

Shipping

Contributing editor
Kevin Cooper



2018

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH 

Shipping 2018

Contributing editor

Kevin Cooper

Ince & Co LLP

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2017
No photocopying without a CLA licence.
First published 2008
Tenth edition
ISSN 1759-0744

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between July and August 2017. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Global overview	7	Indonesia	129
Kevin Cooper, Reema Shour, Monika Humphreys-Davies and Eleanor Dickens Ince & Co LLP		Sahat AM Siahaan, Ridzky Firmansyah Amin and Desi Rutvikasari* Ali Budiardjo, Nugroho, Reksodiputro	
Australia	11	Italy	135
Geoffrey Farnsworth and Dilip Ramaswamy Holding Redlich		Filippo Pellerano and Francesco Gasparini Studio Legale Mordiglia	
Brazil	18	Japan	142
Godofredo Mendes Vianna, Camila Mendes Vianna Cardoso and Lucas Leite Marques Kincaid Mendes Vianna Advogados		Shuji Yamaguchi Okabe & Yamaguchi	
Chile	26	Korea	148
Ricardo Rozas and Max Morgan Jorquiera & Rozas Abogados		Sung Keuk Cho and Hee-Joo Lee Cho & Lee	
China	35	Latvia	154
James Hu, Mervyn Chen, Lawrence Chen and Jasmine Liu Wintell & Co		Gints Vilgerts VILGERTS	
Croatia	48	Liberia	160
Gordan Stanković and Maja Dotlić Vukić & Partners		Lawrence Rutkowski Seward & Kissel LLP	
Cyprus	55	Malaysia	165
Michael McBride, Yiannis Christodoulou and Michael Papadopoulos Chrysses Demetriades & Co LLC		Siva Kumar Kanagasabai and Trishelea Ann Sandosam Skrine	
Denmark	61	Malta	172
Ulla Fabricius and Christian Benedictsens-Nislev NJORD Law Firm		Kevin F Dingli and Suzanne Shaw Dingli & Dingli Law Firm	
England & Wales	68	Netherlands	182
Kevin Cooper, Reema Shour, Monika Humphreys-Davies and Eleanor Dickens Ince & Co LLP		Arnold J van Steenderen and Charlotte J van Steenderen Van Steenderen MainportLawyers BV	
Estonia	82	New Zealand	195
Indra Kaunis Consolato del Mare OÜ		Simon Cartwright, Sarah Holderness, Richard Belcher and Robert McStay Hesketh Henry	
Finland	89	Nigeria	202
Nora Gahmberg-Hisinger and Matti Komonen HPP Attorneys Ltd		Funke Agbor and Chisa Uba Adepetun Caxton-Martins Agbor & Segun	
France	97	Norway	209
Christine Ezcutari Norton Rose Fulbright LLP		Christian Bjørtuft Ellingsen Advokatfirmaet Simonsen Vogt Wiig AS	
Germany	106	Panama	217
Christian Finnern Watson Farley & Williams		Gabriel R Sosa, Eduardo A Real and Alberto Lopez Tom De Castro & Robles	
Ghana	113	Peru	223
Kimathi Kuenyehia, Augustine Kidisil and Paa Larbi Asare Kimathi & Partners, Corporate Attorneys		Francisco Arca Patiño and Carla Paoli Consigliere Estudio Arca & Paoli Abogados SAC	
Hong Kong	121	Portugal	230
Andrew Rigden Green and Evangeline Quek Stephenson Harwood		Ana Cristina Pimentel Ana Cristina Pimentel & Associados, Sociedade de Advogados, SP, RL	

Russia	236	Taiwan	275
Alexey Karchiomov, Yulia Beliakova Egorov Puginsky Afanasiev & Partners		Daniel T H Tsai and James Chang Lee and Li, Attorneys-at-Law	
Singapore	242	Turkey	281
Ajaib Haridass, Thomas Tan, Augustine Liew and V Hariharan Haridass Ho & Partners		Burak Çavuş Çavuş & Coşkunsu Law Firm	
South Africa	252	Ukraine	289
Tony Norton, Mike Tucker and Kate Pitman* ENSafrica		Evgeniy Sukachev and Anastasia Sukacheva Black Sea Law Company	
Spain	261	United States	295
Marie Rogers, David Diez Ramos and Luis Alberto García Villar Rogers & Co Abogados		Bruce G Paulsen and Jeffrey M Dine Seward & Kissel LLP	
Switzerland	269	Quick Reference Tables	301
Alexander Blarer and Anton Vucurovic Bratschi Wiederkehr & Buob SA			

New Zealand

Simon Cartwright, Sarah Holderness, Richard Belcher and Rob McStay

Hesketh Henry

Newbuilding contracts

1 When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

Title will pass in accordance with the terms of the contract, or, pursuant to the provisions of Part 2 of the Sale of Goods Act 1908 (title passes at such time as the parties intend it to pass, with regard to the terms of the contract, conduct of the parties and circumstances of the case). Typically, title will pass on delivery.

2 What formalities need to be complied with for the refund guarantee to be valid?

Under the Property Law Act 2007 a contract of guarantee must be in writing and signed by the guarantor. (Note that it is not common for refund guarantees to be issued in the New Zealand shipbuilding industry.)

3 Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

An order for specific performance is available, but is a discretionary remedy and will only be given where an award of damages is inadequate.

4 Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

Typically, a claim would lie in contract against the shipbuilder, at the suit of the shipowner. However, a shipbuild contract will often contain provisions seeking to limit or exclude liability in respect of defective workmanship or materials.

Ship registration and mortgages

5 What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

The Ship Registration Act 1992 (SRA) created the New Zealand Register of Ships (the Register). The Register comprises Parts A and B. All New Zealand-owned ships exceeding 24 metres register length must be registered in Part A, except for pleasure vessels, ships engaged solely on inland waters and barges that do not proceed on voyages beyond coastal waters (although they may register). Vessels on demise charter to New Zealand-based operators may also register in Part A. New Zealand-owned ships that are pleasure vessels, or ships not exceeding 24 metres register length, or ships jointly owned or majority owned by New Zealand citizens or residents, may register in Part B.

It is not possible to register a vessel under construction (the vessel would not be a 'ship' as defined in the SRA).

The Fisheries Act 1996 separately established a Fishing Vessel Register for fishing vessels operating in New Zealand fisheries waters.

6 Who may apply to register a ship in your jurisdiction?

Only New Zealand nationals (whether individuals or companies) are entitled to register a ship (or where the majority of the owners are New Zealand nationals).

7 What are the documentary requirements for registration?

An application for registration must be made in the prescribed form, together with a declaration of ownership and nationality, builder's certificate, tonnage certificate, documents relating to a change in ownership (eg, bill of sale, deletion certificate of previous registry) and any other document required by the Registrar.

8 Is dual registration and flagging out possible and what is the procedure?

As noted in question 5, the SRA provides that vessels on demise charter to New Zealand-based operators may register in Part A.

9 Who maintains the register of mortgages and what information does it contain?

Maritime New Zealand (MNZ), through the Registrar, shall record the particulars of the mortgage in the Register and endorse on the instrument of mortgage the fact that it has been entered and the date and time of entry.

Limitation of liability

10 What limitation regime applies? What claims can be limited? Which parties can limit their liability?

In October 2013, New Zealand amended the Maritime Transport Act 1994 (MTA) to give the Convention on Limitation of Liability for Maritime Claims 1976 (as amended by the 1996 Protocol) (LLMC) the force of law in New Zealand (see section 84A and Part 7 of the MTA generally).

The LLMC regime allows shipowners (owners, charterers, managers or operators of a seagoing ship), salvors and insurers to limit their liability for the claims listed in article 2 of the LLMC Convention. However, section 86(4) of the MTA states that articles 2, 3 and 9 of the LLMC Convention do not limit or effect claims related to the removal of wrecks by either a regional council or the Director of MNZ, the removal of hazards to navigation, or personal injury. In those cases, the provisions of the MTA or the Accident Compensation Act 2001 (ACA) will take precedence.

New Zealand adopted the new 2015 LLMC liability limits on 8 June 2015.

11 What is the procedure for establishing limitation?

Pursuant to the Admiralty Act 1973 (AA), the New Zealand High Court has jurisdiction over admiralty in rem and in personam proceedings (the District Court has jurisdiction over admiralty in personam proceedings where the amount in dispute does not exceed NZ\$350,000). Part 25 of the High Court Rules (HCR) relates to the High Court's admiralty jurisdiction. The HCR do not contain any specific provisions governing the constitution of a limitation fund or whether limitation can be pleaded without setting up the fund. Currently the courts are left to apply the LLMC provisions (which, as noted above, have force

of law in New Zealand) and adopt whatever procedure is necessary in the circumstances of the case, using the inherent jurisdiction of the court and general powers under the HCR. However, the HCR do state that actions for limitation of liability must be in the form of an action in personam and require the person seeking relief to name at least one person (with claims against it) as the defendant in the proceeding.

The limits which apply are calculated on the basis of the vessel's tonnage as prescribed by the LLMC.

12 In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

Article 4 of the LLMC applies: limit can only be broken if loss resulted from personal act or omission, committed with the intent to cause such loss, or recklessly and with the knowledge that such loss would probably result. Limitation has never been broken in New Zealand.

13 What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

New Zealand is not a party to the Athens Convention. The Carriage of Goods Act 1979 (CGA) applies to domestic carriage and will cover damage to luggage. Under the CGA a carrier will be strictly liable for loss or damage up to a limit of NZ\$2,000 per piece. A carrier is not liable for loss of or damage to hand luggage unless caused by the negligence or wilful default of the carrier.

The ACA contains a statutory bar on claims for personal injury suffered in New Zealand or suffered by New Zealand residents during international carriage (if the injury would have been covered by the ACA).

Port state control

14 Which body is the port state control agency? Under what authority does it operate?

The MTA governs port state control and gives the Director of MNZ certain powers of inspection, investigation, detention and rectification.

15 What sanctions may the port state control inspector impose?

Under section 55 of the MTA, the Director of MNZ has powers to detain a vessel or impose conditions on the operation of the vessel. It is an offence to contravene or fail to comply with a prohibition or condition notified by the Director. On conviction, a person committing an offence is liable to a fine or imprisonment.

16 What is the appeal process against detention orders or fines?

It is possible to appeal to the New Zealand District Court.

Classification societies

17 Which are the approved classification societies?

MNZ keeps a list of recognised classification societies. These are:

- American Bureau of Shipping;
- Bureau Veritas;
- DNV GL;
- Nippon Kaiji Kyokai; and
- Lloyd's Register.

18 In what circumstances can a classification society be held liable, if at all?

It is unlikely that a classification society will be held liable for breach of duty of care in circumstances where class certificates are issued in a statutory capacity: see *Attorney-General v Carter* [2003] 2 NZLR 160 (CA).

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

Where a 'wreck' will be hazardous to navigation, the Director of MNZ may:

- require a vessel's owner, its master (or person in command) or agent of the owner, to remove the whole or any part of that hazard in a manner specified by the Director and within a time specified by the Director; or

- arrange to have the hazard removed, if:
 - the vessel's owner has not complied with the notice to remove the hazard;
 - no regional council has jurisdiction over the place where the hazard is located; and
 - any action taken to remove the hazard is not inconsistent with the Resource Management Act 1991 (RMA).

Similarly, regional councils have power to remove a wreck under Part 3A of the MTA. Under those provisions, a regional council may take steps in accordance with the MTA to remove and deal with any wreck within its region that is hazardous to navigation. These include requiring the vessel's owner or agent of the vessel's owner to remove the wreck within a time and in a manner satisfactory to the regional council. In addition, the council may destroy, dispose of, remove, take possession of, or sell a wreck (or any part of it) if the regional council has made reasonable efforts to find the owner or agent and that owner or agent either cannot be found or fails to remove the whole of the wreck within the time specified or in a manner satisfactory to the council.

20 Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

The following international conventions are in force in New Zealand:

- the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969;
- the International Convention for the Prevention of Pollution from Ships 1973/78 (MARPOL);
- the International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC);
- the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992;
- the United Nations Convention on the Law of the Sea (UNCLOS);
- the Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil 1973;
- the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001;
- the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (OPRC Convention);
- the Marine Pollution by Dumping of Wastes and Other Matter, 1971 (London Dumping Convention) and 1996 Protocol;
- the International Convention on Salvage 1989;
- the Convention on the International Regulation for Prevention of Collisions at Sea 1972; and
- the International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910.

The following Conventions are not in force in New Zealand:

- The Nairobi International Convention on the Removal of Wrecks 2007; and
- The International Convention for the Unification of Certain Rules concerning Civil Jurisdiction in the Matters of Collision 1952 (although the AA nonetheless reflects its provisions).

21 Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory local form of salvage agreement. The Lloyd's standard form of salvage agreement is acceptable.

Typically, salvage will be undertaken by professional salvage operators.

Ship arrest

22 Which international convention regarding the arrest of ships is in force in your jurisdiction?

New Zealand is not a signatory to any international convention regarding the arrest of ships. Ship arrest is instead provided for in the AA and Part 25 of the HCR.

23 In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested?

Vessel arrest is a remedy available for claims listed under section 4(1) of the AA, or for claims that are maritime liens in common law in New Zealand. The particular vessel's flag is immaterial for the purpose of New Zealand law.

Section 4(1) of the AA lists 19 different claims, which include those:

- concerning possession or ownership of a ship;
- in respect of a mortgage or charge on a ship;
- for damage done or received by a ship;
- for death or injury due to a defect in a ship (or its equipment);
- arising out of a carriage of goods or hire agreements for a ship;
- in the nature of salvage, towage or pilotage;
- in respect of goods, materials or services supplied to a ship;
- in respect of construction, repair or equipment of a ship;
- for crew wages or disbursements;
- arising out of a general average act;
- arising out of bottomry; and
- for the forfeiture or condemnation of a ship or carried goods.

Claims which give rise to maritime liens in New Zealand law are those for:

- damage done by a ship;
- salvage;
- seafarers' wages;
- master's wages and disbursements; and
- bottomry and respondentia.

If there is a maritime lien against a vessel, an action in rem may be brought against that particular vessel, together with an application for such vessel's arrest.

If the claim is one listed in section 4(1), the in rem claim and warrant for arrest generally may only be against the subject vessel. However, sister or associated vessels may be arrested in the following circumstances:

- the claim must be one listed in section 4(1)(d) to (r) of the AA (including, for example, claims for damage done or received by a ship, damage to goods carried on the ship, or in respect of goods, materials or services supplied to a ship);
- the person who would be liable on such claim by an action in personam must, when the cause of action arose, be the owner or charterer of, or in possession or in control of, the subject vessel; and
- the other vessel must, when the claim is brought, be beneficially owned or on charter by demise to such person.

24 What is the test for wrongful arrest?

There may be two types of cases, either bad faith or gross negligence on the part of the arresting party, giving rise to a claim for damages for the wrongful arrest. The test for bad faith is where, on a subjective assessment, the arresting party has no honest belief in its entitlement to arrest. An arresting party will be guilty of gross negligence where, on an objective assessment, the basis for arrest is so inadequate that the court can infer that the party did not believe in his entitlement to arrest the vessel, or acted without any serious regard to whether there were adequate grounds to arrest.

25 Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

Yes if, at the time an in rem claim is brought (together with an application for arrest) the vessel is on charter by demise to the particular charterer at fault.

26 Will the arresting party have to provide security and in what form and amount?

Counter-security is not required, although as part of the court papers to be filed on an application for an arrest warrant, the arresting party must provide a written indemnity to the Admiralty Registrar covering any fees and expenses including harbour dues (and to cover the Admiralty Registrar against any liability relating to lawfully executing the warrant).

The Admiralty Registrar also typically requires payment of funds into court as security for such fees and expenses at the same time the application is filed. The amount varies, and is dependent on the Admiralty Registrar's view of what his initial upfront costs will be for the particular vessel to be arrested. In our experience, it tends to be in the region of NZ\$10,000 to NZ\$20,000. From time to time, the Admiralty Registrar may then request additional security to cover fees, expenses and harbour dues as the original payment is exhausted.

27 How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

Generally, the parties will agree on security issues without court intervention (eg, if a ship is arrested and the claim is covered by insurance, the insurer will typically offer security). Otherwise, at the first level, the Registrar will normally address any security issues. If the parties disagree on security or one party wants to challenge the Registrar's decision, an application may be made to the High Court.

There is no prescribed upper limit on security, but it would not exceed the value of the ship. The arresting party is normally entitled to an amount paid into court reflecting its reasonably arguable best case, together with interest and costs. However, the court may release the vessel on the provision of undertakings or guarantees as security.

28 What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

Neither particular formalities nor a power of attorney is required. The court papers on the application must include an affidavit from the applicant (outlining the claim, whether any caveat against the issue of an arrest warrant has been filed, and any other relevant information). If the affidavit is to be sworn overseas, it may be sworn before a commissioner of the High Court of New Zealand, a person who is authorised to administer oaths by the law of the foreign country, notary public, someone otherwise authorised by a judge to administer the oath, or in circumstances otherwise provided for in the Oaths and Declarations Act 1957. If translations are necessary (whether for the body of the affidavit or relevant documents exhibited), the arresting party also needs a separate interpreter's affidavit exhibiting both the original foreign language document and its translation.

Either the arresting party or its solicitor also needs to sign an indemnity for the Admiralty Registrar's costs of arrest and taking care and custody of the vessel. Other court papers where a signature is required can also be signed by the solicitor.

The court will require originals of the papers making up the in rem claim and arrest application for filing (although where relevant documents have been appended to affidavit(s), these need only be copies). But if the deponent for an affidavit is overseas and time requires it, a copy could be filed to put matters in motion together with an undertaking from the person filing to forward the original once received. In only limited cases (typically memoranda of counsel) will the court accept electronic filing.

An arresting party should allow ideally 48 hours to prepare and file an arrest application and for the Admiralty Registrar to put matters in motion. Where there is urgency and the ship is at port, the arrest may be applied for and effected that same day. Note however there may be issues such as a vessel at anchorage refusing to allow the bailiffs access (that particular arrest took two to three days to arrange).

29 Who is responsible for the maintenance of the vessel while under arrest?

The Admiralty Registrar takes custody of the arrested vessel and is responsible for its care, and the arresting party will need to pay his costs of doing so. But if the vessel is sold, the arresting party may be able to recover such costs, because highest priority with respect to the proceeds is accorded to the Registrar's costs and expenses.

30 Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

In New Zealand, the arresting party has the right to pursue a claim on its merits. At the same time as (or before) the arrest papers, a notice of proceeding must be filed. The HCR require statements of claim and notices of proceeding to be served as soon as practicable after they are filed (and if service is not affected within a year, the proceeding will be treated as discontinued).

There is nothing in theory to prevent a party from arresting, seeking to stay the New Zealand proceeding, and pursuing proceedings on the merits elsewhere. What is more usual is that the arresting party will pursue its substantive claim in New Zealand and the defendant may then seek a stay on the basis of *forum non conveniens*. If the defendant prevails, the New Zealand court may nevertheless maintain security pending resolution of the foreign proceeding.

31 Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

A party could seek a 'freezing order' from the court, restraining a respondent from removing assets located in or outside New Zealand (and disposing of, dealing with, or diminishing the value of, those assets). The application must be accompanied by an undertaking to pay any damages the court awards against the applicant. Where the application is 'without notice', the applicant also needs to provide full and detailed disclosure of all material facts, including any possible defences, and all information casting doubt on its ability to comply with its undertakings.

It could be harder to obtain a freezing order as opposed to arresting a vessel, as there are more onerous requirements. The court would need to be satisfied that:

- the applicant has a good arguable case and a cause of action recognised by the New Zealand courts;
- there are assets to which the order can apply (which may be outside the jurisdiction); and
- there is a real risk the respondent will dissipate or dispose of those assets.

32 Are orders for delivery up or preservation of evidence or property available?

Interim orders are available for the detention, custody or preservation of any property (subject to any ordered conditions). The court can also order the sale of property where it is perishable or likely to deteriorate or for any other good reason the court considers justifies it being sold before the hearing. Charging orders (operating as 'stop' orders preserving property) are available, charging the defendant's property with payment of a sum the entitled party may obtain or has obtained by judgment.

Search orders are aimed at preserving evidence and are normally sought without notice at the very start of a proceeding. They may direct the defendant to hand over documents or other property. Because they are so invasive, the court is likely to require multiple undertakings, and must be satisfied the plaintiff has a strong *prima facie* case, the potential loss or damage to the plaintiff if the search order is not made will be serious, there is sufficient evidence the defendant has the relevant evidentiary material, and there is a real possibility the defendant will destroy such material.

33 Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

It is unlikely bunkers can be arrested separately and as distinct from the vessel. The High Court has expressed the view, in obiter, that a vessel would include permanent structures, and its components and accessories, but not its bunkers. A freezing order may be available in respect of bunkers.

Judicial sale of vessels

34 Who can apply for judicial sale of an arrested vessel?

Any party to the proceeding (including interveners) may request a commission for the appraisalment and sale.

35 What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

Either before or after judgment, a party may make a request for commission for appraisalment and sale. The commission issued by the court directs the Registrar to arrange for the vessel to be appraised and sold for the highest price that can be obtained. The sale proceeds are then paid into court together with a filed certificate of appraisalment showing an account of the sale. Generally, the mode of sale will be by tender using brokers the Registrar has appointed. Timing will depend on whether the application for sale is opposed, the state of the vessel and whether there is a market for it. Costs for advertising and conducting the sale will be the amount actually paid by the Registrar.

36 What is the order of priority of claims against the proceeds of sale?

The order of priority is not immutable but, subject to any discretionary element taking into account the circumstances of the case, the customary order is as follows:

- costs and expenses of the Registrar;
- costs and expenses of the producer of the fund (generally the arresting party);
- maritime liens;
- possessory liens;
- mortgages; and
- statutory claims under section 4(1) of the Admiralty Act 1973.

37 What are the legal effects or consequences of judicial sale of a vessel?

A judicial sale will give the purchaser clear title free of encumbrances (including maritime liens). However, New Zealand courts cannot guarantee courts of another country will take a similar approach.

38 Will judicial sale of a vessel in a foreign jurisdiction be recognised?

Yes, where the foreign court has competent jurisdiction.

39 Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

No.

Carriage of goods by sea and bills of lading

40 Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

The Hague-Visby Rules (HVR) have force of law in New Zealand by virtue of section 209 of the MTA. The HVR are appended to Schedule 5 of the MTA. Under article 1(e) of the HVR, carriage by sea covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

New Zealand is not a signatory to the Rotterdam Rules. There is no indication that it is likely to sign in the near future.

41 Are there Conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

The CGA governs domestic carriage of goods by land, water or air or by more than one of those modes.

42 Who has title to sue on a bill of lading?

Under the Mercantile Law Act 1908 (MLA) the following persons have right of suit on a bill of lading (BOL):

- the lawful holder of the BOL;

- the consignee identified in a sea waybill as being entitled to delivery under the contract of carriage; or
- the person entitled to delivery of goods specified in the undertaking of a ship's delivery order.

43 To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

Unless it is specifically referred to in a BOL incorporation clause, a charter party jurisdiction or arbitration clause will not be incorporated into the BOL. However, a validly incorporated jurisdiction or arbitration clause will be binding on a third party lawful holder of the BOL.

44 Is the 'demise' clause or identity of carrier clause recognised and binding?

Yes, so long as it is clearly set out in the BOL.

45 Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

Under the CGA a shipowner as actual carrier may be liable to the contractual carrier, who may seek compensation from the shipowner as actual carrier for loss or damage to goods (for example where the contractual carrier has incurred a liability to the owners of the goods). In addition, the contractual carrier of goods may retain a common law right to sue the shipowner as actual carrier in tort or bailment.

46 What is the effect of deviation from a vessel's route on contractual defences?

What amounts to a deviation will depend on the definition contained in the contracted carriage terms. There is a common law right to deviate from the normal route for reason of avoiding danger to the ship or cargo or to save human life. This right is also contained in article IV(4) of the HVR.

Where there has been an unlawful deviation, this will be a breach of contract which could result in the shipowner or carrier being held liable for any losses arising from the deviation.

47 What liens can be exercised?

- Shipowner's lien on the cargo in respect of freight: this is based on common law, contract and the MLA; and
- shipowner's lien on sub-freight or sub-hire: this will arise from contract, if the contract of carriage is subject to the terms of a validly incorporated charter party clause containing the relevant lien provisions.

Liens on the vessel: see comments at paragraph 23 above and section 4(1) of the AA.

48 What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

Delivery without production of the BOL will potentially expose the carrier to a claim for misdelivery by the lawful BOL holder. Liability cannot be limited.

49 What are the responsibilities and liabilities of the shipper?

Under the HVR the shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him or her, and is obliged to indemnify the carrier against all loss arising or resulting from inaccuracies of any of the above.

Common law requires the shipper not to ship 'dangerous goods' without the consent of the carrier. Article IV(6) of the HVR extends this definition to include any cargo that directly or indirectly causes or threatens to cause loss of life, damage to the ship or other cargo, delay or expenses to the carrier.

Shipping emissions

50 Is there an emission control area (ECA) in force in your domestic territorial waters?

New Zealand does not currently have any ECAs in force.

51 What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

New Zealand is not a party to Annex VI of the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) relating to air pollution. New Zealand does not have any domestic legislation relating to sulphur in fuel and discharge in the coastal marine area is permitted under the RMA. The New Zealand government is currently considering whether to join Annex VI, but a decision has not been announced at the time of writing.

Jurisdiction and dispute resolution

52 Which courts exercise jurisdiction over maritime disputes?

If the amount in dispute is more than NZ\$350,000 or is an in rem claim, it will be brought in the High Court. In personam claims of NZ\$350,000 and less may be determined by the District Court.

53 In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

Generally, the rules governing such service are set out in Part 6 of the HCR. But Part 6 does not apply to initiating documents which may be served in Australia under the Trans-Tasman Proceedings Act 2010 (TTPA) (for which the TTPA itself governs and broadly requires such documents to be served in Australia in the same way as those documents would be served in New Zealand under domestic rules).

Otherwise Part 6 provides that an originating document may be served outside New Zealand without leave for particular claims (such as tort, breach of contract) where such claims have a connection with New Zealand as specified in Rule 6.27 (for example, for tort, the act or omission was done, or the damage suffered, in New Zealand). Leave is also not required in certain other limited cases such as where the subject matter of the proceeding is land or other property in New Zealand, or where the person to be served has submitted to the jurisdiction of the court.

For proceedings when service is not allowed under Rule 6.27, the leave of the court is required to serve an originating document out of New Zealand, and a formal 'on notice' application will need to be brought (Rule 6.28). If service has nevertheless been affected without leave, the plaintiff runs the risk the court may dismiss the proceeding. The court can, however, still decide to assume jurisdiction under Rule 6.29 where the plaintiff can establish the court should assume jurisdiction or would have granted leave if it had been requested under Rule 6.28, or it is in the interests of justice the failure to seek leave should be excused.

For personal service of documents other than originating documents, the court's leave is required for service abroad (Rule 6.30).

54 Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

There are two main domestic arbitral institutions: the Arbitrators' and Mediators' Institute of New Zealand; and the Resolution Institute. Neither has specialist maritime expertise. The Maritime Law Association of Australia and New Zealand has issued arbitration rules, which parties may adopt, and has a panel of arbitrators.

55 What rules govern recognition and enforcement of foreign judgments and arbitral awards?

Foreign judgments may be enforced in New Zealand by registering the judgment under the Reciprocal Enforcement of Judgments Act 1934 (REJA), under the TTPA, registering a memorial of the judgment under the Senior Courts Act 2016 (SCA) or by bringing an action at common law.

REJA includes judgments from the United Kingdom and other countries specified by Order in Council (including France, Hong Kong and Singapore). A judgment registered under Part I of REJA has, for the

purpose of enforcement, the same effect as if the judgment had been originally given in the High Court on the date of registration. The TTPA is directed at registrable Australian judgments. Similarly to REJA, a registered Australian judgment has the same force and effect as if it were a judgment given by a New Zealand court (subject to some limitations).

The SCA concerns judgments made by a court in a British Commonwealth country for a sum of money. A memorial may be filed in the High Court and sealed. The New Zealand court may then require the person against whom the judgment was issued to show why the judgment should not be executed. If the person fails to appear or fails to show sufficient cause, the court may order execution. The judgment may be enforced as if it were a judgment of the High Court. Finally, in certain cases foreign judgments both in personam or in rem may be enforceable at common law.

Arbitration awards are enforceable under the Arbitration Act 1996. Further, New Zealand is a signatory to the Convention of the Recognition and Enforcement of Arbitral Awards 1958 (New York Convention). The New York Convention makes arbitral awards of Convention states enforceable in all other Convention states as if they were domestic arbitral awards.

56 What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

If the claimants are amenable to a New Zealand court's personal jurisdiction, the New Zealand court could on application grant an injunction restraining the claimants from commencing or pursuing the foreign proceedings. However, the circumstances must be such that commencement or pursuit of the foreign proceedings would be oppressive or vexatious to the applicant; that means either the proceedings cannot possibly succeed, or the claimants are suing in more than one jurisdiction without substantial reasons for doing so, or the conduct of the foreign proceeding would interfere with the domestic court's due process.

The oppressive or vexatious threshold will not be met simply because the claimants have brought proceedings in two jurisdictions (New Zealand and elsewhere) and New Zealand is *forum conveniens*.

57 What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

The defendant may protest jurisdiction and apply to the New Zealand court to dismiss (or in the alternative stay) the proceeding on the basis it has no jurisdiction. In the case described, the defendant's argument would be founded on *forum non conveniens* (ie, that New Zealand is not the appropriate forum for the action). A contractual submission to a foreign court or arbitral tribunal will be relevant to such argument but is not conclusive. That said, a plaintiff opposing a stay or dismissal will carry the burden of convincing the New Zealand court there is a strong case for not granting a stay (or dismissal).

Limitation periods for liability

58 What time limits apply to claims? Is it possible to extend the time limit by agreement?

Under the Limitation Act 2010 (LA), New Zealand has a generally applicable limitation period of six years after the date of the act or omission which is the basis of the claim. However, there are several exceptions, including:

- a late knowledge date whereby the claimant has gained knowledge of all the relevant facts as specified by section 14(1) of the LA;
- a one-year limit under the HVR for claims in respect of loss or damage to goods under a contract of carriage governed by the HVR;
- under the CGA, there is a one-year time limit for claims and the contracting carrier must be notified of any partial loss or damage within 30 days;
- under section 361 of the MTA, no action may be brought in respect of discharge or escape of oil from a CLC ship, or in respect of discharge or escape of bunker oil from a bunker oil convention ship, unless the proceedings have been commenced no later than three years after the date on which the claim arose, nor later than six years after the event by reason of which liability was incurred;
- a general one-year time limit for MTA defences, which does not run while a person who is charged with an offence is beyond the territorial sea; and a six-month time limit for offences under the RMA;
- under section 97 of the MTA, there is a two-year time limit placed on claims for damage caused by a ship. However, the plaintiff can apply for an extension;
- salvage claims are subject to a two-year time limit under article 23 of the Salvage Convention; and
- in addition to these statutory limits, the Admiralty jurisdiction draws on the equitable concept of laches in other instances of delay. When considering laches, the court may apply the LA by analogy with reference to the LA provisions.

The LA applies equally to arbitral and civil proceedings.

59 May courts or arbitral tribunals extend the time limits?

The LA provides a complete defence to claims made against a defendant after the expiry of a limitation period. The Act specifies some exceptions to limitation periods and start dates. However, it does not grant the courts a general discretion outside these exceptions. As noted above, the LA applies equally to courts and arbitral tribunals.

Miscellaneous

60 How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

The Maritime Labour Convention came into force in New Zealand in March 2017. It applies to New Zealand ships of over 200 gross tonnes or smaller vessels engaged in international voyages that are engaged in commercial activities and to foreign vessels in a New Zealand port.

**Hesketh
Henry** The Art of Law

Simon Cartwright
Sarah Holderness
Richard Belcher
Rob McStay

simon.cartwright@heskethhenry.co.nz
sarah.holderness@heskethhenry.co.nz
richard.belcher@heskethhenry.co.nz
rob.mcstay@heskethhenry.co.nz

Level 14, PwC Tower
188 Quay Street
Auckland 1010
New Zealand

Tel: + 64 9 375 8700
Fax: + 64 9 309 4494
www.heskethhenry.co.nz

61 Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

Economic hardship will not entitle a party to avoid a contract, subject to the express terms of the contract.

62 Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

No.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Automotive
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation

Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans

Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally



Online

www.gettingthedealthrough.com



Shipping
ISSN 1759-0744



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law