THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 19/ 2010

NAME OF SHIP: *MV IRAN DASTGHAYB*
ISLAMIC REPUBLIC OF IRAN SHIPPING LINES — Appellant

and

TERRA-MARINE SA — Respondent

Neutral citation: ***MV IRAN DASTGHAYB Islamic Republic of Iran Shipping Lines v Terra-Marine SA*** **(19/10) [2010] ZASCA 118 (23 September 2010)**

BENCH: **HARMS DP, LEWIS, PONNAN and MHLANTLA JJA and K PILLAY AJA**

HEARD: **6 SEPTEMBER 2010**

DELIVERED: **23 SEPTEMBER 2010**

SUMMARY: **Admiralty Jurisdiction Regulation Act 105 of 1983 – associated ship – s 7(1)(b) – stay of proceedings for any other sufficient reason.**

ORDER

On appeal from: The KwaZulu-Natal High Court (Durban) (Exercising its Admiralty Jurisdiction) (Patel J)

1 The appeal is upheld with costs.

2 The order of the court below is set aside and substituted with an order in the following terms:

'(a) The respondent's action *in rem* against the *MV Iran Dastghayb* under case number A148/2005 is stayed in terms of section 7(1)(b) of the Admiralty Jurisdiction Regulation Act 105 of 1983 pending determination of the respondent's claims in the arbitration proceedings in London.

(b) The order for the stay of the *in rem* action in paragraph (a) hereof is made subject to the second applicant providing security to the respondent for any final and un-appealable arbitration award in the arbitration proceedings (and also in the *in rem* proceedings should the stay of the action be lifted). Such security shall be restricted to the claims identified in paragraph 59 of the founding affidavit of Mr Reddy at pages 43-45 of the record as arising after 13 December 2000 and limited to the capital sum of USD830 420.43 in respect of:

(i) Unpaid management fees in the sum of USD632 100.00;

(ii) Steel work and repairs in respect of the *MV Eco Elham* in the sum of USD11 000.98;

(iii) Steel work and repairs in respect of the *MV ECO Ekram* in the sum of USD156 044.45;

(iv) P & I Insurance reimbursement in relation to the *MV ECO Ekram* in

the sum of USD15 315.00;

(v) Bunkers at Karachi USD15 960.00,

together with USD99 650.45 in respect of security for interest and USD25 000.00 in respect of legal costs; and

(c) Upon the provision of such limited substitute security the security previously provided by the second applicant shall be cancelled and the respondent is directed to return all and any letters of undertaking furnished in that regard to the applicants' attorneys for cancellation.

(d) The respondent is ordered to pay the second applicant's costs, such costs to include the qualifying fees of the expert witness Dr Iraj Babaei.'

JUDGMENT

PONNAN JA **(HARMS DP, LEWIS and MHLANTLA JJA and K PILLAY AJA concurring):**

[1] During 1995 Eco Shipping Company PJS (ESC), a private joint stock company was registered and incorporated in the Islamic Republic of Iran with a view to providing a vehicle to ten Asian Islamic countries[1] to enable them to engage in shipping as a joint venture. On the formation of ESC, the appellant, the Islamic Republic of Iran Shipping Lines (IRISL), a ship owner incorporated and registered according to the laws of the Islamic Republic of Iran, bareboat chartered two vessels, the *Eco Elham* and the *Eco Ekram*, to ESC.

[2] By written agreement dated 27 January 1997 the respondent, Terra-Marine SA (Terra-Marine), a company duly registered and incorporated with limited liability in accordance with the laws of Switzerland, was contracted to manage and administer the vessels on behalf of ESC. In terms of the written Ship Management Agreement between ESC and Terra-Marine, the latter had inter alia the following responsibilities:

(a) to employ and recruit personnel to crew the vessels;
(b) to maintain the vessels;
(c) to supply the vessels with provisions; and
(d) to generally manage the vessels in accordance with the usual applicable international practice and to thereafter account to ESC.

[3] Clause 6.9 of the Agreement provided:

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1 The ten states, all parties to the treaty of Izmir of 1992, were the Islamic Republics of Iran, Pakistan and Afghanistan and the Republics of Turkey, Azerbaijan, Kazakhstan, Turkmenistan, Uzbekistan Kyrgyzstan and Tajikistan.

'In case of any controversy arising out of the interpretation or enforcement thereof, it should at the first place be settled through mutual negotiation. If the parties fail to reach an agreement in this way, then the matter shall be submitted for arbitration in London to be adjudged under the provisions of English laws.'

Disputes did indeed arise between Terra-Marine and ESC resulting in the former commencing arbitration proceedings against the latter in London. A sole arbitrator was appointed during November 2003. Terra-Marine, as the claimant, delivered its points of claim during October 2004 and ESC its defence and counter-claim during December 2004. On 10 January 2005, by resolution of its members, ESC was placed in liquidation and Mr Syrious Khakpour was appointed its liquidator. ESC is now represented by its liquidator in those proceedings.

[4] On 23 December 2005 and whilst the London arbitration proceedings were still pending, Terra-Marine commenced an action *in rem* against some 92 vessels including the *MV Iran Dastghayb* by the issue of an *in rem summons*. On 6 March 2006 the *Iran Dastghayb* was arrested pursuant to that action in terms of an order granted by the Durban and Coast Local Division of the High Court in the exercise of its admiralty jurisdiction in terms of the Admiralty Jurisdiction Regulation Act 105 of 1983.

[5] The order for the arrest of the *Iran Dastghayb* was sought and obtained on the basis that the *Iran Dastghayb* on the one hand and the *Eco Elham* and the *Eco Ekram* on the other are associated ships within the meaning of that expression as defined in s 3(7) of the Act. The *Iran Dastghayb* was thereafter released from arrest after security was furnished by its owner IRISL in the total sum of USD 1 999 220,[2] with the result that the vessel remained subject to a deemed arrest.

[6] On 6 October 2006 IRISL launched an application for an order inter alia: staying the *in rem* proceedings in terms of s 7(1)(b) of the Act pending determination of Terra-Marine's claims in the arbitration, subject to it providing security for the claims, interest and costs in the arbitration in substitution of the security already furnished; and directing Terra-Marine to furnish counter security for IRISL's counterclaims, interest and

2 Being USD 1 592 113 in respect of capital claims, USD 382 107 in respect of interest and USD 25 000 in respect of costs.

costs in the arbitration.[3] The thrust of IRISL's case was that: (a) the claims which Terra-Marine sought to enforce against the *Iran Dastghayb* in the *in rem* action were claims arising out of a contract between ESC and Terra-Marine that contained an express provision requiring all such claims to be submitted to and determined by arbitration; and (b) those claims were already the subject of pending arbitration proceedings instituted by Terra-Marine against ESC in London in terms of that agreement.

[7] By the time the application came to be argued in the court below IRISL had abandoned its primary relief relating to Terra-Marine furnishing counter security. It also no longer sought, as presaged in its replying affidavit, an order that the court simply decline in terms of s 7(1)(a)[4] to exercise jurisdiction in the *in rem* action, with a consequential dismissal of the action with costs and the return to IRISL of the security furnished. In addition to its claim that the action should be stayed, it also persisted in its contention both in this court and the one below that a number of the claims sought to be advanced in the *in rem* action, whilst permissible claims in the arbitration proceedings against ESC, were not claims enforceable *in rem* against the *Iran Dastghayb* because it was not an associated ship in relation to any claim that arose prior to 13 December 2000.

[8] Patel J, who heard the application, accepted Terra-Marine's submission that because IRISL was not a party to the agreement giving rise to the claims sought to be advanced *in rem* against its vessel the *Iran Dastghayb* it could not invoke the arbitration clause. He accordingly held that there was no basis upon which IRISL could seek a stay of the *in rem* action. Finding that conclusion to be dispositive of the application in its entirety, the learned judge dismissed the application with costs but granted leave to IRISL to appeal to this Court.

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3 Being USD 2 391 405.90 in respect of capital claims, USD 286 968.70 in respect of interest and USD 25 000 in respect of costs.

4 The section provides: 'A court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that any other court in the Republic or any other court or any arbitrator, tribunal or body elsewhere will exercise jurisdiction in respect of the said proceedings and that it is more appropriate that the proceedings be adjudicated upon by any such other court or by such arbitrator, tribunal or body.'

[9] Under s 3(4) a maritime claim may be enforced by an action *in rem* in two circumstances, namely where the claimant has a maritime lien over the property to be arrested or where the owner of that property would be liable to the claimant in an action *in personam* in respect of that claim. In terms of s 3(4)(b) a maritime claim may be enforced by an action *in rem*: 'If the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned'. Section 3(4) thus identifies the necessary conditions for bringing an action *in rem*. Section 3(5) deals with the manner in which such an action is to be brought, namely by the arrest:

'within the area of jurisdiction of the court concerned of property of one or more of the following categories against or in respect of which the claim lies:

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

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

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

(d) the freight . . . , '

[10] Two issues thus arise on appeal: first, was the court below correct in refusing to stay the *in rem* proceedings in terms of s 7(1)(b) of the Act pending determination of the claims in the arbitration; and, second, is the *Iran Dastghayb* an associated ship in relation to maritime claims that arose prior to 13 December 2000?

[11] Before those issues are examined, it will be expedient, I consider, for a proper understanding of the matter, to first record some general observations. A useful starting point is s 3 of the Act, which sets out the circumstances in which a maritime claim may be enforced by an action *in personam* or by an action *in rem*. In *The Berg*,[5] Milne JP analysed the nature of an action *in rem* in these terms:

'I think it is also important to bear in mind that the Act does not refer to claims *in personam* and claims *in rem*, but to claims which may be enforced either by an action *in personam* or an action *in rem*. Once a claim is a maritime claim, then there are two *methods* of enforcing that claim where the Court exercises its admiralty jurisdiction. One is by means of an action *in personam* and the other is by means of an action *in rem*. In other words, it is not so much the nature of the cause of action that is affected by whether the action is *in personam* or *in rem*, but the means by which the same cause of action is

5 *Euromarine International of Mauren v The Ship Berg* 1984 (4) SA 647 (N).

enforced. This distinction is clearly brought out in considering the historical origins of actions *in rem* in British law.'[6]

According to the learned Judge President:

'What does appear to be clear in both British and American admiralty law is that the essence of the action *in rem* is the right to arrest a ship, and the right to satisfy any judgment from the proceeds of the sale of the ship or bail or security provided in respect thereof.'[7]

[12] Section 3(6) of the Act gives to a claimant with a maritime claim the right to bring an action *in rem* by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose. It provides: '[a]n action *in rem*, . . . may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose'. An associated ship is defined in s 3(7)(a) and (b) of the Act. What is required is the existence of a 'ship in respect of which the maritime claim arose' and an associated ship which is either 'owned, at the time when the action is commenced, by the person who was the owner of the ship concerned when the maritime claim arose' (s 3(7)(a)(i)); or a ship owned 'by a person who controlled the company which owned the ship concerned when the maritime claim arose' (s 3(7)(a)(ii)); or a ship owned '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' (s 3(7)(a)(iii)).

[13] Some five weeks after that 'novel procedure'[8] was introduced into our maritime law, it was invoked by a claimant, Euromarine, in an application for the arrest of the *Berg*, a vessel owned by a South African company, in order to furnish security for an arbitration in London. The validity of the arrest was challenged. Euromarine had time-chartered a vessel called the *Pericles* from its owners, the second respondents in the high court application. During the subsistence of that charterparty an explosion occurred on board the *Pericles*, which was then berthed in Durban harbour. Euromarine alleged that the explosion was due to the unseaworthiness of the *Pericles* in breach of the

6 At 653B-D.
7 At 654I-655A.
8 *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 824C-D.

obligations of its owners under the charterparty. It had suffered substantial damages in consequence of the explosion, which it was seeking to recover from the owners of the *Pericles* in arbitration proceedings in London. The purpose of the arrest of the *Berg* was to enable Euromarine to obtain security for those proceedings. Section 5(3)[9] of the Act made that possible. The owners accepted that Euromarine had a claim that was enforceable by an action *in rem* against the *Pericles*. They also accepted that the *Berg* was an associated ship in relationship to the *Pericles* and accordingly that the claim could have been pursued in an action *in rem* in South Africa instituted by the arrest of the *Berg* as an associated ship. However, they contended that such an action remained an action *in rem* against the *Pericles* and was not an action *in rem* against the *Berg* itself. Milne JP disposed of that argument in these terms:

'As that action would be commenced by the arrest of the *Berg*, and as any judgment in that action would be satisfied from the proceeds of the *Berg*, I cannot conceive that the action could be said to be anything other than an action *in rem* against the *Berg*.'[10]

[14] Later the learned Judge President stated:

'As I have already mentioned, however, there is a vital distinction between an action commenced by arresting the *Berg* in terms of s 3(5) and an action commenced by arresting the *Pericles* in terms of that section. It is, quite simply, this, that the action is against a different defendant. This is not a mere matter of form. If the *Berg* is arrested in terms of s 3(5) read with ss (6) and (7), then, at any rate, if the action is undefended, and is successful, it is only the fund derived from the sale of the *Berg* which can be used to satisfy the judgment. In what sense can it be said, one might ask, that the action instituted by arresting the *Berg* would remain one against the *Pericles*? If the American approach is adopted to actions *in rem*, then the *Berg* is the defendant and not the *Pericles*. If the British approach is adopted, then the only sense in which it can be said that an admiralty action *in rem* is against a particular vessel is in the sense that it is the proceeds of that vessel that are used to satisfy the judgment, and in this sense clearly the

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9 Section 5(3) of the Act provides: '(*a*) A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action *in personam* against the owner of the property concerned or an action *in rem* against such property or which would be so enforceable but for any such arbitration or proceedings.
(*a*A) Any property so arrested or any security for, or the proceeds of, any such property shall be held as security for any such claim or pending the outcome of any such arbitration or proceedings.
(*b*) Unless the court orders otherwise any property so arrested shall be deemed to be property arrested in an action in terms of this Act.'

10 At 654F-G

action commenced by arresting the *Berg* remains one against the *Berg*.'[11]

On appeal[12] that was endorsed by Miller JA in these terms:

'Such a provision, it was said, in effect provided the legal machinery by which a claim could be enforced. It is true that s 3(6) read with s 5(3) describes a method for recovery of money due to one who has suffered injury or loss for which he has a maritime claim, but it does much more than that; it gives to the claimant a right which he never had before, namely to recover what is due to him from a party who was not responsible for the damage suffered by him. It provides the claimant not only with a method of recovery but with an additional or alternative defendant. And by that token, it is creative of new liabilities or obligations in owners of ships, or the potential thereof'.

[15] That reasoning, according to M J D Wallis *The Associated Ship and the South African Admiralty Jurisdiction*[13] is not only compelling but inescapable. He adds:

'[i]f one accepts, as English courts have accepted from at least the latter part of the 19th Century, that the action *in rem* has the effect of "impleading the owner of property to answer to the judgment of the court to the extent of his interest in the property", then it is the owner of the associated ship who is impleaded by the arrest of that vessel, not the owner of the ship concerned. If the American approach is adopted the fact is that the action is directed at a different vessel. It necessarily follows that the proper characterisation of the action instituted by the arrest of the associated ship is that it is an action *in rem* against the associated ship, not an action *in rem* against the ship concerned.'[14]

[16] The judgments in the *Berg* thus established from the very inception of the Act that an action *in rem* against an associated ship is something separate and distinct from an action *in rem* against the ship concerned. Thus, whilst the action *in rem* traditionally impleads the owner of the ship concerned it can now be used to implead a third party, albeit one closely connected to the owner of the ship concerned.[15]

[17] The decks have now been cleared for a consideration of the first issue, namely the stay application. Section 7(1)(b) of the Act provides:

'A court may stay any proceedings in terms of this Act if it is agreed by the parties concerned that the matter in dispute be referred to arbitration in the Republic or elsewhere, or if for any other sufficient

11 At 655H-656A.
12 *Euromarine International of Mauren v The Ship Berg* 1986 (2) SA 700 (A) at 712C-E.
13 Unpublished PhD Thesis, University of KwaZulu-Natal (2010) p 145.
14 Wallis p 145.
15 Wallis p 146.

reason the court is of the opinion that the proceedings should be stayed.'

[18] In *MV Achilleus v Thai United Insurance Company Ltd & others*[16] Howard JP[17] considered himself bound by the decision of the full bench of that division in *MV Spartan-Runner v Jotun–Henry Clark Ltd*[18] to hold, conformably to English law, that a plaintiff who sues in this country in breach of an agreement to refer disputes to a foreign court bears the onus of showing why the court should not stay the proceedings and thereby give effect to the agreement. The court referred in this regard to the summary of the relevant principles by Brandon J in *The Eleftheria,*[19] which was adopted by the Court of Appeal in *The El Amria*:[20]

'(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

(2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

(3) The burden of proving such strong cause is on the plaintiffs.

(4) In exercising its discretion, the Court should take into account all the circumstances of the particular case.

(5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded:

(a) In what country the evidence on the issues of facts is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.

(b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.

(c) With what country either party is connected, and how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(*e*) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would: (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlike to get a fair trial.'

16 1992 (1) SA 324 (N) at 334C-J.
17 Galgut and Combrinck JJ concurring.
18 1991 (3) SA 803 (N).
19 [1969] 2 All ER 641 (PDA) at 645.
20 [1981] 2 Lloyd's Rep 119 (CA) at 123-4.

[19] Thus in principle, where claims arise out of an agreement which requires that they be determined in some other jurisdiction, a party resisting a stay of those proceedings bears the onus of showing why it should be permitted nevertheless to pursue those claims here. As it was put in *The Rhodesian Railways Ltd v Mackintosh*[21] the discretion of the court to refuse arbitration, where such an agreement exists, was to be exercised judicially, and only when a 'very strong case' had been made out. The court was there dealing with a different statute, but the comments are no less apposite, because, to borrow from Colman J, it is 'based upon general principles'.[22]

[20] These principles, to the extent that the issue arises between the parties themselves to an arbitration agreement, are well settled. The question here is whether they apply to a third party in the position of IRISL, who is not a party to the arbitration agreement. In arriving at his conclusion that IRISL could not invoke the arbitration agreement, Patel J relied on *Freight Marine Shipping Ltd v S Wainstein & Co (Pty) Ltd & othe*rs,[23] a case involving a claim for damage to cargo carried on board a vessel. Three parties were cited, of whom two were said (in the alternative) to be the carriers of the cargo under the bill of lading. The third was the agent of the carrier cited in terms of the provisions of the Merchant Shipping Act 57 of 1951. The bill of lading contained an arbitration clause. The agent brought proceedings under the Arbitration Act 42 of 1965 to have the action stayed pending arbitration to resolve the question of liability on the claim. That application was dismissed on the basis that the agent was not a party to the arbitration agreement. There the court held that only a party was entitled under that Act to seek a stay for the purposes of enforcing an arbitration agreement.

[21] Of *Freight Marine Shipping Ltd v S Wainstein,* Wallis[24] states:

'The case is relevant because it identifies the basic problem facing the owner of an associated ship in seeking a stay of an action *in rem* properly instituted in South Africa by way of the arrest of an associated ship. Such owner is not a party to the arbitration agreement (or the contract embodying the exclusive

21 1932 AD 359 at 375.
22 *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 391F-G.
23 1984 (2) SA 425 (D).
24 Page 519.

jurisdiction clause) and the problem it faces is therefore that its situation is not encompassed by the language of section 7(1)(b), because it has not been agreed “by the parties concerned” that they will submit their dispute to arbitration or to determination by another court.'

[22] That reasoning formed the bedrock upon which Terra-Marine’s opposition to the stay application rested. But it approaches the section as if it ends with the word ‘elsewhere’. It ignores the disjunctive ‘or’ and all that comes thereafter. The effect of the disjunctive 'or' is to differentiate clearly between two situations when a court may grant a stay in terms of the section. The first where the parties concerned have agreed that the matter in dispute be referred to arbitration and the second *if for any other sufficient reason the court is of the opinion* that the proceedings be stayed.

[23] It follows that Patel J appeared not to appreciate that he was empowered by the legislature to grant a stay in two different circumstances and that in relation to the second he had a far wider discretion. He accordingly limited himself to the first circumstance. Even there he appears to have restricted himself to whether IRISL could 'rely on', in the sense of enforce, the arbitration provision. In respect of that enquiry he concluded that ‘in my view there is no basis upon which the plaintiff could commence arbitration proceedings against IRISL and therefore there is no basis on which IRISL can ask for a stay of the proceedings in this forum’. But that may have been to improperly fetter his discretion in respect of the first circumstance and certainly in respect of the second circumstance he failed to exercise a discretion at all. It thus becomes necessary to consider the second circumstance which, if applicable, will render it unnecessary to resolve whether the first part of the sub-section does indeed encompass a party in the position of IRISL or to determine whether *Freight-Marine Shipping Ltd v S Wainstein* was correctly decided.

[24] In support of its contention that the court should refuse to stay the proceedings, Terra-Marine submits that if the liquidator of ESC formed the view that its claims are good and ESC's counter claims bad, he could simply dissolve the latter mid arbitration thereby bringing those proceedings to an end. Were that to happen, so the contention goes, the prejudice to Terra-Marine would be enormous in terms of wasted time, effort

and money. The matter is dealt with fully in IRISL's replying affidavits. IRISL's expert, Dr Iraj Babaei, an attorney and Professor of Law at the Allameh Tabatabaii University of Teheran, points out that Article 208 of the Iranian Commercial Code provides that a company in liquidation will remain in existence until the liquidation is completed. That, in turn, so he states, expressly requires the 'settlement of all dues and liabilities, collecting of amounts due to the company and the distribution of assets of the company'. The liquidator, according to Dr Babaei, has no power at all to cause a company in liquidation to be de-registered until all claims against the company in liquidation have been resolved or admitted and dealt with in the liquidation and distribution account.

[25] The liquidator confirms that this is and always has been his understanding of the position. In his affidavit he states:

'I have been advised that Terra-Marine SA have suggested that there exists a risk that I would frustrate their pursuing of their claims in the current arbitration proceedings in London by purporting to finalise the liquidation of ESC without reference to that claim and thereafter proceeding to deregister ESC.

I can categorically state that I have no such intention and, indeed, that course of action had not occurred to me.

I appreciate (and have always appreciated) that the finalising of the liquidation of ESC requires that all claims, whether in favour of or against ESC, be resolved and dealt with in ESC's liquidation account.

My understanding is that I cannot lawfully purport to finalise the liquidation of ESC whilst the claims of Terra-Marine remain in dispute.'

[26] Terra-Marine advanced no other factual circumstance in support of its contention that the court should refuse to stay the proceedings. Properly analysed the only ground advanced by Terra-Marine amounted, absent any factual foundation as I have shown, to little more than a speculative hypothesis. Moreover, since December 2004 when ESC filed its defence and counter claim, no further steps have been taken by Terra-Marine in the arbitration proceedings commenced by it in London. Sufficient time one would have imagined for it to have tested its hypothesis should it have been so inclined. But even if the hypothesis sought to be advanced by it were to have some validity, it needs be

remembered that the court is not being asked to decline jurisdiction in terms of s 7(1)(a), but rather to grant the less drastic relief of a stay of proceedings. Thus in time, were Terra-Marine's fear of a dissolution of ESC at the hands of the liquidator to materialise, it could always return to the high court for that order to be lifted or varied to the extent necessary to address that exigency.

[27] Significantly, Terra-Marine, unlike ESC, was not without an alternative remedy. Terra-Marine appears, on its own version, not to be in a position to meet any award that may issue against it in favour of ESC by virtue of the latter's counter claim in the arbitration proceedings. It thus appears to be intent on having its claims dealt with in South Africa, where it has secured security for itself by means of the *in rem* arrest of the *Iran Dastghayb.* ESC on the other hand will have to proceed to arbitration in London without security. On Terra-Marine's approach, ESC, not being a party to the suit in South Africa, cannot avail itself of a claim in reconvention against Terra-Marine. It thus has to forfeit the procedural advantages accruing to a plaintiff in reconvention, namely, that convention and reconvention are usually dealt with together and that the plaintiff in convention is bound to recognise the jurisdiction of the court in respect of the claim in reconvention (*LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd*).[25]

[28] The answer to that conundrum, so it was submitted, was that ESC could always cede its claim to IRISL. However, any such agreement concluded for that purpose would, in and of itself, show that ESC could never have genuinely intended to make a cession of its claims. Rather it would have been entered into to enable IRISL to do something for the ultimate benefit of ESC, that the latter could not itself do, namely to prosecute a counter claim and hand any proceeds that may be secured from it to ESC. Our courts will refuse to recognise such an agreement on the basis that the parties had no real intention to enter into an agreement of cession and that it therefore is not a true reflection of the real agreement between the parties (*Skjelbreds Rederi A/S & others v Hartless (Pty) Ltd*).[26] IRISL will thus be precluded from suing on it. It follows that unlike Terra-Marine, ESC will be remediless in this country.

25 1974 (1) SA 747 (A) at 764B.
26 1982 (2) SA 710 (A).

[29] The alternative remedy available to Terra-Marine is a security arrest afforded by s 5(3) of the Act to a maritime claimant in the position of Terra-Marine. Before us counsel conceded that had Terra-Marine adopted that course, IRISL would have had no answer to it. That procedure though would have required a comprehensive application by Terra-Marine setting out on oath, inter alia, that it has (a) a claim enforceable by an action *in rem* against the *Iran Dastghayb*; (b) a prima facie case in respect of such claim; and (c) a genuine and reasonable need for security in respect of the claim.[27] Here the vessel was arrested pursuant to a writ issued in the *in rem* action. Terra-Marine therefore had a much lower threshold to satisfy. All that Admirality Rule 4(3) required was a certificate by it as the claimant (or its attorney) setting out only the barest detail. The practice appears to be that on the strength of that certificate it is usually for the Registrar (who may refer the question whether a warrant should be issued to a judge) to issue the arrest warrant (*The Galaecia*).[28]

[30] When IRISL launched the stay application all it had to go on was the *in rem* summons and particulars of claim. That contained little in support of the proposition that there existed the requisite association or why it was permissible for Terra-Marine to pursue proceedings in South Africa in the face of the arbitration clause in the agreement and the pending arbitration proceedings that it had already commenced in London. It was therefore unsurprising that as the matter progressed, IRISL amended the relief it had originally sought and filed additional affidavits when confronted by the fuller allegations that first saw the light of day in Terra-Marine's answering affidavit. The course the proceedings had taken appears to have led the learned judge astray. He held:

'I might in passing mention that the applicants have sought a stay of the action instituted by the plaintiff by motion proceedings and to have certain issues which would otherwise be determined at the trial to be determined in these application proceedings. Although nothing is irregular about this, the plaintiff is only expected to justify the arrest to the extent that the arrest is challenged in their founding papers in motion proceedings. The procedure adopted by the applicants in seeking to determine certain of the issues

27 *The MV Thalassini Avgi v* at 832I-833A; *Bocimar NV v Kotor Overseas Shipping Limited* 1994 (2) SA 563 (A) at 579B-E.
28 *The Galaecia: Vidal Armadores SA v Thalassa Export Co Ltd* (2006) SCOSA D252 (D).

between the parties in application proceedings carries with it the risk to the applicants in the event that those issues cannot be determined in these proceedings because of disputes of facts then the applicants must lose on those issues which will then have to be determined at the trial in due course.'

His approach overlooks the principle in our law 'that a party cannot by obtaining *ex parte* an order in his favour secure a more advantageous position than he would have been in if the other party had, consequent upon notice, had an opportunity of opposing' (*Weissglass NO v Savonnerie Establishment*).[29]

[31] It may well have been entirely inappropriate for Terra-Marine to enforce its claims in South Africa by way of *in rem* proceedings in circumstances where not only was it contractually obliged to enforce its claims by arbitration in London but was already doing so. But one need not go that far. It suffices to state that it should be fairly obvious that to permit parallel proceedings to commence and run in different fora at the same time and in respect of essentially the same dispute is undesirable. In *Universiteit van Stellenbosch v JA Louw (Edms) Bpk*[30] this court stated:

'As to the undesirability of allowing two different proceedings in two separate tribunals, the *dicta* in the English Court of Appeal in *Taunton-Collins v Cromie and Another*[31] are very apposite. At 333 Lord Denning said:

"It seems to me most undesirable that there should be two proceedings in two separate tribunals – one before the official referee, the other before an arbitrator – to decide the same questions of fact. If the two proceedings should go on independently, there might be inconsistent findings. The decision of the official referee might conflict with the decision of the arbitrator. There would be much extra cost involved in having two separate proceedings going on side by side; and there would be more delay. Furthermore, as counsel for the plaintiff pointed out, if this action before the official referee went on by itself – between the plaintiff and the architect – without the contractors being there, there would be many procedural difficulties. For instance, there would be manoeuvres as to who should call the contractors, and so forth. All in all, the undesirability of two separate proceedings is such that I should have thought that it was a very proper exercise of discretion for the official referee to say that he would not stay the claim against the contractors."

At 334 Lord Pearson said:

"It can be said in support of the application here that that is what the parties have agreed and that, when the question is brought before the Court, the Court should be willing to say by its decision what the parties have already said by means of their own contract. That is one principle. The other principle is that a

29 1992 (3) 928 SA (A) at 936F-G.
30 1983 (4) SA 321 (A) at 335H-336A.
31 [1964] 2 All ER 332.

multiplicity of proceedings is highly undesirable for the reasons which have been given. It is obvious that there may be different decisions on the same question and a great confusion may arise. Counsel for the plaintiff also was able to point out the serious procedural difficulties which might arise if one had an arbitration between two parties and an action between different parties"'

There would thus ordinarily be much to be said for staying one or other of the two proceedings to allow the merits of the claim to be determined in a single forum.

[32] Moreover, here the result of the *in personam* proceedings must necessarily determine the result of the *in rem* proceedings. Counsel for Terra-Marine was constrained to concede that. Thus if Terra-Marine's claim in the arbitration were to be dismissed, the foundation of the *in rem* action would of necessity fall away. In this case the court was dealing with a genuine contract of submission. Had Patel J adopted a less technical approach he might have been disinclined to deny IRISL its stay application. It would have been permissible for him, I think, in the exercise of his equitable discretion, to have given effect to the substance of the agreement to arbitrate. Thus the mere existence of the arbitration clause coupled with the concurrent proceedings, irrespective of whether or not the arbitration clause could have been invoked by IRISL ought to have caused Patel J, to paraphrase from Lord Pearson, 'to be willing to say by his decision what Terra-Marine had already said by means of its contract'.

[33] Section 3(7)(a) of the Act differentiates between a true sister ship and an associated ship. John Hare[32] describes the latter provision as a novel one[33] 'of South African law that sets it apart from the arrest practice of all other maritime states'. Terra-Marine had commenced an *in rem* action against 92 vessels including the *Iran Dastghayb.* Had any of the other 92 vessels entered South African waters prior to the *Iran Dastghayb* it, like the *Iran Dastghayb*, would also have been liable to arrest. If that vessel had been a true sister ship as opposed to an associated ship as occurred here, then the main contention now advanced by Terra-Marine, namely that the agreement to arbitrate cannot be invoked by one not a party to it, would not have been available to Terra-Marine. The effect of invoking the associated ship provision in this case is that

32 *Shipping Law & Admirality Jurisdiction in South Africa* 2 ed (Juta) p107.
33 Prof H Booysen 'South Africa's New Admirality Act: A Maritime Disaster*?'* 1984 *MBL* 75 at 83 describes it as a revolutionary idea.

Terra-Marine has been able to garner for itself a benefit in this country that it could not secure in any other maritime state. But, although permitted by the Act, its successful invocation is dependent on chance and happenstance, namely whether the associated ship that first finds itself in South African waters happens to be an associated ship as opposed to a true sister ship.

[34] It is well established that effect must be given, if the terms of the contract permit, to the obvious intention and agreement of the parties. That applies no less to choice of law and chosen forum clauses in contracts. Here the arbitration proceedings that are currently extant are subject to the English Arbitration Act and the other laws of England. It would obviously be preferable that such disputes as exist be determined in England under the auspices of an English arbitrator as opposed to the inconvenient and expensive alternative of South African courts having to decide such questions on the basis of expert evidence. There are certain advantages as well, such as finality, that a claimant in an arbitration enjoys over a litigant who has to pursue its rights in a court. And one who has contracted to allow the other contracting party those advantages should not be readily absolved from that undertaking.

[35] Courts should generally be slow to encroach upon a decision to refer a dispute to private arbitration, for to do so would be to disregard the principle of party autonomy.[34] That ought to apply with greater force in a situation such as this, for as Wallis points out:

'However, there seems to be no escape from the conclusion, however unsatisfactory, that by bringing an action *in rem* against an associated ship a claimant can defeat the provisions of both an arbitration clause and an exclusive jurisdiction clause in the contract underlying the claim.'[35]

Were that to be so, as indeed it must be on that analysis, a cynical litigant could with impunity circumvent the terms of a bargain that the other party to it may have thought had been earnestly struck. The other contracting party's rights could thus be rendered nugatory by a maritime claimant by invoking the associated ship jurisdiction, thereby imperilling the important principle of party autonomy. More importantly it could

34 *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC); *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 4; R H Christie 'Arbitration: party autonomy or curial intervention: the historical background' (1994) 111 *SALJ* 143.
35 Page 520.

encourage a practice that should be deprecated, namely forum shopping.[36]

[36] In my judgment the cumulative effect of the factors that I have alluded to, constitute sufficient reason for a stay of the action in terms of s 7(1)(b) and Terra-Marine has failed to show any cause for the court to exercise its discretion against the granting of it. I am thus satisfied that the judgment of the court below refusing a stay was wrong.

[37] I now turn to the second issue, namely whether the *MV Iran Dastghayb* is an associated ship in respect of claims that arose prior to 13 December 2000. The only claims that the court has jurisdiction to entertain are those which could properly be enforced *in rem* against the *Iran Dastghayb*. Although IRISL was the applicant in the stay application, Terra-Marine bore the onus of proving that its original application for the arrest of the *Iran Dastghayb* was correctly granted.[37] Terra-Marine thus retained the onus of justifying the arrest in relation to each claim. In so far as the discharge of the onus involved matters of fact, these had to be proved on a balance of probabilities.[38]

[38] Since the *Iran Dastghayb* was arrested *in rem* on the basis that it is an 'associated ship' in relation to the *Eco Elham* and the *Eco Ekram* and liable to arrest in their stead in terms of section 3(6) and (7) of the Act, it was for Terra-Marine to establish on a balance of probabilities that in relation to each claim the former was an associated ship of the ship concerned.

[39] It is common cause that 10 states were party to the formation of ESC and that it was intended that each would subscribe for an equal 10 per cent shareholding in ESC. There is no dispute that at an extraordinary general assembly meeting of ESC held on 13 December 2000 a decision was taken to amend the Articles of Association with regard to the shareholding. Captain Khan, Terra-Marine's principal witness, was present at that meeting and signed the minute as a representative of Pakistan. The amendment of the Articles of Association reflected the acquisition by IRISL (on behalf of the

36 *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) para 57.
37 *Bocimar NV* at 578G.
38 *Bocimar NV* at 582B.

government of Iran) of the shares of five[39] of the original 10 member states. The net result was that with effect from that date IRISL acquired 60 per cent of the shares. IRISL contends that the *Iran Dastghayb* cannot be an associated ship save in respect of any claim that arose after that date.

[40] The original agreement[40] establishing ESC provided that each of the 10 member states would subscribe for the initial shares in equal proportions as stipulated in the Articles of Association provided that, if any member state did not effect payment of the share capital subscribed, such state would be allotted one symbolic share and, if a state did not subscribe, its shares would be entrusted to the general assembly or a nominee.

[41] Iranian law required that 35 per cent of the share capital of a company be paid in advance as a requirement of incorporation and this amount was paid in full by IRISL during 1995. It was paid on behalf of all 10 member states by IRISL with the result that each of them was regarded in relation to ESC as having subscribed 'and paid' the advance subscription. Captain Khan disputes this contending that as the sole shareholder which had made any payment, IRISL was in fact the sole shareholder in ESC until the shareholder restructuring which occurred in 2000. The original Articles of Association of ESC[41] (albeit prepared in advance of the payment) records that: (a) the

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39 Turkey, Azerbaijan, Kyrgyzstan, Tajikistan and Uzbekistan

40 The agreement provided:

'III SHARE CAPITAL

It was agreed that the share capital of the Company will be US Dollars Ten Million (US $10 000 000) consisting of US Dollars Ten Thousand (US $10 000) individual shares of US Dollars One Thousand (US $1 000) and parties to this Agreement shall subscribe their initial shares in equal proportion as stipulated in the Articles of Association.

. . . . .

V NON-PAYMENT OF ADVANCE SHARE CAPITAL

Where any Member States for any reason do not effect payment of the share capital so subscribed by them in advance will be allotted one symbolic Share and their share of profits will be ploughed back for their share capital.

VI NON-SUBSCRIPTION OF SHARE CAPITAL

Those Member States who do not subscribe for the Company's share, their shares would be entrusted to the General Assembly or a nominee. The General Assembly may decide upon the above as per current ECO regulations in its future Meetings.'

41 It provided:

'**Company's capital : Nominal value of each Share:**

Nominal capital of the company is US $ 10 million which is divided into 10 000 shares of US $1 000, each.

Each Member Country and/or its nominees will hold 1 000 shares all groups of shareholders shall enjoy

whole of the shares have been subscribed by the founder states at equal rates; (b) all groups of shareholders shall enjoy equal rights in all respects; and (c) 35 per cent of the capital has been paid in advance by the subscribing states at equal rates.

[42] The official announcement of the establishment of ESC on 16 August 1997 identifies the original directors of ESC. Each was a representative of a member state. The general meetings of ESC reflect that representatives of various member states attended and voted without any indication that the shareholding between them was anything other than equal. The meeting of 13 December 2000 was preceded by an earlier extraordinary meeting which could not proceed 'due to non-attendance of majority members'. That is consistent with the notion that each of the 10 member states was at that time an equal 10 per cent shareholder.

[43] Capt Khan's evidence does not survive scrutiny. The overwhelming evidence to the contrary is that until 13 December 2000 IRISL (on behalf of the Iranian State) held 10 per cent of the shares in ESC. Moreover, his country, Pakistan objected to the change in shareholding that occurred on 13 December 2000 on the basis that all member states were required, through the Council of Ministers, to approve an amendment to the Articles of Association. It follows that Terra-Marine has failed to discharge the onus resting upon it and that on this leg as well it must fail.

[44] In the result the appeal must succeed. In that event the parties were agreed that the following order that identifies the claims that arose after 13 December 2000 should issue. It is accordingly ordered as follows:

1 The appeal is upheld with costs.

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equal rights in all respects. The Company shall not at any time issue any bearer shares nor shall the Company at any time convert any existing registered shares into bearer shares.

. . .

ARTICLE 7

Subscribing of Shares

The whole of the shares have been subscribed to by the Founder States at equal rates 35 per cent of the capital has been paid in advance by the subscribing states at equal rates. The remaining amount will again be paid by Founder States as equal rates in accordance with the decision of the General Assembly.'

2 The order of the court a quo (below) is set aside and substituted with an order in the following terms:

'(a) The respondent's action *in rem* against the *mv Iran Dastghayb* under case number A148/2005 is stayed in terms of section 7(1)(b) of the Admiralty Jurisdiction Regulation Act 105 of 1983 pending determination of the respondent's claims in the arbitration proceedings in London.

(b) The order for the stay of the *in rem* action in paragraph (a) hereof is made subject to the second applicant providing security to the respondent for any final and un-appealable arbitration award in the arbitration proceedings (and also in the *in rem* proceedings should the stay of the action be lifted). Such security shall be restricted to the claims identified in paragraph 59 of the founding affidavit of Mr Reddy at pages 43-45 of the record as arising after 13 December 2000 and limited to the capital sum of USD830 420.43 in respect of:

(i) Unpaid management fees in the sum of USD632 100.00;

(ii) Steel work and repairs in respect of the *MV Eco Elham* in the sum of USD11 000.98;

(iii) Steel work and repairs in respect of the *MV ECO Ekram* in the sum of USD156 044.45;

(iv) P & I Insurance reimbursement in relation to the *MV ECO Ekram* in the sum of USD15 315.00;

(v) Bunkers at Karachi USD15 960.00,

together with USD99 650.45 in respect of security for interest and USD25 000.00 in respect of legal costs; and

(c) Upon the provision of such limited substitute security the security previously provided by the second applicant shall be cancelled and the respondent is directed to return all and any letters of undertaking furnished in that regard to the

applicants' attorneys for cancellation.

(d) The respondent is ordered to pay the second applicant's costs, such costs to include the qualifying fees of the expert witness Dr Iraj Babaei.'

V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	S R Mullins SC
	Instructed by: Shepstone & Wylie Durban Matsepes Inc Bloemfontein
For Respondent:	A M Stewart SC
	Instructed by: Cox Yeats Attorneys Durban McIntyre & Van Der Post Bloemfontein