



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 30 May 2019

STATUS Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

***Atakas Ticaret VE Nakliyat AS v Glencore International AG (768/2018) [2019]
ZASCA 77 (30 May 2019)***

Today the Supreme Court of Appeal (SCA) upheld an appeal by the appellant, Atakas Ticaret Ve Nakliyat AS (Atakas) and consequently joined the respondent, Glencore International AG (Glencore), as the third defendant in an action that the former had instituted against Richards Bay Coal Terminal (Pty) Ltd (RBCT).

Atakas, a Turkish company, purchased a consignment of coal from Glencore. Atakas chartered the MV 'Cecilia B' (the vessel) from EFE Shipping and Trading Limited of Istanbul to carry the consignment from the port of Richards Bay in KwaZulu-Natal, South Africa to Turkey. After the loading of the consignment had been completed, an explosion occurred in the number 6 cargo hold of the vessel. Atakas instituted a delictual action in personam against RBCT, the operator of the coal terminal, out of the High Court of South Africa, KwaZulu-Natal Division, Durban, in the exercise of its admiralty jurisdiction in terms of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the AJRA).

The vessel's owners were joined as the second defendant to the proceedings. Atakas applied in terms of s 5(1) of the AJRA to join Glencore as the third defendant in the action. In resisting the joinder, Glencore contended that: (i) clause 17 of the sale contract is an 'arbitration agreement' as defined in s 1 of the International Arbitration Act 15 of 2017 (the IAA); and (ii) in terms of the IAA, read with article 8 of the Model Law on International Commercial Arbitration adopted by the United Nations Commission on

International Trade Law on 21 June 1985, the court was required to stay the proceedings and refer the matter to arbitration unless it finds the sale contract to be null and void, inoperative or incapable of being performed. The court below upheld Glencore's argument. It concluded that it would be 'futile to order the joinder of Glencore in the action'. The issue of whether joinder would be ordered on the facts, if a discretion remained, was not addressed by the court.

The SCA referred to article 1(5) of the Model Law, which provides:

'This Law shall not affect any other law of the Republic by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.'

It held that the phrase 'any other law' in article 1(5) plainly encompasses the AJRA. Thus, what the court a quo conceived as an insurmountable obstacle (namely, the IAA) to the exercise of its discretion under ss 5(1) and 7(1) of the AJRA was more illusory than real. The SCA concluded that the IAA had accordingly left untouched the discretion to permit or refuse the joinder of Glencore. As the court a quo did not exercise that discretion, it was free to do so on appeal. The SCA further held that it was appropriate to permit the joinder of Glencore. It accordingly upheld the appeal and ordered the joinder of Glencore as the third defendant in the proceedings.