PART V

THE NEW ZEALAND EXPERIENCE

(A) Introduction

1. In an article commenting on the New Zealand legislation, the Chairman of the Law Reform Committee on Admiralty Jurisdiction, Sir David Beattie, said -

> "The commencement of the Admiralty Act 1973 marks one of the most important advances in the original jurisdiction of the Supreme Court since 1861 when the Supreme Court Act 1860 came into force, completing the inheritance of the Court in terms of the jurisdiction of the superior Courts of common law and equity in England".[1]

2. More colourfully, the legislation has been described -

> "... first as the coping stone in the edifice of the Supreme Court's original jurisdiction, and secondly, as a delayed by-product of colonial constitutional evolution".[2]

3. For maritime law practitioners, the legislation represents a "sea change"[3] in the way in which they conduct their work. Gone are the days of tracing a rather intricate legislative history leading to common law rules which might or might not have given jurisdiction. Gone

too, are the days of fossicking through volume 1 of the 1884 Gazette to find the relevant rules and forms determining the procedure to implement the fruits of the jurisdictional search.

4. The temptation now is to be carried away by moments of reflection on days gone by. Undoubtedly, the requisite research proved stimulating from time to time. It was also diverting. In consequence, for those with an acquisitive nature, research resulted in a fund of knowledge which was likely to be used but once, if at all. The moments of nostalgia are sobered by recollection of those occasions when in the heat of a busy Friday afternoon, a client waited impatiently for advice concerning a difficult and unusual set of facts with an offending ship about to sail.

5. The legislation has met with the universal approval of maritime law practitioners in New Zealand. They recognise it as replacing a regime to which none of them has any ambition to return. Although the legislation has transformed the practice of maritime law, there are nevertheless some practical aspects arising from just over ten years experience of the legislation which call for comment.

(B) The Crawford Report

6. There are two aspects of the report on which specific comment about the New Zealand experience has been requested. They are sister ships and lower court jurisdiction.

Sister ships

7. In the course of enquiries among practitioners for the purposes of this paper, no comment at all has been made by them on the implications of what is described as the extended jurisdiction which New Zealand has in relation to sister ships.

8. In the interests of comity, it is tempting simply to acknowledge the comments which have been made about the reasoning which led to the statutory provision in New Zealand and to recognise that it may be more extensive than other jurisdictions. However, the position which has been taken by the New Zealand legislation can be defended despite the criticism in the Crawford Report.

9. The report criticises the New Zealand provision on the basis that it -

> "... allows an action in rem against ships on charter by demise to the relevant person.

> This appears to have come about due to a misreading of the judgment of Justice Brandon in The Andrea Ursula."[4]

10. However, the explanatory note in the Beattie Report[5] does not support this criticism.

11. A more compelling explanation is that the draftsman correctly picked up the importance of the "Andrea Ursula" for New Zealand conditions in drafting s.5(2)(b)(i) but failed to appreciate the implications of adopting a shorthand form in the drafting of s.5(2)(b)(ii).

12. After all, the New Zealand committee was plainly aware of the point which arose in the "Andrea Ursula" and of the way in which it was resolved by construing the English legislation against the background of the relevant international convention. Recognising that New Zealand was not a party to the international convention, the committee realised that it was necessary to provide for the point which arose in the "Andrea Ursula" to be dealt with specifically by the New Zealand legislation. This is made clear by the commentary on the relevant provision.

13. Such an analysis is supported by an article on the legislation which said of the commentary -

> "This shows how simple it is to fall into the trap of careless adoption of the statutory

> enactments of another country and why the United Kingdom Act had to be scrutinised in such minute detail, but there can be no doubt that New Zealand's acceptance of the basic provisions of that Act was very much in the country's interests in terms of international maritime trade".[6]

14. The criticism which can properly be made is of the draftsmanship of s.5(2)(b)(ii). When the point arises, interpretation of the provision will be interesting, not only in relation to the meaning of the words "as aforesaid" in their context, but also against the background of the narrative in the Beattie Report explaining the purpose of the provision.

15. Another criticism which the Crawford Report makes is that extended jurisdiction is not "justified as a matter of policy" on the basis that the sister ship is "a different 'enterprise' from the wrongdoing ship, with a different owner".[7]

16. One must pause and speculate whether in the way in which many current operational and financing arrangements are made, it is a practical reality to talk of arrangements between owners and demise charterers even in relation to different ships as being different enterprises.

Lower Court jurisdiction

17. There can be no doubt that this aspect of admiralty jurisdiction has worked particularly well.

18. The jurisdiction is exercised by the District Courts in New Zealand which have civil jurisdiction up to $NZ12,000. The jurisdiction is in personam only: there is no jurisdiction in rem.

19. These courts already had some maritime jurisdiction under the Shipping and Seamen Act 1952 in claims such as the recovery of seamen's wages and the settlement of salvage disputes.[8]

20. Prior to the admiralty legislation there was some confusion as to the extent of jurisdiction in cases involving for example, collisions between small pleasure craft within New Zealand waters. There are two conflicting decisions.[9] The legislation has resolved the position by specifically giving the District Courts jurisdiction in personam.

21. Now -

> "... a speedy and effective remedy in case of loss or damage is available to the enthusiastic weekend sailors who throng our coasts, harbours and lakes."[10]

22. There is a residual issue whether the District Courts should now be given jurisdiction in rem.

(C) Illustrations of the New Zealand experience

23. The following illustrations are the result of enquiries of practitioners in New Zealand about their experience of the New Zealand legislation. They are gathered in no particular order.

Arrest

24. One of the features of the New Zealand legislation is that it does not have any provision concerning wrongful arrest. The common law rules apply. The statutory redress proposed by the Crawford Report must be encouraged and admired.

25. Some local flavour is required in order to appreciate one practical issue which has arisen in relation to arrest. This concerns cargo claims.

26. S.11(1) of the Sea Carriage of Goods Act 1940 (NZ) provides -

> "The agents in New Zealand of any ship not registered in New Zealand shall be deemed to be the legal representatives of the master and the owner or charterer of the ship after the departure of the ship from the port at which she was discharged for the purpose of receiving and paying claims for short delivery, damage, or pillage of cargo, and the amount of any such claim may be recovered

from the agents in any Court of competent jurisdiction:"

This provision is reinforced by s.11A which strikes down agreements concerning jurisdiction that would otherwise prevent suit in New Zealand.

27. The rationale for these provisions is obviously to protect the position of a consignee in New Zealand: it affords the opportunity to sue there. No question arises of having to chase foreign shipowners around the world. More importantly, there is no question of having to arrest ships in order to protect the position of a consignee.

28. Although there are some unsatisfactory features of the wording of s.11, the identity of the s.11 agent has produced few problems. There have been some but they have generally been resolved without disadvantage to the consignee.

29. The point of this explanation is that there have been a number of examples where, without any apparent justification, cargo owners have sued in rem and arrested. In most of these cases the identity and financial viability of the s.11 agent has been obvious. This course of action has given rise to unnecessary procedural steps to have the ship released from arrest and has on occasions, resulted in delay.

30. There is a satisfactory statutory regime in New Zealand to deal with cargo claims. Unless a plaintiff can show some acceptable reason why arrest should be made in respect of a cargo claim, the plaintiff should pay the costs associated with release from arrest and any expenses caused by delay.

31. In relation to arrest generally, the absence of a statutory provision in New Zealand which deals with wrongful arrest of ships is a source of concern. It is easy to arrest; it is much more difficult to obtain a release. While there is no evidence of widespread abuse of the power of arrest, there should be redress in proper cases for wrongful arrest. An arresting plaintiff should be prepared to stand behind its decision. The common law rules are plainly insufficient in this respect.

Security

32. Another area which has pointed up some practical issues is security for release from arrest.

33. In this respect, the Admiralty Rules 1975 are not completely satisfactory. They provide (in Rule 20) that security may be given in one of the following ways -

> "(a) By an insurance company carrying on business in New Zealand and approved by

the Governor-General in Council for the purposes of section 15(4) of the Administration Act 1969; or

(b) By the State Insurance General Manager; or

(c) By the person required to give security together with at least 2 sureties, each of whom shall file an affidavit of justification."

Security under the rules must be given by bail bond in a prescribed form.[11]

34. The significant omissions from the list of those who may give security are banks, in the form of bank guarantees and the P & I Clubs, in the form of Club letters. While the reference to the P & I Clubs in this context may seem curious, their absence is anomalous because of the statutory recognition of their role in the field of marine pollution insurance.

35. Part IV of the Marine Pollution Act 1974 (NZ) deals with civil liability. It enacts in New Zealand the International Convention on Civil Liability for Oil Pollution Damage 1969. Consistent with the Convention, the legislation requires certificates evidencing a contract of insurance or other financial security in respect of civil liability for marine pollution. The Minister of Transport accepts as a certificate the "blue card" issued by the Clubs in relation to this liability.

36. As the potential liability for marine pollution damage may involve hundreds of millions of dollars, it seems inconsistent not to recognise the financial security offered by the P & I Clubs in other areas which are generally less significant in terms of financial exposure.

37. The anomaly has been highlighted by a case in which cargo owners rejected a Club letter as security.[12] In response, application was made by shipowners to the Court for a release from arrest. As a term of any order, shipowners offered a Club letter as security. The High Court made an order broadly in terms of the application. An appeal to the Court of Appeal was dismissed. Application for leave to appeal to the Privy Council was dismissed also.

38. In the result, the statutory form of bail bond was adapted to include additional matters of security offered by the Club letter and was executed by an agent appointed in New Zealand by telex from the Club. The status of Club letters has not been questioned seriously since.

39. There are, however, still some issues.

40. When security is offered by owners, limitations are invariably put on the scope of any proceedings (by limiting them to the proceedings at present before the

Court, by excluding proceedings against any others interested in the ship, by restraining the arrest of other ships in relation to the claim and by stipulating forum and jurisdiction). Plainly, the view taken by owners is that if security is to be given, then it will be in a form dictated by them. Although there is occasionally some negotiation about the precise terms of security, almost invariably it is in the form required by the Club.

41. In the past, there has been a very real practical justification for the care with which owners have protected their position in New Zealand. Until this year, New Zealand has enjoyed a regime for limitation of liability which went out of favour internationally in 1957.[13] It is little wonder that Club letters were drafted to ensure that the advantages of proceedings in New Zealand were not defeated.

42. There must be room for cargo owners to argue in every case that security should be in the prescribed form of bail bond.

Definition of ship

43. The New Zealand definition extends to aircraft, the justification for which has been put as follows -

> "... this extension of what have been in the past purely shipping claims in the instance jurisdiction of the Court is logical in terms of aeronautical development and follows an innovation made in the prize jurisdiction of the Court under the Prize Act 1939 (Imp) which remains in force in New Zealand".[14]

44. The width of the New Zealand definition has prompted some interesting experiences.

45. In one case, the jurisdiction led to the arrest of a helicopter which was being carried in the hold of a ship. A claim had been made for salvage of the helicopter. A helicopter pilot had flown the helicopter to ferry personnel and equipment from a ship which was breaking up in ice in the Antarctic. He then flew the helicopter from the ship to a place of safety. The helicopter was being transported back to its owners in Canada. The ship called at Lyttelton where the helicopter was arrested.

46. The jurisdiction extends to ships wherever they are situated - even on dry land - provided they come within the definition of a "vessel used in navigation".

Sister ship jurisdiction

47. The procedure for arresting a sister ship is not altogether satisfactory.

48. A writ of arrest will be issued simply on the filing of an affidavit alleging that the ship is a sister ship within s.5(2)(b)(ii). Whether the vessel is genuinely a sister ship may give rise to issues which will eventually require a hearing. An application to set aside a writ of arrest may take some time to be heard. Inevitably, there is likely to be expense and inconvenience to owners resulting from the delay.

49. There are two possible remedial steps: first, better evidence than a mere statement of belief in an affidavit might be required, for example, some compelling evidence to support the statement of belief; and secondly, a statutory right to damages where arrest is made without proper cause.

Priority of claims

50. This remains a complex area.

51. Now that New Zealand has codified its admiralty jurisdiction, there is room for the view that it would be helpful to codify all maritime claims and their priority.

Central Registry

52. The requirement for a Central Registry can and has led to expense and inconvenience resulting from delay while a search of the Central Registry has been made.

53. Undoubtedly, technology will cure the difficulty. It must only be a matter of time before all High Court Registries have computer access to material such as the Central Registry.

Limitation actions

54. The procedure is somewhat unsatisfactory.

55. The careful provisions in the rules (Rule 31) for resolution of claims for limitation of liability are well suited to determining claims where there is no dispute about the right to limit. The procedure becomes more complicated under the rules where there is a dispute about the right. The rules cannot apply at all where owners want to dispute liability for a claim with an alternative defence that if they are liable they are entitled to limit.

56. The significance of these practical and procedural difficulties has become less relevant with the international step which New Zealand has taken from 1957 to 1976 [15] with the amendment this year of the provisions of the Shipping and Seamen Act relating to limitation of liability.

(D) Conclusion

57. There can be no doubt about the success of the New Zealand experience.

58. The observations which have been made about the legislation by practitioners and commentators alike are invariably prefaced with favourable comment. The criticisms which can be made do not detract in any way from the underlying proposition that New Zealand has taken a significant step forward with its admiralty legislation.

FOOTNOTES

1. Beattie, "The Admiralty Act 1973" [1976] N.Z.L.J. 365

2. Mackay, "The Admiralty Act 1973 - Part II" [1976] N.Z.L.J. 387

3. "The Tempest", Act 1, Scene II, 394-400

4. Civil Admiralty Jurisdiction, The Law Reform Commission Report No.33 1986, p.158, para 207

5. The Report of the Law Reform Committee on Admiralty Jurisdiction, March 1972, pp.15-16 - see Annexure 1

6. See Footnote 2 supra, at p.388

7. Ibid

8. S.98 (Seamen's Wages) and ss.358-359 (Salvage Disputes)

9. Powell v. Galbraith (1950) 6 M.C.D. 371 and Phairn v. Deed (1952) 7 M.C.D. 574

10. See Footnote 2 supra, at p.392

11. See Annexure 2

12. General Motors New Zealand Limited and others v. The Ship "Pacific Charger" (unreported High Court, Wellington, 24 July 1981 (AD No.135), Savage J; Court of Appeal, 30 July 1981 (CA No.101/81))

13. The Limitation of the Liability of Owners of Sea-going Ships 1957

14. See Foonote 2 supra at p.388

15. The Convention on Limitation of Liability for Maritime Claims 1976

Annexure 1

ADMIRALTY JURISDICTION

report of the
Special Law Reform
Committee on
Admiralty Jurisdiction

PRESENTED TO THE MINISTER OF JUSTICE
IN MARCH 1972

5. (1) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed the Admiralty jurisdiction of the Supreme Court may be invoked by an action in rem against that ship, aircraft or property.

NOTE:

This subsection preserves the status of the maritime lien which carries with it certain rights and privileges not accorded any other type of claim. A general definition of a maritime lien has been inserted in section 2 for the assistance of persons reading the Act because of the wide scope and importance of the term. (See also para. 4 of Appendix I.)

(2) In addition to the rights conferred by subsection (1) of this section the Admiralty jurisdiction of the Supreme Court may be invoked by an action in rem in respect of all questions and claims specified in subsection (1) of section 4 of this Act.

NOTE:

The provisions of the Arrest Convention and the United Kingdom Administration of Justice Act have been modified and amended to accord with New Zealand conditions, but in essence this subsection is simply declaratory of the right to bring an action in rem in respect of those matters set out in section 4(1).

Provided that:-

(a) In questions and claims specified in paragraphs (a) (b) (c) and (s) of subsection (1) of section 4 of this Act the Admiralty jurisdiction in rem may be invoked against only the particular ship or property in respect of which the questions or claims arose.

NOTE:

This paragraph has been worded in such a way as to make it conform clearly to the provisions of Article 3(1) of the Brussels Arrest Convention. A sister ship cannot be arrested in respect of any of the claims enumerated above.

(b) In questions and claims specified in paragraphs (d) to (r) of subsection (1) of section 4 of this Act arising in connection with a ship where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the jurisdiction of the Supreme Court may (whether the claim gives rise to a maritime lien on the ship or not) be

invoked by an action in rem against -

(i) that ship if, at the time when the action is brought, it is beneficially owned as respects all the shares therein by, or is on charter by demise to, that person; or

(ii) any other ship which, at the time when the action is brought, is beneficially owned or on charter by demise as aforesaid.

NOTE:

In the recent case The Banco (1971) 1 All E.R.524 at 533-4 the Court of Appeal in England held that the word 'or' where it appears in subpara. (i) (supra) must be construed strictly and not as meaning 'and/or', and the words 'any other ship' which introduce subpara. (ii) mean 'ship' in the singular and not 'ships' in the plural. The Court also held (Cairns L.J. dissenting) that although a plaintiff is not entitled to arrest more than one ship belonging to the defendant he may issue a writ in rem not only against the offending ship but also against all the other ships owned by the defendant at the time the cause of action arose.

The Admiralty jurisdiction in rem cannot be said to have been properly invoked until the writ is served. Where a plaintiff issues a writ against a fleet he must amend the writ by striking out the names of all the other ships before service on the ship which he has decided to arrest.

These subparas (i), (ii) as they appear in the Administration of Justice Act, 1956 (U.K.) contain no reference to the provisions of paragraph (b) being available against a ship which was chartered by demise. In the Andrea Ursula (1971) 1 All E.R. 821 the words "beneficially owned" came before the Admiralty Court for consideration and it was held that they must include a charterer by demise. This was in direct contrast to the St Merriel (1963) 1 All E.R. 537. The reason for the fact that the Court felt at liberty to take a different view in the later case rests in the fact that in two decisions of the Court of Appeal in England it was held that if the meaning of an Act of the United Kingdom Parliament which is intended to give effect to an international convention is not clear, and if the United Kingdom is a signatory to that convention, the Court can look at the terms of the convention to assist it in construing the statute. The Court of Appeal further held that the statute should be so construed as to give effect to the presumption that Parliament intended to fulfill, rather than to break, its international obligations. (Salomon v. Commissioners of Customs and Excise [1966] 3 All E.R. 871, Post Office v. Estuary Radio Ltd [1967] 3 All E.R. 663).

Accordingly, in the Andrea Ursula case, evidence was put before the Court that Article 3 of the Brussels Arrest Convention specifically covered the question of a charter by demise of a ship and provided clearly that the charterer of such a ship could be treated on the same footing as a beneficial owner. New Zealand is not a signatory to that Convention and it therefore follows that evidence of the terms of the Convention would have no bearing if the words "beneficially owned" came before the Supreme Court for interpretation. It is almost certain that the earlier decision in the St Merriel would thus be followed.

Since a number of vessels in the New Zealand trade are on charter by demise it is the view of the Committee that the provisions of our legislation should leave no possible question of doubt as to the availability of the action in rem against a vessel on demise charter in the circumstances set out in paragraph (b) above.

(3) Where in the exercise of its Admiralty jurisdiction the Court orders any ship or other property to be sold the Court shall have jurisdiction to hear and determine any question arising as to the title to the proceeds of sale.

Form 13 (Rule 20 (3))

[*Heading as in action*]

BAIL BOND

WHEREAS this action in rem against the above-mentioned property is pending in this Court and the parties to the said action are the above-mentioned plaintiffs and defendants:

NOW THEREFORE [*Name*] an approved insurance company [*or party claiming, together with 2 sureties approved by the Registrar*] hereby (jointly and severally) submit (ourselves) to the jurisdiction of the Court and consent that if they, the above-named defendants, do not pay what may be adjudged against them in this action with costs or do not pay any sum due to be paid by them in consequence of any admission of liability therein or under any agreement by which this action is settled before judgment and which is filed in this Court, THEN execution may issue against us, our executors or administrators or assigns, and the goods and chattels of us, our executors or administrators or assigns, for the amount unpaid or [*Specify amount of bond fixed by Registrar*].

The Common Seal etc., *or*
This bond was signed by the said
[*Sureties*] ..... at .....
this ..... day of .....
19.....
before me—
A Solicitor of the Supreme Court of New Zealand (*or* A Registrar of the Supreme Court of New Zealand)
(*or* A Notary Public.)