

Shipping Law

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Maritime Security

Following the events of September 11, 2001, the International Maritime Organisation (IMO) convened a diplomatic conference on maritime security in London in 2002. The IMO diplomatic conference introduced wide-ranging new maritime security measures through amendments to Chapter XI-2 of the Safety of Life at Sea Convention 1974 (SOLAS). The most significant of these SOLAS amendments was the introduction of the International Ship and Port Facility Security Code (the ISPS Code).

The ISPS Code sets out detailed mandatory maritime security requirements for contracting States, port authorities, and shipping companies in Part A, and non-mandatory guidelines regarding these requirements in Part B. New security measures introduced in the ISPS Code include fitting ships with security alarm systems, and requiring ships to carry at all times a continuous synopsis record (providing an ongoing broad history of the ship), an employment history of the ship’s crew, and an international ship security certificate verifying compliance with the ISPS Code. The ISPS Code further requires all SOLAS contracting States, which includes New Zealand, to put in place by 1 July 2004 domestic maritime security rules that fully comply with the SOLAS amendments and ISPS Code, and to communicate to the IMO a list of all approved port facility security plans (for an excellent analysis of the ISPS Code and its impact on international shipping, see Girvin, “The Commercial Implications of the ISPS Code” (2005) 326 *Marlus* (forthcoming)).

In response to the imposition of these international obligations, New Zealand enacted the Maritime Security Act 2004. The purpose of the Maritime Security Act is to “enhance ship and port security” and to “prevent international terrorism” (s 3). Perhaps unsurprisingly, the Act does not attempt a legal definition of “international terrorism” (for a discussion of the difficulties surrounding this exercise, see Dunworth, “Public International Law” [2004] *New Zealand Law Review* 411, 418-421; Myburgh, “Categorising Horror: Marine Insurance Coverage and Terrorism” (2002) 126 *Maritime Studies* 1, 4-5). However, there is also no meaningful attempt in the Act to delineate the concepts of “security” and “security incident”. The Act merely states that a security incident “means any suspicious act or circumstance threatening the security of a ... ship; or ... port facility; or ... ship-port interface; or ship-to-ship activity” (s 5).

There are a number of difficulties with this definition. First, it is essentially a circular non-definition, in that the idea of “security” itself is left undefined. Although this gave rise to some debate during the Select Committee process, the report of the Government Administration Committee concluded that the meaning of security “is implicit in the context and purpose of the Bill”. Second, the definition is overly

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broadly framed, potentially covering a wide range of lawful as well as unlawful activities and circumstances. The Government Administration Committee responded to this concern by further defining “suspicious act” as not including “the lawful exercise of any right to demonstrate, protest, or strike”. Whilst this rather clumsy redefinition amounts to a step in the right direction, it nonetheless still leaves open the possibility that lawful activities other than demonstrations, protests or strikes may be subjected to the full force of the maritime security regime. Third, the definition appears to conflate the risk of, or potential for, a security incident with the actual existence of a security incident itself. It is thus not clear from the definition exactly when a suspicion or risk or threat of a security incident translates into an actual security incident, or whether the existence of a security incident is to be assessed on objective or subjective grounds.

This lack of a coherent and developed definition of security incidents is particularly troubling, as the Maritime Security Act focuses almost entirely on the identification, assessment and management of risks in relation to security incidents. The Act also confers on the Minister of Transport, the Director of Maritime Safety, and maritime security organisations extremely broad and potentially highly invasive powers to prevent security incidents by, amongst other things, restricting entry to designated port security areas, screening and searching ships, people, cargo and vehicles, seizing items, and arresting and detaining people (ss 44-61). These powers may, in general terms, only be exercised where there is a reasonable belief that a security incident may occur. However, because the definition of security incidents in the Act is so nebulous, this will not provide a particularly effective constraint on overzealous application or abuse of the powers granted under the Act.

By comparison, the Australian legislature seems to have had less difficulty in defining the focus of the Maritime Transport Security Act 2003 (Cth). Section 3(1) of that Act provides that its purpose is to safeguard against “unlawful interference with maritime transport”, which is in turn defined in s 11 as follows:

- (1) Any of the following done without lawful authority is an unlawful interference with maritime transport:
 - (a) committing an act, or causing any interference or damage, that puts the safe operation of a port, or the safety of any person or property at the port, at risk;
 - (b) taking control of a ship by force, or threat of force, or any other form of intimidation;
 - (c) destroying a ship that is being used for maritime transport;
 - (d) causing damage to a ship that is being used for maritime transport that puts the safety of the ship, or any person or property on board or off the ship, at risk;
 - (e) doing anything on board a ship that is being used for maritime transport that puts the safety of the ship, or any person or property on board or off the ship, at risk;
 - (f) placing, or causing to be placed, on board a ship that is being used for maritime transport anything that puts the safety of the ship, or any person or property on board or off the ship, at risk;
 - (g) putting the safety of ships at risk by interfering with, damaging or destroying navigational aids, communication systems or security systems;
 - (h) putting the safety of ships at risk by communicating false information.

Whilst still generally framed, the Australian definition of “unlawful interference with maritime transport” is considerably more concrete, detailed and objective than its New Zealand counterpart, and thus — ironically, given the track record of Australia on anti-terrorism legislation and its eagerness to participate in the “war on terrorism” — affords more certainty and protection for the human rights of participants in the maritime industry than the New Zealand legislation.

Since the commencement of the Maritime Security Act, the Maritime Safety Authority has been designated as the organisation responsible for its overall implementation. The Ministry of Agriculture and Forestry, the New Zealand Customs Service, and the Aviation Security Service have been designated as maritime security organisations under the Act. The implementation of the Act seems to have been largely uneventful. The Maritime Safety Authority has verified that all four New Zealand registered ships covered by the Act and all 25 New Zealand port facilities are fully compliant with the ISPS Code. Maritime Safety Authority inspections of vessels arriving at New Zealand ports have revealed a “satisfactory” level of compliance with the ISPS Code.

Readers may be relieved to learn that, at the time of writing this review, New Zealand’s Maritime Security Level is 1, which merely means that “minimum appropriate security measures must be maintained at all times”. So far, the only two maritime security incidents in New Zealand have reportedly involved a hunter who tried to gain access to a port facility while carrying a shotgun, ammunition and a number of knives in his car boot, and a device found attached to a leg of an offshore platform that, it later transpired, was actually a wave-measuring device legitimately placed there by a monitoring authority (Duynhoven, “Address to the National Ports Forum” www.beehive.govt.nz/ViewDocument.aspx?DocumentID=21793).

Maritime Safety

A Maritime Transport Amendment Act 2004

The Maritime Transport Amendment Act 2004 had its genesis in the Transport Legislation Bill 2004, an omnibus Bill implementing the key recommendations of the Government's *Transport Sector Review* (www.beehive.govt.nz/transport/docs/connecting-transport-sector.pdf). The aim of the Transport Sector Review is to ensure that the Ministry of Transport and the various transport agencies are better placed to achieve the vision articulated in the New Zealand Transport Strategy of an affordable, integrated, safe, responsive, and sustainable transport system by 2010. The Review concluded that there are a number of problems in the transport sector, including a lack of leadership from the Ministry of Transport, a lack of collaboration and co-ordination amongst the different transport entities, and an overly narrow focus on safety and efficiency. The Review recommended a number of what it termed “softwiring” initiatives, as well as structural and legislative changes, to ensure closer collaboration between the various transport

entities and the Ministry of Transport, and to bring about a change in culture in the transport sector.

In practical terms, the Maritime Transport Amendment Act 2004 inserted a new statement of the Minister's objectives into the Maritime Transport Act 1994, which now expressly requires the Minister to undertake his or her functions under the Act in accordance with the New Zealand Transport Strategy mantra. The Amendment Act also repealed the safety cost-benefit analysis requirement ("a cost is a reasonable cost where the value of the cost to the nation is exceeded by the value of the resulting benefit to the nation") which had been built into the Maritime Transport Act 1994 by the previous National Government. Predictably, both of these amendments proved controversial. The Amendment Act also broadened out the scope of maritime rules and maritime protection rules to include the entire smorgasbord of New Zealand Transport Strategy objectives: assisting economic development, improving access and mobility, protecting and promoting public health, and ensuring environmental sustainability.

Because the functions and objectives of the Maritime Safety Authority have now been broadened to include all of the New Zealand Transport Strategy objectives, "Maritime Safety" was considered too narrow a soubriquet to describe the full range of the Authority's future activities. "Maritime Transport Authority" was initially suggested, but it was pointed out that the acronym MTA could cause confusion with the Motor Trade Association. Thus, in keeping with the proud New Zealand tradition of conferring silly names on government boards, authorities and other entities, the Maritime Safety Authority will be known as "Maritime New Zealand" from 1 July 2005.

One player in the shipping industry was conspicuous by its absence from this review. As submissions on the Maritime Transport Amendment Act 2004 pointed out, there is no guidance in the Port Companies Act 1988 on the role of port companies in the New Zealand Transport Strategy, and what (if any) measures they should be required or encouraged to undertake in order to achieve New Zealand Transport Strategy objectives. The rather lame response of the majority of the Transport and Industrial Relations Committee was that, as the Transport Sector Review had not considered amendments to the Port Companies Act, this issue could not be included in the Amendment Act. The majority did, however, recommend that "serious consideration" be given to a future review of the Port Companies Act.

B New Zealand Port and Harbour Marine Safety Code and Guidelines

A number of serious incidents involving commercial vessels have occurred off the New Zealand coast in recent years, including the grounding of the *Jody F Millennium* outside Gisborne Harbour in February 2002, the grounding of the *Tai Ping* in Bluff Harbour in October 2002, and the grounding of the oil tanker *Capella Voyager* at the entrance to the approach channel to Whangarei Harbour in April 2003. These incidents highlighted systemic failures in New Zealand port governance. The Maritime Safety Authority's final Accident Report on the *Jody F Millennium* grounding recommended that the Director of Maritime Safety and the Ministry of Transport introduce a port marine safety code and guidelines modelled on the United

Kingdom Port Marine Safety Code (for further discussion of the Report and its recommendations see [2003] New Zealand Law Review 287-289). The final version of the New Zealand Port and Harbour Marine Safety Code, 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, was completed by the Maritime Safety Authority in August 2004 (www.msa.govt.nz/Ports&Harbours/intro.htm).

There is undoubtedly a need for some form of code or digest to gather together in a more organised and accessible format all of the statutory material and other information relevant to port and harbour maritime safety (Code, Introduction, para 3):

Since the advent of port reform in the late 1980s and due to an incomplete and fragmented statutory regime, different division of responsibility for harbour marine safety functions has developed in various ports and harbours around New Zealand. The applicable statutory framework is such that there is a degree of uncertainty as to the precise legal duties and powers of the various entities that have responsibility for marine operations.

However, from a lawyer's perspective, the Code is a rather curious beast. It is "not law". Instead, it is "a statement of good practice based on a practical interpretation of New Zealand law". In the same breath, however, it is said to be "an assessment of legal responsibilities under existing law applicable to the operation of New Zealand ports and harbours". It is also, more importantly, "an assessment of where those responsibilities lie" and "represents the national standard against which the policies, procedures and performance of regional councils, port companies, the Maritime Safety Authority and other relevant parties may be measured". Whilst compliance with the Code is not mandatory, "prudent participants in the system will be able to use compliance with the Code to demonstrate they have taken all reasonable steps to ensure safe marine operations in ports and harbours" and the "best practice guidelines set a standard to which in future they will hold themselves accountable publicly" (Code, Introduction, paras 1, 5, 6).

This blurring of the imperative and hortative voice, of mandatory and voluntary norms, continues throughout the Code, and is neatly illustrated in the definition section, which provides that:

- Must means a legal obligation.
- Shall means a requirement in order to comply with the Code.
- Should means best practice identified by the Code.
- May means empowerment to act, but no direct legal obligation.

The implementation of the Code has already begun. Regional councils are being asked to complete harbour risk assessments by June 2005. These assessments will include an assessment of risks associated with port-related marine operations in their regions. Once the Maritime Safety Authority has signed off on these risk assessments, regional councils will be called upon to develop safety management plans by June 2006 that will again be reviewed and approved by the Maritime Safety Authority.

It would be churlish to criticise any measure that might help to improve maritime safety in New Zealand ports and harbours. However, it does seem rather odd

that this vitally important maritime safety objective should have to be furthered in such a fashion, especially given the current focus on the New Zealand Transport Strategy. Maritime safety in New Zealand ports and harbours is a national issue of paramount importance that ought not to be addressed on a voluntary opt-in basis, or by regulation by stealth. At the very least, the New Zealand Port and Harbour Marine Safety Code should be given some form of proper legislative imprimatur, and compliance with the Code should be made mandatory for all port companies and regional councils.

Carriage of Goods by Sea

In *Dairy Containers Ltd v Tasman Orient Line CV (The Tasman Discoverer)* [2004] UKPC 22; [2005] 1 NZLR 433, one of the last appeals from New Zealand to the Privy Council, the Board upheld the decision of the Court of Appeal in *Dairy Containers Ltd v The Ship "Tasman Discoverer"* [2002] 1 NZLR 265, discussed in [2003] New Zealand Law Review 297-299. This case, it will be recalled, involved the interpretation of a package limitation clause in a bill of lading. Clause 6(B)(b)(i) incorporated the Hague Rules and then provided that:

for the purpose of this sub-paragraph the limitation of liability under the Hague Rules shall be deemed to be £100 sterling, lawful money of the United Kingdom per package or unit ...

Lord Bingham of Cornhill, delivering the opinion of the Board, first discussed the effect of article IX of the Hague Rules, saying that article IX made it plain that the "£100" (or "100 livres sterling" in the official French text) package or unit limitation in article IV rule 5 of the Rules refers to the value of the quantity of gold that was the equivalent of £100 sterling in 1924, rather than to the current monetary or paper value of £100 sterling. As his Lordship pointed out, the passage of time since the Rules were adopted in 1924, and the marked depreciation in the value of pound sterling over this period, meant that "the practical effect of article IX has become increasingly great" (para 11). The Privy Council confirmed that, where the Hague Rules are compulsorily applicable, any attempt to limit the carrier's liability to the monetary or paper value of £100 — as opposed to its gold value — will fall foul of article III rule 8 of the Hague Rules and will be rendered null and void. However, where, as here, the Rules apply as a result of contractual incorporation rather than mandatory application, everything will turn on the correct contractual interpretation of the relevant clause.

The Privy Council restated the well-established general principles that a party seeking to exclude or limit its contractual liability must do so in clear words, and that any ambiguity will be construed *contra proferentem*, and applied Lord Hoffman's general approach to interpreting bills of lading in *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 AC 715 (para 12):

There may reasonably be attributed to the parties to a contract such as this such general commercial knowledge as a party to such a transaction would ordinarily be expected to have, but with a printed form of contract, negotiable by one holder to another, no inference may be drawn as to the knowledge or intention of any particular party. The contract should be given the meaning it would convey to a reasonable person having all the background knowledge

which is reasonably available to the person or class of persons to whom the document is addressed ..., which would certainly include a holder such as Dairy Containers.

Like the Court of Appeal, the Privy Council had no difficulty in concluding that clause 6(B)(b)(i) was clear and unambiguous, and meant precisely what it said: namely, that the carrier's liability was limited to the monetary or paper value of £100 per package or unit. The Privy Council rejected Dairy Containers' argument that the clause was ineffective because article IX of the Hague Rules had not been expressly excluded. While this would have put the issue beyond doubt, it was not the only drafting formula capable of achieving this result. The "deeming" provision in clause 6(B)(b)(i) was clearly intended to modify the limitation provision in the Hague Rules, and it was difficult to imagine what modification could have been intended other than to exclude the effect of article IX. The Privy Council also disagreed that the clause was repugnant to article III rule 8 of the Hague Rules because it introduced a lower package limitation. Where the Hague Rules are not compulsorily applicable, it would be "absurd" to conclude that a clear contractual limitation agreed by the parties was invalidated by article III rule 8 (para 16).

The difficulty with the above arguments advanced by Dairy Containers is that they fail to appreciate the fundamentally different interpretation exercises involved in cases where the Hague Rules are mandatorily applicable, and cases where they are not. In the former category of cases, the starting point for interpretation is the mandatory benchmark of the Rules. The specific bill of lading terms are held up to this benchmark. Those that are repugnant are struck down by article III rule 8. Those that are not may supplement the Rules. In the latter category of cases, however, there is a Copernican shift in interpretation. Here, the starting point is the specific bill of lading terms. The Rules are only relevant to the extent that they are incorporated into the bill of lading, and they do not enjoy any preferential or default status.

Dairy Containers' third main argument, that the parties could not have intended a limitation provision of £100 sterling in clause 6(B)(b)(i) because they had included a much more generous limitation of US\$2.50 per kilo of gross weight in clause 6(A)(4), was also rejected by the Privy Council. Lord Bingham acknowledged that this argument would have had some force if it could be assumed that the bill of lading had been drafted by a single hand and expressed a single coherent intention, but warned (para 17):

[T]hese would be most unsafe assumptions to make when construing a document such as this. It is notorious that clauses are added and amended by different draftsmen at different times in response to the exigencies of commercial life, when and as they arise. A single draftsman expressing a single coherent intention would have been unlikely to provide one limitation in US dollars per kilo and another in British pounds per package or unit.

In confirming the approach of the Court of Appeal in *The Tasman Discoverer*, the Privy Council provided a succinct, pragmatic, and commercially sensible answer to a short (and, some would say, obvious) question. Apart from the fact that it was a "financially significant" matter (para 1), this case was not an obvious candidate for appeal to the Privy Council. In future, given the more stringent criteria for leave to appeal to the Supreme Court (see s 13 of the Supreme Court Act 2003), it seems highly unlikely that cases like *The Tasman Discoverer*, which probably cannot be said

to involve matters “of general commercial significance”, will be heard by the highest New Zealand court.

Limitation of Liability

Global limitation of liability issues rarely come before the New Zealand courts. In *Tasman Orient Line CV v Alliance Group Ltd* [2004] 1 NZLR 650, the High Court had to decide, apparently for the first time in New Zealand, two issues arising from the grounding of the *Tasman Pioneer* off the Japanese coast on “a dark and stormy night” in 2001 (para 5). At the time of the grounding, the *Tasman Pioneer* was sub-chartered by Tasman Orient on a NYPE form from Tasman Orient Line (Cyprus) Ltd, which in turn had chartered the vessel from its owner, Rimba Shipping Co Ltd. As a result of the casualty, Tasman Orient faced cargo claims of over \$13m. It sought a decree from the High Court limiting its total liability to the New Zealand currency equivalent of 2,880,416 SDRs (approximately \$4.5m).

The first issue was whether Tasman Orient, as a time sub-charterer, was entitled to limit its liability. Article 1 of the Convention on Limitation of Liability for Maritime Claims 1976, to which New Zealand is a party, provides that shipowners and salvors are entitled to limitation of liability. “Shipowner” is further defined in article 1(2) as “the owner, charterer, manager and operator of a seagoing ship”. The Convention text therefore obviously extends the right to limit liability to time and voyage charterers. However, the position under Part 7 of the Maritime Transport Act 1994, which gives domestic effect to the Convention in New Zealand law, is less clear. Although the definition of “owner” in s 84 of the Maritime Transport Act does refer to “the charterer”, unfortunate paraphrasing of the Convention text by the New Zealand legislative drafters makes it arguable that this reference is restricted to charterers “responsible for the navigation and management of the ship”; in other words, to demise charterers only, and not to time or voyage charterers.

Williams J declined to adopt a restrictive interpretation of “owner” in s 84 of the Maritime Transport Act, and held that the definition was capable of including a time sub-charterer. Accordingly, as Tasman Orient came within the definition of an “owner” in s 84 and had incurred liability as the carrier under the relevant bills of lading, it was entitled to limit its liability for cargo claims brought against it. Whether Tasman Orient was also entitled to limit its liability in respect of any claims brought by the owner, Rimba, did not arise for consideration, and this question was expressly left open (see paras 31-34). Williams J’s broad, purposive interpretation of s 84 is consistent with the ordinary meaning of article 1(2) in the Convention text, and accords with the English Court of Appeal’s subsequent interpretation of the same Convention provision in *CMA CGM SA v Classica Shipping Co Ltd* [2004] EWCA Civ 114, [2004] 1 Lloyd’s Rep 460.

The second issue was whether Tasman Orient’s conduct disentitled it from obtaining a limitation decree. Article 4 of the Convention, which is given domestic effect in New Zealand as s 85(2) of the Maritime Transport Act, provides that limitation is not available where the cargo claimant proves that the loss resulted from the liable party’s “personal act or omission, committed with the intent to cause such

loss, or recklessly and with knowledge that such loss would probably result". This is not an easy onus for cargo claimants to discharge. The limitation regime established by the 1976 Limitation Convention is regarded as being virtually unbreakable. The cargo claimant's task of proving the liable party's intention or knowledge is made even more difficult where the liable party is a company.

In this case, the maritime accident investigation report concluded that the casualty was caused by the master's negligent navigation. The question was whether the master's conduct could be attributed to Tasman Orient. Here, the master and crew were not employed by Tasman Orient. Although Tasman Orient gave the master broad directions about ports of call and routes to be followed, the details of navigation and management of the ship were left to the master, who was directly responsible to, and sought instructions from, Rimba rather than from Tasman Orient. Williams J found that, in these circumstances, the master could not possibly be described as Tasman Orient's alter ego, and the master's conduct that might have caused the casualty could thus not be described as Tasman Orient's "personal act or omission". He rightly refused to adopt questionable obiter dicta in an earlier New Zealand case, *Nelson Pine Industries Ltd v Seatrans New Zealand Ltd (The Pembroke)* [1995] 2 Lloyd's Rep 290, to the effect that a master's reckless re-stowing of machinery on deck could, without more, be attributed to the carrier under the Hague and Hague-Visby Rules. Williams J concluded that Tasman Orient was therefore entitled to a decree limiting its liability for loss or damage to cargo, containers and other property on board.

The final issue, which followed from Williams J's decision to make the limitation decree, was whether Tasman Orient should be required to establish a limitation fund. The cargo claimants, Alliance Group Ltd and Comalco New Zealand Ltd, argued that this was the case, applying for an order under s 89 of the Maritime Transport Act requiring Tasman Orient to provide security by paying the limitation amount into court. Tasman Orient challenged the Court's jurisdiction to order the constitution of a limitation fund. In the alternative, Tasman Orient argued that a P & I club letter of undertaking should be accepted in lieu of payment of the limitation amount into court. Williams J accepted that a club letter would be an appropriate form of security. However, the more vexed question was whether there was jurisdiction to constitute a limitation fund in the first place.

New Zealand has not enacted Article 11 of the Convention regarding the constitution of limitation funds. Instead, s 89 of the Maritime Transport Act provides that the Court can, on application, consolidate limitation claims, determine the amount of the owner's liability, and distribute this amount rateably amongst all claimants. Section 89 also gives the Court broad procedural powers to stay other proceedings in relation to the same matter, and to make orders in respect of the inclusion or exclusion of parties, the giving of security, or the payment of costs. At first glance, s 89 seems broadly comparable to the process of constituting a limitation fund under the Convention. However, the difficulty is that s 89 of the Maritime Transport Act only refers to the consolidation of claims "of a kind referred to in section 86(2) of this Act". Whereas s 86(1) of the Act refers to claims that are *subject to* limitation of liability, section 86(2) of the Act actually refers to those claims that are *excepted from* limitation of liability; for example, claims for salvage, general average contributions, oil pollution damage and nuclear damage. On a strictly literal interpretation, therefore,

s 89 of the Act does not allow for the consolidation of any claims that are subject to limitation.

Williams J meticulously examined the legislative history of s 89 and concluded that, although it was not at all clear why Parliament would thus restrict the consolidation of limitation claims, there was no positive evidence suggesting that this was a result of legislative inadvertence or error. Accordingly, he held that the Court had no jurisdiction under s 89 of the Maritime Transport Act to order the constitution of a limitation fund.

This surprising and highly unsatisfactory outcome may partly be explained by the narrow focus of the arguments on this point. Neither counsel nor the Court referred to s 88 of the Maritime Transport Act, which provides that Convention SDR limits may be converted to New Zealand currency “at the date on which the limitation fund is constituted”. This provision strongly indicates that Parliament envisaged the constitution of limitation funds in New Zealand. The Court should have avoided a literal reading of s 89 that has the effect of rendering s 88 redundant. Moreover, a literal reading of s 89 of the Maritime Transport Act is inconsistent with Article 11 of the Convention. Given that New Zealand is a party to the Convention, the Court should have adopted a purposive interpretation of the Maritime Transport Act that allows for the constitution of a limitation fund in accordance with Article 11. Finally, neither counsel nor the Court explored in depth the possibility of supplementing s 89 by exercising the Court’s inherent jurisdiction to constitute a limitation fund. All in all, it is difficult to understand why the Court adopted such a narrow and acontextual reading of s 89 of the Act, in sharp contrast to its broader, purposive interpretation of s 84 in respect of the first issue in this case.

This case neatly illustrates the pitfalls involved in rewriting, paraphrasing, or “improving on” the original text when incorporating Conventions into the domestic statute book. Part 7 of the Maritime Transport Act is an embarrassment. The Maritime Transport Act is due for a comprehensive review next year. It is to be hoped that Part 7 of the Act will be completely redrafted in order to give the force of law in New Zealand to the unadulterated text of the Convention on Limitation of Liability for Maritime Claims 1976 (as has been done, for example, with the Salvage Convention 1989: see s 216 and Schedule 6 of the Maritime Transport Act 1994).

Relationship between the Admiralty and General Civil Jurisdictions

As has been discussed in a previous review ([2003] New Zealand Law Review 295) the scope of New Zealand admiralty jurisdiction in respect of aircraft is highly limited. Section 5(1) of the Admiralty Act 1973 provides that claims giving rise to maritime liens may be enforced against “any ship, aircraft, or other property” by means of an action in rem, but the only potential candidate would seem to be maritime liens for property and life salvage involving aircraft. Furthermore, s 5(2) of the Admiralty Act only creates statutory rights of action in rem against the relevant ship, or a sister ship, but not against aircraft.

Nonetheless, in *Danzas AG v Hally Press Ltd* (2004) 17 PRNZ 181 (CA) Hally brought admiralty proceedings in rem against a Malaysian Airlines aircraft, and

in personam against Malaysian Airline System (MAS) and Danzas in the High Court on 12 December 2001. Hally claimed NZ\$948,677 for damage to a heavy duty printing press carried by MAS and Danzas from St Gallen in Switzerland to Auckland. This carriage was subject to the Warsaw Convention (s 91C of the Civil Aviation Act 1990, read with s 91A and Schedule 4). Article 29(1) of the Warsaw Convention provides that the “right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination...”. In this case, the two-year limitation period expired on 21 December 2001. MAS agreed to accept service on condition that Hally removed proceedings from the admiralty jurisdiction. Hally filed a notice of discontinuance against the aircraft on 12 February 2002, together with an amended statement of claim deleting all references to the aircraft and the admiralty jurisdiction, and requested the Registrar to transfer the proceedings to the general civil jurisdiction. Nicholson J subsequently issued a consent order stating that the proceedings were transferred pursuant to s 12 of the Admiralty Act 1973. MAS accepted service, filed a statement of defence, and did not challenge jurisdiction.

Danzas, however, was not party to this arrangement. When eventually served, Danzas filed a notice of appearance under protest, objecting to the Court’s jurisdiction and applying for Hally’s claims against it to be struck out. Danzas argued that Hally’s “admiralty action” commenced on 12 December 2001 was a nullity, as the Court lacked any admiralty jurisdiction in respect of the claims. Hally’s later action in the general civil jurisdiction, whilst valid, had only commenced in February 2002, after the article 29 limitation period had expired. Hally’s Warsaw Convention right to claim damages against Danzas was therefore extinguished.

However, neither the High Court nor the Court of Appeal accepted these arguments. Instead, the Court of Appeal upheld the finding of the High Court that, when exercising its admiralty jurisdiction, the High Court always has concurrent civil jurisdiction. As a consequence, even if the Court had no *admiralty* jurisdiction in respect of Hally’s claim, the action was nonetheless properly brought in the *civil* jurisdiction within the Warsaw Convention limitation period. This conclusion is highly controversial, as it turns on its head the traditional view that: (1) New Zealand’s admiralty jurisdiction is discrete and distinct from the general civil jurisdiction; (2) plaintiffs choose to bring their claims either in admiralty or in the general civil jurisdiction, subject to the Court’s powers of transfer; and (3) full concurrency of the jurisdictions can only be achieved by filing parallel actions both in admiralty and in the general civil jurisdiction (see, for example, *Linton v Taranaki Harbour Board* [1959] NZLR 523; *Illman Jones Inc v The Ship “Dasher 1”* (1986) 3 PRNZ 585; *Moore v Westpac Banking Corp* (HC Auckland, A486/79, AD357/83, 30 April 1984)).

The Court of Appeal based its finding on concurrency of jurisdictions on three grounds. First, the Court emphasized the unitary and integrated nature of the High Court’s overall jurisdiction. There is no separate Admiralty Court or Admiralty Division in New Zealand. Even when hearing claims in admiralty, the High Court “still acts as the High Court of New Zealand. The proceedings are still filed in that Court. The Judge is acting as a Judge of the High Court, not as a Judge of the Court of Admiralty” (para 27). Admiralty proceedings are merely a subset of general civil proceedings, and the rules on admiralty practice are incorporated into the High Court

Rules. The Court of Appeal concluded, therefore, that “in exercising its [admiralty] jurisdiction in personam, the [High] Court is exercising its Civil jurisdiction in relation to the ... causes of action against the individual defendants” (ibid).

There are several difficulties with this reasoning. The Court of Appeal arguably overstates the level of integration of the two jurisdictions. Whilst the High Court exercises both general civil jurisdiction and admiralty jurisdiction, the latter is a special, limited, and largely codified statutory jurisdiction conferred by the Admiralty Act 1973. Although the Admiralty Rules 1975 were incorporated into Part 14 of the High Court Rules in 1998, rule 766 provides that the general Rules on proceedings in the civil jurisdiction only apply to admiralty proceedings where they are not “modified by or inconsistent with” Part 14 of the Rules or the Admiralty Act. As Part 14 of the Rules and the Admiralty Act set out comprehensive separate requirements, forms, and procedures for admiralty actions in rem and in personam, the general Rules would seem to have only marginal “gap-filling” application to the issue of whether there was admiralty jurisdiction in this case. Furthermore, even if the Court of Appeal’s conclusion that exercising admiralty jurisdiction in personam also amounts to an exercise of the general civil jurisdiction is correct, this does not seem to address the issue in this case. Hally’s admiralty action in personam against *Danzas* failed to come within the admiralty jurisdiction in the first place. As a consequence, there was simply no valid admiralty jurisdiction in personam for the Court to exercise on 12 December 2001.

Secondly, the Court of Appeal referred to the situation in England, noting that it was “abundantly clear” that the English High Court has concurrent civil and admiralty jurisdiction (para 24). The Court rejected *Danzas*’ argument that the English experience is not comparable because there is no New Zealand equivalent to s 5(5) of the Supreme Court Act 1981 (UK), which expressly provides that the jurisdiction of the English High Court belongs to all Divisions alike. Instead, the Court held that the “established position in England, from which New Zealand Admiralty law and procedure emanated”, indicated concurrency of admiralty and general civil jurisdiction (para 28).

But the histories of admiralty jurisdiction in the United Kingdom and in New Zealand have, in fact, been quite different. For a start, New Zealand admiralty jurisdiction has never been subject to the sweeping unification and integration effected by the Judicature Acts of 1873 and 1875 (UK) (a historical point apparently lost on Beck, “Admiralty and General Jurisdiction” [2004] NZLJ 395, 396, who applauds the Court of Appeal’s decision in *Danzas* on the ground that, to “accede to an approach which requires entirely separate claims to be brought in admiralty smacks of the minefield which bedevilled the Courts in England prior to the Judicature Acts of 1873”). Indeed, until the Admiralty Act 1973 came into effect in 1976, the New Zealand Supreme Court exercised admiralty jurisdiction while sitting as a completely separate Colonial Court of Admiralty (see the Colonial Courts of Admiralty Act 1890 (Imp), s 2(2)).

Although the Admiralty Act 1973 did vest admiralty jurisdiction in the High Court, there are clear indications in the Special Law Reform Committee Report that preceded the Admiralty Act and in the Act itself that the admiralty and general civil jurisdictions were nonetheless still conceived of as separate and distinct. Indeed, one of the reasons given for reform of the admiralty jurisdiction was that the existing

demarcation between New Zealand's admiralty jurisdiction and "the common law jurisdiction of the Supreme Court" was not clear enough (see the Report of the Special Law Reform Committee on Admiralty Jurisdiction (Wellington, 1972) 3).

In particular, if Parliament had intended to integrate fully the admiralty and general civil jurisdictions of the Court, there would have been no need to enact s 12 of the Admiralty Act 1973, which provides that the "Court may, of its own motion or upon application, at any stage order that any proceedings be transferred from or to the Court in its admiralty jurisdiction". When introducing the second reading of the Admiralty Bill, the Minister of Justice indicated that the power to transfer proceedings between the admiralty jurisdiction and the "ordinary jurisdiction" was considered necessary to provide "a measure of reciprocity" between the two jurisdictions (NZ Parliamentary Debates, vol 384, 18 July 1973, p 2461). The legislative history of the Admiralty Act therefore simply does not support the Court of Appeal's monistic view of New Zealand's admiralty and general civil jurisdictions.

Thirdly, the Court of Appeal construed s 3(2) of the Admiralty Act 1973 as confirming the concurrency of the admiralty and general civil jurisdictions. Section 3(2) provides:

In exercising the jurisdiction conferred by this Act, the Court may exercise at the same time any of its other civil jurisdiction, whether statutory or otherwise, and all powers incidental thereto.

The Court of Appeal rejected Danzas' argument that s 3(2) was irrelevant, as there had been no valid exercise of the admiralty jurisdiction in this case, and there was thus, as a matter of logic, no "other civil jurisdiction" to exercise at the same time. The Court of Appeal held that the High Court had exercised the jurisdiction conferred by the Admiralty Act in determining whether Hally's claim fell within the admiralty jurisdiction, and that this had triggered the Court's other civil jurisdiction as well.

It does seem rather odd, however, to characterise the High Court's determination that there was *no* admiralty jurisdiction in rem or in personam in this case as amounting to an *exercise* of admiralty jurisdiction. Moreover, the legislative history of s 3(2) again does not support the Court of Appeal's construction. Section 3(2) was added to the Admiralty Act 1973 by the Admiralty Amendment Act 1975 because of concerns that the jurisdiction conferred by the Admiralty Act was not sufficiently broad to enable the High Court sitting in admiralty to grant equitable remedies, such as specific performance and injunctions (see Mackay, "The Admiralty Act 1973 — Part II" [1976] NZLJ 387, 391). Rather than providing evidence confirming concurrency of the jurisdictions, the enactment of s 3(2) seems to underline Parliament's view of the admiralty jurisdiction as distinct from the general civil jurisdiction. The purpose of s 3(2) was to *supplement* an existing, separate admiralty jurisdiction, and to avoid the need to bring parallel proceedings in admiralty and in the general civil jurisdiction in *admiralty* cases involving a mixture of admiralty and non-admiralty issues. This is, in fact, how s 3(2) has been used by the courts. In *JE Dennis Ltd v "The Steel Mariner"* (HC Rotorua, AD1/95, 1 August 1997), for example, where a misrepresentation action was joined on the basis of s 3(2) of the Admiralty Act, in rem admiralty jurisdiction already existed. Section 3(2) was never designed to bootstrap general civil jurisdiction via the Admiralty Act in the event of an *absence* of admiralty jurisdiction.

The Court of Appeal further held that the High Court had been entitled to “regularise” Hally’s admiralty action by transferring it to the general civil jurisdiction under section 12 of the Admiralty Act 1973, as the admiralty proceeding was “an irregularity only, and not an act beyond the High Court’s overall jurisdiction” (para 29).

Although the High Court Rules do grant broad powers to amend defects or errors in pleadings and to cure non-compliance with the requirements of the Rules (see rr 5 and 11), they do not appear to grant to the High Court powers to remedy a lack of substantive admiralty jurisdiction under the Admiralty Act 1973. This is not to suggest that Hally’s erroneous invocation of the admiralty jurisdiction was irreparable. The appropriate course of action would have been to refile proceedings in the general civil jurisdiction (which is, in effect, what Hally did in February 2002). However, regardless of whether the “irregularities” in Hally’s admiralty action were cured by means of transfer to the general civil jurisdiction, amendment of pleadings, or refiling proceedings, the awkward fact remains that all these steps occurred nearly two months after Hally’s Warsaw Convention right to damages had been extinguished. It is very difficult to understand how “regularising” Hally’s action in February 2002 could have retrospectively resurrected a Convention claim that, in the words of Bollen J in *Timeny v British Airways plc* (1991) 102 ALR 565, 578, was already “extinguished, dead and gone forever”.

Danzas cited several authorities on the Hague-Visby Rules in its submissions. In the High Court Harrison J found these of little help, preferring instead to decide the issue by reference to the Admiralty Act and the High Court Rules. The Court of Appeal briefly referred to the Hague-Visby Rules cases, but neither Court seems to have taken into account any jurisprudence or academic commentaries on article 29 of the Warsaw Convention. It is suggested that these could have been of assistance, for at least two reasons.

First, although the Convention limitation period may appear harsh, it was designed to achieve certainty in international transport law, and was an integral part of the international compromise embodied in the uniform air carrier liability regime (see Buckler and Fisher, “The Time Bomb in the Warsaw Convention: *Gal v Northern Mountain Helicopters and a Review of the Law on Article 29*” (2001) 34 UBC LR 553, 560-561). For these reasons, it is appropriate for domestic courts to enforce the Convention limitation period strictly. The onus is on the plaintiff to comply punctiliously with article 29. If the Court of Appeal had carefully considered the international policy underpinning article 29, it might have taken a more jaundiced view of a plaintiff erroneously invoking the admiralty jurisdiction to enforce its Convention right to damages just 10 days before the two-year limitation period expired, and might not have been quite so dismissive of the defendant’s arguments as “technical and designed to avoid dealing with proceedings on the merits” (para 34).

Secondly, a consideration of the jurisprudence and commentaries on article 29 of the Warsaw Convention might have led the Court of Appeal to conclude that the central question in this case was not whether the High Court had overall competence in abstracto to hear claims for breach of contract, negligence, or bailment; but rather the more focused question of whether Hally’s admiralty action against Danzas was validly commenced in the admiralty jurisdiction before the expiration of the article 29

limitation period. The clear answer to that question is that it was not, and that Hally's Warsaw Convention claim had therefore been extinguished.

Quite apart from the merits, this case, like *Transpac Express Ltd v Malaysian Airlines* (HC Auckland, AD 36-SD/99, 18 June 2002), discussed in [2003] New Zealand Law Review 295-297, illustrates the need to remove the anachronistic residual references to aircraft in the Admiralty Act 1973 to help prevent further cases of erroneous use (or, in the *Transpac* case, abuse) of the admiralty jurisdiction. To the extent that actions in rem against aircraft are thought to be necessary or useful, they would be more appropriately accommodated within the framework of the Civil Aviation Act 1990.

Seizure, Forfeiture, and the Admiralty Jurisdiction

There are fundamental tensions between the admiralty jurisdiction under the Admiralty Act 1973, and seizure and forfeiture provisions in statutes such as the Fisheries Act 1996. Both regimes affect the relevant ship in similar ways, but they are likely to have very different effects on the rights of parties with competing interests in the ship. The difficulty is that, in the event of a direct clash of jurisdictions, there is no clear answer as to which regime should prevail, or how the two regimes should be accommodated. This difficulty was well illustrated by the Australian case of *Readhead v Admiralty Marshal, Western Australia District Registry* (1998) 157 ALR 660 (FCA), discussed in [2001] New Zealand Law Review 118, where a fishing vessel was arrested by the mortgagee bank after it had been apprehended and detained by Australian fisheries officials, but before an order of forfeiture had been issued under the Fisheries Management Act 1991 (Cth). Summary judgment was given on the bank's claim and the ship's sale was ordered under the Admiralty Rules. The Federal Court of Australia declined to rule that any title acquired by the judicial sale would be affected by the Crown's rights to detention and forfeiture. The Court concluded that the legislature intended to leave to the Admiralty Court a discretion to adjust the competing rights of the plaintiff and other interested parties in the admiralty action in rem, and of the Crown under the Fisheries Management Act 1991 (Cth).

The High Court had to grapple with similar issues in *Debis Financial Services (NZ) Ltd v The Cray Fishing Vessel "Stryker"* (HC Wellington, CIV-2003-485-002372, 19 December 2003). *Debis* brought an admiralty action in rem and in personam against the vessel and its owners in respect of a loan secured by a ship mortgage. The Registrar issued a warrant of arrest on 24 October 2003. The vessel was fishing out of the Chatham Islands. The Registrar went to the Chatham Islands on 30 October to effect the arrest, but learned that, on the previous day, the Ministry of Fisheries had seized the vessel under s 207 of the Fisheries Act 1996 for allegedly taking "berried" rock lobsters. The warrant of arrest was eventually served on a fisheries officer and on the vessel on 8 November 2003. The vessel remained at the Chatham Islands in the custody of the Ministry of Fisheries. On 10 November 2003 Port Nicholson Fisheries Ltd intervened in the admiralty proceedings, and served notice on the owners and the Ministry of Fisheries that it intended to take possession of and sell the vessel under s 109(1)(b) of the Personal Property Securities Act 1999,

on the basis that the vessel, which served as collateral for its chattel mortgage, was at risk.

Neazor J accepted submissions made on behalf of the Ministry of Fisheries and Port Nicholson that the Chief Executive of the Ministry had legal custody of the vessel, because the statutory custody of the Chief Executive under ss 207-210 of the Fisheries Act had been established before the vessel was arrested, which would have brought the Registrar's control into effect. (Port Nicholson's support for the Ministry's custody of the vessel can presumably be explained on the basis of a strategic assessment that its chattel mortgage would fare better under the more discretionary relief from forfeiture regime in s 256 of the Fisheries Act 1996 than on an application of established admiralty priorities.) The effect of this legal custody was to give the Chief Executive the right to physical possession of the vessel and the right to decide where, and under what conditions, the property was to be held: *Abel Fisheries Ltd v Stuart* [1997] 2 NZLR 87.

However, Neazor J rejected the Ministry and Port Nicholson's arguments that the Chief Executive's custody of the vessel under the Fisheries Act was exclusive, and should therefore override the Registrar's rights under the Admiralty Act (paras 19-20):

The suggested difficulties with dual control are in my view illusory. The Registrar is to keep the ship under safe arrest. If and so long as the Registrar is satisfied that pursuant to a statutory power the Ministry has the vessel in custody which is protective in nature, there is no need for more to be done in that regard. The Ministry's protective obligation continues as long as it asserts its right to custody.

The argument that one party needs to have full and exclusive control of the vessel if the requirements of custody are to be met is in my view not supported by authority. So long as the parties claiming custody, or having some other obligation to preserve the ship do not interfere with each other ... there is no need to declare that only one can assert its right.

In particular, Neazor J found (para 18) that it would not be "a significant diminution" of the Chief Executive's control to require the Registrar's consent under r 776(11) of the High Court Rules before the Ministry moved the arrested vessel, thereby effectively granting the Registrar a veto over any subsequent changes of position ordered by the Chief Executive. He rejected arguments that this approach undermined the forfeiture regime in the Fisheries Act. Although the forfeiture regime was intended to deter offences which were difficult to detect, it did not follow that Parliament intended to "foreclose any other protective action in respect of the vessel" (para 23). This was particularly so where, as here, it was unclear whether the vessel would eventually be subject to forfeiture. Neazor J held that the warrant of arrest was therefore valid, and refused to set it aside or release the vessel from arrest.

Although Neazor J in obiter dicta sketched a possible end-game scenario where "the Court, if any question of sale in the admiralty proceedings arose, took care, following *Readhead*, to see that the Chief Executive's interest, inchoate as it might then be, was protected" (para 28), he was largely able to sidestep the issue completely by preserving the status quo. For, unlike *Readhead*, *Debis* did not involve a head-on collision between the admiralty jurisdiction and the Chief Executive's rights of custody: it is not the warrant of arrest per se, but subsequent orders for the

sale of the vessel, the determination of priorities, and the distribution of the fund amongst claimants that generate real conflict between the jurisdictions.

Nonetheless, both *Readhead* and *Debis* highlight the need for a cleaner and clearer interface between the admiralty jurisdiction and statutory seizure and forfeiture regimes. Australia has already responded to this need, albeit in a narrow, blunt, and knee-jerk manner. Following the *Readhead* decision, the Commonwealth Parliament promptly enacted the Fisheries Legislation Amendment Act (No 1) 1999 (Cth), which now expressly provides that enforcement action and forfeiture under the Fisheries Management Act take precedence over any admiralty proceedings.

The lack of any statutory guidelines in New Zealand on conflicts between the admiralty jurisdiction and statutory seizure and forfeiture regimes potentially results in unnecessary uncertainty and costs for the parties involved, dubious judicial haruspication of non-existent Parliamentary intent, and the unedifying prospect of a headlong dash to the oar mace (or in the opposite direction, to tip off Ministry of Fisheries officials). The New Zealand Law Commission is currently reviewing the forfeiture provisions in the Customs and Excise Act 1996. The scope of this review could usefully be broadened to include an examination of forfeiture provisions in other statutes like the Fisheries Act 1996, and an analysis of how they impact on established rights and interests in personal property in the general civil and admiralty jurisdictions.