THE SHIPPING LAW REVIEW

Second Edition

Editors

JAMES GOSLING AND TESSA HUZARSKI

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This book aims to provide those involved in handling wet and dry shipping disputes in multiple jurisdictions with an overview of the key issues relevant to each jurisdiction. We have sought contributions on the law of leading maritime nations, including both major flag states and the countries in which most shipping companies are located. We also include chapters on the law of the major shipbuilding centres and a range of other jurisdictions.

Building on our first edition last year, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry internationally: competition and regulatory law, marine insurance, ocean logistics, piracy, ports and terminals, shipbuilding and environmental issues.

Each jurisdictional chapter then gives an overview of the procedures for handling shipping disputes in each country, including arbitration, court litigation and any alternative dispute resolution mechanisms. Jurisdiction, enforcement and limitation periods are all covered. Contributors have summarised the key provisions of local law in relation to shipbuilding contracts, contracts of carriage and cargo claims. We have also asked each author to address limitation of liability, including which parties can limit, which claims are subject to limitation and the circumstances in which the limits can be broken. Ship arrest procedure, which ships may be arrested, any security or counter-security requirements and the potential for wrongful arrest claims are also included.

The authors review the vessel safety regime in force in each country, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, along with the local rules in respect of collisions, wreck removal, salvage and recycling.

Following the entry into force of the 2002 Protocol to the 1974 Athens Convention last year and the Maritime Labour Convention in 2013, passenger and seafarer rights are also examined and contributors set out the current position in each jurisdiction. The authors have then looked forward and have commented on what they believe are likely
Editors' Preface

to be the most important forthcoming developments in their jurisdictions over the coming year.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations estimating that commercial shipping represents around US$380 billion in terms of global freight rates, amounting to around 5 per cent of global trade overall. More than 90 per cent of the world’s freight is still transported by sea. The law of shipping remains as interesting as the sector itself and the contributions to this book reflect that.

This past year, a key issue within the shipping industry has been environmental regulation, which is becoming ever more stringent. From January 2015, the limit for sulphur content within emissions control areas has fallen from 1 per cent to 0.1 per cent. Tier II limits on nitrogen oxides emissions have been in place globally since 2011. Tier III, which represents a significantly more stringent regime than Tier II limits, will be implemented in emissions control areas from 2016. Further, also from 2016, the United States Clean Air Act will introduce a target of an 80 per cent reduction in nitrogen oxides emissions from vessels by 2030.

The International Maritime Organisation (IMO) has so far not introduced similar limits on the emission of greenhouse gases, such as carbon dioxide (CO\textsubscript{2}), although it is generally perceived that the IMO is in the future likely to further regulate global CO\textsubscript{2} emissions from vessels. Outside of the IMO, the EU and individual countries are focusing on greenhouse gas-reduction policies. In particular, the European Commission’s current proposal is that, from 2018, vessels calling at ports in the EU should be expected to monitor, report and verify CO\textsubscript{2} emissions. The strategy is intended to evolve into CO\textsubscript{2} reduction targets and market-based measures in the longer term, in line with the EU’s approach to land-based greenhouse gas emissions.

Another challenge facing the shipping industry relates to the handling of ever-larger casualties. The most recent high-profile container ship casualties, such as the MSC Napoli or the Rena, involved relatively small vessels with a maximum capacity of up to 4,688 containers; however, the latest mega-containerships can carry up to 15,000 containers. It is likely that at some stage there will be a casualty involving one of these new larger vessels and this may prove a major test for the industry. It has been suggested that the current salvage industry may find it difficult to deal with the scale of any wreckage. The regulatory environment is becoming increasingly stringent, with far stricter controls on both clean-up and wreck removal, which will also make handling any mega-container ship casualty more challenging. The London underwriting community has responded to concerns about the general average implications by evolving a new insurance product, which, it is suggested, could replace the traditional approach to general average for large container ships. It remains to be seen whether this will be accepted by the market.

Piracy remains a considerable issue for the shipping industry worldwide. There has been a decline in the number of incidents off Somalia since the peak in 2010/11, but an increase in West Africa and (to an extent) elsewhere. Although the use of armed guards and increased naval policing in recent years have undoubtedly contributed to the decline, challenges remain and the shipping industry must continue to be alive to the threat.
We would like to thank all the contributors for their assistance with producing this second edition of *The Shipping Law Review*. We hope that this volume will provide a useful source of information for those in the industry handling cross-jurisdictional shipping disputes.

James Gosling and Tessa Huzarski  
Holman Fenwick Willan LLP  
London  
June 2015
I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

New Zealand is predominantly a shipper, not a carrier. Its shipping policy reflects the ‘philosophy that the country’s interests are best served by being a ship-using rather than a ship-operating nation’. New Zealand has a highly efficient export-oriented agricultural sector, with primary commodities accounting for more than half of total goods exports, while exports of goods and services represent around one third of real expenditure GDP. In 2013/2014, over 99 per cent of New Zealand’s exports and imports by volume, and over 90 per cent by value, were transported by sea.

1 John Knight is a partner and Armando Neris is a solicitor at Chapman Tripp. The authors wish to thank Gabrielle Scott-Jones and BoHao (Steven) Li for their assistance in preparing the first edition of this chapter.


3 See New Zealand Treasury, ‘New Zealand Economic and Financial Overview 2015’ (15 April 2015) (available at www.treasury.govt.nz/economy/overview/2015), p. 21. The Treasury states that New Zealand’s policies seek to ensure that exporters and shippers have unrestricted access to the carrier of their choice and to the benefits of fair competition among carriers.

4 Ibid., at p. 11. Over the past three decades, the New Zealand economy has changed from being one of the most regulated in the OECD to one of the least regulated.

The commercial performance of New Zealand’s shipping industry, as well as the broader economy, has remained much the same as it was in July 2014, when the first edition of this chapter was published.

As in most advanced economies, the shipping industry contracted during the global financial crisis. Fortunately, New Zealand’s recession was relatively shallow and, since the March quarter of 2010, the economy has rebounded with annual growth averaging 2.2 per cent, and was strong by historical standards in 2014. Much of this growth has been generated by trade. The total value of New Zealand’s merchandise exports and imports increased in the year ending September 2014 to approximately NZ$50.37 billion and NZ$50.83 billion respectively, with New Zealand’s three largest export markets – Australia, China and the United States – accounting for 48.2 per cent of merchandise exports and 40.1 per cent of merchandise imports.

There are 18 seaports on the New Zealand coast. Port companies operate 13 of New Zealand’s 14 commercial ports. Of the commercial ports, 14 are engaged in exporting and 13 importing. There were more than 1.85 million container loads and discharges in the year ending December 2014.

6 New Zealand Treasury (footnote 3, supra), p. 11.
7 Ibid. Growth has primarily been driven by the construction, services and agricultural sectors. However, the high New Zealand dollar continues to be a drag on exports, leading to forecasts of higher current account deficits as a percentage of GDP.
8 Ibid., p. 25. The New Zealand terms of trade fell in the September quarter 2014 from their 40-year high in June, and are expected to decline further in the near term, as prices of dairy exports continued to fall in the second half of 2014. The terms of trade are forecast to stabilise later in 2015 at above-average levels, and are expected to remain solid over the medium term on the back of stronger global demand, particularly from China: ibid., at p. 9.
9 Ibid., pp. 28–29. China overtook Australia in 2013 to become New Zealand’s largest trading partner, with bilateral trade amounting to NZ$19.3 billion in the year ending September 2014. Australia is New Zealand’s second-largest trading partner. In the year ending September 2014, two-way merchandise trade amounted to NZ$14.8 billion, with Australia taking 17.4 per cent of New Zealand’s exports and supplying 12.3 per cent of imports.
10 Ibid., p. 21. These companies operate at arm’s length from their predominantly local authority owners, although four are partly privatised and listed on the New Zealand Stock Exchange. The Port of Tauranga continues to be both the biggest bulk and containerised exporting port. The highest volume of imports at a New Zealand seaport was 5.4 million tonnes at North Port. North Port continues to be the largest bulk importer, while Ports of Auckland continues to be the largest containerised importer with 3.2 million tonnes. Ministry of Transport, ‘Freight Information Gathering System & Container Handling Statistics January–December 2014’ (March 2015) at pp. 7–8.
11 The largest exchange was made at Port of Tauranga, where 5,727 TEUs were exchanged in a single visit.
12 Ministry of Transport (footnote 10, supra), p. 29.
In terms of international cargo volumes, during the same period seaports handled: 14

\[\begin{align*}
\text{a} & \quad \text{exports valued at NZ$39.5 billion (FOB) with a gross weight of 37.7 million tonnes, of which (by value) 19.8 per cent were bulk exports and 80.2 per cent were containerised;} \\
\text{b} & \quad \text{imports valued at NZ$48.2 billion (CIF) with a gross weight of 21.3 million tonnes.}
\end{align*}\]

Overseas vessels chartered by international shipping lines and registered in open-registry jurisdictions transport most of New Zealand’s bulk cargo tonnage. Around 30 international shipping lines call at New Zealand ports. Major international routes are trans-Tasman and South-East Asia routes. 2,600 port visits were made by over 923 ship visits in the year to December 2014, with the largest ship having a capacity of 5,040 TEUs. New Zealand-registered ships, by contrast, are mainly involved in domestic (coastal) and Pacific Island routes.

Apart from cargo shipping:

\[\begin{align*}
\text{a} & \quad 11.4 \text{ million tonnes of oil were transported around New Zealand’s coastline by more than 90 oil tankers in 2012/2013;} \\
\text{b} & \quad \text{over 1,500 fishing vessels operated around the coastline, generating NZ$1.4 billion in exports in 2012/2013;} \\
\text{c} & \quad 5 \text{ million passengers a year use 1,154 harbour ferries;} \\
\end{align*}\]

---

14 This data is derived from the Ministry of Transport (footnote 10, supra).
15 The most exported commodities by value were dairy products (NZ$13.5 billion), meat products (12 per cent), and foodstuffs (9.8 per cent). By volume, 37.7 million tonnes were exported through sea ports in the year to December 2014, approximately unchanged from the year to September 2014. Of the 37.7 million tonnes, 21.7 million tonnes were forestry products. By volume, 68.9 per cent was bulk exports, and 31.1 per cent was containerised, of which the most exported commodities were forestry (53.4 per cent, being mainly logs), minerals, coal and fuel (13.7 per cent), and dairy products (7.6 per cent). Dairy products are the largest containerised export commodity group.
16 The most imported commodities by value were oil and coal (NZ$9.3 billion), vehicles (NZ$8.8 billion), and chemicals, plastics and rubbers (NZ$6.8 billion) and by volume were coal and fuel (7.4 million tonnes), followed by food, chemicals, vehicles, and machinery and electrical goods.
17 New Zealand Treasury (footnote 3, supra), p. 21. Coastal shipping services, operated by both local and international shipping companies, provide intra and inter-island links and play a key role in the distribution of bulk cargos such as petroleum products and cement.
18 Ministry of Transport (footnote 10, supra), p. 20. New Zealand is continuing to see a marked increase in ship visits made by large ships. In 2013 there were 108 ship visits made by ships of 4,000 TEU or greater (with one greater than 5000 TEU) compared with 142 ships visits, with 11 greater than 5,000 TEU, in 2014.
d 1 million passengers and more than 230,000 vehicles cross the Cook Strait (between the North and South Islands) annually on 7,000 interisland ferry crossings;

e approximately 1,400 staff work in offshore industries, extracting and exploring for oil, gas and mineral sands; and

f over 687 visits were made by 40 cruise liners in 2012/2013.

The marine industry is one of New Zealand’s largest manufacturing sectors with more than an estimated NZ$1.6 billion in annual revenue in the year ending 31 March 2014. It also employs more than 10,000 people.\(^{19}\)

While New Zealand does not build many commercial vessels, it is well known for the design, build and refit of super yachts and luxury launches. Following several recessionary years, the boatbuilding industry has largely continued to struggle on the back of a high New Zealand dollar but has recently started to indicate signs of improvement through increased export revenue.

Finally, fishing remains a major New Zealand industry and an important merchandise export earner. Fish and other seafood accounted for NZ$1.4 billion in export revenues in the year ended November 2014, up 2.5 per cent from the previous year.\(^{20}\)

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

New Zealand has a three-tier scheme of primary legislation, regulations and tertiary rules giving effect to its obligations under various maritime conventions. Primary legislation prescribes the framework for the maritime regime, and subordinate regulations and orders contain administrative and mechanical provisions. Tertiary maritime rules, often formulated by Maritime New Zealand (MNZ), a Crown entity, are promulgated to give effect to technical standards.

The Maritime Transport Act 1994 (MTA) is the principal statute governing maritime activity. Broadly, it regulates:

\[\begin{align*}
a & \text{ maritime activity;} \\
b & \text{ the powers and duties of MNZ;} \\
c & \text{ maritime offences;} \\
d & \text{ limitation of liability for civil maritime claims;} \\
e & \text{ civil liability for marine pollution;} \\
f & \text{ protection of the marine environment (including criminal liability for discharges from ships beyond the territorial sea); and} \\
g & \text{ the international carriage of goods by sea.}
\end{align*}\]

---

\(^{19}\) See ‘Weaker dollar helps boating industry’, Stuff News (September 2014), www.stuff.co.nz/business/industries/10527377/Weaker-dollar-helps-boating-industry.

\(^{20}\) New Zealand Treasury (footnote 3, supra), p. 18.
The Maritime Transport Act (Conventions) Order 1994 and the Maritime Transport (Marine Protection Conventions) Order 1999 list the conventions given effect by the MTA.\textsuperscript{21} A number of more recent conventions are also either incorporated directly into the MTA or given effect to by subordinate legislation.\textsuperscript{22}

Most recently, there have been significant amendments to the MTA through the Maritime Transport Amendment Act 2013 (the MTA Amendment Act 2013) concerning the regulation of, and civil liability for, pollution of the marine environment, the catalyst for which was the grounding of the MV \textit{Rena} in October 2011.\textsuperscript{23}

The most important tertiary rules underpinning the MTA are:
\begin{enumerate}
\item the Maritime Rules: concerned with (\textit{inter alia}) ship operations, ship design, construction and equipment, the health, safety and welfare of ships' personnel, documentation, and pilotage and navigation;\textsuperscript{24} and
\item the Marine Protection Rules (subset of Maritime Rules): concerned with preventing pollution by discharge of harmful substances from ships, oil pollution preparedness and response, the dumping of waste, compulsory public liability insurance for damage from oil pollution, and the notification of shipping operations involving harmful substances.\textsuperscript{25}
\end{enumerate}

Apart from the MTA, other relevant maritime-related legislation includes:
\begin{enumerate}
\item the Admiralty Act 1973 (AA) and Part 25 of the High Court Rules 2008 (HCRs): contain rules and procedures governing the admiralty jurisdiction;
\item the Carriage of Goods Act 1979 (CGA): regulates domestic carriage of goods by sea;
\item the Biosecurity Act 1993: contains requirements for the discharge of ships’ ballast water from overseas;
\end{enumerate}

\textsuperscript{21} The international conventions include the Salvage Convention 1989, the STCW Convention, the LLMC Convention 1976, MARPOL, OPRC, the 1992 Protocol to amend the CLC Convention Convention, the 1996 Protocol to the London Dumping Convention, the Intervention Convention, the Oil Pollution Fund Convention, the Colregs and SOLAS.

\textsuperscript{22} Examples include the LLMC Protocol 1996, the Bunker Convention and the Intervention Protocol.

\textsuperscript{23} The 2013 amendments (\textit{inter alia}) give direct force of law to the LLMC Convention 1976, the LLMC Protocol 1996, and extend the MTA to incidents where the Intervention Protocol applies. At the same time, oil pollution levies to feed into the Oil Pollution Fund established under the MTA have been increased under the Maritime Transport (Oil Pollution Levies) Order 2013 to meet the costs of maintaining New Zealand’s oil pollution preparedness and response system. For more information on the MV \textit{Rena} disaster, see Marten, ‘The \textit{Rena} and liability’ [2011] NZLJ 341.

\textsuperscript{24} The Maritime Rules give effect to a number of conventions, including the STCW, the Colregs and SOLAS.

\textsuperscript{25} The Marine Protection Rules give effect to a number of Conventions, including MARPOL, the London Dumping Convention, OPRC and CLC Convention.
the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act): establishes an environmental management regime for New Zealand’s Exclusive Economic Zone (EEZ) and continental shelf and (following 2013 amendments implemented through the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Amendment Act 2013) has assumed jurisdiction from the MTA for harmful substance discharges in the EEZ or continental shelf by structures (e.g., offshore installations) and ships engaged in mining activity;

e
the Health and Safety in Employment Act 1993 (HSE): non-sector-specific employee safety legislation that extends to (among others) seafarers working onboard New Zealand ships;

f
the Maritime Security Act 2004 (MSA) and Maritime Security Regulations 2004: give effect to (aspects of) SOLAS and the ISPS Code by introducing security measures around ships and ports;

g
the Maritime Crimes Act 1999: provides for specific criminal provisions relating to maritime matters, which are intended to give effect to the Rome Convention and Rome Protocol;26

h
the Mercantile Law Act 1908: governs rights and liabilities under shipping documents and the delivery of goods, liens for freight, and warehousing of cargo;

i
the Port Companies Act 1988: provides for the formation of port companies and management and operation of the commercial aspects of ports;

j
the Resource Management Act 1991 (RMA) and Resource Management (Marine Pollution) Regulations 1998: regulate discharges from ships and offshore installations within 12 nautical miles from shore. Monitoring and enforcement is carried out by regional councils;

k
the Ship Registration Act 1992 (SRA): provides for ship registration, transfer of ownership and mortgages; and

l
the Shipping Act 1987: contains the objectives of New Zealand’s shipping policy relating to outward shipping and exempts outward shipping from the restrictive trade practices provisions in the Commerce Act 1986.

III FORUM AND JURISDICTION

i Courts
Jurisdiction broadly depends on: (1) proper service of process establishing territorial jurisdiction or submission to jurisdiction; (2) the type of claim; and (3) power to grant the remedy sought.27


27 In the New Zealand context, see the illuminating seminar by David Goddard and Campbell McLachlan ‘Private International Law – Litigating in the trans-Tasman context and beyond’ (NZLS CLE Seminar, Wellington 2012) at pp. 15–56. For a classical exposition, see Dicey.
**Territorial jurisdiction**

Civil jurisdiction over an intended defendant in an action *inter partes* depends on valid service under the relevant procedural rules (Parts 6 and 25 of the HCRs). Service out of the jurisdiction for *in personam* proceedings is permissible in certain circumstances.

Procedural rules governing High Court admiralty actions are contained in Part 25 of the HCRs. Admiralty jurisdiction will arise in an *in rem* proceeding where there has been valid service in accordance with the HCRs upon the *res* within New Zealand’s territorial jurisdiction. A notice of proceeding *in rem* may not be served out of the jurisdiction. Proceedings endorsed with both *in rem* and *in personam* claims may be served out of the jurisdiction in respect of the *in personam* claim only.

The *forum non conveniens* doctrine may be able to be invoked if there is a competent foreign forum in which the case can be more suitably tried. However, in an *in rem* action, security provided by arresting the vessel will usually be a significant factor weighing in favour of New Zealand proceedings, unless equivalent security in the foreign forum can be provided.

**Claims courts are competent to hear**

Shipping disputes are typically resolved in the High Court, which exercises a general (statutory and inherent) civil jurisdiction over all types of dispute, as well as admiralty

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28 *Cockburn v. Kinzie Industries Inc* (1998) 1 PRNZ 243 (HC). In certain situations, substituted service will be permissible. The HCRs are incorporated in Schedule 2 of the Judicature Act 1908. The District Courts Rules 2009 (DCRs) cross-reference the HCRs on service in DCRs 3.40–3.44. For detailed analysis of procedural rules, see *Sim’s Court Practice* (online edition, LexisNexis) at Part 25 and *McGeachan on Procedure* (online edition) at Part 25.

29 HCR 25.7(3) applies HCRs 6.27–6.35 for service out of the jurisdiction of *in personam* proceedings in the admiralty jurisdiction. For protests to jurisdiction where civil proceedings are served outside the jurisdiction, see HCRs 5.49 and 6.29. For jurisdictional objections in admiralty proceedings, see HCR 25.17.

30 For the District Courts, the procedural rules for the admiralty jurisdiction are contained in Part 10 of the DCRs.

31 See HCRs 25.10(1)(a) and (b).

32 HCR 25.8(4).

33 HCR 25.8(4) and (5).

34 *Wing Hung Printing Co v. Saito Offshore Pty Ltd* [2011] 1 NZLR 754 (CA) at [30]. A New Zealand court will consider a wide range of factors to determine which forum is most appropriate: see, for example, Goddard and McLachlan (footnote 27, supra), pp. 48–50.

35 *Swords v. The Ship ‘Derwent Enterprise’* HC Wellington AD 397, 8 October 1996; and *Tomita v. The Unnamed Vessel Formerly Known as ‘Amami Taiki Go’ and Also Known as ‘Intrepid’* HC Auckland AD 36/00, 8 December 2000.

36 See Part 1 of the Judicature Act 1908.
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jurisdiction to determine in rem and in personam admiralty actions. The High Court is the only court with the jurisdiction to determine disputes involving sums greater than NZ$200,000. The District Courts have jurisdiction to determine civil or admiralty in personam proceedings for lesser amounts.

Remedial jurisdiction

New Zealand courts may grant common law, equitable or statutory remedies. Civil and admiralty (in rem and in personam) jurisdiction may be exercised concurrently.

The Accident Compensation Act 2001 (ACA) prevents (subject to exceptions) proceedings in respect of ‘personal injury’ claims.

Limitation periods generally expire six years after the date of the act or omission on which the claim is based as per the Limitation Act 2010. There are a number of exceptions, the most notable being for ‘late knowledge’ of certain facts necessary to be able to bring a claim.

Additional limitation periods include:

a. a one-year time limit for claims in respect of loss or damage to goods under a contract of carriage governed by the Hague-Visby Rules;

b. a one-year time limit (except in the case of fraud) on actions against a carrier for loss of goods under the CGA. Loss or damage must be notified within 30 days (subject to exceptions);

c. no action for discharge of oil from a CLC Convention ship may be brought unless proceedings are commenced within three years after the date on which the claim arose (and not later than six years after the event);

d. a one-year time limit for MTA offences (not running while person charged is beyond the territorial sea); and

e. a six-month time limit for RMA offences.

37 AA, Section 3(1)(a). Section 4(2) of the AA also provides that the High Court retains the admiralty jurisdiction it enjoyed prior to commencement of the Act.
38 District Courts Act 1947, Section 29; and AA, Section 3(1)(b).
39 AA, Section 3(2) and 3(3). Equitable relief such as specific performance and injunctions may be granted in the admiralty jurisdiction.
40 ACA, Section 317(1).
41 Limitation Act 2010, Section 11(1).
42 See subsection iii regarding imitation periods in the enforcement of foreign judgments (and arbitral awards).
43 Article 3(6) of the Hague-Visby Rules provides that suit must be brought within one year after delivery of the goods or when the goods should have been delivered.
44 CGA, Section 19.
45 CGA, Section 18(1).
46 MTA, Section 361.
47 MTA, Section 411.
48 RMA, Section 338(4).
ii  Arbitration and ADR

Parties may include enforceable arbitration agreements (specifying the seat of arbitration, procedural rules, and the law of the contract) in their commercial contracts.

There are no maritime-specific arbitration procedures. Domestic arbitrations are governed by the Arbitration Act 1996, which implements, with some amendments, the 1958 New York Convention and the 1985 UNCITRAL Model Law on International Commercial Arbitration.  

Many maritime disputes are resolved offshore by private arbitration. However, the Maritime Law Association of Australia and New Zealand has a panel of arbitrators and specialised arbitration rules that parties may adopt. Mediation and expert determination may also be contractually adopted as precursors to litigation.

Where proceedings in a matter subject to an arbitration agreement are brought in New Zealand, the court must, if requested, stay those proceedings and refer the parties to arbitration, subject to certain exceptions. Granting a stay of *in rem* proceedings in favour of arbitration will not necessarily result in unconditional release of an arrested vessel. A court has discretion to retain security if there is a significant prospect of an *in rem* judgment being obtained.

Limitation enactments apply to arbitral claims as they apply to civil proceedings.

iii  Enforcement of foreign judgments and arbitral awards

Depending on the circumstances, foreign judgments may be enforced through an action at common law, by registering the judgment under the Reciprocal Enforcement of Judgments Act 1934 or the Trans-Tasman Proceedings Act 2010 (TTPA), or by registering a memorial of judgment under Section 56 of the Judicature Act 1908.

A foreign judgment may be enforced through an action at common law where:

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52 The applicability of *The ‘Rena K’* [1979] QB 377 was confirmed by the High Court in *Raukura Moana Fisheries Limited v. The Ship ‘Irina Zharkikhi’* [2001] 2 NZLR 801 (HC) in which Young J also indicated that he was attracted to the view that an overall stay of proceedings under the Arbitration Act 1996 should not be available in respect of *in rem* proceedings because of the inability of an arbitrator to make an *in rem* award.

53 Limitation Act 2010, Section 39.

54 Section 56 of the Judicature Act 1908 is a rarely used procedure for enforcement of a money judgment obtained in any court of ‘Her Majesty’s dominions’ (i.e., under the sovereignty of the Crown) to which the Reciprocal Enforcement of Judgments Act 1934 does not apply.

55 *Von Wyl v. Engeler* (1998) 12 PRNZ 187 (CA). A judgment cannot be enforced at common law if it is a judgment to which Part I of the Reciprocal Enforcement of Judgments Act 1934 applies, thereby requiring registration under that Act per Section 8.
the foreign court’s jurisdiction to give that judgment is recognised by New Zealand law;

b the judgment is for a debt, or definite sum of money (but not a sum payable in respect of taxes or other charges of that nature, or in respect of a fine or penalty); and

c the judgment is final and conclusive.

An in rem judgment of a foreign court will be recognised where the prerequisites as to jurisdiction and finality are met, and can be enforced by in rem proceedings in New Zealand. A foreign judgment pronounced in rem on a maritime lien will be binding even if the lien would not have arisen under New Zealand law. The holder of the lien may enforce the judgment against the res regardless of the possessor’s personal liability.

Enforcement of a foreign judgment can be resisted on grounds that it was obtained by fraud, that enforcement is contrary to public policy, or that the proceedings were contrary to New Zealand’s conceptions of natural justice.

The Reciprocal Enforcement of Judgments Act 1934 provides for the registration of money judgments of foreign countries under Part 1 (being the United Kingdom and certain other countries). A statutory conception of jurisdiction is prescribed. The most important requirements for registration are that the judgment must be final and conclusive, capable of being enforced in the country in which it was given, and not have been wholly satisfied. The Act addresses circumstances in which registered judgments may be set aside (similar to common-law bases).

56 Goddard and McLachlan (footnote 27, supra), pp. 57–90.
58 Ibid.
60 Relevantly, the Reciprocal Enforcement of Judgments Act 1934 also applies to any judgment given by a court in a country (other than Australia) in respect of which the CLC Convention is in force, to enforce claims in respect of liability for discharge of harmful substances or waste: see Section 369 of the MTA. Part 1 of the Reciprocal Enforcement of Judgments Act 1934 also applies to any judgment given by a court against the International Oil Pollution Fund (IOPF) in a country in respect of which the Oil Pollution Fund Convention is in force. Subsections (3) and (4) of Section 6 of the Reciprocal Enforcement of Judgments Act 1934 (relating to jurisdiction) have no effect in the case of any such judgment: Section 382 of the MTA.
61 Reciprocal Enforcement of Judgments Act 1934, Sections 6(1)(b) and 6(3)–(4); and Morgan v. Brierley Holdings Ltd HC Auckland CIV-2008-404-3725, 1 September 2009.
62 Reciprocal Enforcement of Judgments Act 1934, Sections 3 and 4.
63 Reciprocal Enforcement of Judgments Act 1934, Sections 6(1)(a) and (c)–(e) and 6(2).
The TTPA ensures most final money and non-money judgments of Australian courts are able to be recognised and enforced in New Zealand.\footnote{A judgment given by a court in Australia to enforce a claim in respect of liability incurred under Part II of the Protection of the Sea (Civil Liability) Act 1981 (Aust) (or any later Australian enactments corresponding to Section 345 of the MTA, relating to liability of shipowners for pollution damage) must be treated as a registrable Australian judgment for the purposes of subpart 5 of Part 2 of the TTPA 2010.} Broadly, a final and conclusive judgment given in a civil proceeding is registrable and enforceable in New Zealand.\footnote{TTPA, Section 54(1).} The only defences to enforcement are that the judgment is contrary to public policy or registration contravened the TTPA.\footnote{TTPA, Section 61.} A proceeding \textit{in rem} may be set aside where the subject matter was moveable property not situated in Australia at the time of the proceeding.\footnote{TTPA, Section 61(2)}

There is (generally) a six-year limitation period on enforcement of any foreign judgment (including an arbitral award entered as a judgment) from the date on which judgment became enforceable (or registrable) irrespective of the mode of enforcement.\footnote{See Limitation Act 2010, Section 35(1). The court has the ability to order that the limitation defence not apply: Sections 35(5) and (6). The principles on which the discretion will be exercised are not prescribed by the Act. See also TTPA, Section 56(2)(c); and Reciprocal Enforcement of Judgments Act 1934, Section 4(1).}

Arbitral awards are enforceable under the Arbitration Act 1996, subject to procedural requirements and limited grounds for refusing enforcement.\footnote{Arbitration Act 1996, Schedule 1, Articles 35–36.} The limitation period for enforcement of an arbitral award or entry of an arbitral award as a judgment is six years after the date it became enforceable.\footnote{Limitation Act 2010, Section 36. The court may, if it thinks it just to do so, order that relief may be granted in respect of the claim as if no limitation defence applies: Section 36(4).}

\section*{IV SHIPING CONTRACTS}

\subsection*{i Shipbuilding}

There is no specific statutory regime for shipbuilding contracts – general contract law applies. Determination of property interests in a partly completed vessel, and when property passes to a ship’s purchaser, depends on the terms of the shipbuilding contract and the rules on passing of title in the Sale of Goods Act 1908.\footnote{Sale of Goods Act 1908, Part 2. Property interests in partly completed vessels are not usually registrable under the SRA because such vessels will not usually meet the definition of ‘ship’ in Section 2(1).}
ii **Contracts of carriage**

New Zealand has two main statutes governing carriage of goods by sea:

- **the MTA** (incorporates the Hague-Visby Rules for international carriage of goods by sea),\(^{72}\) and
- **the CGA** (governs domestic carriage of goods).\(^{73}\)

New Zealand has not signed or ratified the Hamburg Rules or Rotterdam Rules. In cases of multimodal carriage involving international and domestic stages, the Hague-Visby Rules cover international carriage of goods by sea from loading to discharge.\(^{74}\) Any other stage performed in New Zealand is subject to the CGA.\(^{75}\)

New Zealand has (partially) deregulated cabotage.\(^{76}\) The MTA provides\(^{77}\) that no foreign ship may carry coastal cargo unless:

- it is passing through New Zealand waters while on a continuous journey from a foreign port to another foreign port and is stopping in New Zealand to load or unload international cargo; and
- its carriage of coastal cargo is incidental to its carriage of international cargo.

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\(\text{73 For a useful exegesis of carriage of goods contracts in New Zealand, see Paul Myburgh and Geoff Mercer 'Practical Aspects of the Law Relating to Carriage of Goods' (Continuing Legal Education Seminar, Auckland District Law Society, May 1995).}

\(\text{74 MTA, Schedule 5, Article 1(e).}

\(\text{75 Terms in combined (multimodal) transport documents that govern domestic transport stages and which are inconsistent with the provisions of the CGA are of no application: CGA, Sections 5–7.}


\(\text{77 MTA, Section 198(1)(c).}

\(\text{78 'Coastal cargo', in relation to any ship, means (1) passengers who initially board the ship at a New Zealand port for carriage to and final disembarking from that ship at another New Zealand port; or (2) goods initially loaded on the ship at a New Zealand port for carriage to and final unloading at another New Zealand port: see MTA, Section 198(6).}

\(\text{79 The only other type of foreign ship that may carry coastal cargo is a foreign ship on demise charter to a New Zealand-based operator who employs or engages crew to work on board the ship under an employment agreement or contract for services governed by New Zealand law: Section 198(1)(b).}

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A foreign ship may only load and unload coastal cargo at a New Zealand port: (1) at which it loads or unloads international cargo; or (2) that it is scheduled to pass in the course of its continuous journey.

**International carriage of goods by sea**

The Hague-Visby Rules (incorporated in Schedule 5 of the MTA) have direct force of law in New Zealand.\(^\text{80}\) Carriage of goods by sea from a New Zealand port to a foreign port is governed by Part 16 of the MTA.

The Hague-Visby Rules apply to every bill of lading (BOL) relating to the carriage of goods between ports in two different states if:\(^\text{81}\)

- the BOL is issued in a contracting state;\(^\text{82}\)
- the carriage is from a port in a contracting state; or
- the contract evidenced by the BOL provides that the Hague-Visby Rules or legislation giving effect to them (e.g., MTA) are to govern the contract.

Parties may not limit the New Zealand courts’ jurisdiction in respect of a:\(^\text{83}\)

- BOL, or a similar document of title, relating to the carriage of goods from any place in New Zealand to any place outside New Zealand (or vice-versa); or
- non-negotiable document (other than a BOL or similar document of title) that contains express provision to the effect that the Hague-Visby Rules are to govern the carriage as if the document were a BOL.

However, arbitration agreements and foreign choice-of-law clauses are generally enforceable.\(^\text{84}\)

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\(^{80}\) MTA, Section 209(1). The scheme of the Hague-Visby Rules, and the extent to which carriers are liable for loss or damage to goods, was recently outlined by the Supreme Court in the leading case, *Tasman Orient Line CV v. New Zealand China Clays Ltd* [2010] NZSC 37.\(^\text{81}\)

\(^{81}\) MTA, Schedule 5, Article 10. The MTA also extends the application of the Hague-Visby Rules to carriage of goods by sea evidenced by a non-negotiable document (other than a BOL or similar document of title) that contains express provision to the effect that the Hague-Visby Rules are to govern the carriage as if the document were a BOL.\(^\text{82}\)

\(^{82}\) As to ‘contracting states’, see Section 211 of the MTA which creates a rebuttable presumption for the Secretary of Foreign Affairs and Trade to certify that, for the purposes of the Rules, a state specified in the certificate is a contracting state.\(^\text{83}\)

\(^{83}\) MTA, Section 210(1).\(^\text{84}\)

The obligation to pay freight is a common law and contractual obligation, enforceable by a carrier’s lien. Generally, a BOL will provide that freight payment is earned when the goods are delivered to the carrier and loaded onto the ship. The Mercantile Law Act 1908 provides for continuation of liens where a shipowner gives notice to a warehouse owner.

Domestic carriage of goods by sea

Domestic carriage of goods by sea is governed by the CGA. It applies to ‘every carriage of goods, not being international carriage, performed […] by a carrier pursuant to a contract’ (even if the ship is simultaneously engaged in international carriage).

The CGA creates a framework for liability for all those involved in domestic carriage. ‘Carrier’ is defined widely to include persons who procure carriage but do not perform the work (‘contracting carriers’) as opposed to ‘actual carriers’. The Act provides (subject to exceptions) for strict liability for carriers for loss or damage to goods. But loss caused by delay in delivery is not covered, so common law principles apply.

The CGA recognises four types of carriage contract:

a ‘At limited carrier’s risk’: this essentially amounts to strict liability with limited defences. It is the default liability regime.

86 For a recent New Zealand example of the contractual obligation to pay freight arising out of the MV Rena disaster, see Resource New Zealand Limited v. Mediterranean Shipping Co SA [2014] NZHC 292. In that case, MSC’s entitlement to the freight charges arose according to the contract before MV Rena left port (with the timber on board) despite the fact that the timber was never delivered.
89 CGA, Sections 5 and 9(6)–(7). The Act applies mandatorily to domestic carriage of goods, including cargo handling within New Zealand ports: see Fletcher Panel Industries Ltd v. Ports of Auckland [1992] 2 NZLR 231 (HC). ‘International carriage’ is defined as meaning ‘carriage from any port in New Zealand to any port outside New Zealand, or to any port in New Zealand from any port outside New Zealand, commencing when the goods are loaded onto a ship and ending when they are discharged from a ship’: CGA, Section 2. Fletcher Panel Industries held that the effect of the definition of international carriage was that the ship’s tackle constitutes the demarcation between domestic and international carriage, and all activity on the port side of the ship’s tackle falls under the CGA.
90 CGA, Section 2. ‘Carriage’ includes any ‘incidental service’, defined as any service (such as that performed by consolidators, packers, stevedores and warehousemen) undertaken to facilitate the carriage.
91 CGA, Section 8.
92 CGA, Section 17.
At owner’s risk: the carrier will only be liable for intentionally causing loss or damage.

At declared value risk: the carrier’s liability is the same as ‘at limited carrier’s risk’, but liability is limited as specified in the contract.

On declared terms: the contracting parties may regulate the carrier’s liability under the contract.

Subject to limited defences, the default rule is that the contracting carrier is liable to the contracting party for loss or damage to any goods while the contracting carrier is responsible for them, whether caused by the contracting carrier or by an actual carrier. The right to sue for freight arises when each carrier ceases to be responsible for the goods. The right to sue is supported by a lien. If the owner does not pay within two months’ notice of the lien, the carrier may sell the goods by public auction.

### Cargo claims

In practice, few cargo claims make their way to a hearing – most disputes are settled on commercial terms. The High Court has statutory and inherent jurisdiction to hear cargo claims in the civil jurisdiction, and admiralty actions *in rem* and *in personam*.

**Who has the right to sue?**

The Mercantile Law Act 1908 governs rights and liabilities under shipping documents, including title and the right to sue. A person falling into one of the following categories has rights of suit on a BOL or similar document governed by the Hague-Visby Rules:

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93 A carrier will avoid liability if he or she can prove that the loss or damage resulted directly, without fault on his or her part, from: an inherent vice; breach of the contracting party’s statutorily implied warranties relating to the condition, packing and lawfulness of the consignment; seizure under legal process; or saving or attempting to save life or property in peril: CGA, Section 14.

94 CGA, Section 9(2).

95 CGA, Section 9(1).

96 CGA, Section 21. An action for recovery of freight may be brought against the consignee if property in the goods has passed to the consignee: CGA, Section 22.

97 CGA, Section 23(2). The carrier’s lien is active, which means there is a right to sell the goods in certain circumstances. The carrier’s lien is also particular, which means that it is confined to the sum owing in relation to the goods held, and does not extend to a general balance of account.

98 CGA, Section 23(5).

99 Under Section 4(1)(g) of the AA, admiralty jurisdiction extends to any claim for loss of or damage to goods carried in a ship.

100 Mercantile Law Act 1908, Section 13B(1). The transferal of rights of suit and liabilities under BOLs and similar documents is not dependent on property passing at a specific stage of the transaction.
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The lawful holder of the BOL; the consignee identified in a sea waybill as being entitled to delivery; or the person entitled to delivery of goods specified in a ship’s delivery order.

Under the CGA, the ‘contracting carrier’ is liable to the ‘contracting party’ (either the consignor or consignee, depending on who contracted for carriage). A non-contracting consignee may sue the contracting carrier for loss or damage if property in the goods has passed to the consignee.

Who should be sued?
The interpretation of the Hague-Visby Rules in New Zealand is similar to English law. The key issue is the identity of the carrier – determined based on the BOL in accordance with contractual construction principles. In practice, the proper defendants in a contractual cargo claim are likely to be the ship (in rem) and the shipowner or the contracting carrier (e.g., charterer). There may also be a right to sue shipowners in tort.

Demise and identity of carrier clauses that transfer liability to the shipowner are, in principle, enforceable provided they are given sufficient prominence on the face of the BOLs, and are not contradicted by written terms.

Under the CGA (subject to limited exceptions) the contracting carrier is directly liable to the contracting party. An actual carrier is generally liable to the contracting carrier (who may seek compensation from the responsible actual carrier for loss or damage to goods).

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101 CGA, Section 9.
102 CGA, Section 20. As passing of property triggers the non-contracting consignee’s right of suit against the carrier, problems may arise in cases where the risk of loss or damage has already passed to the consignee, but property has not. In such cases, the consignee will, apart from where the Contracts (Privity) Act 1982 applies, be forced to rely on the cooperation of the contracting consignor.
105 For instance, where the shipowner is an independent contractor of the charterer. However, shipowners may be able to rely on a ‘Himalaya’ clause or other mechanism (e.g., the Contracts (Privity) Act 1982) to exempt or limit liability in tort in accordance with the BOL. See Myburgh ‘Interpreting Bills of Lading: The Lords Giveth and the Lords Taketh Away’ [2003] NZLJ 253.
106 See Myburgh (footnote 84, supra).
107 CGA, Section 9.
108 CGA, Section 10. There is an exception in the case of insolvency of the contracting carrier: CGA, Section 11. There is also an exception where the actual carrier intentionally caused
**Damages**

The measure of damages under the Hague-Visby Rules is the reduction in value of the cargo at delivery (i.e., arrived sound market value less arrived damaged market value).\(^{109}\) Consequential losses are excluded, except by agreement.\(^{110}\) Loss by delay is usually contractually excluded, but where it is not, loss of market may be recoverable if it was in the reasonable contemplation of the parties.\(^{111}\)

Under the default CGA regime, the contractual measure of damages is recoverable, including consequential losses arising out of the contract provided it meets the common law requirements (e.g., causation and remoteness).\(^{112}\)

Courts have a discretionary power to award interest\(^{113}\) or legal costs (including increased or indemnity costs) to successful claimants, together with disbursements.\(^{114}\)

### iv Limitation of liability

Limitation of liability is governed either by contract or by default statutory regimes incorporating conventions on limitation of liability.

#### Cargo claims

For cargo claims, both the Hague-Visby Rules and the CGA limit carriers’ liability (by default):

- **a** the Hague-Visby Rules limit liability for loss or damage unless the nature and value of goods has been declared by the shipper before shipment and inserted in the BOL; and
- **b** the CGA limits liability of the contracting carrier to the contracting party to NZ$1,500 for each unit of goods lost or damaged.\(^{115}\) This limit applies unless the contract is ‘on declared terms’ or another amount is specified in a contract ‘at declared value risk’.\(^{116}\) Limitation of liability does not apply to intentional loss or damage, delay or consequential damages.\(^{117}\)
Overall limitation of civil liability

A shipowner has a general right to limit civil liability, save in exceptional cases. The limitation of civil liability regime (the ‘overall limit’) for maritime claims applies to New Zealand or foreign ships in cases where the High Court has admiralty jurisdiction.

Following the MV Rena grounding, the limitation of liability regime in the MTA has been reformed. Before 2013, Part 7 (unsatisfactorily) paraphrased the LLMC Convention 1976. Further, the LLMC 1996 Protocol was not incorporated into New Zealand law.

Part 7 now gives direct force of law to the LLMC Convention (incorporated in Schedule 8) as amended by the LLMC Protocol (incorporated in Schedule 9). The relevant limits on liability for qualifying claims are prescribed by the Protocol. Those limits are now able to be amended by Order in accordance with Article 8 of the Protocol.

The right to limit liability may be pleaded as a defence to an admiralty action, or may take the form of an in personam action. The constitution and distribution of a limitation fund, together with a bar on other actions, is provided for in the LLMC Convention.

V REMEDIES

i Ship arrest

Ship arrest is provided for in the AA and Part 25 of the HCRs.

An admiralty claim (in personam or in rem) must be based on a maritime lien or otherwise fall within one of the 18 claims enumerated in Section 4(1) of the AA.

118 Daina Shipping Company v. Te Runanga O Ngati Awa [2013] 2 NZLR 799 (HC).
119 MTA, Section 83.
120 See Maritime Transport Amendment Act 2013.
121 For the problems involved in the pre-2013 regime, see the recent MV ‘Rena’ case, Daina Shipping Company v. Te Runanga O Ngati Awa [2013] 2 NZLR 799 (HC), where the Court had to ‘correct’ the MTA to enable the constituting of a limitation fund. See also Tasman Orient Line CV v. Alliance Group Ltd [2004] 1 NZLR 650 (HC).
122 A person liable is not entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.
123 MTA, Section 87A.
124 See HCR 25.25.
125 For detailed treatment of the ship arrest jurisdiction in New Zealand, see Cremean, Admiralty Jurisdiction: Law and Practice in Australia, New Zealand, Singapore and Hong Kong (Third Edition, Federation Press, Australia 2008); Laws of New Zealand, Maritime Law: Admiralty; and Sim’s Court Practice (online edition, LexisNexis).
126 The AA also expressly preserves the inherent jurisdiction of the Admiralty Court as it existed before the AA came into force: Section 4(2). Section 2 of the AA defines a maritime lien.
Section 5 prescribes those claims that can be commenced *in rem* against a ‘particular ship’ (in respect of which a claim arose) or one of its ‘sister ships’.

Where there is a maritime lien on any ship, aircraft, or other property for the amount claimed, an action *in rem* may be commenced against the particular res. An action *in rem* may also be commenced for Section 4(1) claims provided that:

- for claims specified in paragraphs (a) to (c) and (s) of Section 4(1), an *in rem* action may be invoked only against the particular ship or property in respect of which the claim arose; and
- for claims specified in paragraphs (d) to (r) of Section 4(1) arising in connection with a ship, where the person who would be liable on the claim in an action *in personam* was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship, the *in rem* action may be invoked against:
  - that ship if, at the time when the action is brought, it is beneficially owned as respects all the shares by, or is on charter by demise to, that person; or
  - any other ship (sister ship) that, at the time the action is brought, is beneficially owned or on charter by demise as aforesaid.

Where an *in rem* action is commenced, a plaintiff (or counter-claimant) may apply for a warrant to arrest the res. The party applying for the warrant must conduct an Admiralty Registry search to determine whether any caveat against arrest is extant.

**Arrest procedure**
The following documents must be filed on application for an arrest warrant: (1) application; (2) affidavit in support; (3) indemnity and security to registrar for fuel, ‘without derogating from the generality of the term’ as including a lien in respect of bottomry, respondentia, salvage of property, seafarers’ wages and damages.

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127 AA, Section 5(1). There is no statutory requirement for a link between the personal liability of the owner of the ship or property and the ownership at the time when the proceedings are commenced in order to bring a claim *in rem* under Section 5(1). Maritime lien claims cannot be brought against sister ships, although claims which give rise to maritime liens may provide a basis for statutory *in rem* claims under Section 5(2).

128 AA, Section 5(2)(a).

129 AA, Section 5(2)(b)

130 Accordingly, a sister ship can be the subject of *in rem* proceedings if the person who would be liable on the claim *in personam* was the owner or charterer or in possession or control of the ship in connection with which the claim arose at the time the cause of action arose, and, at the time the action *in rem* is brought against the sister ship, the sister ship is beneficially owned as regards all the shares in the ship by, or on demise charter to, the person who would be liable on the claim.

131 HCR 25.34(1).

132 HCR 25.34(3). The entry of a caveat against arrest does not prevent the issue of a warrant of arrest: HCR 25.43(2).

133 For the requirements of the affidavit, see HCR 25.34(4)(a).
expenses, and harbour dues; (4) draft notice of arrest by registrar; and (5) warrant of arrest.\textsuperscript{134} The costs of maintaining the arrest of a vessel payable to the registrar can often be exorbitant, and where they are not met by the party applying for arrest, the registrar is likely to request that the court issue an order discharging the vessel from arrest.\textsuperscript{135} For a compliant arrest application, the registrar must (1) complete the certificate on the application for a warrant and (2) issue the warrant.\textsuperscript{136} A warrant must be served by the registrar in the manner prescribed for service of a notice of proceeding in rem.\textsuperscript{137}

A caveat can be requested (with a security undertaking) to prevent an arrest. The caveator must undertake to give security in a sum specified in the request.\textsuperscript{138} Entry of a caveat does not prevent an arrest warrant, but where a party arrests caveated property, that party will be liable for damages on application to set aside the arrest unless good and sufficient reason for arrest is shown.\textsuperscript{139} Where property has been arrested and, for instance, several parties have claims against it, any of those parties can prevent the release of property in an action in rem or payment of proceeds out of court by filing a request for a caveat against release or payment.\textsuperscript{140}

Ships may be arrested via helicopter or chase boat within New Zealand’s territorial waters,\textsuperscript{141} provided the warrant is properly served.\textsuperscript{142} Once served, custody of the ship

\textsuperscript{134} See HCRs 25.34–25.38. The relevant forms are annexed to Schedule 1 of the HCRs at AD1–AD17. Court filing fees are contained in the High Court Fees Regulations 2013. The current fees for filing an initiating document (notice of proceeding) is NZ$1,350 and an application for the issue of a warrant of arrest under HCR 25.34 is currently NZ$1,500.

\textsuperscript{135} For a recent situation where this outcome resulted, see Afitos Compania Naviera SA v. The Ship 'Hang Zhou Wan' [2012] NZHC 1847. The registrar may seek the court’s assistance and apply for appropriate orders under HCR 25.55. In circumstances where the party that has applied for arrest of the vessel seems unable to meet the continuing costs of arrest, the counter-party may be better to wait for the registrar to apply to the court to discharge the vessel from arrest. The reason for this is that HCR 25.44(5) requires a party applying for an instrument of release to meet the costs of keeping the vessel in custody during the period of arrest.

\textsuperscript{136} HCR 25.35(3).

\textsuperscript{137} HCR 25.36(1) and (2). Where the action is brought in relation to a ship, cargo, or other property on board a ship, the proceedings must be served by attaching a sealed copy of the notice close to the bridge, or some conspicuous part of the ship, or next to an entrance way to the superstructure, or accommodation section of the ship, and by leaving a copy of the notice with the person apparently in charge of the ship, if that person is available at the time of service: HCR 25.10(1)(a) and (b).

\textsuperscript{138} HCR 25.42.

\textsuperscript{139} HCR 25.43(2).

\textsuperscript{140} HCR 25.46(1).

\textsuperscript{141} For example, on 15 June 2013, the registrar arrested the log carrier New Giant by attaching the original arrest writ to the hull of the vessel by tape. The New Giant was anchored in Poverty Bay and was not allowed to berth at the Gisborne Wharf.

\textsuperscript{142} A warrant of arrest can be served at any time. The registrar (or his or her duly appointed officer or agent) must give notice of the arrest of property by serving on any person or by
passes to the court until the action is determined, or the vessel is released (under authority of an instrument of release)\textsuperscript{143} or sold under court order.\textsuperscript{144}

**Bunker arrest**

Whether bunkers can be arrested independently of the ship has not been tested, but is unlikely, and would in any case depend on the bunkers being the subject of a maritime lien. Bunkers may be able to be arrested as part of an arrested ‘ship’ provided the bunkers are in the ownership of the shipowner. The trend of Australian authority is in that direction.\textsuperscript{145} However, in one New Zealand case, it was remarked (obiter) that a ‘ship’ includes permanent structures, components and accessories but not its bunkers.\textsuperscript{146}

**Arrest of ship for security**

A claim may be brought for security where there is reason to believe an arbitral award or \textit{in personam} judgment may not be satisfied. The High Court recently stated that although certain claimants were not New Zealand based, proceedings \textit{in rem} could be issued if a vessel in which the respondent had a qualifying interest was to visit New Zealand (the purpose being to obtain security for foreign arbitration claims).\textsuperscript{147} Similarly, an action commenced under a contract containing an arbitration clause was stayed on condition that the shipowners provide security.\textsuperscript{148}

**Security and counter-security**

An arrest (or threat of arrest) will usually result in agreement with the plaintiff that security be provided to avoid detention of the ship. Where property under arrest is released, the plaintiff is entitled to security on the basis of the reasonably arguable best case together with interest and costs.\textsuperscript{149} Security cannot exceed the value of the ship. A

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\textsuperscript{143} A party interested in any property arrested under a warrant of arrest may request a registrar to issue an instrument of release in form AD12 for the release of the property unless the property is sold under an order of the court: HCR 25.44. A registrar may issue a release on payment into court of the amount claimed in the notice of proceeding together with the costs of issue and execution of the warrant of arrest; or on security for those amounts given to the satisfaction of the registrar: HCR 25.45.

\textsuperscript{144} HCR 25.44(1).


\textsuperscript{146} *Mobil Oil NZ Ltd v. The Ship ‘Rangiora’* HC Auckland AD 877, 10 August 1999.


\textsuperscript{149} *Det Norske Veritas AS v. The Ship ‘Clarabelle’* [2002] 3 NZLR (CA). Where money has been paid into court, it can only be paid out by court order, except where the written consent
P&I club guarantee is an accepted form of security.\textsuperscript{150} If security is provided by a person not ordinarily resident in New Zealand, that person must usually submit to the court’s jurisdiction.\textsuperscript{151}

Counter-security is not required; however, an indemnity and security must be provided to cover fees and expenses incurred in keeping property under arrest.

\textbf{Re-arrest and wrongful arrest}

Where a ship or property is arrested and released on provision of security, it cannot generally be re-arrested on the same claim. In exceptional circumstances, a party will be permitted to re-arrest prior to judgment (e.g., inadequate initial security).\textsuperscript{152}

A claim for damages for wrongful arrest is available where the party arresting has acted in bad faith or with gross negligence.\textsuperscript{153} At least one wrongful arrest claim has succeeded in New Zealand.\textsuperscript{154}

\textbf{ii Court orders for sale of vessel}

A party may request a commission for the appraisement and sale of any property under arrest on undertaking to pay the registrar’s reasonable fees and expenses.\textsuperscript{155}

A vessel may be sold, before or after final judgment, with or without appraisement, either by public auction or by private contract.\textsuperscript{156} The court has a broad discretion as to

\begin{footnotesize}
\begin{enumerate}
\item New Zealand courts have approved the provision of guarantees from the International Group of P&I Clubs: see \textit{General Motors New Zealand Ltd v. The Ship ‘Pacific Charger’ CA88/81}, 16 July 1981.
\item HCR 25.48(2).
\item In \textit{The ‘Clarabelle’} (footnote 149, supra), the court held that an interlocutory application to re-arrest the vessel was appropriate and available under the inherent jurisdiction of the court.
\item An award of aggravated damages for wrongful arrest was available in \textit{Transpac Express Ltd v. Malaysian Airlines} [2005] 3 NZLR 709 (HC) where bad faith or at least gross negligence had been established in applying for arrest since the plaintiff’s commercial representative had known that there was no proper factual basis for the claim. The conduct of the plaintiff’s lawyer, in deciding to institute proceedings when there was no jurisdiction (arrest of an aircraft was not available in the circumstances), was described as an error of judgement not amounting to bad faith or gross negligence and for which only compensatory damages would be available. See also \textit{Nalder & Biddle} (footnote 153, supra).
\item Appraisement and sale of property under arrest is addressed in HCR 25.51. A request in form AD15 must be filed and payment for filing fees of NZ$2,000 must be made.
\item HCR 25.51(2).
\end{enumerate}
\end{footnotesize}
manner of sale.\textsuperscript{157} Property under arrest can be sold before judgment where the costs of maintaining it are significant, although this is not normally done unless the vessel is deteriorating.\textsuperscript{158} The gross proceeds of the sale will be brought into court.\textsuperscript{159}

A sale cannot be concluded for less than appraised value, unless the court is satisfied that a higher price cannot be achieved.\textsuperscript{160} Sales are usually by registrar-appointed broker.\textsuperscript{161} A party who obtains judgment against the ship or its sale proceeds may apply for orders determining the order of priority of claims.\textsuperscript{162}

VI REGULATION

i Safety
The MTA is the principal maritime safety enactment, although much of the comprehensive regime regulating construction, operation, and navigation of vessels is found in the Maritime Rules.\textsuperscript{163}

Parts 19 to 25 (regulating ship operations and safety management systems) and Parts 40A to 49 (regulating ship design, construction, and equipment) of the Maritime Rules are most significant for present purposes. In particular:

\begin{itemize}
  \item[a] Part 20 defines ships’ operating limits, and sets standards for commercial ships, equipment, and qualifications of crewmembers.
  \item[b] Parts 19 and 21 provide for safe ship management systems (SSMS) to ensure compliance with prescribed standards relating to construction, stability, equipment, operating limits, operating parameters, crew qualifications and training, vessel maintenance, emergency procedures, and health and safety.\textsuperscript{164}
\end{itemize}

Section 1 (Part 21) applies to foreign SOLAS ships, and incorporates SOLAS

\textsuperscript{157} Laws of New Zealand, Maritime Law: Admiralty at [192].
\textsuperscript{158} HCR 25.51(3). UFL Charters Ltd v. The Ship ‘Malakhov Kurgan’ HC Christchurch CIV-2006-409-1370, 17 October 2006. For an example where an order was made despite opposition, see Bank of Nakhodka v. The Ship ‘Abruka’ (1996) 10 PRNZ 326 (HC). Such an order was refused in Tomita v. The Unnamed Vessel Formerly Known as ‘Amami Taiki Go’ and Also Known as ‘Intrepid’ (footnote 35, supra).
\textsuperscript{159} HCR 25.51(7).
\textsuperscript{160} Laws of New Zealand, Maritime Law: Admiralty at [192].
\textsuperscript{161} Ibid. For an insight into the customary procedures, see Mobil Oil NZ Ltd v. The Ship ‘Rangiora’ [2000] 1 NZLR 49 (HC) (order for sale); California Bank & Trust v. The Ship ‘Cara’ HC Whangarei CIV-2010-488-39, 23 March 2010 (order for appraisement and sale) and Mobil Oil NZ Ltd v. The Ship ‘Rangiora’ HC Auckland AD877, 21 August 1998 (judgment on application concerning appointment of broker).
\textsuperscript{162} HCR 25.52 sets out the procedure for determining priority of claims against proceeds of the sale of a ship.
\textsuperscript{163} Health and safety issues regarding seafarers are addressed below.
\textsuperscript{164} MTA, Section 17(4). Part 21 prescribes the conditions of entry to an SSMS and for remaining within that system. It includes the requirement for compliance with the NZ Safe Ship Management Code, appearing as an appendix to Part 21.
Chapter IX by requiring shipowners to implement shore-based and shipboard SSMS in compliance with the International Safety Management Code (ISM). For New Zealand-registered ships, Part 19 implements a maritime operator safety system (MOSS) by which operators develop safety systems required for maritime transport operator certificates (MTOC).  

- Part 22 contains the Colregs. The MTA imposes further obligations on shipowners and masters regarding accidents.
- Parts 24A–E address carriage, stowage, and securing of cargo, including dangerous cargo.
- Part 40B requires (broadly) foreign passenger ships, non-passenger ships exceeding 500 GRT and ships operating on the New Zealand coast that exceed 45 metres in length and which proceed beyond restricted limits to comply with SOLAS design, construction, telecommunications and equipment requirements.
- Part 46 implements SOLAS survey certification requirements for applicable New Zealand ships and foreign ships while at New Zealand ports.
- Part 47 prescribes requirements for assigning and marking load lines and issue of load line certificates.
- Part 48 requires certain New Zealand ships to be measured for tonnage and issued with tonnage certificates.
- Part 49 addresses testing, examination and inspection of ships’ lifting appliances and loose cargo gear aboard ships.

165 Part 19 replaces Section 2 (Part 21). MOSS also replaces Part 46 (which guides surveys, certification and maintenance) with Part 44. Part 44 prescribes requirements for recognition as to who may be a surveyor and requirements for survey, certification, and maintenance of ships operated under an MTOC.

166 For instance, Section 30 requires every employer of seafarers on a New Zealand ship to maintain a register of accidents, incidents, and mishaps, and by Section 31 a master of a ship that is involved in a mishap that results in serious harm to a person, an accident, or an incident, must notify the mishap, accident, or incident to MNZ as soon as practicable. Section 32 imposes obligations on masters to assist persons in danger, assist following a collision, and respond to distress calls, and Section 33 imposes a requirement that a master report dangers to navigation.

167 These Parts give effect to several aspects of SOLAS, the International Convention for Safe Containers 1972, and several IMO codes of safe practice.


169 The tonnage measurement and tonnage certificate requirements implement the International Convention on Tonnage Measurement of Ships 1969.

Regional port and marine regulation

Part 3A of the MTA provides for local regulation of maritime activity by regional councils. The most important provisions relate to harbormasters, port operations, and navigation by-laws. Harbour masters have extensive powers to perform prescribed duties to ensure maritime safety. Obligations are placed on regional councils to promulgate navigation by-laws and prescribe ship traffic separation and management schemes. Finally, port operation provisions require operators not to operate in a manner causing unnecessary risk, and include a comprehensive regime for port inspection and audit to ensure health and safety standards are upheld. The non-legally binding New Zealand Port and Harbour Marine Safety Code and Code of Practice for Health and Safety in Port Operations are also of practical import to port operators in this regard.

Maritime security

The MSA was enacted in the aftermath of 9/11 to ‘enhance ship and port security’ and to ‘prevent international terrorism’. It establishes a maritime security framework to reduce the risk of security incidents affecting ships or ports, and reflects New Zealand’s adoption of Chapter XI-2 of SOLAS by implementing the ISPS Code. It contains provisions necessary for:

- assessing security risks for individual ships and port facilities;
- developing ship and port facility security plans based on risk assessments;
- specifying security levels at which ships and port facilities must operate;
- maintaining communication protocols for ships and port facilities;
- preventing unauthorised access to ships, port facilities, and restricted areas; and
- preventing the introduction of unauthorised weapons, incendiary devices, or explosives to ships and port facilities.

The MSA (in Part 2) imposes security measures for ports and ships (e.g., mandated security plans and systems) and (in Part 3) provides for preventive security measures concerning access to, and security at, ports. The Maritime Security Regulations 2004,

171 MTA, Sections 33D–F.
172 MTA, Sections 33S–V.
173 MTA, Sections 33M–Q.
174 The navigation by-laws may be sourced directly from the regional councils.
175 The Code was introduced together with accompanying Guidelines for Port and Harbour Risk Assessment and Safety Management Systems in New Zealand, Guidelines for Providing Aids to Navigation in New Zealand, and Guidelines of Good Practice for Hydrographic Surveys in New Zealand Ports and Harbours. Additional Guidelines include the Guidelines on environmental factors affecting safe access and operations within New Zealand ports and harbours, Guidelines for aquaculture management areas and marine farms, and Guidelines in relation to safety management of power line waterway crossings.
177 MSA, Section 3.
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together with Rule 40B of the Maritime Rules, implement detailed technical security requirements.

ii Port state control

Port state control (PSC) of foreign ships is governed by the MTA. MNZ has the power to detain, seize, or impose conditions upon the operation of dangerous or hazardous ships.

A PSC regime – the Tokyo MoU – has been in effect for major Asia-Pacific maritime nations since April 1994. It requires members to establish and maintain an effective PSC system to ensure foreign merchant ships comply with appropriate international standards. New Zealand adopted the Tokyo MoU targeting system under which it aims to inspect 90 per cent of all high-risk vessels calling at its ports. In harmonising the Paris and Tokyo MoUs, a new inspection regime has been implemented from January 2014, under which ships are categorised by risk with corresponding inspection intervals. New Zealand and Australia signed a separate MoU in 1999 recognising each other’s PSC inspections. Both countries operate identical PSC documentation and inspection data exchange regimes.

In 2012–2013, a total of 580 vessels were inspected: 420 were initial inspections, 160 were follow-up inspections, checking that previous deficiencies had been corrected, and 12 vessels were detained.

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178 MTA, Section 54. The Director may require any person who holds a maritime document or operates, maintains, or services, or does any other act in respect of any ship to undergo inspections and audits in the interests of maritime safety or the health or safety of seafarers, or for the purposes of any provision of any of Parts 1 to 15. A recently added Section 54A also enables the Director to investigate maritime document holders in certain cases. There are 11 inspectors based at 11 ports throughout New Zealand.

179 MTA, Sections 55 and 397.

180 The governments whose maritime administrations are parties to the non-legally binding Tokyo MoU are Australia, Canada, Chile, China, Fiji, Hong Kong, Indonesia, Japan, Korea, Malaysia, New Zealand, Papua New Guinea, the Philippines, the Russian Federation, Singapore, Thailand, Vanuatu and Vietnam. The MoU gives effect to a number of international conventions: see paragraph [2.1] of the MoU.

181 If a vessel had deficiencies at its last inspection, whether in New Zealand or any other member, it will be inspected on its next visit to New Zealand regardless of when the last inspection occurred.

182 See www.tokyo-mou.org/inspections_detentions/NIR.php.

183 MNZ 2013 (footnote 5, supra).
iii Registration and classification

Registration

The SRA establishes a Register of Ships, divided into Parts A and B.\textsuperscript{184} It applies to all New Zealand-owned ships.\textsuperscript{185} Registration under Part A confers nationality, is evidence of title, and enables registration of mortgages.\textsuperscript{186} Part B registration only confers nationality.\textsuperscript{187} Caveats against dealing may be entered in some cases.\textsuperscript{188}

It is compulsory for New Zealand-owned ships 24 metres and over to be registered under Part A except pleasure vessels and ships engaged on inland waters.\textsuperscript{189} Foreign ships on demise charter to New Zealand-based operators are entitled to Part A registration.\textsuperscript{190} Other New Zealand-owned ships are entitled to be registered under Part A or Part B, including ships not exceeding 24 metres.\textsuperscript{191} Registration under Part B is optional and includes pleasure vessels and ships less than 24 metres.\textsuperscript{192} Where such ships voyage overseas they must register under either Part A or B if New Zealand-owned.\textsuperscript{193}

For registration, the registrar must be provided with a prescribed application and statutory declaration.\textsuperscript{194} Part A applicants must furnish certain evidence and the ship

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\textsuperscript{184} The Fisheries Act 1996 contains a separate registration regime for commercial fishing vessels within New Zealand waters.

\textsuperscript{185} See the detailed definition of ‘New Zealand ship’ in SRA, Section 3. The SRA also applies to ships on ‘demise charter to New Zealand-based operators’, for the definition of which see Section 4.

\textsuperscript{186} SRA, Sections 13 and 34. New Zealand has two registers in which security interests over ships can be registered, one being the SRA and the other the Personal Property Securities Act 1999. The relation between the two in respect of ships less than 24 metres is of some complexity. Ships 24 metres and over cannot be registered on the PPSR, only the SRA.

\textsuperscript{187} SRA, Section 57(1). Ships entitled under Section 8 to be registered (not being ships that are required by Section 6(2) to be registered) are also conferred nationality. As to mortgages, see SRA, Sections 39–45 and 70.

\textsuperscript{188} SRA, Sections 51–56.

\textsuperscript{189} SRA, Section 6(1). There is an exception in the case of pleasure vessels, ships engaged solely on inland waters of New Zealand, barges that do not proceed on voyages beyond coastal waters and certain other ships exempted by the Director of MNZ.

\textsuperscript{190} SRA, Section 8(1).

\textsuperscript{191} Ibid.

\textsuperscript{192} SRA, Section 8(2).

\textsuperscript{193} Ibid. The Minister of Transport may exempt from registration any New Zealand-owned ship that is being operated by a foreign resident under a demise charter, if the Minister is satisfied that the ship is registered, or will be registered in a foreign country and that it is, or will be entitled to fly that country’s flag. The exemption is for the period of the relevant charter.

\textsuperscript{194} Registration fees specified in the Ship Registration (Fees) Regulations 2013 must be paid, and registration form SR2 must be submitted for Part A. As to the declaration, see SRA, Section 13.
must be surveyed by the MNZ Director. Part B requires the name, description, and overall length of the ship, and shipowner details.

The purchase, sale, and ownership of ships is broadly governed by ordinary personal property principles. Property in ships can be divided into 64 individual shares. Transfer of ownership in a registered ship normally occurs on execution of a bill of sale. For transfer of ownership or shares registered under Part A, a bill of sale must be lodged with the registrar.

Classification societies
MNZ maintains a list of approved classification societies. Those societies are the American Bureau of Shipping, Bureau Veritas, Lloyd's Register International, Germanischer Lloyd New Zealand Ltd and Det Norske Veritas (NZ) Ltd.

The leading authority on tortious liability of surveyors is Attorney-General v. Carter, where the Court held no duty of care was owed by surveyors because the survey certificates were part of a statutory safety regime thereby militating against imposition of a duty to guard against economic loss. It has also been held that a classification society does not owe a duty to protect economic interests of ship purchasers. The position may be different where loss is not purely economic.

Environmental regulation
Protection of New Zealand’s marine environment from vessel-source pollution is provided for by a combination of primary legislation, regulations, Maritime Protection Rules, standards, guidelines, and conventions.

The major international conventions implemented in New Zealand are:

195 SRA, Sections 14–15. A certificate specifying the ship’s length and description (in the case of ships with a register length of no more than 24 metres) or the ship’s gross and net tonnages and its description (in the case of ships with a registered length of more than 24 metres) is required.

196 SRA, Section 12(3).

197 SRA, Section 57(2).

198 SRA, Section 22. Most commonly, where ships are (for instance) jointly owned, the owners will form a holding company under the Companies Act 1993 in which they will be shareholders.

199 SRA, Sections 35–36.


DNV GL was formed in September 2013 by the merger between Det Norske Veritas and Germanischer Lloyd.


203 For a critique, see Myburgh ‘Shipping Law’ [2003] NZLR 287.

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\[ a \] the Intervention Convention and the Intervention Protocol;
\[ b \] CLC Convention;
\[ c \] the Oil Pollution Fund Convention;
\[ d \] MARPOL;
\[ e \] UNCLOS;
\[ f \] the OPRC Convention; and
\[ g \] the London Dumping Convention and 1996 Protocol.

Environmental framework
The enactments governing vessel-source pollution are the RMA and MTA:
\[ a \] Within New Zealand’s territorial waters – the coastal marine area (CMA) – criminal liability for dumping of waste and discharge of contaminants and harmful substances from ships into water or air is governed by the RMA.\(^{205}\)
\[ b \] Within the EEZ (and beyond for New Zealand ships), criminal liability for discharge of harmful substances is governed by the MTA, as is liability for dumping into the EEZ or onto the continental shelf.\(^{206}\)
\[ c \] Civil liability for pollution damage is (generally) governed by the MTA.\(^{207}\)

The EEZ Act has recently been amended to transfer regulation of exploratory and development activities in the EEZ and continental shelf to the Environmental Protection Agency.\(^{208}\) The amendments prohibit harmful discharge and dumping of waste from structures, submarine pipelines and ships (where it is a mining discharge from a ship).\(^{209}\)

The MTA continues to regulate non-mining discharges and dumping from ships in the EEZ (and beyond for New Zealand-registered ships) as well as civil liability for pollution damage and marine oil spill response.

Two other relevant environmental enactments are the Biosecurity Act 1993, which contains requirements for discharge in New Zealand waters of ships’ ballast water from overseas,\(^{210}\) and the Hazardous Substances and New Organisms Act 1996, which governs importation and management of hazardous waste and products.

Vessel-source pollution within territorial waters – RMA
The provisions of the RMA and Resource Management (Marine Pollution) Regulations 1998, concerning discharge of contaminants from ships within the CMA, mirror

\(^{205}\) RMA, Sections 15A–15C.
\(^{206}\) MTA, Sections 226 and 261.
\(^{207}\) MTA, Part 25.
\(^{208}\) Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.
\(^{209}\) Section 11 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Amendment Act 2013 sets out the demarcation points between regulation under the EEZ Act and the MTA.
\(^{210}\) It does so via import health standards promulgated under Section 22. The rules controlling the discharge of ballast water are spelled out in the Import Health Standard for Ballast Water.
MARPOL and the London Dumping Convention. Monitoring and enforcement is conducted by regional councils.

The principal provisions provide that no person may:

- **a** dump or incinerate any waste from any ship in the CMA (unless allowed to by resource consent);\(^{211}\)
- **b** discharge a harmful substance\(^{212}\) or contaminant\(^{213}\) or water from a ship into water, land or into air, unless the discharge is permitted or controlled by regulations, a (proposed) regional (coastal) plan, or resource consent.\(^{214}\) There are exceptions if there is no significant adverse effect on the environment (and contaminants incidental to normal ship operations may be discharged);\(^{215}\) or
- **c** dump from any ship in the CMA any radioactive waste or radioactive matter.\(^{216}\)

A strict liability offence is committed where a person contravenes or permits a contravention of the RMA concerning unauthorised dumping or incineration of waste (including radioactive waste).\(^{217}\) Where a harmful substance or contaminant or water is discharged from a ship in breach of the RMA, the master and owner each commit a strict liability offence.\(^{218}\) The definition of owner includes:\(^{219}\)

- **a** persons with legal or equitable ownership, or possession of the ship; and
- **b** any charterer, manager, or operator of the ship, or any other person (apart from a pilot) responsible for navigation of the ship. It captures time charterers, even where not responsible for ship management.\(^{220}\)

Non-natural persons face a maximum penalty of NZ$600,000 plus NZ$10,000 per day for continuing offences.\(^{221}\) Natural persons face a maximum penalty of imprisonment for two years or a maximum NZ$300,000 fine. An additional penalty of three times

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\(^{211}\) RMA, Section 15A.

\(^{212}\) The definition of ‘harmful substance’ is prescribed in Regulation 3 of the Resource Management (Marine Pollution) Regulations 1998 as including petroleum in any form, substances specified in Schedules 1 and 2 of the Regulations, drainage, and wastewater.

\(^{213}\) ‘Contaminants’ are defined in Section 2(1) of the RMA to broadly include any substance that when discharged into water, changes or is likely to change the physical, chemical, or biological condition of water.

\(^{214}\) RMA, Section 15B.


\(^{216}\) RMA, Section 15C. ‘Radioactive waste or other radioactive matter’ means any waste or other matter containing any radioactive material within the meaning of the Radiation Protection Act 1965.

\(^{217}\) RMA, Section 338(1A).

\(^{218}\) RMA, Section 338(1B).

\(^{219}\) By Section 2(1), the definition of owner in Section 222(2) of the MTA is imported into the RMA.


\(^{221}\) The penalties are contained in Section 339(1) and (1A) of the RMA.
the commercial gain can be imposed where the offence was committed in the course of producing that gain.\footnote{222} Reparations for clean-up costs may be awarded.\footnote{223} Offenders on foreign ships (with exceptions) cannot be imprisoned for such offences.\footnote{224}

\textbf{Vessel-source pollution beyond CMA – MTA}

Parts 18–27 of the MTA regulate vessel-source pollution beyond the CMA.\footnote{225} They prohibit (unless otherwise authorised):

\begin{itemize}
\item[a] harmful substances from being discharged from any ship into \textit{(inter alia)} the EEZ or beyond the outer limits of the EEZ for any New Zealand ship;\footnote{226}
\item[b] dumping into the sea within the EEZ or the continental shelf beyond the outer limits of the EEZ;\footnote{227} and
\item[c] dumping radioactive matter from any ship within the EEZ, the continental shelf beyond the EEZ’s outer limits, or from a New Zealand ship beyond New Zealand continental waters.\footnote{228}
\end{itemize}

Where a harmful substance is discharged from a ship, the master and owner of the ship each commit a strict liability offence.\footnote{229} The maximum penalty is imprisonment not exceeding two years or a fine not exceeding NZ$200,000 plus NZ$10,000 per day for continuing offences. A court may also order that clean-up costs be paid.\footnote{230} An additional penalty of three times the value of any commercial gain may be imposed where the offence was committed in the course of producing that gain.\footnote{231} The master and owner of a ship each commit a strict liability offence if waste or other matter, or radioactive waste or matter, is taken on board a ship for dumping or is dumped.\footnote{232} The penalties are the same as for discharges (except imprisonment is not available for dumping of

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\footnotesize

\begin{itemize}
\item[222] RMA, Section 339B.
\item[223] Sentencing Act 2002, Section 12.
\item[224] RMA, Section 339A.
\item[225] See Section 11 and Schedule 1 of the EEZ Amendment Act 2013 for the regulatory functions being transferred to the EEZ Act. These principally concern regulation of offshore installations, marine operations, pipelines, and mining discharges from ships within the EEZ.
\item[226] MTA, Section 226. A ‘harmful substance’ is any substance so specified by the Marine Protection Rules.
\item[227] MTA, Section 261. Part 21 implements the London Dumping Convention.
\item[228] MTA, Section 258.
\item[229] MTA, Section 237. ‘Owner’ is defined in Section 222(2) of the MTA. There are limits on persons against whom proceedings can be commenced beyond the territorial sea in Section 224. Section 243 contains certain defences, such as where a discharge occurs for the purpose of securing the safety of a ship.
\item[230] MTA, Section 244(1).
\item[231] MTA, Sections 244(1)(c) and 409.
\item[232] MTA, Sections 263–264.
\end{itemize}
non-radioactive waste). Restrictions on imprisoning shipowners or masters of foreign ships also apply.


The marine environment is protected from ‘hazardous ships’ in Part 20 of the MTA in accordance with the Intervention Convention and Protocol. A host of other (more minor) requirements (and offences) are imposed under the MTA concerning reporting of discharges that are in breach of the RMA or the MTA, notifying arrivals of ships carrying oil or noxious liquid substances, and notifying transfers of harmful substances.

**Marine oil spill response**

New Zealand gives effect to its OPRC obligations by providing for plans and responses to protect the marine environment in the event of oil spills. MNZ has produced a National Oil Spill Response Strategy and Plan, which enacts a three-tiered (on-site, regional, and national) response to oil spill containment. Oil spill contingency plans and on-scene commanders are provided for.

The Oil Pollution Advisory Committee (OPAC) has the role of advising MNZ on response strategy for oil spills, oil pollution levies, and use of the Oil Pollution Fund (OPF). Part 24 contains the framework under which levies are imposed on ships to fund the OPF. The OPF meets costs involved in running OPAC, and planning, implementing and responding to oil spills.

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233 MTA, Sections 266–267.
234 MTA, Sections 244(2) and 267(2).
235 These rules implement provisions of MARPOL, the OPRC and the London Dumping Convention.
236 MTA, Section 248. The MNZ Director may instruct the master of any New Zealand ship or ship within New Zealand continental waters to render assistance to a hazardous ship, assist in operations for the cleaning up and control of harmful substances, and take on board any items or equipment.
237 MTA, Sections 244–245.
238 For example, MTA, Sections 227–230.
239 Parts 23 and 24 of the MTA.
240 MTA, Sections 283–285.
241 MTA, Sections 286–328. Shipboard and site marine contingency plans are required to be prepared, reviewed, and kept in accordance with Marine Protection Rules.
242 MTA, Section 282.
243 The current levies are specified in the Maritime Transport (Oil Pollution Levies) Order 2013.
244 MTA, Sections 330–331.
Civil remedies for vessel-source pollution
The MTA imposes civil liability for pollution damage in internal and marine waters (i.e., the CMA and EEZ). Specifically, where:

a) the Crown or marine agencies have incurred clean-up costs in dealing with harmful substances or dumped waste, the owner of a ship must pay – subject to the overall limit – reasonably incurred clean-up costs. This provision does not apply to discharge of oil from CLC Convention ships;245 and

b) pollution damage is caused by discharge of harmful substances or dumping of waste, a claim in damages may be made – subject to the overall limit – against the owner of the ship.246 Costs incurred for any reasonable preventive measures taken by the Crown to reduce or eliminate a grave and imminent threat of a discharge may also be recovered under this provision.247

While the RMA does not apply to civil claims for pollution damage, it does provide the option of pursuing an enforcement order against a shipowner for breach of certain RMA provisions.248 Enforcement orders are discretionary remedies,249 which may be sought as part of a stand-alone action or in connection with sentencing250 (except for pollution damage by CLC Convention ships liable under Part 25 of the MTA).251

Limitation of liability for civil claims
The overall limit on liability applies for MTA pollution claims against non-CLC Convention ships (whether for damages or clean-up costs).252 There is debate as to

245 MTA, Section 344 (subject to the overall Part 7 limit).
246 MTA, Section 345. The definition of ‘pollution damage’ in Section 342 means that claims may be made for a number of heads of loss, including cost of any reasonable preventive measures taken, costs of reasonable measures of reinstatement of the environment that are or are to be undertaken and losses of profit from impairment of the environment.
247 Before 2005, the MTA did not provide for the recovery by the Crown of spill response preparation costs where no pollution from a ship actually occurred. Following the successful defence of the Tai Ping (a bulk carrier that ran aground near the entrance to Bluff Harbour in October 2002) on this basis, Section 345(1)(b) of the MTA was inserted to enable the Crown to recover such costs.
248 RMA, Section 314(1) may apply where breach of Sections 15A–15C is concerned.
249 Enforcement orders could be made under Section 314(1)(d) to require a person to pay money to or reimburse any other person for any actual and reasonable costs and expenses which that other person has incurred.
250 RMA, Section 316(1). No person (other than the Minister, the MNZ Director, a local authority, or a consent authority) may apply to the Environment Court for an enforcement order to require any person to comply with or cease contravening Section 15B.
251 RMA, Section 325B(3).
252 Sections 344 and 345 are ‘subject to’ Part 7. That this is the case is also emphasised by Section 347(6) which states that overall liability limits for pollution damage, other than oil pollution damage, from CLC Convention ships, are specified in Part 7.
whether it applies to reparations or enforcement orders, with some commentators arguing that clean-up costs exceeding the overall limit may be recovered.\textsuperscript{253}

For oil spills from CLC Convention ships, liability is based on the CLC Convention and Oil Pollution Fund Convention.\textsuperscript{254} CLC Convention ships are not liable to the Crown for clean-up costs from oil discharges, but damages claims may be brought for oil pollution.\textsuperscript{255} Those damages claims for oil pollution are subject to the liability limits in the CLC Convention regime (not the overall limit).\textsuperscript{256} Part 26 provides another layer of compensation for oil pollution damage from the International Oil Pollution Fund under the Oil Pollution Fund Convention.\textsuperscript{257} Claims against CLC Convention ships may be made by the Crown for clean-up costs of harmful substances, and damages claims for pollution may also be made, provided the harmful substance or pollution is not oil, subject to the overall limit.\textsuperscript{258}

The recently amended MTA – reflecting Parliament’s appreciation following the MV Rena grounding that the vessel-source pollution regime required modernisation – has provided for the implementation of the Bunker Convention, which came into force on 1 October 2014.\textsuperscript{259} Bunker Convention claims are subject to the overall limit.\textsuperscript{260}

\textsuperscript{253} For an excellent analysis, see Marten, ‘Limitation of Liability in Maritime Law and Vessel-Source Pollution: A New Zealand Perspective’ [2013] NZLR 199. Stand-alone enforcement orders cannot be made against CLC Convention ships in any event.

\textsuperscript{254} MTA, Section 347.

\textsuperscript{255} MTA, Sections 344(2) and 347(1).

\textsuperscript{256} MTA, Section 347(1). The current limits are specified in clause 4 of the Maritime Transport (Maximum Amounts of Liability for Pollution Damage) Order 2003. Note the 2003 Supplementary Fund Protocol, which would increase the upper limits, is not in force.

\textsuperscript{257} MTA, Section 372. Claims may be made against the IOPF where (inter alia) the owner of the ship is not liable for the pollution damage under Part 25 or the pollution damage exceeds the maximum amount of liability of the owner of the ship determined under Section 347. Section 373 contains the maximum amounts of liability, Sections 378–383 set out the mechanical provisions in respect of proceedings against the IOPF, and Section 385 provides for levies on oil imports. Levies on oil imports (required to comply with the Oil Pollution Fund Convention) are presently imposed in accordance with the Maritime Transport (Fund Convention) Levies Order 1996.

\textsuperscript{258} MTA, Sections 344(2) and 347(1) and (6).

\textsuperscript{259} MTA Amendment Act 2013, Sections 91–100. Sections 91 to 100 of the Maritime Transport Amendment Act 2013 come into force on 1 October 2014: Maritime Transport Amendment Act 2013 Commencement Order 2014.

v Collisions, salvage and wrecks

Collisions
The Maritime Rules give domestic effect to the Colregs and the IMO Traffic Separation Schemes. Liability for collisions is determined under tort law. Contravention of the Colregs (where established) is normally considered negligent.

Section 6 of the AA bars in personam claims for damage, loss of life or personal injury arising from collisions between ships, manoeuvres to avoid a collision, or non-compliance with the Colregs, unless:

a the defendant ordinarily resides in, or has a place of business within New Zealand;

b the collision took place within New Zealand territorial waters;

c an action arising from the same incident or series of incidents is proceeding in, or has been decided by, a New Zealand court; or

d the defendant has submitted to the New Zealand courts’ jurisdiction.

Salvage
Most salvage services are undertaken by contractual arrangement, most commonly using the LOF. As the LOF requires the salvage award to be fixed by negotiation or, ultimately, arbitration, salvage disputes are typically settled without judicial intervention.

The Salvage Convention is incorporated in Schedule 6 to the MTA. Part 17 of the MTA contains supplementary provisions, mainly regarding salvage for the purposes of preserving life and the apportionment of salvage payments.

Wrecks
The wreck regime aims to minimise navigational hazards. The MTA requires anyone who ‘finds or takes possession of any wreck within the limits of New Zealand, or takes possession of and brings within the limits of New Zealand any wreck found outside those limits’ to notify the MNZ Director. If the finder is not the owner, he must deliver it to the police or allow the police to take possession of it. Failure to comply is an offence, resulting in loss of any salvage claim against the wreck and a fine of double the wreck’s value.

The MNZ Director has the power to remove and sell wrecked or derelict ships that are navigational hazards. Regional councils may also take steps to remove wrecks

261 See MTA, Part 22.
262 For a recent New Zealand decision on the scope of the Salvage Convention, see Switzer Salvage BV v. Z Energy Ltd [2013] NZHC 3541. For more detail, see Marten, ‘Salvaging the Rena’ [2013] NZLJ 412.
263 MTA, Section 105.
264 MTA, Section 110.
(or abandoned ships)\(^265\) within their region posing a hazard to navigation.\(^266\) The Director may take steps to remove the wreck if a regional council fails to do so.\(^267\)

vi Passengers’ rights

Carriage of passengers by sea is principally regulated by the individual terms of the carriage contract, although some aspects are statutorily regulated. New Zealand has not ratified the Athens Convention.

**Passengers**

Owners of New Zealand ships and seafarers (including masters) have a general duty to take all practicable steps to ensure the ship does not cause harm.\(^268\)

For international carriage of passengers not ordinarily resident in New Zealand, the Accident Compensation Act 2001 (ACA) will not apply while they are on board a ship that comes to or leaves New Zealand.\(^269\) Accordingly, non-residents’ proceedings for personal injury on international ships are not barred by the ACA (although New Zealand may not be *forum conveniens*). If a claim is brought, a carrier’s civil liability for death or injury will be determined according to tort law but is subject to the overall liability limit.\(^270\)

Claims for personal injury suffered by persons ordinarily resident in New Zealand during international carriage are barred in New Zealand (but not necessarily in foreign courts) provided the injury would have been covered by the ACA if it had occurred in New Zealand.\(^271\)

In terms of carriage of passengers on domestic ships (where the ship remains within 300 nautical miles from New Zealand), the ACA bars proceedings against the carrier for personal injury in New Zealand.\(^272\)

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265 MTA, Section 33L. The MTA Amendment Act 2013 inserted the new wreck provisions in Part 3A.
266 MTA, Section 33J.
267 MTA, Section 33K.
269 ACA, Section 23.
271 ACA, Section 22.
272 ACA, Sections 16(3), 20 and 317(1).
Baggage
Carriers’ liability for damage to passengers’ baggage during international carriage is determined in accordance with the contract of carriage, subject to the overall limit.

Domestically, carriers’ liability for damage to checked baggage is determined under the CGA, meaning that carriers are, by default, strictly liable for loss or damage, subject to a NZ$1,500 limit for each item of baggage. The ordinary regime does not apply to hand baggage, for which the carrier is only liable for loss or damage caused by negligence or wilful default.

vii Seafarers’ rights
Seafarers’ conditions of employment on New Zealand vessels are largely determined by their employment contracts under the Employment Relations Act 2000 and the non-sector-specific statutory overlay (e.g., HSE, Minimum Wage Act 1983, Wages Protection Act 1983 and Holidays Act 1981).

The MTA sets minimum health and safety standards and prohibits unacceptable maritime employment practices. Employers owe duties to seafarers on New Zealand ships going overseas concerning employment agreements, illness and injury, return of seafarers to their home country, and certificates as to the quality of seafarer’s work. Employers also owe duties regarding provision of food and water, medical attention, and wage payments in the event of the loss or foundering of the ship.

The major technical health, safety, and welfare regulation concerning seafarers is located in the Maritime Rules. MNZ has recently introduced a seafarer-licensing framework for competency called ‘SeaCert’. At the core of the framework are Maritime Rules covering seafarer certification, medical standards, training and examination. These Rules give effect to STCW and SOLAS. The Rules also govern medical stores and crew accommodation per the international conventions. Shipowners must provide training and supervision to employees to maintain compliance with prescribed safety standards and promote safety.

In addition, the non-sector-specific HSE applies to New Zealand ships and to foreign ships carrying coastal cargo while on demise charter to a New Zealand-based operator. It contains general duties to ensure employee safety and to provide a safe

273 CGA, Sections 12 and 3(1)(h). This amount was increased to NZ$2,000 from 17 June 2014 by dint of the Carriage of Goods Amendment Act 2013.
274 CGA, Section 12(4).
275 MTA, Sections 22–27.
276 MTA, Section 22.
277 MTA, Section 23, which gives effect to the ILO Convention (Unemployment Indemnity).
278 Maritime Rules, Parts 31–35 and 50–53.
279 Maritime Rules, Parts 31–35.
281 MTA, Section 17.
282 HSE, Section 3B.
working environment.\textsuperscript{283} The HSE duties are supplemented by regulations, approved codes of practice, and guidelines. MNZ has also promulgated a Code of Safe Working Practices for Merchant Seafarers, aimed at seafarers on New Zealand-registered SOLAS ships. Moreover, the comprehensive Health and Safety Reform Bill, which is currently before the Parliamentary Transport and Industrial Relations Select Committee, is expected to be enacted to replace the HSE in late 2015.

While New Zealand has not yet ratified the Maritime Labour Convention 2006 (MLC), the government (through the Ministry of Transport and the Ministry of Business, Innovation and Employment) is currently considering the implications of incorporating the MLC into domestic law. No time frame has been set for New Zealand to ratify the MLC.

Seafarers ordinarily resident in New Zealand are covered by the ACA scheme for personal injury while on board ships even if outside New Zealand, and are therefore barred from bringing proceedings (but not necessarily in foreign courts).\textsuperscript{284}

Finally, in terms of seafarer compensation, there is admiralty jurisdiction for claims by a master or seafarers for unpaid wages,\textsuperscript{285} for which a maritime lien can attach.\textsuperscript{286}

\textbf{VII OUTLOOK}

The past few years have been marked by significant reform of the statutory and regulatory framework that governs environmental and safety aspects of New Zealand's maritime environment. These reforms have been prompted by several factors.

First, New Zealand is entering a new period of offshore energy exploration and (potentially) development. This increased activity has coincided with the \textit{Deepwater Horizon} disaster, which prompted a comprehensive review of the maritime health and safety regime. That review has resulted in new environmental legislation for the EEZ and a rationalisation of the existing maritime scheme.

Secondly, the grounding of the MV \textit{Rena}, with its associated environmental damage, brought intense focus on the effectiveness of the country's pollution response. Aspects of the regulatory scheme were found wanting – including New Zealand's failure to adopt the LLMC Protocol 1996 and the Bunker Convention. MNZ worked closely with the Ministry of Transport on the 2013 amendments to the MTA, in relation to which operational changes are continuing to be implemented.

At the same time, 2013/14 saw the achievement of significant enhancements to the two key pillars of domestic shipping safety regulation, aimed at strengthening safety standards in the domestic maritime transport sector. In particular, the process of finalising the new MOSS safety system for the domestic maritime industry and the related seafarer-licensing framework (SeaCert) has been completed after years of development.

\begin{footnotesize}
\begin{itemize}
\item[283] HSE, Section 6.
\item[284] ACA, Sections 20, 22 and 317(1).
\item[285] AA, Section 4(1)(o).
\item[286] AA, Section 2 ('maritime lien').
\end{itemize}
\end{footnotesize}
MNZ is also undertaking an assessment of the work required to bring New Zealand’s rules into conformity with various outstanding and pending amendments to the SOLAS, as well as drafting amendments to increase the minimum insurance limits for offshore installations. This work will continue throughout 2015.

For the fishing industry, a key development has been the government’s decision to require all foreign charter fishing vessels operated by New Zealanders in the EEZ to reflag as New Zealand ships. That process is under way and must be completed by 22 May 2016.

Further substantial reform seems unlikely in the short term. The next few years will be a period for bedding in new arrangements – with the hope that the environmental provisions, in particular, will not be tested. In the meantime, there are several ongoing proceedings arising out of the MV Rena grounding concerning cargo claims and other losses, as well as civil disputes regarding the fate of the wreck itself.
Appendix 1

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John Knight is a partner in the Wellington office of Chapman Tripp. He advises on all types of insurance law issues and has a broad range of maritime law experience ranging from environmental regulatory aspects of maritime activity through to cargo claims, collisions, groundings and vessel securities, including enforcement processes and vessel arrests.

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He is listed in both the *Best Lawyers International Guide* and *Chambers Asia Pacific 2013* for maritime law. According to *Chambers Asia Pacific 2013*, Mr Knight is ‘widely respected by his peers, he is accounted “a strong, able maritime lawyer”’. Among his notable roles, Mr Knight advised the New Zealand government on specialist maritime law aspects concerning the grounding of the cargo vessel MV *Rena* and acted for Maersk in High Court declaratory judgment proceedings regarding the coastal shipping provisions of the Maritime Transport Act 1994.

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Armando Neris is a litigation and dispute resolution solicitor based in the Auckland office of Chapman Tripp. He acts on a broad range of civil disputes for predominantly financial services, energy and natural resources clients, and has particular expertise in corporate, regulatory and commercial contract litigation. He also advises clients, mainly insurers, on contentious insurance and maritime law matters.

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