrict the category of such contracts' at para 27.

[32] In *MV Pacific Yuan Geng: KP7 International SA and Others v Glory Wealth Shipping (Pte) Ltd* 2011 (4) SA 461 (WCC), the court held that the effect of s 1(3) means that a ship at the hands of the demise charterer is susceptible to arrest, but the provisions of s 1(3) cannot be read together with ss 3(6) & (7) to extend the ambit of the associated ship-arrest provisions. Also see the decision to the same effect in *Lauritzen Bulkers A/S v MV "Chenebourg", Maple Maritime Inc. v E.A.S.T. International Ltd and Others* 2011 (4) SA 467 (KZD).

Furthermore, section 1(3) of AJRA,[33] the deeming provision against liabilities of the charterer, was inserted to provide that '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'. The amendment to introduce section 1(3) with its deeming provision was to recognise that a section 3(4) arrest lay against a ship for a claim owed by the demise charterer. It was deliberately introduced to remedy the shortcomings of section 3(4) and to make the demise-chartered ship susceptible to arrest.

Wallis JA argues that the extension of the deeming provision catered for two circumstances. First, for a situation where the charterer was the ship's cargo carrier, and in cases where such cargo is misplaced or harmed.[34] Second, it dealt with ship consumables like stores and bunkers, for which the charterer bore financial obligations outlined in the charterparty agreement.[35] The creditor, in these circumstances, could enforce its claim directly against the ship controlled by the demise charterer.

2.4 THE RELEVANT TIME OF ASSOCIATION

For the purposes of arresting an associated ship to enforce a maritime claim against the ship owner or the charterer, the determination of the time of association is crucial for the creditors in accordance with section 3(7)(a) of AJRA. The time of association is a two-leg inquiry dependent on the ownership or control of the guilty ship (the so-called 'ship concerned') and the associated ship. Section 3(7)(a)(i) describes an associated ship as one 'owned by the person who was the owner of the ship concerned at the time when the maritime claim arose'. The control or ownership of the guilty ship is determined at the date when the maritime claim arose. Secondly, AJRA provides that in order to determine ownership or control of a target ship for arrest (associated ship), the appropriate and relevant time is the time of commencement of the action *in rem.*

The first leg of inquiry is the focus of this dissertation. The following two dates are considered for determining the relevant time of association:

a) the date on which the award was handed down; or
b) the date when the original claim arose.

In a claim enforceable by way of an arbitration award, the determination of the time of association is crucial in so far as there are possibilities that the ownership or control of the ship concerned may

[33] This deeming provision came into effect on 20 June 2003.
[34] Wallis, op cit note 7 above at page 210.
[35] Ibid.

change prior to the delivery of the arbitral award and/or pending the arbitration proceedings. In extreme circumstances, the ship may have been scrapped or sunk and there is thus no longer a ship concerned on the date the award is handed down for establishing association. In other circumstances, by the time an award is made, ownership or control may have changed if the ship has been sold. If an associated ship is arrested on the basis of common control with the new owner of the ship concerned, there may be no connection to the entity that owned the ship concerned at the time the original claim arose.

It was held in *The Berg*[36] that the purpose of AJRA is to make the loss fall where it belongs by reason of ownership, and in the case of the company, the company that owns or controls the ship.[37] This purpose is not achieved if the critical date considered for the ownership of the ship concerned is the date of the award. Such a finding would mean that a third-party owner or controller is liable for the claim under the arbitration award. However, the third party or new owner is not liable for the original claim and permitting the arrest of an associated ship owned by the third party or the new owner would be inconsistent with the purpose of associated ship arrest provisions.

It should be noted that once it has been determined who owned the guilty ship (ship concerned) on the date the maritime claim arose, it is not relevant that the guilty ship is no longer owned or controlled by the debtor at the time the associated ship is arrested.[38] In other words, it means that the same debtor's liability remains intact, and any property owned by that debtor, except the ship concerned, would be susceptible to arrest.

Shaw provided an example of the intention of the draftsmen and gave guidance for better understanding of section 3(7)(a)(i) – stating that:

> 'As has been suggested with regard to the action *in rem* against the ship concerned, the phrase "owned by the person" means "owned by the person at the time of the arrest". If therefore, A, at the appropriate time (that is, at the time of the arrest), owns a ship, that ship will be an associated ship if A, at the time when the maritime claim arose, was the owner of the ship concerned. Changes of ownership in the ship concerned after the maritime claim arose are irrelevant, as is the question of whether the ship which is an associated ship was owned by A when the maritime claim arose.'[39]

[36] *Euromarine International of Mauren v The Ship 'Berg' and Others* 1986 (2) SA 700 (A).
[37] Ibid at para 712A.
[38] Wallis op cit note 7 above at page 174.
[39] Wallis op cit note 7 above at page 172-173, quoting Shaw *Admiralty Jurisdiction and Practice in South Africa* (1987) 37-38.

In *October International Navigation Inc. v The Fayroux IV,*[40] the vessel *The Jade II*, the ship concerned, was sold by its owners to a *bona fide* buyer by the conclusion of the standard form of agreement. The terms of the form exempted the buyer from any outstanding claims lodged against the vessel. Before the sale, World Food Programme obtained a maritime lien against *The Jade II* and later attempted to enforce that lien against the vessel after the conclusion of the sale. The buyer had an action *in personam* against the owner (Katerina) in accordance with section 3(7)(a)(ii) because during the time the maritime claim arose, three members of the family owned the shares of the controlling companies that owned the associated ship at the time the arrest was made. Before the court, it was found that it was immaterial that no action *in rem* could be used by the claimant if there was an existing *in personam* claim made against the debtor (Katerina).

It was further held that the vessel was owned or controlled by the same person at the time the claim arose and subsequently when the arrest was made. As a result, the court found that the arresting party's right to arrest the associated ship stood, even if the 'ship concerned' had been sold to a third party at the time the arrest was made or when the action commenced.[41] Wallis JA notes that in an action against the associated ship, the relevant time is the date of the vessel's deemed or actual arrest.[42] This is a correct view because an arrest remains effective once the target ship has actually been arrested. The issuing of *in rem* papers at court does not complete the process fully but merely commences it:[43] the arrest of a ship is central to effect or to perfect the action *in rem*. Without an arrest, the action is incomplete – no recourse is granted to the creditor.

The associated ship provisions' wording enforces the goal of the relevant section. This is to make property owned or under the control of the party that owned the guilty ship or which controlled the guilty ship's owner, available to creditors. This principle was endorsed in *MV Heavy Metal*[44] per Farlam AJA, where it was held that 'each subsection was couched in the present tense when it spoke of ownership or control of the owner of the associated ship, but in the past tense when it dealt with the same matters in relation to the ship concerned'.[45] This was a strong indication that for the purposes of associated ship arrests it was unnecessary that it should still be possible to pursue an action *in rem* against the ship concerned.[46]

[40] 1988 (4) SA 675 (N).
[41] *The Berg*, supra at 712A.
[42] Wallis op cit note 7 above at pages 206-207.
[43] Ibid at page 223.
[44] *MV Heavy Metal: Belfry Marine v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) at 484G-487I.
[45] *MV Heavy Metal* supra at 484G-487I.
[46] Wallis op cit note 7 above at pages 207-208.

Therefore, the 'control of the relevant company owning the ship concerned at the time the maritime claim arose and control of the company owning the associated ship at the time of the commencement of the action that gives rise to association − serve to identify the key dates and laying to rest another issue arising from the terms of section 3(6)'.[47]

2.5 WHEN DOES THE MARITIME CLAIM UNDER AN ARBITRATION AWARD ARISE? A CASE LAW DISCUSSION

Having considered the time of association, the relevant question that will be considered is when does the claim on the arbitration award arise. The difficulty arising from the determination of when a maritime claim arises when the claim is one to enforce an arbitration award, has been outlined above. The issue has been considered in three Supreme Court of Appeal decisions in South Africa. This section discusses those three decisions, and the three key issues are analysed.

2.5.1. *MV Yu Long Shan*[48]

Facts

In *MV Yu Long Shan* the issue was whether an arbitral award could be enforced to recover damages arising out of a time charterparty by arresting an associated ship in terms of section 3(7)(c) of AJRA – in terms of the wording of AJRA as amended by the Admiralty Jurisdiction Regulation Amendment Act 87 of 1992 (the '1992 amendment'). Prior to the 1992 amendment, only the demise charterer was liable to have an associated ship arrested for the maritime claim arising out of a charterparty.

Before the 1992 amendment, section 3(7)(c) provided that 'if a charterer or subcharterer of a ship by demise, and not the owner thereof, is alleged to be liable in respect of a maritime claim, the charterer or subcharterer, as the case may be, shall be for the purposes subsection 6 be deemed to be the owner'.[49] After the amendment in 1992, the provision read 'if at any time a ship was the subject of a charterparty of 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'.[50]

The background to this case is as follows. A company called Groupco owned the vessel *Fei Xia Shan* (the ship concerned), which it chartered to an entity called Zhen Hua. In turn, Zhen Hua time chartered

[47] Wallis op cit note 7 above at page 207.
[48] *MV Yu Long Shan* supra note 2 above.
[49] Ibid at 649 H-I.
[50] Ibid at 649I-650A.

the *Fei Xia Shan* to Drybulk SA during May 1991.[51] Delivery of the vessel ought to have taken place between 1 August and 20 September 1991, but Drybulk SA refused to take delivery on the basis that certain charterparty terms were not complied with by Zhen Hua. Drybulk SA further claimed damages from Zhen Hua.[52] The charterparty agreement concluded between the parties provided for disputes to be resolved by arbitration.

Arbitration was held in London and the arbitrators, in 1994, ruled in favour of Drybulk SA. Zhen Hua failed to pay the damages in terms of the arbitration award. Consequently, Drybulk SA instituted an action *in rem* for the recovery of its claim. The action *in rem* was instituted by causing an arrest of an associated ship, the *MV Yu Long Shan*, on the basis that it was under common control of the deemed owner of the chartered ship at the time the arbitration award was made in 1994.

Arguments raised

In the court a quo,[53] counsel for the defendant (*MV Yu Long Shan*) raised an exception to the plaintiff's particulars of claim arguing that at the time the original maritime claim for damages arose, and before the 1992 amendment of section 3(7)(c) of AJRA, only a demise charterer was liable in terms of sections 3(6) and (7) of the AJRA for the purposes of arresting an associated ship.[54] A time charter was not, at that time, included in the provisions. A time charterer was liable on the underlying maritime claim if an action in *personam* could be instituted against it by attaching its property to found or confirm jurisdiction in such an action. However, another ship owned or controlled by the time charterer was not susceptible to arrest *in rem* as an associated ship of the time-chartered vessel.

The earlier decisions in *The Berg*[55] and the *MV Pericles*[56] concerned security arrests for pending arbitration proceedings on claims arising under charterparties. There were no arbitration awards as yet, and therefore the only claim in question related to the 'original' maritime claim in the respective cases. The claims arose before the law was amended. In both cases the arrests were thus set aside because the law – as it was at the time the maritime claim arose – did not permit the arrest, even though the law as it was at the date of the arrest would have allowed this. Therefore, the situation where there is an arbitration award to be enforced creates a new difficulty. If the law when the original claim arose

[51] Ibid at 649 C-D.
[52] Ibid at 649 D-E.
[53] *MV Yu Long Shan: Drybulk SA v MV Yu Long Shan* 1997 (3) SA 629 (D).
[54] *MV Yu Long Shan* supra note 2 at 649 E-G.
[55] *The Berg* supra note 36 above.
[56] *National Iranian Tanker Company v MV "Pericles GC"* (726/92) [1994] ZASCA 145; [1995] 1 ALL SA 493 (A).

would not have permitted an arrest, but the law at the time an arbitration award was made on that claim permitted an arrest, then the court must decide which date to use.

In *MV Yu Long Shan*, the plaintiff's claim for damages had arisen in 1991 when it rejected delivery of the vessel. This was before the 1992 amendment became effective on 1 July 1992. However, the arbitration award was made after that date in 1994. The plaintiff counter argued that an award was made on 10 June 1994 after the 1992 amendment, and by virtue of the 1992 amendment Zhen Hua was deemed to be the owner of the *Fei Xia* Shan in accordance with the associated ship provisions.[57] Therefore, the 1992 amendment served to extend the right to proceed against an associated ship – irrespective of the nature of the charterparty agreement .[58]

In this regard, the plaintiff argued that the award is a claim its in own right by virtue of paragraph 1(1) (aa) of AJRA. Furthermore, they relied on the fact that the arbitral award was an English award governed by English law. In terms of English law, the enforcement of an arbitral award, it was argued, arises 'on or shortly after the award' and is based on an undertaking to honour the award.[59] The plaintiff thus argued that the time charterer was deemed to be the owner of the ship concerned and that the plaintiff was entitled to proceed against the associated ship in terms of the 1992 amendment.

The court a quo[60] reasoned that the plaintiff failed to allege that the parties had concluded a demise charterparty that could render Zhen Hua liable for the claim in terms of AJRA. In this regard, the court a quo held that the *MV Yu Long* was not an associated ship.[61]

The court a quo upheld the defendant's exception by ruling that 'the arbitration award itself cannot be regarded as an entirely separate and independent cause of action'[62] and that the charterparty and the original breach thereof are part of the cause of action based on the arbitration award.[63] The court a quo also held that the plaintiff's claim arose prior to the 1992 amendment of section 3(7) of AJRA.[64]

The main issue for determination before the court of appeal was whether the maritime claim arose before the 1992 amendment of section 3(7)(c) of AJRA, that is, at the time the underlying claim arose. And if not, whether the maritime claim arose at the time the arbitral award was made.

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[57] Ibid at 650 A-B
[58] Ibid at 649 G-H.
[59] Ibid at 650 B-C.
[60] *MV Yu Long Shan: Drybulk SA v MV Yu Long Shan* 1997 (3) 629 (D).
[61] Ibid at 635D.
[62] Ibid at 635 C-D. See also *MV Yu Long Shan* supra note 2 above at 650 D-F
[63] Ibid.
[64] Ibid.

Counsel for the defendant argued that section 1(1)(aa) makes it clear that in the case of a time charterer who is considered to be an owner in terms of the 1992 amendment to section 3(7)(c) of AJRA, only judgments or awards made against it that are related to prior maritime claims that arose after the amendment may be enforced as maritime claims against associated ships.[65] He suggested that the qualifier 'related to a maritime claim' that appears after the phrase 'any judgment or arbitration award' in section 1(1), provides that indication in (aa). The court of appeal held that the argument did not hold up under close scrutiny.[66] The court said that nothing in the words "related to a maritime claim" suggests that the prior maritime claim that resulted in the judgment or award must also have occurred after the 1992 amendment, in order for the remedy offered to be used against a time charterer. The qualifying words are at most neutral for the defendant and did not advance the specific issue being considered.[67]

It was held that the phrase 'relating to a maritime claim' which qualifies the words 'any judgment or arbitration award' in section 1(1)(aa) showed that an arbitral award must relate to the original underlying claim. In examining the words 'relating to a maritime claim' which qualify the words 'any judgment or debt' in section 1(1)(aa), the court found that the words qualify the claims that fell within the ambit of AJRA. As to the context of paragraph (aa), the court noted that the provisions envisaged that arbitration awards not relating to any maritime claim are excluded.[68] As a result, judgment creditors who have obtained arbitral awards in their favour in matters not related to maritime law may not use section 1(1)(aa) by virtue of the definition.

Court's reasoning and findings

On appeal, it was held, criticising the reasoning of the court a quo:[69]

1. Drybulk's claim was for the enforcement of the award.
2. The arbitration award was a maritime claim in its own right, and prior to the amendment the AJRA had contained such a claim (in the section then numbered 1(1)(x) and now renumbered 1(1)(aa) (with some changes in wording that did not matter for purposes of the case)).

[65] *MV Yu Long Shan* supra note 2 above at 651C.
[66] Ibid.
[67] Ibid at 651E.
[68] Ibid at 651D.
[69] *MV Yu Long Shan* supra note 2 above at 650 E-J.

However, the court nevertheless upheld the conclusion that the arrest should be set aside because following the reasoning in *The Berg*, no right to arrest existed at the time of the conduct in question, and the Act could not retrospectively be reinterpreted to impose such a liability *ex post facto*.[70]

The court thus held that one should not adopt the plaintiff's interpretation of the amendments if doing so would make persons or ships retroactively accountable for events for which they were not responsible at the time they occurred.[71] The court relied on the decisions of *The Berg* and the *MV Pericles* and further held:

> 'It is unquestionably so, and the counsel for the plaintiff did not contend otherwise, that the 1992 amendment 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.'[72]

It was accepted that the plaintiff could not have arrested the defendant (the *MV Yu Long Shan*) before the amendment in order to enforce its right to damages under the charterparty or to seek security for the payment of any subsequent arbitral judgement that had already been rendered.[73] The court found that the 1992 amendment broadened the categories of persons who may incur liabilities arising from maritime claims and, alternatively, made ships amenable to arrest which could have not been susceptible to arrest prior to the amendment.[74] The court held that the defendant's argument was correct in that the *MV Yu Long Shan* could not be arrested because the underlying claim had arisen prior to the amendment, and at that time she was not liable to be arrested as an associated ship in terms of the charterparty agreement.[75]

In addition, *The Berg* had already held that the effect of the associated ship-arrest provision was 'creative of new liabilities or obligations in owners of ships, or the potential thereof, of which such owners, if the claims arose prior to the commencement of the [AJRA], would have been wholly unaware and unsuspecting'.[76] Thus, the owner of the associated ship finds his vessel liable to arrest for a claim which he would not be liable for outside of the associated ship-arrest provisions of AJRA.

Marais JA further emphasised the point when he held that he would probably have reached a different conclusion if the outcome of the judgment was merely to make the assets of the debtor (*Zhen Hua*) liable to arrest when they were previously immune from arrest. However, the reach of associated ship

[70] Ibid at 651 A-B.
[71] Ibid at 651 F-G
[72] Ibid at 651 F-H.
[73] Ibid at 651 H-J.
[74] Ibid at 651 H-I
[75] Ibid.
[76] *The Berg* supra at 712 A-E. The AJRA provides a claimant 'with additional or alternative defendant'.

arrest is much broader as it makes the assets of some other juristic person liable to arrest (even if 'common control' can be established). The problem would not arise if the owner was a natural person because then there would be common ownership.

Regarding the interpretation of the associated ship provisions, the court rejected the plaintiff's argument that in the phrase 'if at any time a ship was the subject of a charterparty' in section 3(7)(c), the words 'at any time' suggested that the legislature intended[77] that no distinction should be drawn between the causes of action arising before and after the amendment in the application of the deeming provision.[78] The court held that the words are included to rebut any argument that the deeming provision only applies where a charterparty has been entered into after the 1992 amendment. However, the mere existence of a charterparty does not give rise to a cause of action. Breach of the charterparty gives rise to a cause of action. Hence, there was no clear indication that the AJRA imposes retrospective liability, and the court found that it does not.[79]

The court further held that that the submission of the plaintiff ignored 'the unique and special character of the cause of action based upon an arbitral award or a judgment of a court'.[80] The court opined:

> 'In both instances they [arbitration awards] are entirely derivative causes of action in the sense that they 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. Whatever the substantive effect in law of the giving of a judgment or the making of an award upon the cause of action adjudicated upon may be, it cannot alter the fact that 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. If the cause of action so ventilated would not have given the successful claimant rights against particular ships or persons when the cause of action arose, it must be questioned whether the Legislature intended to confer upon the claimant any such rights merely by reason of the fact that his claim happened to be upheld by an arbitrator or a court after the enactment of the amendment. It would certainly amount in substance, if not in form, to saddling ships and persons with retroactive liability in respect of breaches of contract and the commission of delicts for which they were not liable at the time when they occurred. For the reasons I have already given, I remain unpersuaded that such was the intention of the Legislature. Much plainer language than that which the Legislature has employed would be required before such an interpretation could be justified.'[81]

The arbitration award is therefore regarded as a binding pronouncement of liability arising from the cause of action ventilated in the arbitration proceedings. However, the judgment rested on the fact that no retrospective liability could be imposed. The question of the nature of the arbitration award and

[77] Reference to interpretation based on ascertaining the 'intention of the legislature' should be treated with caution following *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA).
[78] *MV Yu Long Shan* supra note 2 at 652H.
[79] Ibid at 652H-653A.
[80] Ibid at 647I.
[81] Ibid at 653F-654A

whether it was a novation of the original claim was argued but not decided. The following statement is *obiter dictum*:

> 'If it is true that the award … did not supersede the antecedent cause of action and create a new debt, but merely "strengthened" or reinforced the right to be paid the antecedent debt, and if it is so that "the enforceable right remains the same", as was held to be the position in the cases referred to, then that is all the more reason for declining to give retroactive operation to the 1992 amendments in the manner contended for by plaintiff, if the result would be to render liable to arrest a vessel which was not liable for the antecedent debt which was the subject of the award or judgment.'[82]

The court made important remarks about the law of novation. It was argued by counsel for the defendant that the arbitral award does not necessarily result in a novation of the debt upon which the cause of action is based or supersede the antecedent cause of action and create a new debt, however, the award merely 'strengthens' or 'reinforces'[83] the right to be paid the antecedent debt.[84] The judgment does not reach any binding conclusions on this issue. In fact, the court had been at pains to distinguish itself from comments by Niles Dunér AJ that the claims were the same. Moreover, it also expressed doubts about whether it is correct that a judgment or arbitration award does not extinguish (novate) the original debt.[85] In conclusion, the court held that the arbitration award does not give rise to an entirely new and independent cause of action which could be pursued irrespective of when the antecedent cause of action on the charterparty arose.[86]

2.5.2. The *MV Silver Star*[87]

Facts

The issue that arose in this matter was when does the maritime claim arise in relation to an arbitration award pursuant to claims arising out of letters of indemnity relating to a charterparty.

The facts were briefly that the respondent, Hilane Ltd (Hilane), owned the ship concerned (*MV Sheng Mu*). On or about 6 July 2011, Hilane concluded a voyage charterparty on the Gencon form with a company called Phiniqia International Shipping LLC (Phiniqia) – for the carriage of a coking-coal

[82] Ibid at 654 F-J.
[83] Ibid at 654I.
[84] Ibid at 654 G-I. The defendant relied on *Swadif (Pty) Ltd v Dyke* NO 1978 (1) SA 928 (A); *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N); and *Zygos Corporation v Salen Rederierna AB* 1984 (4) SA (444) (C). The principle of novation as set out and applied in these judgments continues to be a precedent in the law of novation as it applies to arbitration awards. See also Ramsden op cit note 1 at page 176.
[85] Ibid at 654H.
[86] *MV Yu Long Shan* supra at 654H.
[87] *MV Silver Star* supra note 3 above.

cargo from Iran to India.[88] Phiniqia requested the issue of a second set of bills of lading against a letter of indemnity and Hilane demanded that they be indemnified when subsequently the holders of the first set of bills of lading, which had not been cancelled, claimed the value of the coal from Hilane. Pursuant to an arbitration award in its favour, Hilane had a claim against Phiniqia and sought to enforce its claim by arresting an associated ship (*MV Silver Star*) in terms of sections 3(6) and 3(7) of AJRA.[89]

On 12 August 2013, the *MV Silver Star* was arrested on the basis that it was an associated ship of the *Sheng Mu*. Action Partner Limited, the registered owners of the *MV Silver Star*, made an application to court seeking the release of the *MV Silver Star* on the basis that Hilane failed to prove association on a balance of probabilities.[90] The charterparty agreement was governed by English law[91] and the disputes that arose in relation to the charterparty were subject to arbitration in London.[92] Pursuant to the arbitration proceedings, Hilane obtained an award in its favour and was awarded a USD 3,8 million with interest and costs.[93] It was this claim (on the arbitration award) that Hilane sought to enforce by arresting an associated ship by the arrest *in rem* procedure.

Arguments raised

The owners of the *MV Silver Star* argued that English law applied as the arbitration award was obtained in London.[94] In this regard, they contended that the effect of the English law governing the arbitration award was that, in effect, it serves to eradicate or extinguish the underlying maritime claim which formed the basis of the award and substitutes the underlying claims with a claim based on an arbitration award itself.[95] Thus, Action Partner contended that the claim was no longer related to the *MV Sheng Mu* and thus the 'ship concerned' did not exist for the purposes of associated ship provisions.[96]

The owners further argued that associated arrest provisions must be narrowly construed to guard against deprivation of property in terms of section 25 of the Constitution.[97]

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[88] Ibid para 1.
[89] Ibid.
[90] *MV Silver Star* supra note 3 above para 2.
[91] Ibid para 3.
[92] Ibid para 9.
[93] Ibid para 10.
[94] Ibid para 19.
[95] *MV Silver Star* supra note 3 above para 19.
[96] Ibid para 19 with reference to s 3(6) of AJRA, which states one may arrest 'an associated ship instead of the ship in respect of which the maritime claim arose'.
[97] Ibid para 17, they did not offer any narrower alternative reading of s 3 (7) (c). It is important to note that counsel for Phiniqia stressed that there was no challenge to the constitutionality of the section. In para 18, the court obiter referred to its view that a constitutional challenge to associated ship provisions should not succeed. In para 33, the court said it did not think that it was necessary to resolve the issue of whether Hilane's claims were monetary claims arising out of

Court's reasoning and findings

At inception, the court laid a background to associated ship arrests. In doing so, the court stated that it is well known that the introduction of associated ship-arrest provisions in AJRA resulted from an international trend of registration of one-ship-owning companies. As a result, the recovery of maritime claims was rendered difficult.[98] The court further noted that although the 1952 Arrest Convention provided for sister-ship arrests, that was not effective as vessels were owned by separate 'one ship' companies.[99]

The court then laid out the requirements for the arrest of an associated ship in terms of AJRA. As a starting point, the court stated that an associated ship arrest can only be sought when there is a ship in respect of or against which the maritime claim has arisen, and this ship is called the ship concerned.[100] Then there must be second ship (target ship) which is an associated ship. The arrest of the associated ship must satisfy the requirements of section 3(7)(a) through common ownership or control – as explained earlier in this chapter.[101] The associated ship provisions require commonality of ownership or control between the ship concerned and the associated ship.[102]

The court emphasised that for the purposes of determining whether association exists, in terms of section 3(7)(a) the main consideration required to be made is to determine who the owner of the ship concerned is at the time the maritime claim arose.[103] With regard to the deeming provision – section 3(7)(c) – the only difference is that it places the charterer or the subcharterer of a ship who is personally liable in respect of the maritime claim or who incurred the debt or liability, in the same position as the owner, if the owner was liable for the debt at the time the maritime claim arose. In order words, the deeming provision places the creditor of the charterer in the same position as a creditor of the owner, and consequently places the charterer in the shoes of the defaulting owner.[104]

With regard to the key issue of when the maritime claim arose, the court explained:

> 'If the maritime claim did not give rise to a maritime lien against a particular vessel, and an in personam claim did not arise "in respect of" a particular ship, there could be no action in rem against

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the charterparty or a separate contract of indemnity. That issue was best dealt with at trial and the court held for the purposes of this application that the claims were still against the charterer and related to the core of charterparty.

[98] Ibid para 13.
[99] Ibid.
[100] Ibid para 14.
[101] Ibid.
[102] Ibid para 15.
[103] Ibid para 16.
[104] *MV Silver Star* supra para 18.

> a particular ship because the requirements of s 3(5) of the [AJRA] could not be satisfied. In the event there would be no ship concerned and there could be no arrest of an associated ship.'[105]

However, Wallis JA found that the argument raised by the owners of the *MV Silver Star* that the arbitration award extinguishes the underlying claim was incorrect.[106]

Wallis JA reasoned *obiter* that an arbitration award in terms of English law cannot be regarded as extinguishing the underlying claims on which the award was based.[107] The court noted that the English law authority was 'expressed … cautiously'.[108] English law provided that '[t]he award itself creates new rights between the parties in *most* cases superseding their previous rights in relation to the matters referred' (own emphasis).[109] However, this was not an inevitable and absolute consequence.[110]

Phiniqia relied on the authority of *The Beldis*[111] and *The "Bumbesti*".[112] Both cases were deciding disputes on the jurisdiction which, by virtue of English legislation (that is of no present application in South Africa) claims under a charterparty, must be heard in the County courts in England. Both decisions had held that a claim under an arbitration award was not met by this prohibition on jurisdiction.[113]

The court noted that the English cases are not unanimous.[114] The court further relied on a decision of *F.J. Bloemen Pty Ltd v Council of the City of Gold Coast*[115] where it was held that "the award of an arbitrator cannot be viewed in isolation from the submission under which it was made".[116] The court further referred to the distinction drawn in that case 'between an award which merely establishes and measures liability under a contract and so does not create a fresh cause of action and an award of damages which supersedes the liability under the contract and creates a fresh cause of action'.[117]

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[105] Ibid para 20. The court held that 'I accept for present purposes, because Hilane did not challenge the proposition, that the starting point for determining whether a ship may be arrested as an associated ship must be the existence of a maritime claim against or in respect of particular ship'.
[106] Ibid.
[107] Ibid para 21. In this regard, the court relied on an English textbook by D Sutton and J Gill, *Russel on Arbitration* (22nd ed, 2003) 6. Further, see para 30 where the court held it was not necessary to reconcile differences of opinion on the effect of an arbitration award in English law.
[108] Ibid para 21.
[109] Ibid.
[110] Ibid para 22.
[111] *The Beldis* [1936] P 51.
[112] *The "Bumbesti"* [1999] 2 Lloyds Rep 481.
[113] See *MV Silver Star* supra note 3 above paras 27 and 28. Wallis op cit note 7 also discusses the evolution of the action *in rem* in admiralty courts at pages 32–42.
[114] *MV Silver Star* supra note 3 above para 29, referring to *The St Anna* [1983] 2 All ER 691 (QBD).
[115] 1973 AC 115.
[116] *MV Silver Star* supra note 3 above para 21.
[117] Ibid, citing *F.J. Bloemen Pty Ltd v Council of the City of Gold Coast* supra at para 126.

Therefore, the court decided the cases on the basis that an arbitration award is a derivative cause of action,[118] which cannot be severed from the underlying maritime claim or cause of action.[119] It is incorrect to sever the underlying maritime claim from the arbitration award as that would mean that there is no ship concerned, and hence an associated ship cannot be arrested[120] in terms of the arrest provisions of AJRA.

The court relied in *MV Yu Long Shan* to confirm that an arbitration award is an entirely derivative cause of action. Furthermore, the court held with reference to the wording of section 1(1)(aa) of the AJRA that:

> '*where an arbitration award is made in terms of an arbitration clause in a charterparty relating to a particular ship, the award cannot be severed from its source and it remains one in respect of that particular ship* . . . Any judgment or arbitration award "relating to a maritime claim" is itself a maritime claim. In this case the maritime claims that underlie the award arise from a charterparty dispute, and any claim for, arising out of or relating to a charterparty, is a maritime claim. The words "for, arising out of or relating to" predicate a relationship between the claim and the maritime topic sufficiently intimate to impart to the claim a maritime character of a sort rendering it appropriate for the claim to be adjudicated in accordance with maritime law.'[121] (emphasis added)

In addition, the court illustrated the position with an example that in a claim by the charterer for damages arising from a breach of the charterparty agreement the claim would be a maritime claim against the owner of the ship which arose against the chartered vessel.[122] As a result, if the charterer ignored the arbitration clause, this claim could be pursued by way of an action *in rem* against the chartered vessel.[123] The 'strange'[124] result of the argument raised by Action Partner would be that if the charterer referred the dispute to arbitration, the award so granted could not be enforced by an arrest *in rem* against an associated ship because the claim did not arise against the chartered vessel. In other words, the court found that Action Partner's argument in proceeding with arbitration means that the charterer forfeited its right to proceed *in rem* against the vessel. This, the court found, is not consistent with the wording of the AJRA, as AJRA defines the arbitration award as a standalone maritime claim.

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[118] *MV Silver Star* supra note 3 above para 22. See also Peter Ramsden, *The Law of Arbitration: South African and International Arbitration* (2009) at page 176; *MV Yu Long Shan: Drybulk SA v MV Yu Long Shan* 1998 (1) SA 646 (SCA) at 653F-H.
[119] *MV Silver Star* supra note 3 above para 22.
[120] Ibid para 21.
[121]Ibid paras 23-24.
[122]Ibid para 25.
[123] Under AJRA s 7(1)(b) the owners would seek a stay of proceedings, but if the law were that you cannot enforce an arbitration award against an associated ship, claimants might argue that a stay of proceedings should be refused because if they are 'compelled to pursue arbitration … they would thereby be deprived of a legitimate juridical advantage'. See *MV Silver Star* supra note 3 above at para 26.
[124] *MV Silver Star* supra note 3 above para 25.

The arbitration award is even enforceable by an associated ship arrest under AJRA if it is a South African award enforceable in terms of the Arbitration Act 42 of 1965.[125] It would follow that the same result would apply to an international arbitration award enforceable in terms of the International Arbitration Act.[126]

Ultimately, the court held that the question of the effect of the arbitral award ought to be determined in accordance with the statutory interpretation of the AJRA in terms of South African law.[127] The court stated that foreign law will only be considered if the courts need 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 under section 1 of AJRA.[128] Consequently, the court cannot adopt the provisions of section 6 of AJRA because section 6 is employed to determine the law applicable in the adjudication of claims by a court exercising its admiralty jurisdiction, and only becomes relevant when the question of whether the court has the necessary jurisdiction under the AJRA has been resolved.[129]

The court then applied a 'practical' approach to interpreting the requirements of the AJRA and held that:

> '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. Any practical person engaged in the maritime world would answer "of course it is" to that question. Their answer would not change if they were told that under the arbitral law the award extinguished the original claim. That is in my view clearly the correct position and it disposes of Action Partner's first argument.'[130]

In conclusion, the court stated at paragraph 32:

> 'Hilane's maritime claims under the charterparty arose in respect of the Sheng Mu and Phiniqia, which was liable in respect of those claims, was deemed to be its owner for the purpose of an associated ship arrest. Had no arbitral award existed to fortify Hilane's claims it could have arrested an associated ship in relation to the Sheng Mu on the basis that the latter was 'the ship concerned'. The fact that it

[125] Ibid.
[126] 15 of 2017.
[127] *MV Silver Star* supra note 3 above para 31.
[128] Ibid.
[129] *MV Silver Star* supra para 31.
[130] Ibid para 32.

> has pursued its claims by way of arbitration does not alter the situation. The award is one in respect of the Sheng Mu, which is the ship concerned for the purpose of an associated ship arrest.'

In light of the above, and after consideration of the facts in the unanimous majority judgment by Ponnan JA, the court held that association was established on a balance of probabilities.[131]

2.5.3. *MT Pretty Scene* (SCA)

The facts of the *MT Pretty Scene* (SCA) have been extensively discussed in Chapter 1. To avoid repetition, facts giving rise to the issues at hand will not be discussed.

The court again clarified a long-standing contention regarding the phrase 'when the maritime claim arose' with reference to an arbitration award. The relevant question that was determined by the court was whether a claim of the arbitration award arises at the time when an arbitration award is delivered or, alternatively, when the relevant underlying claim arose.

Arguments raised

It was not disputed that Parakou Shipping had concluded a charterparty in respect of the *MV Jin Kang*, but Pretty Scene Shipping argued that the *MT Pretty Scene* was not an associated ship of the *Jin Kang* for three reasons.[132] First, it argued that Parakou Shipping never took delivery of the vessel, and thus it never became a charterer in terms of section 3(7)(c) of AJRA. Secondly, in relation to claims of the arbitration awards, it contended that at the time of the delivery of the awards, Parakou had ceased to be the charterer of the *Jin Kang.*[133] Lastly, it argued that the second arbitral award was handed down at the time Parakou Shipping was placed under liquidation, and therefore it was no longer controlled by Mr Poi Lu – but by the liquidators.[134] In addition, PSS further advanced an argument that was previously raised in the *MV Silver Star* and *MV Yu Long Shan*: English Law was applicable to the charterparty agreement and consequently the original claim had been extinguished by the delivery of the two arbitration awards.[135]

Court's reasoning and findings

The court, in analysing the purpose behind an arrest of associated ship provisions, noted that the purpose of AJRA emanated from the 1952 Arrest Convention and in terms of English law to cater for

[131] Ibid para 56 of the majority judgment (per Ponnan JA), and then para 37 of the concurring judgment (per Wallis JA)
[132] *MT Pretty Scene* (SCA) para 56.
[133] Ibid.
[134] Ibid.
[135] Ibid para 61.

the fact that the consequences of loss must be felt by the correct liable party by control or ownership. Accordingly, the associated ship provisions allow the arresting creditor an 'alternative defendant' in the form of the associated ship.[136]

In that regard, the SCA held that in terms of section 3(7)(a)(iii), the *MT Pretty Scene* was owned at the time the action was commenced by the company that was controlled by Parakou Tankers Inc., which was controlled by a sole shareholder, Poi Lu.[137] Thus, where the charterer is personally liable for the claim in terms of section 3(7)(c), it will be deemed to be an owner of the ship concerned for the purposes of the associated ship arrest.[138] Therefore, if Poi Lu was deemed to control the charterer Parakou Shipping when the claim arose, the *Pretty Scene* would be an associated ship of the *Jin Kang.*

The court rejected a technical argument that as Galsworthy did not adduce evidence to show that Poi Lu controlled the *MT Pretty Scene* on the date of the arrest, Galsworthy did not comply with the principle laid down in the *Seaspan Grouse*,[139] where it was held that the action commenced on the date of service as opposed to the date of the issuing of a summons. The basis of rejection by the SCA was that Parakou Shipping never disputed the claim for the association on its papers in the application to set aside the arrest.[140] In other words, there was no suggestion on Parakou's own papers that the position was any different at the later date as opposed to the date of issue of the summons. If they had done so, Galsworthy could have addressed the point in its replying affidavit. The court had earlier reiterated the principle stated in *Andrico Unity*[141] that 'in an application to set aside an arrest, the party that obtained an order may advance any ground to justify the arrest, whether or not the ground [was] relied on initially at the time the arrest order was obtained'.[142]

As far as the first argument on association was concerned, the court found that PSS was bound by the charterparty, and the deeming provision could be enforced against it on the basis that the first arbitration award declared that the parties had entered into a legally binding charterparty, and the charterers were found to have repudiated the charter.[143]

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[136] *Pretty Scene KZD*, para 50.
[137] *MT Pretty Scene* (SCA) para 58.
[138] *MT Pretty Scene* (SCA) para 58.
[139] *The Seaspan Grouse*: *Seaspan Holdco 1 Ltd v MS Mare Travelle Schiffahrts GmbH* 2019 (4) SA 483 (SCA).
[140]*MT Pretty Scene* (SCA) para 59.
[141] *Transol Bunker BV v MV Andrico Unity and Others*; *Grecian-Mar SRL v MV Andrico Unity and Others* 1987 (3) SA 794 (C) at 798D-800E, confirmed on appeal in *Transol Bunker BV v MV Andrico Unity and Others*; *Grecian-Mar SRL v MV Andrico Unity and Others* 1989 (4) SA 325 (A).
[142] Ibid.
[143] *MT Pretty Scene* (SCA) para 59.

As far as the argument that the arbitration award was a novation of the original claim under English law, the argument rested on the provisions of section 34 of the English Civil Jurisdiction and Judgments Act of 1982, resulting in the original claim becoming merged with the arbitration award, and remarks made on the effect of this provision in the *Indian Endurance: Republic of India and Others v India Steamship Co Ltd.*[144] It was argued that the English statute was applicable, first by virtue of section 6(5) of the AJRA which gives effect to a contractual choice of law clause. However, the court held that the choice of law clause in the charterparty only serves to identify the legal system that will apply to a dispute between the parties.[145] It does not identify the law governing the arbitration proceedings or the consequences of the award. The law that is applied on arbitration is determined by the place where arbitration proceedings takes place. In this matter, the arbitration law of England was applicable. If the arbitration had taken place elsewhere, the court pointed out that English law would have applied to the resolution of the charterparty dispute – even if arbitration were held in South Africa or Singapore.[146] It however held that the English Civil Jurisdictions and Judgements Act did not apply as it applies to judgments of foreign courts and not arbitration awards.[147]

With regard to the key issue of when the claim on an arbitration award arises, the court held as follows:

a. Even though AJRA lists the arbitration award relating to a maritime claim as a 'distinct' claim,[148] it does not mean that the arbitration award can be 'detached' from the underlying claim for purposes of determining when the maritime claim (on the award) arises.[149]

b. The arbitration award 'alone' is not a maritime claim, in that it must 'relate to a maritime claim' as contemplated in section 1(1)(aa) of AJRA.[150] As the arbitration award and underlying claim are 'inextricably tied together', the arresting party must plead and prove that the award relates to the underlying claim;[151]

c. There must be an underlying claim to which the award should be linked and the claim must have arisen before the award was handed down by the arbitrator because the

[144] [1993] 1 All ER 998 (HL) at 1003-1004.
[145] Para 62.
[146] Ibid.
[147] Ibid para 64.
[148] *MT Pretty Scene* (SCA) para 67, citing with approval *MV Ivory Tirupati: MV Ivory Tirupati v Badan Urusan Logistik (aka Bulog)* 2003 (3) SA 104 (SCA) para 32, which confirms that once the arbitration award has been delivered, proof of the claim (on the award) does not require proof of the merits of the underlying claim.
[149] *MT Pretty Scene* (SCA) para 67.
[150] Ibid.
[151] Ibid para 67.

arbitration award is the determination of the pre-existing liability relating to a maritime claim,[152] and refers to an original claim.[153] Thus the claim on the award would, in terms of AJRA, arise at the same time as the original claim on which the award is based.[154] This was a 'broad' and 'practical' approach taken in the *Cape Courage*.[155]

d. In terms of section 3(7)(c), the charterer is deemed to be the owner of the ship concerned in relation to the claim for which the charterer, not the owner, would be liable.[156] The purpose of the deeming provision is to establish the identity of the deemed owner on the date the maritime claim arose for the purposes of s3(7)(a). This wide construction means that there is no implied condition that on the date the award is handed down the charterer must still be the charterer. This, the court held, followed from the words in section 3(7)(c): '(i)f at any time a ship was the subject of a charter-party'.[157]

Wallis JA, in applying the aforementioned legal principles, held that the ship concerned was the *Jin Kang*, and the underlying claim must have arisen against the *Jin Kang* to give rise to an arrest of an associated ship.[158] The underlying claim arose under the charterparty, and in terms of section 3(7)(c) the charterer is liable as opposed to the owner of the ship at the time when the maritime claim arose.[159] The fact that ownership of the vessel changed or that the ship no longer existed, was irrelevant.[160] The only essential requirement is that the ship was deemed to be owned by the relevant charterer at the time the claim arose.[161] In line with the deeming provision, the charterer, who is liable for the claim, is placed in the same position as the owner.

[152] *MT Pretty Scene* (SCA) para 67. See also Ramsden op cit note 114 above at page 176.
[153] *MV Ivory Tirupati: MV Ivory Tirupati v Badan Urusan Logistik* 2003 (3) SA 104 (SCA) at para 32.
[154] *MT Pretty Scene* (SCA) para 68. See also *MV Cape Courage: Bulk Ship Union SA v Quanah Shipping Co Ltd and Another* 2010 (1) SA 53 (SCA) at para 23.
[155] *MV Cape Courage: Bulkship Union SA v Qannas Shipping Co Ltd and Another* 2010 (1) SA 53 (SCA) ([2009] ZASCA 74) at para 23 held: '(W)hen a claim has "originated" and enough factors are present to indicate that the owner or controller of the ship concerned at that time (or those for whose actions or omissions it is liable) has "offended", . . . another ship owned or controlled by that person when the claim is enforced may be arrested in respect of the claim. Damage resulting from the offending actions or omissions by the owner or controller (or for which it is liable) may not yet have been suffered, but if it is clear that it will in due course be suffered, I think that it is not stretching language to say that the claim has "arisen".' The Court does not expressly approve of the judgment, but merely notes that the correctness of the judgment was not challenged. It decided the case on a different 'stronger' basis flowing from the wording of s3(7) (c). (see *MT Pretty Scene* (SCA) para 69).
[156] *MT Pretty Scene* (SCA) para 69.
[157] Ibid para 70.
[158] Ibid.
[159] Ibid para 70.
[160] Ibid para 71.
[161] Ibid.

Accordingly, it was found that the *Jin Kang* was chartered by Parakou Shipping and, as such, the charterer was liable for certain claims arising against the *Jin Kang* and deemed to be her owner when the claim arose for showing association with the *MT Pretty Scene*.[162] This also answered the third argument, as although the charterer was in liquidation on the date of the second arbitration award, this award, on the same reasoning, arose at the same time as the claim under the first arbitration award.[163]

2.6 COMPARATIVE ANALYSIS OF THE APPROACHES: AN OVERVIEW

Having discussed the facts and reasoning in each of the decisions, the approaches adopted in each case are now analysed.

2.6.1 Classification of the arbitration award as a maritime claim

In all three cases, this question posed no difficulty as the AJRA clearly defines the arbitration award as a separate maritime claim. The courts approached the classification of the arbitration award as a maritime claim by first considering the words adopted in AJRA, which provides that a claim is a maritime claim if it 'relates to or arises out of' an underlying maritime claim. In *MV Yu Long Shan*, it was decided that the legislature was clear from the date AJRA came into effect in 1983 and that the phrase was used to show that that an arbitral award that is enforceable for the purposes of AJRA must relate to an underlying maritime claim. This meant that the words have been employed to clearly exclude non-maritime law awards from being enforced in terms of AJRA. This reasoning was properly adopted by the Supreme Court of Appeal in *MT Pretty Scene* and *MV Silver Star*. All courts in the above decisions found guidance in the meaning of the phrase 'any claim for, arising out of or relating to'. As a result, all courts decided that an arbitral award cannot be a stand-alone maritime claim, but must relate to an original claim which was canvassed during arbitration proceedings.

2.6.2 The nature of an arbitration award

Generally, in South Africa, the Arbitration Act[164] and the International Arbitration Act[165] regulate the settlement of disputes by arbitration tribunals in terms of written arbitration agreements, and regulate

[162] Ibid.
[163] Ibid para 73.
[164] 42 of 1965 ("the Arbitration Act").
[165] 15 of 2017 ("the International Arbitration Act " or "the IAA").

the enforcement of the arbitral awards of such arbitration tribunals. Section 1 of the Arbitration Act provides that an award includes an interim award.

In arbitrations, a judge does not preside over the dispute. However, one or more arbitrators are appointed by the parties to adjudicate on the matter. An arbitration award is made by an arbitrator pursuant to the arbitration proceedings[166] held between the parties. The award is the binding decision or judgment of the arbitrator(s)[167] and can be enforced in foreign jurisdictions. The foreign arbitral award in terms of the IAA may be enforced in South Africa provided that: (a) the matter does not deal with a subject that may not be determined or arbitrated under South African law;[168] (b) the enforcement of the award is not contrary to public policy;[169] or (c) the tribunal does not lack jurisdiction to hear the arbitration or the arbitration clause or the agreement is not invalid.[170]

It is an implied term of the arbitration agreement that the parties to the agreement agree to perform the award.[171] Although a judgment or an award is sometimes referred to as a *novation necessaria*, if the contract is not cancelled a judgment or award does not extinguish or replace the contractual debt. Instead, the contractual debt is strengthened and rendered more permanent by the judgment or award.[172] Accordingly, the cause of action on an arbitral award is entirely derivative and exists because of the prior existence of some antecedent cause of action found good in fact and in law after the arbitration proceedings.[173]

At common law, an arbitrator's award had the same effect and force as if it had been delivered by a judge.[174] In terms of section 16(3) of the International Arbitration Act, it is provided that 'a foreign arbitral award must, on application, be made an order of court and may then be enforced in the same manner as any judgment or order of court…'. For maritime law, it is usual practice to enforce a foreign

[166] It is beyond the scope of this thesis to discuss in detail the rules and requirements applicable to arbitration proceedings. This thesis focuses on the award which is made by the tribunal or the arbitrators.
[167] Peter Ramsden *The Law of Arbitration: South African and International Arbitration* (2009) at page 154.
[168] See s 18(1)(a)(i) of the International Arbitration Act.
[169] See s 18(1)(a)(ii) of the International Arbitration Act.
[170] See s 18(1)(b)(ii) of the International Arbitration Act. This section includes other substantive and procedural grounds for the South African courts to refuse recognition or enforcement of the arbitration award.
[171] Ramsden op cit note 1 at page 176.
[172] *Zygos Corporation v Salen Rederierna* AB 1984 (4) 444 (C) at 455H. And see the further authorities referred to therein at 454C-455I.
[173] Ramsden op cit note 1 at page 176. See also the *MV Yu Long Shan*, the *MV Silver Star* and *the MT Pretty Scene.*
[174] Ibid at page 182.

arbitral award on a maritime claim by arresting a ship in an action *in rem*. The arrest may be targeted against a ship concerned or an associated ship.

It is an implied term of the arbitration agreement that the parties to the agreement agree to perform the award.[175] Although a judgment or an award are sometimes referred to as a *novation necessaria*, if the contract is not cancelled a judgment or award does not extinguish or replace the contractual debt. Instead, the contractual debt is strengthened and rendered more permanent by the judgment or award.[176]

2.6.3 When the maritime claim arose

In each of the cases discussed above, the overriding concern for each court was to establish the relevant time the maritime claim arose in relation to the arbitration award, in order to justify the enforcement of the foreign award in South Africa. In *MV Yu Long Shan*, the court declined to retrospectively apply the extended associated ship provisions under the 1992 amendment of section 3(7)(c), where the original claim arose before the amendment. In *MV Silver Star*, the court held that 'the intervention of an arbitration award did not mean that the ship in respect of which the claim had originally arisen was no longer the ship concerned for the purposes of an arrest'.[177] In *MT Pretty Scene*, by the time the arbitration awards were handed down, the charterer debtor, Parakou Shipping, was no longer the charterer of the ship concerned and the court had to consider whether it could still be deemed to be the owner of the ship concerned at the time the maritime claim arose.

In each of the cases, the court approached the issue of the time the maritime claim arose by considering the background, purpose and the meaning behind the arrest of associated ships for the purposes of enforcing an arbitration award. The courts reiterated that the purpose of associated arrest provisions is to ensure that liability for loss is placed where it belongs by reason of ownership or control.

If the claim on the award is regarded as arising when the award is handed down, this may lead to situations where an associated ship could be arrested *in rem* immediately to enforce the underlying claim. However, if the charterer refers the dispute to arbitration as required by the contract, an associated ship arrest provisions may be defeated if the ship concerned has since changed ownership. The court in *MT Pretty Scene* properly outlined that this would be a far-reaching result, which would deprive maritime claimants of a remedy to enforce their claims in an action *in rem*. This result is not

[175] Ramsden op cit note 1 at page 176.
[176] *Zygos Corporation v Salen Rederierna* AB 1984 (4) 444 (C) at 455H.
[177] *MT Pretty Scene* (SCA) para 66.

desired by the associated ship-arrest provisions in terms of AJRA. Therefore, as a result, the claim under an arbitral award arises at the time the underlying claim arose.

2.7 ISSUES THAT MAY ARISE IN FUTURE CASES

2.7.1 Insolvency

In addition to the issues of determining the time for the association, in *MT Pretty Scene* (SCA), the court considered the issues relating to liquidation or insolvency before the delivery of an award. In this regard, a question of determining whether a claim under the arbitration award may be considered to arise at the time the award is made is crucial. In the court's view such a separation is impermissible.[178] The claim under the arbitration award arises at the time of the underlying claim. In this matter, the court found that the claim that adjudicated under the second award was subject to the first award and as result it was linked to the underlying claim and there was no justification to separating the claims.

In terms of AJRA, if a judgment debtor is facing insolvency or liquidation procedures that does not prevent property from being seized in South Africa to enforce a maritime judgment or an award.[179] Property seized in connection with a maritime claim does not pass to a trustee in bankruptcy and does not become part of the assets to be controlled by the property owner's liquidator or judicial manager.[180] In addition, no proceedings relating to such property or the claim for which that property was arrested will be stayed as a result of that owner's sequestration, winding up, or judicial management.[181] The practical effect of section 10 of AJRA means that the property so arrested will remain under control of the trustee in instances whereby such foreign insolvency or liquidation proceedings relating to the award are recognised in South Africa. Accordingly, in terms of South African law, the foreign winding-up or liquidation proceedings are not automatically recognised as a bar to creditors from enforcing arbitration awards through an in rem arrest.

[178] *MT Pretty Scene* (SCA) at para 73.
[179] Section 10 of AJRA. See also *Rennie NO v South African Sea Products Ltd* 1986 (2) 138 (CPD) at 144B-E; *The Nantai Princess Line Co Ltd v Cargo Laden on the Nantai Princess* 1997 (2) SA 580 (D) at 590I-J.
[180] Section 10 of AJRA. In *Gendor v Holdings Ltd v City Fishing Holdings (Pty) Ltd; Breemond Trust* (Intervening Party) [2007] 3 All SA 400 (C) at para 28, the court held that "Sections 10 and 11 (13) provide that the property arrested does not vest in a liquidator except after all claims have been paid in accordance with the preferences codified in sections 11 (5) and 11 (11)". In *Commissioner, South African Revenue Service v Van der Merwe NO and others* [2017] 2 All SA 335 (SCA) at para 22, the court held that section 10 of AJRA excludes the vesting of certain property in the trustee on insolvency.
[181] Ibid. See also *The Polaris: Southern African Shipyards (Pty) Ltd v MFV Polaris And Others* 2018 (5) SA 263 (WCC) at para 38.

2.7.2 Prescription

The Prescription Act[182] provides that, in terms of section 11(a)(ii), "the period of prescription of a judgment debt is 30 years". In turn, section 13 of the Prescription Act, provides that "completion of prescription of a debt that is the object of a dispute subjected to arbitration shall not be completed until at least one year after the arbitration has terminated".[183] Therefore, an arbitration award only acquires the status of a judgment debt once it is made an order of the court and the failure of the other party to enforce the award would result in the prescription of the claim three years after the publication of the award. However, an arbitration agreement with resultant court orders, may provide that the award would operate as an order of court. In such a case prescription of the award is in effect prescription of a judgment debt, being 30 years.

The words '*subjected to arbitration'* in terms of section 13(1)*(f)* of the Prescription Act mean that for the completion of prescription to be postponed there must have been a reference to arbitration actually proceeding. The mere requirement that the dispute be referred to arbitration is not an impediment in terms of section 13(1)*(f)* of the Prescription Act, which delays the completion of prescription without having been referred for arbitration. Thus, arbitration proceedings in terms of our law interrupts prescription. Further, any part performance by a judgment debtor of the arbitrator's award, such as the paying of interest on the award, carries with it the necessary implication that he tacitly acknowledged liability to perform the balance of the award. It has not been finally decided whether a claim for arbitration is a process which has the effect of interrupting the running of prescription in respect of the original debt as intended in section 15 of the Prescription Act.

In *MT Pretty Scene* (SCA), Pretty Scene Shipping contended that the underlying claim for damages had prescribed in terms of the English Limitation Act, 1980. In this regard, Pretty Scene Shipping relied on section 5 of the English Limitation Act, which provides that:

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[182] 68 of 1969.

[183] Section 13 of the Prescription Act provides that completion of prescription of a debt that is the object of a dispute subjected to arbitration shall not be completed until at least one year after the arbitration has terminated:

13. Completion of prescription delayed in certain circumstances:

(1) If—

. . .

(f) the debt is the object of a dispute subjected to arbitration; and

(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph *(a), (b), (c), (d), (e), (f), (g)* or *(h)* has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).

'Time limit for actions founded on simple contract:

An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.'

The court reasoned that even if the choice of law clause governing the charterparty contract incorporates the English Limitation Act, 1980, which the court appears to have regarded as doubtful, the English Limitation Act only bars proceeding on the claim in an English court. The Act does not extinguish the claim. Thus, the court queried why a South African court should be bound to apply the English Arbitration Act[184] if the South African Prescription Act[185] would not regard the claim as prescribed.[186]

2.8 The interplay between AJRA and the IAA

In *Atakas Ticaret Ve Nakliyat AS v Glencore International AG and Others*[187] ('the *Cecilia B*') the Supreme Court of Appeal addressed the conflicts caused by the overlapping powers or boundaries of the IAA and AJRA. The court reasoned that there is no implied rule that the earlier provisions in the AJRA are repealed by the newly promulgated statutory provisions of the IAA, in the absence of a clear indication to the contrary.[188]

The court held that article 1(5) of the UNCITRAL Model Law[189] makes it clear that the IAA should not affect any other South African law by virtue of which disputes may or may not be submitted to arbitration in terms of provisions other than those stipulated in the UNCITRAL Model Law. As a result, the court held that the phrase 'any other law' in article 1(5) includes AJRA.[190] Therefore the court found that the IAA did not affect the court's discretion to adjudicate the matter within the prescripts of AJRA and to deliver a decision in accordance with the provisions of AJRA.

Thus, in light of the *Cecilia B*, it remains clear that admiralty proceedings are to be governed by the provisions of AJRA. However, it is vital that the requirements of a valid international award, as set out above, must be met by the claimant in order for the arbitral award to be enforceable in South

[184] 1996 (1996, c 23).
[185] 68 of 1969.
[186] *MT Pretty Scene* (SCA) at para 74.
[187] 2019 (5) SA 379 (SCA).
[188] Ibid, para 7. See also Donnelley D et al 'To Stay Or Not To Stay? Admiralty Proceedings after the International Arbitration Act 15 Of 2017: *Atakas Ticaret Ve Nakliyat As v Glencore International AG'* (2021) 138 SALJ 40.
[189] UNCITRAL Model Law is incorporated to the IAA.
[190] Cecilia B, para 7.

Africa. In this regard, the award must be valid and attached to the application or *in rem* arrest papers. In effect, if the claim is not enforceable under the IAA this may be grounds to challenge the arrest.

2.9 CONCLUSION

For the purposes of AJRA and enforcing maritime-related arbitration awards, it is clear that the arbitration award, as defined in section 1(1)(aa) of AJRA, arises at the same time the underlying claim arose. However, the critical and vital nature of an arbitration is that although an arbitral award is recognised as a standalone claim, in terms of maritime law and in general it does not invariably novate the original debt; rather it 'strengthens' or 'reinforces' an underlying claim.

CHAPTER THREE

THE PROCEDURE FOR THE ENFORCEMENT OF A MARITIME CLAIM THROUGH THE ACTION *IN REM* IN SOUTH AFRICA

3.1 INTRODUCTION

The Admiralty Jurisdiction Regulation Act[1] (AJRA) provides a claimant with a right to bring in the High Court either an action *in rem*[2] (claim for property, technically 'against a thing') or an action *in personam*[3] (against a person for the recovery of property or a debt) – together with various enforcement options such as a unique procedures for the arrest of the associated ship[4] and arrests to secure payment.[5] The variety of ship arrest options in South Africa allows a claimant to choose the best possible remedy in order to succeed in claims against a defaulting party.[6]

Through the action *in rem*, the claimant may enforce its maritime claim against 'the ship with or without its equipment, furniture, stores, bunkers, cargo, freight or any container'.[7] The action *in rem* is thus the preferred procedure as it is quick and uncomplicated[8] compared to the action *in personam* or security arrests. This is because the action *in rem* does not require detailed averments to be made in the summons compared to applications made on affidavits.[9]

According to Hofmeyr, the action *in rem* gives a claimant a variety of advantages, such as the arrest of a maritime property without concern for the identity or location of the ship's owner and having to lodge security for the claim. To obtain a release of the ship,[10] the owner is required to provide security equal in value to the ship or the claim[11] (whichever is lesser). In other words,

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[1] Act 105 of 1983 (hereinafter referred to as AJRA).
[2] Section 3(4) and 3 (5) of AJRA afford jurisdiction on the High Courts to adjudicate admiralty action *in rem*.
[3] John Hare, *Shipping Law and Admiralty Jurisdiction in South Africa* (2009). The action *in personam* proceedings is regulated in section 3(2) of AJRA. In an action *in personam* the claimant institutes a maritime claim against the named defendant, who will be a natural or juristic person who is liable on the claim in delict or contract.
[4] Sections 3(6) and 3(7) of AJRA.
[5] Section 5(3) of AJRA.
[6] UK P&I Club, *A Quick Overview of Ship Arrest in Popular Jurisdictions*, Legal Briefing (2016) 3.
[7] Gys Hofmeyr, *Admiralty Jurisdiction Law and Practice in South Africa* (2012, 2 ed) at 116 and 117. The words 'ship' and 'container' are defined in section 1(1) of AJRA.
[8] See, also, the procedure adopted in Canada re: *in rem* arrests by John Bromley, *'*Canadian Practice and Procedure in the Enforcement of Maritime Claims*'* (2006-2007) 19 (1) *University of San Francisco Maritime Law Journal* 101-120.
[9] *MT Pretty Scene* (SCA).
[10] Hofmeyr op cit note 7 at 116. See *The Jute Express* 1992 (3) SA 9 (A) at 17J-18A.
[11] Section 3(10)(a) of AJRA. See, further, Admiralty Rule 3(4)(7)(a)(ii), which provides that 'a release warrant shall be issued only on the giving of security in a sum representing the value of the property'. See, also, *Transnet Ltd v The owner of the mv 'Alina II'* [2011] ZASCA 129; 2011 (6) SA 206 (SCA), where the court held that the defendant is required to provide security to the value of the res, even when the claim exceeds the value of the res.

by arresting the ship, a claimant becomes entitled to a secured claim in a monetary amount limited to the value of the ship or the value of the claim including interest and costs, not exceeding the value of the ship arrested. The ship arrested is cited as the defendant in the proceedings.[12]

It is noteworthy that an action *in rem* is available to the claimant only when the ship is arrested and has not been sold prior to arrest.[13] In the latter circumstances, the claimant would be required to claim from the fund created from the proceeds of the sale, if the sale took place as a judicial sale.[14] However, if the ship was sold privately to an innocent third party purchaser, a subsequent writ of arrest would be rendered ineffective, thereby leaving the claimant with no cause of action.[15]

This chapter discusses and analyses the issues considered by admiralty courts when adjudicating the arrest of an associated ship for the enforcement of an arbitration award. The chapter begins by looking at the general requirements for proceedings *in rem*. It then considers the content required in the arrest *in rem* summons and the correct interpretation to the applicable Admiralty Rules.

3.2 PROCEEDINGS *IN REM*

Section 3(4) of AJRA provides that 'an action *in rem* can be instituted against the ship where a claimant has a maritime lien over the property to be arrested;[16] or if the owner of the ship to be arrested would be liable to the claimant in an action *in personam'*.[17] In addition, the AJRA requires that the property subject to arrest must be the property against or in respect of which the claim lies. Admiralty Rule 4 sets out the procedure for the arrest of the property in the action

[12] Rule 2(4) of the Rules Regulating the Conduct of Admiralty Proceedings (Admiralty Rules). See, further, J Hare op cit note 3 above at page 90.
[13] Ibid.
[14] Section 9 of AJRA. See, also, Bowmans, *Guide: Enforcement and Defence of Maritime Claims in South Africa* (2020) 11-12.
[15] See *The Seaspan Grouse: Seaspan Holdco 1 Ltd v Ms Mare Traveller Schiffahrts* 2019 (4) SA 483 (SCA) at paras 49-61. The court was required to determine whether the mere issuance of a writ of arrest was sufficient to commence an admiralty action, thereby protecting the claimants against a change in ownership. The court held that 'the proper approach would require that the date of the commencement of the action is the date of arrest in terms of section 2(1)(a)(i) of AJRA as opposed to the date of issuing the protective writs'. This approach was further found to accord with the 'associated arrest main purpose which requires connection between the arrested ship and the ship concerned or the person liable in personam in the claim'.
[16] Section 3(4) (a) of AJRA.
[17] Section 3(4)(b) of AJRA. In the *Mount Royal/Walsh Inc. v Jensen Star* [1990] 1 F.C. 199 (Canada), a bare boat charterer was liable *in personam* for necessaries claim, but the court held that the *in rem* proceeding could not be maintained as the owner, as opposed to the bare boat charterer, was not liable *in personam* for necessaries.

in rem, and the requirements for the release of same.[18] Thus, the court will also recognise any other appropriate remedy available and permitted in law, for example a vindicatory action is used for cases where ownership is disputed by the parties for the enforcement of a maritime claim.[19]

Admiralty proceedings *in rem* are commenced by the issuing of an admiralty summons[20] by the Registrar of the High Court, accompanied by an arrest warrant[21] together with a certificate in terms of Rule 4(3) of the Admiralty Proceedings Rules.[22] The certificate is signed by the plaintiff's local attorney[23] and confirms the matters referred to in the rule. The service of the issued *in rem* papers confirms the jurisdiction of the court as averred in the summons.[24]

The Admiralty Rules require that the summons must be 'clear and concise'.[25] Once issued, service is effected[26] by the sheriff of the court on the vessel directly – by either affixing the warrant of arrest and summons on the vessel or serving the master of the vessel.[27] An arrest is also permitted where the Colonial Court of Admiralty[28] could have proceeded *in rem*.[29] The Registrar issues the warrant of arrest, which permits the arrest of a vessel[30] or provides for the release of the vessel. The arrest warrant generally provides that once the security for claims has been furnished to the satisfaction of the plaintiff or the Registrar, the vessel can be released.

The warrant of arrest may also provide for the terms in which the vessel can be released. For example, the arrest warrant usually states that once the security for claims has been furnished to the satisfaction of the plaintiff or the Registrar, the vessel can be released and owners can obtain

[18] Hofmeyr op cit note 7 at page 156.
[19] *Great River Shipping Inc v Sunnyface Marime* Ltd 1994 (1) SA 65 (C). Also see *Dias Campania Navarra SA v MV Al Kaziemah & others* 1994 (1) SA 570 (D). An arrest *in rem* of a property other than a ship in a vindicatory action was not permitted in *The Atlantic Pride Sivadoba Fishing (Pty) Ltd v Marine Radio Acoustic Devices CC* (2003) SCOSA B224(C) B230C-E.
[20] Admiralty Rule 2(1) and 9 (1).
[21] Admiralty Rule 4(2)(a). The warrant of arrest must be issued by the Registrar, and it should be in a form corresponding to Form 2 of the First Schedule of Admiralty Rules.
[22] Hereinafter referred to as Admiralty Rules.
[23] The Practice Directive of the KwaZulu-Natal Provincial Division states that it is preferred that an attorney practising within its jurisdiction be the signatory of the certificate in terms of Rule 4(3). (Practice directive).
[24] Hare op cit note 3 at page 83.
[25] Admiralty Rule 2(1)(a).
[26] Admiralty Rule 4(1).
[27] Admiralty Rule 6(2) provides that a summons in an action *in rem* must be served on the property in respect of which the action is brought, in the same manner as that on which the warrant must be served.
[28] Colonial Courts of Admiralty Act, 1890 (applied when South Africa was a British colony).
[29] Section 6(1) of AJRA. See, also, Bowmans op cit note 14 at 7, para 6.
[30] In terms of Admiralty Rule 4(2)(a), (b) and (c), the Registrar may refer the issue to a judge if it appears in the certificate that the arrest is complicated, and unless such issue has been raised and resolved before the judge, the Registrar cannot issue the warrant of arrest unless authorised by the judge. See Hofmeyr op cit note 7 at page 156.

a ship's release order from the court. If the owners of the arrested ship fail to furnish security, the ship remains under arrest and the defendant may file and serve its notice of intention to defend[31] the claim of the owners. If security is furnished for the arrested ship, the ship will sail and the plaintiff cannot re-arrest the same ship in respect of that cause of action.[32] In terms of the provisions of section 3(10)(a) of AJRA, security would stand, precluding further arrest.[33] However, the defendant can challenge the arrest by bringing an application to set aside the arrest,[34] which can be accompanied by an application for security for costs, security for a counterclaim (with or without conditions), reduction or other changes to the security already furnished if any, and/or an order for damages against the plaintiff for wrongful arrest.[35]

3.3 SUMMONS *IN REM*

The AJRA provides that 'an admiralty action shall for any relevant purpose commence with the issue or service of any process for the institution of an action *in rem'*.[36] Therefore, the issuing of a summons as prescribed by form 1 of Admiralty Rules generally commences the action *in rem* against the defendant.[37] Admiralty Rule 2(1) provides the requirements and form of admiralty summons.

The relevant provisions of Admiralty Rule 2, provide that:

> '(1) (a) A summons shall be in a form corresponding to Form 1 of the First Schedule and 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.

[31] Admiralty Rule 8(2). In this event the vessel remains under arrest in the custody of the sheriff, who is authorised to 'take all such steps as the court may order or as appear to the sheriff to be appropriate for the custody and preservation of the property, including the removal and storage of any cargo and the removal, disposal and storage of perishable goods which have been arrested or attached, or which are on board any ship which has been arrested or attached'. See Admiralty Rule 21(1) of the Admiralty Rules.

[32] Section 3(8) of AJRA provides that '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'.

[33] Hofmeyr op cit note 7 at 167. See, further, *The Christiansborg* (1885) 10 PD 141 (CA) at 152, 154 and 156; *The Point Breeze* [1928] 135; *The Daien Maru No 18* [1986] 1 Lloyd's Rep 387; and the *MT Pretty Scene (SCA)* at para 87.

[34] A party wishing to set aside the arrest may do so in terms of Uniform Rule 6 (12)(c), which rule is applicable to admiralty proceedings in terms of Admiralty Rule 24. See, also, *Transol Bunker BV v MV Andrico Unity; GrecianMar SRL v MV Andrico Unity* 1989 (4) SA 325 (A).

[35] Section 5(4) of AJRA. See, also, *Windrush Intercontinental SA v UACC Bergshav Tankers AS* 2017 (3) SA 1 (SCA).

[36] Section 1(2)(a)(iii). There are three other admiralty proceedings available that are not relevant for present purposes. In the *MV Seaspan Grouse: Seaspan Holdco 1 Ltd v MS Mare Traveller Schiffahrts GmbH Co KG and Another* 2019 (4) SA 483 (SCA) at para 34, the court made it clear that an action *in rem* can be regarded as commencing at a different time; section 1(2)(a)(i) is specifically relevant when determining whether the ships are associated at the time the action is commenced.

[37] *MV Seaspan Grouse*: *Seaspan Holdco 1 Ltd v MS Mare Traveller Schiffahrts GmbH Co KG* 2019 (4) SA 483 (SCA) at para 49.

(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.

(2) Subject to the provisions of subrule (3), the summons shall set forth the matters referred to in rule 17(4) of the Uniform Rules.

(3) A party may be described as the owner or insurer of a named ship or of the cargo in or formerly in a named ship or as the owner, master and crew of a ship, or in any other similar manner, and in any such case the party need be further named or described in the pleadings and may sue or be sued as such.

(4) In the case of an action *in rem* the property in respect of which the claim lies, as set forth in section 3(5) of the Act, shall be described as the defendant.

....' [own emphasis]

Rule 2(1)(a) states that 'the summons must provide a statement in "*clear and concise*" terms of the "nature of the claim"'. The wording does not refer to pleading a complete cause of action. Practice has shifted in this respect. The *MT Pretty Scene* (SCA) noted that summonses were increasingly becoming lengthy,[38] so defeating the aim of AJRA which is to avoid uncertainty occasioned by unnecessary detail in the summons. Distinguished from the pleadings,[39] the summons does not require 'more or much detailed facts than necessary to satisfy the "label" requirement of a simple summons under the Uniform Rules of Court'.[40] What is required is that the summons be sufficiently detailed to apprise the defendant of the basis of the plaintiff's claim.[41]

3.4 WARRANT OF ARREST AND A CERTIFICATE IN TERMS OF RULE 4(3)

The arrest of the vessel *in rem* is governed by the general provisions of Admiralty Rule 4, whereas Rule 4(3) specifically deals with the certificate to be issued by the plaintiff or the plaintiff's attorney for the arrest of a vessel.

Rule 4(3) except where a court has ordered the arrest of ship, the Registrar is required to issue the warrant of arrest if: (a) the claim is a maritime claim and which gives the court the necessary jurisdiction to effect the arrest;[42] (b) the ship or property so arrested is the property on which the

[38] In *MT Pretty Scene* (SCA) supra note 9 above at para 49, the court noted that the practice directive had led to the drafting of summonses stuffed with 'excessive and unnecessary prolixity in drafting'.
[39] *Icebreakers No 83 (Pty) Ltd v Medicross Health Care Group (Pty) Ltd* 2011 (5) SA 130 (KZD).
[40] *MT Pretty Scene* (SCA) supra note 9 above para 47.
[41] The proper interpretation of this phrase and its application in practice has been widely discussed in detail by Wallis JA in the *MT Pretty Scene* (SCA) matter and by Hofmeyr, Hare and Cooke. Their arguments will be discussed in extensive detail in this chapter.
[42] Rule 4(3)(a) of AJRA.

claim lies or an associated ship; [43] (c) must state whether any security or undertaking has been provided for the release of the vessel;[44] and (d) that the contents of the certificate are true and correct.[45] Therefore, a claimant in an action *in rem* must show that the certificate in terms of Rule 4(3) complies with the stipulated requirements on the face of it, in order to enable the Register to issue the warrant of arrest. In circumstances where the arresting attorney knows of certain issues which may negatively affect the issuing of the arrest warrant or if the certificate does not comply with the rule, the matter must be referred to the judge in chambers for adjudication.[46]

Rule 4(3)(b) requires the arresting party to make the required allegations in the summons. In essence, Rule 4(3)(b) requires a specific allegation that the ship arrested is an associated ship in respect of the underlying claim. The rule is, however, unclear and does not provide particular detail required for making this allegation. This provision has caused confusion about what must actually be stated in the certificate concerning the facts of association. The uncertainty of this provision was the main issue considered in *The Galaecia* case, which is discussed and analysed in detail below.

3.5 *THE GALAECIA*

In *The Galaecia*[47], the High Court per Combrinck J criticised the *in rem* procedure as adopted in South Africa, especially because it permitted the deprivation of another's property without a court order issued by a judge.[48] In this regard, Combrinck J approved sentiments expressed 20 years earlier in *The MV Paz*,[49] where Didcott J stated the following regarding the arrest of ships:

> '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. Especially when the attachment is sought *ex parte*, as can be and almost always is done, the Court must therefore be given sufficient information to show that a measure with results so harmful to others is nevertheless necessary for the protection of

[43] Rule 4(3)(b) of AJRA.
[44] Rule 4(3)(c) of AJRA.
[45] Rule 4(3)(d) of AJRA.
[46] Admiralty Rule 4(2)(b).
[47] *The Galaecia: Vidal Armadores SA (Owner of the MFV "Galaecia") v Thalassa Export Co Ltd* (2006) JDR 0379 (D) (hereinafter referred to as 'The Galaecia'). The case is also reported as '*The Galaecia; Vidal Armadores SA v Thalassa Export Co Ltd* (2006) SCOSA D252' in *Shipping Cases of South Africa*, a private source which publishes maritime law judgments delivered in South Africa.
[48] Ibid para 4.
[49] *Katagum Wholesale Commodities Co Ltd v The MV Paz 1984 (*3) SA 261 (N) at 269G-I.

> the applicant's legitimate interests. The Court must be told enough to put it at ease on all these scores.'

In my view, the reason behind Combrinck J requiring extra facts in the summons was that he wanted the arresting party to put the court at ease by requiring explanations that would show that the arrest of the target vessel was not against section 25 of the Constitution. This considering that the arrest of a ship interferes with its voyage which is a serious business and that the consequences are detrimental to all parties in the supply chain.

In *The Galaecia*, a ship by that name was arrested by Viarsa Export Co Ltd (the plaintiff) *in rem* on 14 March 2006, when it called at Durban. It was arrested based on allegations that it was an associated ship of the *MFV Carron* ('ship concerned')[50] in relation to a maritime claim against the ship concerned. The owner of the arrested ship applied to set aside the arrest on the grounds that, *inter alia*, the allegations made by the defendants in the summons were all conclusions of law and that no facts supporting the plaintiff's conclusions were set out to support its claim.[51]

Combrinck J, in deciding whether the claim was a maritime claim, found that the parties concluded a sale and purchase contract. The fact that the agreement related to fish caught by a fishing vessel did not make the claim a maritime claim in terms of AJRA.[52] The arrest was set aside, and the vessel was released. In making this decision the judge further criticised the arrest *in rem* procedure as adopted in South Africa.

Combrinck J held that:

> 'The Certificate in terms of Rule 4(3) does little to ensure that the arresting party's claim is not frivolous or spurious. The certificate does not have to confirm or verify the cause of action nor apparently is it required that the certifier must set out facts in support of the matters to which he must certify in terms of sub paragraphs (a), (b) and (c). The certificate is therefore of little value and of no assistance to the Registrar who must decide whether to issue the warrant of arrest. This is more so when the certifier is a local attorney who has been instructed by a Johannesburg attorney who has in turn been instructed by a director of the respondent. Clearly the certifying attorney has no personal knowledge whatsoever that the contents of a certificate which he is certifying are true and correct.'[53]

[50] See section 2(1) and 3(7) of AJRA for reference to the words 'ship concerned'.
[51] *The Galaecia* supra note 47 above para 3.
[52] Ibid D261.
[53] Ibid para 5.

In reaching the above decision, Combrinck J depended on the English decisions of *The Tuyuti*[54] and *The Jangmi*[55] to support his reasoning pertaining to the required content and format of the admiralty summons. In *The Tuyuti*, it was held that the long-standing practice and purpose of the admiralty court was to enable the owners of a ship or cargo to sue *in rem*, rather than in their names,[56] and there must be reasonable reasons why this practice ought to be maintained.[57] It was moreover remarked that in the event that solicitors are expected to persist with enjoying that benefit, they must ensure that the writ identifies the cause of action giving rise to the claim, as the writ was so brief that it could have been connected to any cargo owned by any person who lives or works at any of the 19 identified addresses and carried on the voyage of the *MV Tuyuti* during 1982.[58]

In *The Jangmi*, a similar situation prevailed; the court required more detail on the admiralty summons. Combrinck J in *The Galaecia* quoted with approval the reasoning in *The Jangmi* that found that:

> 'the Rules do not require a general endorsement to be a précis of the statement of claim. In *Sterman v E.W. & W.J. Moore Ltd,* Salmon, L.J. said:'. . . I would emphasise that it is highly desirable that the endorsement to the writ should plainly set out the cause of action on which the plaintiff relies . . .'[59]

Darryl Cooke[60] however argues that Combrinck J erred in relying on the English judgments as *The Tuyuti*[61] reasoning relied upon was made '*en passant by the judge a quo'*.[62] Furthermore, Cooke argues that *The Tuyuti* was irrelevant in these circumstances because it dealt with an application to stay proceedings pending an arbitration and the setting aside of the arrest warrant.[63]

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[54] [1984] 2 Lloyds Rep 51.
[55] [1988] 2 Lloyds Rep 462.
[56] *The Tuyuti*, note 54 above.
[57] Ibid. The admiralty practice referred to here is that of the English Court. The English practice is relevant because it commands precedent that the requirements regarding a summons and the issue of a warrant of arrest are not significantly different. The claim form in an admiralty claim *in rem* requires only 'brief details of the claim'. Particulars of claim may be annexed or must follow within 75 days.
[58] Ibid.
[59] *The Galaecia* note 47 above at para 6. The writ set out the claim in the following words:
'The plaintiffs' claim is for damages for breach of contract and/or duty in or about the loading, handling, custody, care and discharge of the plaintiffs' cargo and the carriage thereof aboard the defendant's ship, *Tuyuti* in the year 1982.'
[60] Darryl Cooke, '*The Galaecia'* (2007) 124 *SALJ* 247. The critique by Cooke has been welcomed as well directed by Hofmeyr op cit note 8 at page 157. See, also, *MT Pretty Scene (SCA)* supra note 9 above at para 23.
[61] *The Tuyuti* supra note 54 above at para 56.
[62] Ibid.
[63] Ibid.

Cooke correctly argued that the reliance on *The Jangmi* was ill-founded as the judge dismissed the application to set aside the summons on the basis that the summons was defective.[64] Cooke states that, in fact, the court held '*it is not the function of the court to punish those who make mistakes, but the court's function is to decide the rights of the parties. It seems it would be unjust to set aside the writ in the action as the defects in the endorsement will be cured by the statement of claim*.'[65]

Cooke is correct, in my view, because a defective summons does not render the claim invalid, and more so in the *in rem* arrest proceedings because the arresting party may file an affidavit which provides full details of the basis of the claim.

Nonetheless, Combrinck J held that 'practitioners are required to ensure that the summons complies with Admiralty Rule 2(1)(b)';[66] and that 'it is advisable that the certificate in terms of rule 4(3) must be signed by the arresting party's attorney who has knowledge of the matter'.[67] In assessing whether sufficient allegations and contentions are made regarding association,[68] the Registrar should, as a precautionary measure, on account of the lack of admiralty law Registrars, refer these matters to the judges for a decision.[69]

Combrinck J concluded that the relevance of the requirements had been addressed to various senior judges in the division and such requirements would benefit from the introduction of a practice directive adhered to by maritime law practitioners.[70] Combrinck J's views and reasoning in *The Galaecia* thus led to the promulgation of the Practice Directive 27 (practice directive) of the KwaZulu-Natal division of the High Court.

3.5.1 *Practice directive 27 of the KwaZulu-Natal Provincial division*

The practice directive was circulated in the province and was headed 'Admiralty Arrest Warrants in terms of Rule 4(3)'.[71] The directive recapitulates the reasoning of Combrinck J in *The Galaecia* and applies only to the KwaZulu-Natal High Courts. There is no equivalent or similar directive that is promulgated in the other courts that adjudicate on admiralty matters, such as Western Cape and Eastern Cape, respectively.[72] However, there are certain distinctions

[64] Cooke op cit note 60 above.
[65] Ibid para 8.
[66] Ibid.
[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Ibid.
[71] The practice directive was circulated by the Judge President of the then Natal Provincial Division, dated 7 September 2007.
[72] Hofmeyr, op cit note 7 at 157.

between Combrinck's comments, and the practice directive as applied in the KwaZulu-Natal High Court.[73] The practice directive reads as follows:

'27. Admiralty arrest warrants in terms of Rule 4(3)[74]

1. The attention of practitioners is drawn to the fact that Rule 2(1)(a) provides for a clear and concise statement of the nature of the claim. The certificate with regard to the warrant in terms of Rule 4(3) provides for a statement by the giver of the certificate that the contents of the certificate are true and correct to the best of the knowledge, information and belief of the signatory. The source of any such knowledge and information must be given.
2. As the matters to be certified include a statement that the claim is a maritime claim and that the property sought to be arrested is the property in respect of which the claim lies or, if the arrest is an associated ship arrest, that the ship is an associated ship which may be arrested, it is inherent in the nature of the certificate that the signatory should believe on proper grounds that there is a claim and also that it is enforceable by the arrest of the property to be arrested. It follows therefore, in the case of an associated ship arrest, that the certifier believes that the ship is an associated ship. It is therefore necessary that the summons should contain a statement of the facts upon which the claim is based and a statement of the facts on the basis of which it is stated that the ship is an associated ship.
3. It is desirable that the certificate should be signed by an attorney practising in the Court out of which the warrant is issued. In order to deal with cases of difficulty Rule 4(2)(b) provides that the Registrar may refer to a judge the question whether a warrant should be issued. In the vast majority of cases this is neither necessary, practicable nor desirable. It should be done in any case of difficulty either in regard to the claim or in regard to a question of association. In order to assist the Registrar the responsibility for identifying cases that should be referred to a judge will in the first instance rest on the attorney providing the certificate. When requesting a warrant, therefore, the attorney should submit in addition to the certificate required by Rule 4(3) a statement that the attorney knows of no circumstances making it desirable to refer the issue of the warrant to a judge. In the absence of such a statement, the Registrar will refer the matter to a judge under Rule 4(2)(b).'

In terms of section 8(4)(b) of the Superior Courts Act No. 10 of 2013, the Head of the Court ("Judge President") is granted authority to facilitate the proper day-to-day management or running of the court and assigning the management of judicial functions of each court is the responsibility of the head of that court. Accordingly, the Superior Courts Act permits the Judge President, as and when required, to develop directions that may help manage cases, including, but not limited to, the issuing of various practice directives.

[73] See the *MT Pretty Scene* (SCA) supra note 9 above, paras 24 to 48.
[74] The practice directive paragraphs are not numbered. I have numbered them 1, 2 & 3 for ease of reference.

In *National Director of Public Prosecution (ex parte application*)[75] the SCA held that 'the practice directive is subordinate to any relevant statute, the common law and the Uniform Rules and it cannot be applied to restrict or undermine any piece of legislation, the Uniform Rules of Court or the common law. Practice directives deal essentially with the daily functioning of the courts and their purpose is to supplement the rules of court'.[76] In this case, the High Court had granted the practice directive a statutory force which superseded the provisions of section 38 of the Prevention of Organized Crime Act[77] and Rule 6(4)(a) of the Uniform Rules – which is prohibited. The practice directive cannot in law countermand the meaning and application of the provisions of the relevant legislation and the Uniform Rules of Court. Accordingly, if a practice directive is contrary to a rule of court and any legislation applicable, its provisions should be ignored as they are ultra vires.

The practice directive 27 'actuates' the requirement for summons by providing that the certifier must 'believe on proper grounds' that the maritime claim exists and that it can be enforced by proceedings *in rem.*[78] However, it is unfortunate that a directive establishes a route to which a summons ought to be drafted which appears to be against the legislative requirements.[79] It was also found 'illogical' for the directive to require the summons to contain a statement of facts on which the claim is based in the Rule 4(3) certificate.[80] This is because the certificate ought to regulate the contents of the certificate and not a summons, as per the heading.[81]

Although the directive's main purpose is to regulate the contents of the certificate, the requirement that the plaintiff set out facts on which the claim is founded creates doubt as to what facts and what level of detail the plaintiff is expected to furnish – i.e., *facta probanda* or *facta probantia*.[82] This goes beyond the provisions of Admiralty rule 2(1)[83] which only requires that the summons contains a clear and concise statement of the nature of the claim. This is dealt with below in the reasoning of Wallis JA in the *MT Pretty Scene* (SCA).

[75] 2018 (2) SACR 176 (SCA).
[76] Ibid para 31.
[77] 121 of 1998.
[78] Cooke op cit note 60 at 251.
[79] Ibid. See, also, Hofmeyr op cit note 7 at pages 156-158. Hofmeyr argues that the directive has been subject to 'well directed criticism'.
[80] Ibid.
[81] Ibid.
[82] Cooke op cit note 60 at page 251.
[83] Ibid.

In *University of Johannesburg v Auckland Park Theological Seminary and Another*,[84] the Constitutional Court held that interpretation must be approached holistically, that is simultaneously considering the text, context and purpose[85] of a document. This would require the provisions of the admiralty rules and AJRA to be applied according to the words used and adopted by the drafters of the legislation – in line with its context.[86] The word 'concise' is defined in *dictionary.com* as 'expressing or covering much in few words; brief in form but comprehensive in scope.'[87]

Therefore, based on the meaning of 'concise' there should be a succinct, short or brief explanation of events as required by the admiralty rules and the AJRA – as opposed to a more detailed explanation that is generally provided in pleadings. On a proper interpretation of Rule 2(1)(a), the summons ought to follow the format of Form 1, which states that the summons must set out the cause of action in concise terms to avoid 'e*xcessive and unnecessary prolixity'*.

The repetition of the word 'concise' in the AJRA and admiralty rules shows that the plaintiff bears the duty to provide sufficient facts for the defendant to understand the nature of the claim, without including unnecessary details in the summons.[88] The word 'facts' means 'something that is known to have happened or to exist, especially something for which proof exists, or about which there is information'.[89]

It is reasonably expected that the claimant includes relevant facts or information which is available on the date the summons is issued.[90] However, the information included in the summons is limited by the requirements of the legislation. What the court in *The Galaecia* found and transformed into a directive would open the door to 'information imbalance'[91] because when *in rem* proceedings begin, the claimant, generally, is not in possession of all the

[84] *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC).
[85] Ibid para 65.
[86] *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012) 4 SA 593 (SCA) at para 18. Although this case dealt with the interpretation of contract, its principle can be applied to the interpretation of statutes. Wallis states that 'while I agree that the manner in which a court determines the meaning of a statute will differ from the manner in which it will approach a contract . . . it does not, I think, undermine the basic point of Endumeni that text and context go together in the process of interpretation; that one starts with the language and the rules of grammar and syntax, but always viewed in the light of the context, the apparent purpose of the document and, where there is relevant knowledge, the material known to those responsible for its coming into existence. This is not confined to contracts.'
[87] *Dictionary.com* *https://www.dictionary.com/browse/concise*, accessed on 08 September 2021.
[88] Cooke op cit note 60 at page 251.
[89] *https://dictionary.cambridge.org/dictionary/english/fact*, accessed on 16 September 2021.
[90] Cooke op cit note 60 at 251.
[91] Ibid page 252.

information to prove its claim.[92] At most, the claimants have in their possession the contract giving rise to a claim – and no other information.[93] The additional relevant information is generally sourced during investigations which are conducted once the ship has been arrested. For example, in a claim for a damaged cargo, the plaintiff would not know the extent of the damage of its cargo and the cause until the report showing the cause of the damage is delivered.[94] It was the intention of the legislature to afford claimants 'litigating at a disadvantage'[95] more time to source relevant information before filing the particulars of the claim with detailed averments giving rise to the cause of action.[96] It is not necessary that the summons sets out details of the particular cause of action – but it must give a general indication of the cause of action.[97]

Form 1 of admiralty summons is adapted from form 9 of simple summons in terms of the Uniform Rules of Court.[98] It is generally accepted at common law that a summons is described as 'merely a label' for the claim,[99] because a summons is not a pleading.[100]

In *Icebreakers No 83 (Pty) Ltd v Medicross Health Care Group (Pty) Ltd (Icebreakers),*[101] the court was asked to determine whether a summons was a pleading; and whether the delivery of a notice of exception was valid in law, as the plaintiff had issued a simple summons. The court held that there was a 'plethora of authority' for the requirement that only the concise terms of a cause of action[102] must be set out amounting merely to a label.[103] It concluded that a simple summons was not a pleading, and therefore could not be attacked by way of exception.[104] Furthermore, the superior courts had over the years ruled that the provisions of rule 18(4) of the rules of court were not applicable to simple summons, because it was not a pleading.[105]

Admiralty Rule 9 regulates admiralty pleadings. Rule 9(1) starts by providing that 'no pleading shall be required in an action unless the notice of intention to defend is delivered'. Rule 9(3)(a) provides that 'every pleading shall contain a clear and concise statement of the material facts

[92] Ibid.
[93] Cooke op cit note 60 at 251.
[94] Cooke op cit note 60 at 252.
[95] Admiralty Rule 14(3).
[96] Cooke op cit note 60 at 253.
[97] *Sighn v Vorkel* 1947 (3) SA 400 9 (C) at 405.
[98] Cooke op cit note 60 at page 353. See, also, *MT Pretty Scene* (SCA) at para 41.
[99] *Emdom v Margan* 1926 WLD 159 at 162.
[100] *Absa Bank Ltd v Janse Van Rensburg* 2013 (5) SA 173 (WCC) at 15.
[101] 2011 (5) SA 130 (KZD).
[102] Ibid para 5.
[103] Ibid para 11.
[104] Ibid para 12.
[105] Uniform Rules of Court (rules of court).

upon which a party relies for his or her claim, defense or answer, with sufficient particularity to enable the opposite party to reply'. Rule 9[106] clearly excludes a summons since it is issued before a notice of intention to defend is served and filed. It further shows that the legislature in line with the Uniform Rules of Court, contemplated an uncomplicated admiralty practice.[107] The directive does not take into account the distinction between a summons and particulars of claim. Hence, some judges apply a strict approach,[108] particularly when adjudicating proceedings *in rem* insofar as the content of summons is concerned. Therefore, in light of the above cases and the uniform rules, form 1 only requires that the facts in terms of Rule 2(1) should be sufficient to enable the defendant to ascertain the grounds upon which the claim is based.[109] The emphasis on providing further and full facts contradicts the requirements of rule 9 and uniform rule 18.

Sufficient particulars to sustain the claim are considered present if the plaintiff offers enough facts to allow the defendant to identify the claim – that is the elaboration of when and where the alleged breach occurred.[110] The determination would thus depend on the facts and circumstances of each case. In the *MT Pretty Scene* (SCA), it was argued by the defendant that the plaintiff failed to disclose the facts for the foundation of the claim.[111] However, the plaintiff had attached voluminous arbitration awards to its summons to enable the defendant to be aware of the cause of action.[112] The attachment of the arbitration awards provided the defendant with sufficient particulars to identify the basis of the claim. Similarly, in *The Galaecia,* the contents of the affidavit deposed to in the application to set aside the arrest, showed that the defendant was aware of the contract relied on which was the basis of the underlying claim.

The directive also requires that the signatory of the certificate be an attorney practising in the court in which the summons is issued. The maritime practitioners have encouraged and

[106] Rule 9(4) further provides that where damages are claimed, it shall not be necessary to state particulars of damage, provided that the amount and nature of the damages claimed is stated; and rule 9(5) states that no further particulars may be requested for the purposes of pleading, and no exception may be taken to any pleading on the ground that it is vague and embarrassing.
[107] *SY Sandokan*: *Owner of the SY Sandokan v Liverpool and London Steamship Protection and Indemnity Association Ltd* 2001 (3) SA 82 (D) at 827D-828J.
[108] See the decision of *The Galaecia*: *Vidal Armadores SA (Owner of the MFV "Galaecia") v Thalassa Export Co Ltd* (2006) JDR 0379 (D); *Galsworthy Limited v Pretty Scene Shipping and MT Pretty Scene*, Case No. A23/2015 unreported judgment of KwaZulu-Natal Local Division, exercising its admiralty jurisdiction (31 October 2016); *Galsworthy Limited v Pretty Scene Shipping SA* 2019 JDR 0374 (KZD).
[109] Admiralty rule 2(1)(b).
[110] *The Jangmi*, [1989] EWCA Civ J0308-464.
[111] *MT Pretty Scene* (SCA) supra note 9 above para 51.
[112] Ibid.

welcomed this part of the directive in line with Combrinck J's ruling that it was preferable for the plaintiff's attorney to personally sign the certificate.

The directive further requires the attorney within the court's jurisdiction to request that the Registrar issue a warrant without referring a matter to the judge.[113] The submission must include 'a statement that the attorney knows of no circumstances making it desirable to refer the issue of the warrant to a judge'.[114] This requirement raises a presumption that the attorney should know whether there were any obstacles to the arrest.[115] If no such request is made in the certificate, the Registrar will automatically refer the matter to the judge for a decision on whether the warrant of arrest should to be issued.[116]

Cooke argues that this requirement poses some difficulties:

a. First, the arresting party's attorney would be less robust in interrogating the validity of a claim so as to meet the requirements of a Rule 4(3) certificate, and a more robust approach would result in the arresting party's attorney advising on the prospects of success and the likelihood of the wrongful arrest claim;[117]

b. Secondly, there may be a temptation to obtain minimum information regarding the claim, so as to meet the requirements of the certificate;[118]

c. Thirdly, the statement has implications for attorney–client privilege.[119] Cooke argues that a client may be hesitant to disclose all the relevant facts or information, which may then hinder a successful arrest.[120] This point is further embraced by the fact that at the commencement of arrest proceedings, claimants ordinarily have less factual information to support the arrest, and thus the disclosure of such information may be limited while the client awaits more evidence such as engineers' reports and the assessment reports of the damages in a damages claim; and [121]

d. Lastly, the attorneys who foresee a risk of the claim aborting may be reluctant to sign the certificate, as this may pose liability for costs *de bonis propriis* or a

[113] Practice directive supra note 27 para 3.
[114] Ibid.
[115] Cooke op cit note 60 above at 256.
[116] Practice directive 27.
[117] Cooke op cit note 60 above at 257.
[118] Ibid.
[119] *S v Safatsa* 1988 (1) SA 868 (A) at 886B-C.
[120] Cooke op cit note 60 at 257.
[121] Ibid.

> disciplinary action by the Legal Practice Council if it can be proved that the arrest was ill-conceived in the knowledge of the attorney. This may result in a sound claim being delayed and the arrest being frustrated.[122]

In theory a judge will not be available to hear the matter, in particular if the *in rem* arrest papers are issued late at night, on Friday afternoon and/or on weekends. Furthermore, in practice, the judge may only be available to hear the matter a day or a few hours later.[123] For example, if a ship is calling in the Durban port for bunkers only, the arrest may be delayed and the ship may leave the jurisdiction by the time the judge is available to hear the matter.[124] Cooke posits that this could cause delays in obtaining an arrest order (ranging from a few hours to a few days) if a judge will not be available to hear the matter immediately, in particular if the *in rem* arrest papers are issued late at night, on Friday afternoon and/ or on weekends. This may be overstating the point as it is a requirement that there is always a judge on duty who can be approached at any time of the day or night if a matter is urgent. Certain practitioners have attended at judges' homes to move urgent arrest applications and have had counsel arguing an arrest application at midnight. There may be rare, extremely urgent matters where an additional hour or two could jeopardise the arrest, but in such instances if a practitioner envisaged having to seek such an order arrangements could be put in place to obtain the order before the vessel is due to arrive.

3.6 *MT PRETTY SCENE* ON THE PROPER APPLICATION AND INTERPRETATION OF ADMIRALTY RULE (2)(1) AND THE PRACTICE DIRECTIVE 27

The facts of this case were discussed in detail in Chapter 1. However, the facts relating to the validity of a summons are briefly summarised here, for ease of reference.

The arrest was affected against the ship *MT Pretty Scene* on the allegation that it was an associated ship of the *Jin Kang*. The arrest was made *in rem* and the summons was issued out of the High Court, KwaZulu-Natal, Durban, exercising its admiralty jurisdiction. The summons was issued two years earlier – naming as defendants all vessels owned or controlled by Parakou Shipping or its subsidiaries. A summons was issued as a 'protective writ'[125] in order to interrupt

[122] Ibid.
[123] Ibid.
[124] Ibid.
[125] See the case of *MV Seaspan Grouse: Seaspan Holdco 1 Ltd v MS Mare Traveller Schiffahrts GmbH Co KG* 2019 (4) SA 483 (SCA) for definition of the protective writ.

prescription.[126] The matter was brought *ex parte* before the late Mnguni J,[127] who authorised a secrecy direction ordering that the arrest papers be kept in a safe and secret place to prevent arrests of any vessel calling in South African territorial waters from being restrained. This is general practice, as owners may be aware of the risk of arrest and routinely request attorneys to conduct weekly admiralty register checks to determine if there are any summonses issued against their entities.[128]

3.6.1 The first arrest

Pursuant to the secrecy order, when the *MT Pretty Scene* called in the Port of Durban, it was summarily arrested as an associated ship. The owners filed a notice of intention to defend and applied for the arrest to be set aside, arguing that 'the writ of summons failed to comply with Admiralty Rule 2(1) and the practice directive 27 as the summons failed to contain a clear and concise statement of the nature of the claim and a statement of facts on which the claim is based to enable the defendant to identify the claim made against it'.[129]

This matter came before Vahed J who reserved judgment and delivered it after hearing arguments on a full opposed motion. He then ordered the release of the *MT Pretty Scene* based on the invalidity of the summons and without considering other arguments[130] raised by Galsworthy. The arrest was set aside on the basis that the first and second arbitration awards annexed to the summons had nothing connecting the *MT Pretty Scene* or its owner to the claims made,[131] and the summons failed to comply with the practice directive 27 and the requirements of *The Galaecia*. [132] In this regard, the court held that the rules and practice directions must be complied with; compliance with Admiralty Rule 2(1), *The Galaecia* judgment and the practice directive, was peremptory.[133]

Vahed J erred in reasoning that the first and second arbitration awards annexed to the summons contained nothing connecting the *MT Pretty Scene* or its owner to the claims made. The

[126] *Senctrachem Ltd v Prinsloo* (1997) (2) SA 1 (A) at 15J-16D, holding that 'section 15(1) of the Prescription Act 16 of 1969, which provides that the running of prescription is interrupted by the service of summons on the debtor of any process whereby the creditor claims payments of the debt', and it was unnecessary for the interruption of prescription that the summons disclose a cause of action, provided that it was not a nullity incapable of rectification.
[127] The application was argued under case number A20/2015 in the High Court of the KwaZulu-Natal Local Division, Durban (Exercising its Admiralty Jurisdiction).
[128] *MT Pretty Scene* (KZD), para 7.
[129] Practice directive (note 23 above).
[130] Vahed judgment on *MT Pretty Scene*.
[131] Ibid para 17.
[132] Ibid para 22-26.
[133] Ibid para 29.

application made before Mnguni J listed the *MT Pretty Scene* as one of the associated ships targeted for arrest, should they call in South African waters. It did not matter that the *MT Pretty Scene* was not the ship concerned in respect of the claim. An arbitration award was granted against Parakou Shipping in respect of the ship concerned (*Jin Kang*). *MT Pretty Scene* was an associated ship, which was accordingly susceptible to arrest in terms of the deeming provision in section 3(6) and 3(7) of the AJRA. Although Vahed J appreciated that the arbitration award would only refer to the ship concerned, he refused to accept that the arbitration award was linked to the main maritime claim.

The fact that various 'target' ships were included in the summons meant that no specific allegations were made about each associated ship. It is well known that the main purpose of protective writs is usually to interrupt prescription. This is allowed in terms of the AJRA,[134] which provides that an admiralty action is commenced upon the issue of any process for the purposes of institution of the action *in rem*. In relation to associated ships, the claimant is permitted to proceed *in rem* against any number of vessels in a fleet controlled by the debtor.[135] At the time of issuing the protective writs, the claimant would not know which vessel would first call in the port; hence, it is not unusual to issue protective writs against each vessel in a fleet. The reasoning and decision of Vahed J imposed a difficulty to claimants intending to issue protective writs, as it was not possible to provide sufficient facts about the whole fleet.[136]

Furthermore, Vahed's J reliance on *The Galaecia* was ill-founded as that case dealt with whether a claim was a maritime claim. Even though the judgment is unreported, it is generally binding. However, the comments on the summons in *The Galaecia* case were obiter – and accordingly not binding. Vahed J accepted *The Galaecia* reasoning that admiralty summonses were pleadings.[137]

3.6.2 The second arrest

Whilst the *MT Pretty Scene* was under arrest and the respective parties were awaiting judgment to be delivered by Vahed J, Galsworthy had probably foreseen that the *MT Pretty Scene* could be released from arrest. Consequently, on 28 October 2015, Galsworthy issued a summons and a warrant of arrest under a new case number A65/2015. The certificate issued by Galsworthy's attorney stated that the matter need not be referred to a judge in terms of practice directive 27.

[134] Section 1(2)(a) of the Act.
[135] See discussion of protective writs, Cooke op cit note 60 at 255.
[136] Ibid.
[137] *MT Pretty Scene* Vahed judgment.

The Registrar then issued the summons and warrant of arrest. After Vahed J released the *MT Pretty Scene* from arrest on 31 October 2016, Galsworthy's action caused a second arrest of the *MT Pretty Scene* on 28 October 2016, without notice to the attorneys of the *MT Pretty Scene* and/or Vahed J. The owners of the *MT Pretty Scene* then applied to set aside the arrest of the *MT Pretty Scene* based on the invalidity of the summons and that the second arrest was vexatious and an abuse of court processes. Henriques J relied on the facts presented in the affidavit filed under case number A20/2025 and upheld the second arrest on the basis that the fact that Mnguni J had been unaware of *The Galaecia* judgment did not affect the disclosure of facts and circumstances.[138] Henriques J held that the findings relating to association and various citing of defects by Vahed J were 'rectified' in this affidavit because the affidavit provided sufficient and detailed explanation regarding association of the vessels.[139]

3.6.3 Appeal to the Full Bench[140]

Both parties appealed the judgments made against them. Galsworthy appealed against Vahed J's setting aside of the arrest under case number A23/2015, and the *MT Pretty Scene* owners appealed against the decision refusing to release the vessel from arrest. The respective judges refused leave to appeal. The parties then applied to the Supreme Court Appeal (SCA) which granted the parties leave appeal to the full court of the KwaZulu-Natal, Pietermaritzburg.

The full court unanimously (per Mbatha J), regarding the validity of the first and second arrests, confirmed the findings of Vahed J. In turn, Mbatha J held that 'Mnguni J would not have authorised the arrest had he been aware of *The Galaecia* judgment and practice directive 27'. Mbatha J reasoned that Galsworthy was legally required to maintain compliance of the rules, as the protections put up by the rules are 'peremptory' in nature[141] and the practice directive was 'borne out of a binding decision of the court, and it cannot be said to be some kind of a regulatory procedure'[142]

The reasoning of Mbatha J fails to take into account the invalidity of the practice directive when it contradicts the rules of court. In *National Director of Public Prosecutions*, the court

[138] *Pretty Scene Shipping SA & MT Pretty Scene v Galsworthy* (Case no: A65/2016) unreported judgment of KwaZulu-Natal Local Division, Exercising its Admiralty Jurisdiction (22 September 2017) paras 31 and 34.
[139] Ibid para 32.
[140] *MT Pretty Scene* (KZD).
[141] Ibid para 25.
[142] Ibid para 26.

held that the practice directive is junior to the legislation and the rules of court. Therefore, any provisions of the practice directive which cause such inconsistencies are invalid.

Mbatha J then held that in addition to the failure to comply with the practice directive 27, the non-compliance with Rule 2(1)(b) obstructed the constitutional right[143] of the *MT Pretty Scene* owners. The directive drew special attention to the requirements of the Rule 2(1) and 4(3) and did not introduce any new obligations for the arresting party. The directive was merely an emphasis of Rule 2(1) and 4(3).[144] The judge's reasoning is, with respect, incorrect. The directive appears to go further than Rule 2(1). The reasoning that the practice directive is couched as a 'peremptory provision' and serves to 'highlight' the provisions of Rule 2(1). It therefore makes the directive inconsistent with the provisions of Rule 2(1) and leads to direct complications in the drafting of admiralty summons. Hence, it is not merely a 'highlight' of the rule as it requires more facts than the rule itself requires.[145]

If the directive is a mere highlight and is 'not binding' as Mbatha J held, then the court ought to have considered the provisions of the AJRA and admiralty rules strictly, without considering the provisions of the directive.[146] Although the judge accepted that the directive was not binding, she reasoned that it differed from other directives, i.e., '*it cannot be said to be some kind of a regulatory procedure'* (own emphasis).[147] This is a misleading phrase because it implies that this directive is different from other directives made in terms of section 8(4)(b) of the Superior Courts Act because it is sourced from a binding decision of the High Court. Furthermore, this reasoning directly conflicts with the principle set in *National Director of Public Prosecutions*. Hence, the KwaZulu-Natal High Courts appear to apply the provisions of the directive more than the Rule itself.

In addition, Mbatha J held that all pleadings 'must contain a clear and concise statement of the material facts upon which the party relies upon for its claim'.[148] In this regard, Mbatha J essentially reasoned that rule 9(1) did not affect the court's discretionary powers. She then

[143] Ibid para 28. It may be argued that the constitutional rights referred to by Mbatha J relate to section 25 of the Constitution, which prohibits arbitrary deprivation of property.
[144] Ibid.
[145] *President of the Republic of South Africa v South African Rugby Union* 2000 (1) SA 1 (CC), para 141. It was held that some tasks performed by the judicial officers are administrative in nature. The directive in question purports to alter the provisions of the rules.
[146] LTC Harms, *Civil Procedure in the Superior Courts* 3 ed (2006).
[147] Ibid A3.4, 'Where a judge is satisfied that the substantive law demands different treatment of a specific case, he is to apply the law as he finds it*'*.
[148] *MT Pretty Scene* (KZD) supra at para 37. The discretion refers to the discretion granted to judges when hearing a matter to grant a just and equitable decision in the relevant circumstances.

found that a summons amounted to pleadings, as the summons lacked relevant averments in terms of rule 9(5)(b)(i).[149] This is incorrect, as summonses are not pleadings.

Mbatha J dismissed the appeal, in essence ordering that the first and second arrests of the *MT Pretty Scene* be set aside. Galsworthy was then liable for payment of security for costs.

3.6.4 The *MT Pretty Scene* (SCA)

Galsworthy then petitioned the SCA for special leave to appeal against the decision of the KwaZulu-Natal full court. The issues before the SCA were:

a. Validity of the warrant of arrest;

b. The proper application of *The Galaecia* decision and practice directive;

c. The proper approach to admiralty rules 2(1)(b); and

d. Whether the summons was defective.

The judgment of Wallis JA clarified the findings and the errors and contradictions of the lower courts and provided guidance on how admiralty summonses ought to be drafted.

3.6.4.1 Validity of the warrant of arrest

Wallis JA held that Pretty Scene Shipping was required to prove that an order directing the Registrar to issue the warrant of arrest was unlawful and invalid. For the procedural objection to stand, the defect in the summons had to invalidate the warrant of arrest.[150] Both parties incorrectly believed that an invalid summons automatically invalidated the warrant of arrest.[151] Wallis JA held that both were independent, in that each could be validly issued without the existence of the other.

He reasoned that Rule 4(3) allows the Registrar to issue a warrant of arrest only if a summons had been issued, except that a warrant of arrest may be issued without the summons where an arrest has been ordered by the court in urgent matters.[152] For example, where a vessel calls into a port for bunkers and is susceptible to arrest, an arrest can be ordered by a judge based only

[149] Ibid.
[150] *MT Pretty Scene* (SCA) supra note 9 above para 11.
[151] Ibid para 12.
[152] Ibid.

on affidavits or oral evidence[153] being submitted by the claimant, in chambers or at the Judge's home after hours. Wallis JA concluded that there was 'no link between the warrant of arrest and summons; the deficiency of the one does not invalidate the other'.[154]

This raised the question of the correct legal position when the issue of the warrant is not authorised by a judge. It was held that a warrant issued by the Registrar in terms of Rule 4(3) may be rendered invalid if no summons was issued.[155] The Registrar was not a judge and was not authorised to exercise discretion granted to judges in law.

The court decided that the summons issued and the warrant of arrest granted by the judge based on the information provided in the affidavit and rejected by Vahed J and Mbatha J were valid. Mnguni J was correct in relying on the affidavit.[156] Furthermore, the SCA found that Galsworthy correctly argued that Vahed J ought to have considered the affidavit filed before Mnguni J, as the onus rested on the arresting party to justify the arrest.[157] The arresting party may, in principle, rely on grounds not advanced in the summons to sustain the arrest. Thus, it is not wrong to supplement a deficient summons with an affidavit when an arrest was challenged because, regardless of existing deficiencies found in summons, a sufficient case showed that the *MT Pretty Scene* was an associated ship to the *Jin Kang*.[158] In any event, the deficient summons may be amended.[159]

3.6.4.2 *The proper application of The Galaecia and practice directive 27*

The SCA found that the reliance on *The Galaecia* by Vahed J and the full court was an error as the case dealt with the issue of whether a claim was a maritime claim and not the setting aside of the arrest based on procedural grounds.[160]

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[153] Ibid.
[154] Ibid.
[155] *MT Pretty Scene* (SCA) supra note 9 above para 14.
[156] Ibid.
[157] Ibid para 15. *Transol Bunker BV v MV Andrico Unity; GrecianMar SRL v MV Andrico Unity* 1987 (3) SA 794 (C) at 798D to 800E, confirmed on appeal in *Transol Bunker BV v MV Andrico Unity; GrecianMar SRL v MV Andrico Unity* 1989 (4) SA 325 (A).
[158] *MT Pretty Scene* (SCA) supra note 9 above para 15.
[159] *MT Pretty Scene* (SCA) supra note 9 above para 13.
[160] Ibid para 24.

Wallis JA reasoned that *The Galaecia* judgment paid attention to the terms of Rule 2(1)(b) that the three allegations outlined in the summons were conclusions of law without any substantive detail being elaborated.[161] He stated that *The Galaecia* case:

> 'was no more than an extended obiter dictum concerning procedural issues. It had no binding effect and was not adopted in terms in the Act. It only stressed the importance of Admiralty Rule 2(1)(b) without any analysis of its requirements. It has not been reported and its relative anonymity should be preserved.'[162]

With regard to the practice directive, Wallis JA noted that it was more important because it dealt with the functioning of the High Court's inherent powers.[163] However, it did not have similar standing to the rules promulgated under a statute. It may supplement provisions of any rule provided that it did not dethrone the rules governing a certain area of law.[164]

Wallis JA agreed that the first three requirements of the directive were undisputed.[165] However, the disputed requirements related to the provision stating that the 'summons should contain facts upon which the claim is based, and the facts on which association of a ship is founded'.[166]

Wallis JA then held that the lower courts erred in delineating facts for the purposes of summons and the extent to which facts were required in the summons.[167] He reasoned that the lower courts required more information than the provisions set forth in the rules and they assessed the summons based on the requirements of pleadings that did not apply to summonses.[168]

Dismissing the findings of the full court, Wallis JA held that the finding by Mbatha J that Vahed J had 'exercised his discretion judiciously' to set aside the arrest was an error of law – as there was no proof in Vahed's judgment that he exercised such a discretion.[169]

3.6.4.3 *The proper approach to Admiralty Rule 2(1)(b)*

Wallis JA held that Admiralty Rule 2(2) required that the summons adopt the same form and style as Uniform Rule 17(4), which requires 'the identification of the defendant – name,

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[161] Ibid.
[162] *MT Pretty Scene* (SCA) supra note 9 above para 25.
[163] Section 173 of the Constitution of the Republic of South Africa, 1996 (the Constitution).
[164] *MT Pretty Scene* (SCA) supra note 9 para 26. See, also, *National Director of Public Prosecutions* 2018 (2) SACR 176 (SCA) at para 31.
[165] The undisputed provisions of the directives are: (a) it is desirable that the person giving the certificate under Rule 2(3) be an attorney practising in the KwaZulu-Natal Division; (b) that the signatory should state that they know of no circumstances making it desirable that the matter be referred to a judge; and (c) that the signatory should specify the source of their knowledge.
[166] *MT Pretty Scene* (SCA) supra note 9 above at para 27.
[167] Ibid.
[168] Ibid para 44.
[169] Ibid para 32.

address, occupation and if being sued in a representative capacity, that capacity – and the full names, gender (if a natural person), residence and the representative capacity (where relevant) if suing in a representative capacity, of the plaintiff'.[170] However, the admiralty rules permit the ship to be cited as the defendant in the action *in rem*[171] and the owners or insurers of the ship or the cargo, master and crew of the ship to be cited as plaintiffs.[172] These are 'not complicated and burdensome'[173] requirements of the admiralty rules.

Wallis JA then provided a detailed comparison of admiralty rules with Uniform Rule 17(4).[174] In terms of Rule 17(4), a simple summons required no more than a 'label of the claim'[175] or a general indication of the claim made against the defendant.[176] It did not require details as required in the pleadings.[177] Admiralty Rule 2(1) (a) and form 1 adopted the format and requirements of rule 17(4), and there was no indication that the rules require more details than in the said summons.[178] Furthermore, an *in rem* summons does not distinguish between liquidated and unliquidated claims; no pleadings are required unless the action *in rem* is defended.[179] Wallis JA held that this was consistent with the earlier admiralty practice which required no pleadings to be filed unless ordered by the court.[180]

Wallis JA also correctly summarised the content of the admiralty rule 2(1)(a) which ought to be followed by the High Court:

> '1 [A]dmiralty Rule 2(1)(a) requires only a clear and concise statement of "the nature of the claim". A clear and concise statement of the material facts on which the claim is based, with sufficient particulars to enable the other party to reply thereto, is only required when it becomes necessary to file particulars of claim; and
>
> 2 Subrule (b) requires that sufficient particulars of the claim are given to enable the defendant to identify the facts and contentions on which the claim is based. Beyond the

[170] Ibid para 42.
[171] Rule 2(4).
[172] Rule 2(3).
[173] *MT Pretty Scene* (SCA) supra note 9 above para 38.
[174] *MT Pretty Scene* (SCA) supra note 9 above para 43.
[175] Ibid.
[176] Ibid para 43. See, also, for generic understanding *Globe Engineering Works Ltd v Ornelas Fishing Co (Pty) Ltd* 1983 (2) SA 95 (C).
[177] Ibid.
[178] Ibid.
[179] Ibid para 43. See, also, Admiralty Rule 9(1).
[180] Ibid. Relying on the case of *Incorporated General Insurance Ltd v Shooter t/a Shooter's Fisheries* 1987 (1) SA 842 (AD), which was conducted under the AJRA without pleadings under the rules applicable before the Admiralty Rules were promulgated.

> few pertinent facts needed to satisfy this requirement, the rule does not require the facts upon which the claim is based to be furnished.[181]

Admiralty Rule 2(1) allows the Registrar, the defending party and the court adjudicating the matter, in circumstances where the matter is not defended or no pleadings have been filed by any party, to be informed in general terms of the nature or the source of the claim. Rule 2(1) does not intend, in any way, that the admiralty summons be equivalent to the particulars of claim, which is what was ruled in the *MT Pretty Scene (SCA)*:

> 'Admiralty Rules 9(1) and (2) direct that particulars of claim are only delivered when the action is defended. It accords with the historic approach of admiralty cases that they should be dealt with quickly, inexpensively and relatively informally. This is reinforced by the fact that in admiralty cases there are no requests for particulars and no exceptions on the grounds that a pleading is vague and embarrassing.'[182]

The court concluded that the provisions of the Practice Directive 27 that seek to regulate the drafting of the admiralty summons have caused confusion,[183] which in turn resulted in the admiralty practice losing the simplicity AJRA and Admiralty Rules that it is intended to have. It was now time to end this confusion.[184] Rule 2 (1) requires that the arresting party put forward sufficient information to enable the defendant to be aware of the claim in broad terms – the facts and contentions which are the primary basis of the claim. This is all that is required by the rule.

Wallis JA held that the *'final sentence in paragraph 2 of the Directive is inconsistent with the requirements of the rule and should no longer be followed and there is no reason to qualify any of the other requirements of the Directive*' [own emphasis]. The sentence continues: 'It is therefore necessary that the summons should contain a statement of the facts upon which the claim is based and a statement of the facts on the basis of which it is stated that the ship is an associated ship.'[185]

3.6.4.4. *The summons was not defective*

Wallis JA found that the summons was not defective, based on the facts that:

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[181] *MT Pretty Scene* (SCA) supra note 9 at para 47.
[182] Ibid.
[183] *MT Pretty Scene* (SCA) supra note 9 above at para 47.
[184] Ibid para 50.
[185] Final sentence of paragraph 2 of the Practice Directive 27, KwaZulu-Natal Provincial Division (note 23 above).

a) the summons contained 12 paragraphs dealing with the two arbitration awards which were both annexed;
b) the defendant knew the nature of the claim against it and the facts on which it was based;
c) it was necessary for Galsworthy to aver that it suffered damages as a result of a repudiated charterparty which was quantified in the annexed arbitration awards; and
d) with regard to association, the summons made repeated reference to the repudiated charterparty; the basis of reliance on section 3(7)(c) was thus clear.[186]

Galsworthy placed facts and contentions to show that *MT Pretty Scene* was an associated ship. The owners were not entitled to more information. It was accordingly found that the summons was not defective.[187]

In addition, the court found that even if the allegations on association in the summons were a conclusion of law, the supporting paragraphs referred to the factual allegations relating to the charterparty.[188] The summons stated that 'Parakou Shipping was the charterer of the *Jin Kang*'.[189] The summons then referred to the deeming provision of the charterer as being the owner of the *Jin Kang*. Accordingly, the defendant was apprised of the facts and contentions for the basis of association.[190]

It was further held that the failure by Galsworthy to challenge the allegation of association showed that Pretty Scene Shipping had satisfied one of the categories listed in section 3(7)(a) of AJRA, which is mainly concerned with the control of two vessels at critical times.[191] The allegation of association was not a surprise to Pretty Scene Shipping, which was apparent in the founding affidavit in an application to set aside the first arrest.[192]

However, in my view, I submit that it should be encouraged by our courts that the claimants in the in rem arrest should set out facts in detail taking into account that an arrest of a ship disturbs the voyage which is a serious business. However, this may open floodgates to technical

[186] *MT Pretty Scene* (SCA) supra note 9 above at para 51.
[187] *MT Pretty Scene* (SCA) supra note 9 above at para 52.
[188] Ibid.
[189] Ibid.
[190] Ibid.
[191] Ibid para 53.
[192] Ibid.

defences. It may also prevent claimants who do not have the full facts about association, because those facts are known only to the defendant, from bringing what is otherwise a good claim. This issue may require a legislative amendment.

3.7 CONCLUSION

As seen above, the practice directive purports to prescribe in detail the contents of the admiralty summons in terms of rule 2(1). What is required in the *in rem* summons is a clear and concise statement of the nature of the claim. Cooke and Wallis JA, among others, have clearly pointed out the shortcomings and inconsistencies of the practice directive 27. The final sentence in paragraph 2 of the directive is inconsistent with the requirements of the rule and should no longer be followed.

Although the Uniform Rules of Court are not generally applied in the admiralty practice, however, certain uniform rules do apply to admiralty matters.[193] The Superior Court judges are advised to apply the uniform rules of court in a manner that does not lead to a conflict with the Admiralty Rules and AJRA. For example, Admiralty Rules 24 and 25 are specifically made applicable to admiralty proceedings. The judgment in *MT Pretty Scene* showed that in the instances of conflict between the uniform rules of court and the admiralty rules, it is important to look into the purpose behind the promulgation of AJRA and the admiralty rules. The purpose and practicality of managing admiralty litigation matters is mainly sourced in AJRA and the admiralty rules. Therefore, in the event of a conflict, AJRA and the admiralty rules' provisions ought to prevail.

Accordingly, it is now settled that the requirements of the directive created obligations that exceed the requirements of the legislation, the regulations and the uniform rules of court, and to that extent the practice directive 27 was found ultra vires by the SCA. The directive has caused various practical problems for clients and practitioners, as far as the content of the summons is concerned.

[193] The Uniform Rules that apply to admiralty proceedings include, amongst others, Uniform Rule 4, Uniform Rule 8, Uniform Rule 17 (3) and 17(4), Uniform Rule 19(3) and Uniform Rules 35 and 37. In terms of Admiralty Proceedings Rule 24, the following Uniform Rules do not (save as provided for in the admiralty rules) apply to admiralty proceedings: 9, 13, 17, 18, 20-23, 25, 26, 29, 30, 32, 43-46 and 50-57 of the Uniform Rules.

CHAPTER 4
CONCLUSION

4.1. Introduction

This thesis has considered the issues of great importance in the academic sphere and practice. The arbitration of maritime disputes is increasing and carries several advantages, such as the controlled timelines for filing pleadings and notices, the lower risk of the late delivery of awards, and the avoidance of pernicious court delays for both clients and practitioners. The Admiralty Jurisdiction Regulation Act, 103 of 1983 (AJRA), provides that an arbitration award is recognised as a distinct maritime claim. Therefore, if an arbitration award is made outside South Africa, it is crucial that practitioners clearly understand the proper approach to procedures that may be utilised to enforce the order made in an arbitration award.

An analysis of the *MT Pretty Scene* shows that *in rem* arrest proceedings allows maritime creditors to arrest the ship concerned or an associated ship. In doing so, our courts and practitioners need to use and follow the wording in a manner in which the law, AJRA and the Admiralty Rules, as it provides the required content of the arrest *in rem* papers, in more particular, the summons and the Rule 4(3) certificate. The Pretty Scene judgment and the guidance it provides will do away with the confusion sourced from the KwaZulu-Natal Practice Directive 27, which is inconsistent with AJRA and the Admiralty Rules. Following the ruling of the *MT Pretty Scene* will provide sensible solutions to the problems such as duplicating information in the admiralty summons and the particulars of claim if the action *in rem* is defended.

4.2. Summary of the Findings

Chapter 1 of this dissertation provided the explanatory background to the relevant provisions applied by the arresting parties when utilising the *in rem* arrest procedure. This chapter discussed the objectives and the underlying purpose of analysing the *MT Pretty Scene (SCA)* judgment. In this regard, the facts of the *MT Pretty Scene (SCA)* were set out and discussed in detail. During an early stage of the dissertation, it was found and discussed that the purpose underlying the arrest proceedings *in rem* is to ensure that the defendant in the proceedings provides security for the claim.

Following this introduction, Chapter 2 considered the nature and the statutory background of the arbitration award law in South Africa. Furthermore, case law was considered to show the legal

principles applicable to the arrest of the associated ship and the phrase "*when the maritime claim arose*" relating to the arbitration award. In this chapter, it was found that the associated ship provisions of AJRA demand a deeper look into the relevant company's management and ownership. The arresting party bears the onus of establishing the association of vessels on a balance of probabilities. In various cases, the level of control required relates to the person who takes decisions for the direction and fate of the relevant companies. In more particular, relating to the time the claim under the arbitration arises, it was shown that the arbitration award is linked to the underlying claim and therefore cannot be separated to the underlying claim. Hence, the claim does not arise at the time the arbitral award is delivered. In addition, the issues relating to insolvency, prescription and the interplay between AJRA and the IAA were discussed.

Chapter 3 looked at the arrest *in rem* procedure in terms of South African law to provide a general understanding of section 3(4) of AJRA, Rule 2(1). In this respect, it was submitted that the meaning of the Admiralty Rule 2(1) is straight to the point and requires that the summons be "clear and concise" as provided in the Admiralty Rules. There is no need to create confusion against the wording of AJRA by enforcing the Uniform Rules of Court in admiralty proceedings. The allegations that ought to be made in the summons were analysed and discussed in the *MT Pretty Scene (SCA)*. It was found that the allegations necessary to be made in the summons must be set out briefly, clearly and concisely. The main reason behind these provisions is that at a practical level, the arresting party is usually not in possession of the full information at the time of the arrest. The court found that the KwaZulu-Natal Practice Directive 27 must be amended to cure the confusion the directive has caused in drafting summons and the certificate in terms of Rule 4(3).

The SCA in the *MT Pretty Scene* confirmed the principles and the purpose of the associated ship provisions in terms of section 3(7)(c) that the deeming provisions renders the charterer liable for a maritime claim and places the charterer in the same position as the owner of the vessel. Accordingly, the *MT Pretty Scene* judgment implies that, with regards to the association, the arrestor is not required to state detailed averments in a summons to prove the association. What is required as per the binding decision of the SCA case laws such as the *MT Pretty Scene (SCA), MV Silver Star, the Heavy Metal* dissenting judgment, and *MV Filippo Lembo* judgments is that the arresting party must point out association. The arresting party may have circumstantial evidence to lead association sourced from, for example, from Aquasis, cross mortgages, and Lloyds Rep reports. Accordingly, the summons that propounds Plaintiff's conclusions and opinions regarding

association is not defective. Association ought to be proved on a balance of probabilities, and there is no extensive detail required to be pleaded in a summons.

4.3. CONCLUSION AND RECOMMENDATIONS

Although, the KwaZulu-Natal Practice directive 27 has not been amended to comply with the judgment of the *MT Pretty Scene (SCA)*, it must be read and applied in the light of the judgment. Admiralty Rule 2(1) provides a precise statutory mechanism for the allegations which must be made in the admiralty summons, and the findings of the South African case law provides clear guidance on the drafting of the summons and Rule 4(3). The practical approach is that the arresting party must set out factual information that will be sufficient to inform the debtor of the claim made against it and comply with Rule 2(1). The arresting party cannot plead everything because, in most instances, facts come to light if the owner of the arrested ship takes the court to its confidence regarding the allegations of ownership during the application to set aside the arrest.

In terms of an arbitration award as a maritime claim, it is apparent that there was previously no clarity in separating the underlying claim and the award. The law is settled now. That is especially so as the Constitutional Court dismissed an application for leave to appeal against the SCA judgment. The arbitration award is derivative to the underlying claim and cannot be detached from the original claim. The fact that an arbitration award is listed as a stand-alone claim in AJRA does not mean that the award ought to be separated from the underlying claim. Accordingly, and in terms of AJRA, the claim of the award arises at the same time the original claim arose.

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UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

10 February 2022

Siphosakhe Phakathi (212528224)
School of Law
Howard College Campus

Dear S Phakathi,

Protocol reference number: HSS/1994/016M
Project title: The presentation of the Original Straight Bill of Lading as a pre-requisite for devilery of goods: A comparative study
Amended title: The enforcement of an arbitration award against an associated ship in South Africa: An analysis of the MT Pretty Scene: Galsworthy LTD v Pretty Scene Shipping and Another 2021v JDR 0711 (SCA)

Approval Notification – Amendment Application

This letter serves to notify you that your application and request for an amendment received on 03 November 2021 has now been approved as follows:

- Change in title

Any alterations to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form; Title of the Project, Location of the Study must be reviewed and approved through an amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

All research conducted during the COVID-19 period must adhere to the national and UKZN guidelines.

Best wishes for the successful completion of your research protocol.

Yours faithfully

[redacted]

.....
Professor Dipane Hlalele (Chair)

/dd