

*Marine Cargo Claims in  
New Zealand:  
The Former Role of Section 11 of the Sea  
Carriage of Goods Act 1940 in the  
Recovery Process*

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It has never been particularly easy for cargo owners and marine insurers to successfully make recoveries against sea carriers for lost or damaged cargo.

In New Zealand the majority of cargo claims involve inbound goods. Notification of possible insurance claims is usually received by cargo insurers within a few days of the goods being discharged from the vessel. In most cases the claim follow-up procedure will be supervised by the insurer's claims staff or an assessor. Following payment by the insurer to the insured, the insurer will lodge a formal claim with the carrier for the amount of the loss.

Unfortunately many such 'formal claims' simply go unanswered, either because the insurer has claimed against the wrong party or because it is in the carrier's interest not to process cargo claims with much enthusiasm. Occasionally a claim will be met in full by the carrier. But more often the carrier will either deny liability or seek to limit liability under the terms of the contract of carriage.

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Without exception the terms of carriage will specify a time limit for settling claims. If no agreement is reached proceedings may have to be issued before the time bar expires to preserve the rights of the cargo owner's insurer to recover the amount of the claim under subrogation.

This sequence of events usually means that if underwriters wish to pursue a recovery solicitors are instructed many months after the event giving rise to the claim has occurred. By this stage the likelihood of eventual success against the carrier will probably depend on how well the initial claims investigation was conducted. The number of parties involved with unloading ships and delivering inbound cargo to the consignee means that investigation more than a few weeks after the event is a hard job. In many cases, usually because of limitations of liability under the contract of carriage and the expense of litigation, it will simply be uneconomic to pursue small claims.

Even medium-sized and large claims can be affected by limitations. So, as a whole, recovery rates for international sea carriage claims are lower than those for domestic carriage or international air transit. But the poor recovery rates for claims against sea carriers cannot be attributed solely to the limitations under the contract of carriage. More often difficulties arise in identifying who is the responsible party and agreeing on the course of events preceding the event which resulted in the claim.

It is strange that this has been so in New Zealand where until 1 February 1995 s 11 of the *Sea Carriage of Goods Act 1940* imposed liability for cargo damage on the ship's port agent. By virtue of s 213 of the *Maritime Transport Act 1994*, the *Sea Carriage of Goods Act 1940* has now been repealed and the right to proceed against the ship's agent disappears. It remains to be seen whether recovery rates for cargo importers and their marine insurers will decrease even further.

This paper examines the history of New Zealand's unusual legislation and discusses the consequences for cargo owners and underwriters if the ship's agent's liability for cargo claims is removed.

In practice, a ship's port agent acts for the shipowner in doing whatever needs to be done while a ship is in port. This usually means the agent has responsibility for sorting out the administrative details of the ship's arrival and departure with port and Customs authorities, arranging the ship's stores, overseeing cargo operations, and collecting freight. The modern practice is that the agent will also prepare cargo documentation such as loading manifests and bills of lading especially in respect of container ships. In many cases those delivering cargo to the ship or receiving goods from it will deal exclusively with the ship's agent rather than the shipowner or named carrier. Because of this 'hands-on' involvement, the ship's agent is quite often better able to prevent cargo claims (or at least observe what happens when something does go wrong) than any other party involved in a cargo claim dispute.

Although a ship's agent might accept liability as a principal in some transactions, it is unlikely the agent would accept responsibility for cargo claims as a principal intentionally.

It is possible that the ship's agent could become liable unintentionally, say if it actually caused the loss, or if an estoppel argument was raised on the basis of the agent's actions. But unless such liability is assumed, intentionally or not, an action against the agent will not normally arise out of the law of agency. However, responsibility as a principal can be imposed on the agent by statute.

New Zealand was a pioneer in imposing this type of responsibility by statute. The history of provisions deeming a ship's agent to be liable at law for cargo claims began 90 years ago, with the appearance of s.302 in the *Shipping and Seamen Act 1903*:

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 owner

- 1 Not much academic writing has focused on the duties of ships' agents. But see: Morris, 'The Port Agent — His Rights, Liabilities and Problems' [1982] LMCLQ 218, and Trappe 'The Duties, Obligations and Liabilities of the Ship's Agent to His Principal' [1978] LMCLQ 595.
- 2 For example, when purchasing ships' stores from some suppliers, or when booking port services etc.

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 or pillage of cargo, and the amount of any such claim may be recovered from such agents in any court of competent jurisdiction. Provided that it shall be lawful for such agents, by notice in writing delivered to the Collector not later than 24 hours before the departure of the ship, to decline to accept any responsibility in respect of that ship, in which case the Master and some other person approved by the Collector shall, before the ship is allowed her clearance, enter a joint and several bond in a sum not exceeding the value of her cargo as shown by the ship's papers for the payment of any sum which, together with costs, may be recovered against the agents of the ship.'

No proceedings for the recovery of any claim under this section shall be taken unless notice of the claim is given to the agents not less than 14 days after the delivery of the cargo in respect of which the claim is made.

The 1903 Shipping and Seamen Bill had been introduced into Parliament with much gusto. The Honourable Mr Hall-Jones, M.P. for Timaru and Minister of Marine, on the second reading of the Bill to the House stated:

Our position in the Southern Hemisphere is a particularly happy one. We have a large seaboard, and magnificent harbours and ports along our coastline, and I have no hesitation in saying the time is coming when New Zealand will be a great maritime country.

Section 302 was inserted in Part XI of the *Shipping and Seamen Act* 1903. Part XI was concerned with the 'Liability of Shipowners'. It was a new inclusion in *Shipping and Seamen Act* legislation in New Zealand, not appearing in the original *Shipping and Seamen Act* 1877 nor any of its seven amending acts.

No specific reference to a reason for introducing Part XI or s 302 is mentioned in the Parliamentary Debates. But it seems clear that at

<sup>3</sup> New Zealand Parliamentary Debates, Vol CXXIV (1903) p 124.

<sup>4</sup> 1885,1889,1890,1894,1895,18%, 1899.

the time New Zealand was struggling to align itself with developments in shipping law occurring overseas.

The United Kingdom, traditionally New Zealand's mentor in legislative development, was, as a mainly shipowning nation, not overly concerned with special legislation dealing with shipowners' liability for cargo claims. Such liability, if any, was governed by the terms of the contract of carriage. Part VIII of the U.K.'s *Merchant Shipping Act* 1894 did have some provisions covering the liability of shipowners generally. But nothing was mentioned about responsibility for cargo claims.

New Zealand was at the time a non-shipowning country, relying heavily on overseas carriers (mainly British) for its trade links. During the 19th Century shipowners could basically dictate their terms of carriage and exclude liability for negligent damage, meaning cargo claimants would always have difficulty in recovering from carriers. In any case New Zealand's isolation meant that even trying to pursue carriers by legal methods once ships had sailed out of local waters was prohibitively expensive.

Interesting developments were taking place in the USA where by 1893 the Harter Act had imposed minimum standards on carriers which could not be contracted out of. These provisions had obvious appeal to New Zealand legislators, concerned at the ability of carriers to dictate terms as they pleased.

So it seems that Part XI of the *Shipping and Seamen Act* 1903 took shape guided on one side by the UK's 1894 legislation on shipping tonnage limitations (and the like) and on the other side by the revolutionary 1893 USA legislation. Sections from both these acts were simply adapted to suit New Zealand's needs.

But neither the *Merchant Shipping Act* nor the Harter Act imposed any liability on ship's agents for cargo damage. New Zealand, isolated by vast oceans and dependent on foreign carriers for trade and supplies, needed to protect its importers. Imposing liability on local

5 eg. NZs293=USAs3, NZs294=UKs502, NZs295/296=UKs503, NZs 297=UKs504, NZs298=UKs505, NZs300=USAs1 etc.

agents solved the problem. Section 302 gave importers and their insurers somebody to proceed against in New Zealand, and the localised Harter Act type provisions prohibiting the exclusion of negligence gave the section real bite. This obviously seemed sensible to the politicians and the only debate in Parliament about the radical s 302 was what the time limit on making claims should be. In the end the bill's proposed 7 days' notice was increased to 14 days and the section passed in the form shown above.

Two comments should be made at this point, both of which remain valid 90 years later. The first is that the proviso to s 302(1) neatly provides a backstop security for cargo interests if the agent for some reason declines to accept liability for cargo claims. Notice repudiating responsibility must be given to the Collector of Customs 24 hours prior to the ship's estimated departure. The Collector can then refuse to allow the ship clearance from the port until a bond is provided. Of course it seems that the idea of the bond is to provide a fund for cargo claimants if the ship leaves no responsible agent to accept liability under the first part of s 302(1). But neither the *Customs Act* 1966 nor the Customs Regulations 1968 contain provisions about how the bond is to be divided amongst cargo claimants. From Customs' point of view the main concern is simply to have security for any unpaid Customs charges. Section 302 creates a policing role for Customs. That is, the Customs Department will arrange security for cargo interests as well as for its own purposes. Potentially there are some difficult procedural points with the proviso. But even with no guiding cases it seems that the backstop proviso would work as follows:

- (1) The vessel would be refused port clearance by Customs and would be forced to remain in port. Cargo claimants would then be able to exercise Admiralty proceedings in rem;
- (2) If the ship wanted to leave port, its owners would be required to put up a bond covering the value of her cargo. Although

6 Per the Hon. Mr Jenkinson, M.P. for Canterbury NZPD vol CXXVI p 443.

7 eg. Whether or not the value of the cargo can be assessed by the 'ship's papers', and how the bond is to be collected, and how existence of the bond is to be communicated to cargo interests.

received by Customs, the Collector would presumably have no interest in the security once any outstanding Customs charges are settled. In the absence of any legislative guidance it is likely Customs would probably let the cargo claimants and the shipowner argue over what is to happen to the security on an interpleader basis.

Although the proviso to s 302(1) is rarely, if ever, utilised it could conceivably be important if an agent was aware of a vessel arriving with massive cargo damage and no Protection and Indemnity cover, or if a ship's agent went into receivership. In both cases it is likely the agent or the receiver could give the appropriate notice to Customs.

The second point to be made at this stage is that the cargo claimant's rights to proceed directly against the carrier and/or the ship are not extinguished by the section. The ship's agent is just a local recipient for the claim. If for some reason the local agent is not a good target for litigation (say, because of uncertainty about the agent's ability to pay) proceedings can be issued against the carrier or the ship. However, this will raise the original problems of economically enforcing claims with which the section was designed to deal. It was of course envisaged that New Zealand agents would arrange with their principals for reimbursement (an indemnity) for successful claims. The liability of the agent and the Master/owner is a joint and several one. They can be sued jointly and severally in one action, or proceeded against individually but in the alternative.<sup>8</sup>

The wording of s 302 remained unchanged in the 1908 version of the *Shipping and Seamen Act* and an early reported case confirmed its importance as '*a special section giving a special right of action*'.

In 1922, as part of a revamp of New Zealand's maritime legislation, s 302 was removed from the *Shipping and Seamen Act* and introduced as s 7 in the new *Sea Carriage of Goods Act 1922*.

8 That this is so seems to be accepted without question, although there are no New Zealand cases on the point. But see *Good Claims Ltd v Globus-Reederei GMBH* 1981 3 DNCLD 485 — a South African case dealing with a similar provision.

9 *N.Z. Hardware Co Ltd v Dalgety & Co Ltd* (1921) 26 MCR162 at 164.

Section 7 of the new act differed from the old s 302 in two ways. Firstly, claims could now be made against ship's agents for general 'damage' to cargo as well as for short delivery and pillage. Secondly the definition of 'owner' in the new act (and of course s 7) included '*any charterer to whom a ship had been demised*'. Thus, for cargo claimants, the potentially thwarting effect of a demise clause contained in a bill of lading could be avoided in some cases. The answer was to shortcut suing the demise charterer and proceed against the agent of the ship for damage, pillage or short-delivery claims.

There are few reported cases on the operation of s 7 of the 1922 Act. But those which are reported indicate the devastating effectiveness of the section. In *Keith Ramsay v Bing, Harris and Co Ltd*<sup>1</sup> goods were shipped from Auckland to Dunedin. The appellant acted as agent for the vessel in Dunedin. The goods were pillaged between arrival at the Auckland wharf and discharge from the wharf at Dunedin. As the ship was not registered in New Zealand the respondent had sued the agent under s 7 and was successful in the Magistrate's court. The main point on appeal was that as the goods had been shipped from Auckland it should have been the Auckland agent who was sued, or alternatively that s 7 was not intended to apply to this type of local transit situation. Reed J dismissed the appeal:

It does seem rather absurd that the appellant should be made liable in these circumstances, and the Legislature might very well have excepted such a case from the operation of section 7 as not being within the mischief intended to be cured thereby. But it has not done so and the case seems to be within the terms of the section. The object of the section appears to be to put the agent, after departure of the ship from the port of discharge, in the shoes of the Master and owner of the ship in connection with claims for cargo short delivered or pillaged, and make the agent

<sup>10</sup> Section 2.

<sup>11</sup> Under such a clause the shipowner drops out of the picture and the charterer is the appropriate party to sue. See Todd, *Modern Bills of Lading* (2nd ed 1990) p 93. Cargo claimants would normally be forced to sue the (offshore) charterer.

<sup>12</sup> See commentary by McKay in Tetley *Marine Cargo Claims* (3rd ed 1975) p 1069.

<sup>13</sup> [1924] NZLR1230, 1925 GLR16.

<sup>14</sup> Reported as *Bing Harris & Co Limited v Keith Ramsay* (1924) 20 MCR 30.

responsible in those cases where a claim could be established against the Master and owner. Where there is more than one port at which cargo is discharged the section must be construed distributively, I think, so that the agent at each port of discharge would be responsible only in connection with cargo discharged at the port at which he was agent.

Of course, an action under the *Sea Carriage of Goods Act* provisions in these circumstances would not be available to the cargo-owner now. Section 5 of the *Carriage of Goods Act 1979* governs liability for domestic coastal transport, even when the contract of carriage is undertaken by a foreign-registered vessel.

Section 7 of the 1922 Act was transposed without change to s 11 of the *Sea Carriage of Goods Act 1940*. In 1968 however, s 11 was amended. Section 2 of the *Sea Carriage of Goods Amendment Act 1968* repealed s 7(2) of the 1940 Act and substituted new subsections (2) and (3). These wordings remain and s 11 of the *Sea Carriage of Goods Act 1940* read:

*'Lodging of Claims for  
Damage, Short-Delivery and Pillage'*

(1) The agents in New Zealand of any ship not registered in New Zealand shall be deemed to be the legal representatives of the Master or 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.

Provided it shall be lawful for the agents, by notice in writing delivered to the Collector of Customs not later than 24 hours before the departure of any ship, to decline to accept any responsibility under this section in respect of that ship, in which case the Collector shall, before the ship is allowed her clearance, enter into a joint and several bond in a sum not exceeding the value of her cargo, as shown by the ship's papers, for the payment of any sum which, together with costs, may be recovered against the agents of the ship.

15 See also *Sise v Turnbull Martin & Co* [1927] NZLR 476 1927 GLR 297.

- (2) No proceedings for the recovery of any claim under this section shall be taken unless notice in writing giving reasonable particulars is given to the agents and the proceedings commenced within one year after the delivery of the cargo or the date when the cargo should have been delivered.
- (3) Nothing in this section shall prevent the agents from raising any defence available to their principal, and in particular but not in limitation, any defence available to their principal by virtue of the provisions of Rule 6 of article III of the rules relating to bills of lading contained in the Schedule to this Act.

Some comments need to be made about the reasons for the 1968 amendment. Until the 1960s the *Sea Carriage of Goods Act* 1940 had been working well as a shortcut for cargo interests who would otherwise have to commence Admiralty proceedings in rem or instruct solicitors overseas. But by 1968 two things were affecting the effectiveness of the old s 11:

- (1) Containerisation and other developments in the shipping business meant that goods could not be inspected within the 14 day time limit for lodging claims against agents;
- (2) Bills of lading more commonly began to incorporate foreign jurisdiction clauses, raising questions about whether cargo interests could proceed against agents in the New Zealand courts.

These developments led to procedural difficulties for cargo owners or subrogated insurers wishing to economically bring proceedings against ships' agents. The Contracts and Commercial Law Reform Committee, alerted to these problems by their preliminary work on their Report on the Law Governing the Carriage of Goods, provided a separate report relating to claims by importers and exporters against sea carriers. The report stated that:

New Zealand lives by its trade and its laws must properly protect its traders. New Zealand's geographical distance [from other countries] makes it necessary to give special protection to importers in the matter of pursuing claims against sea carriers.<sup>16</sup>

16 As quoted by the Hon J R Marshall, Minister of Industries and Commerce, Vol 357 (1968)

So the reasons for the amendments made to s 11 were relatively uncomplicated. Fourteen days had become insufficient as the time period for unpacking cargo and thoroughly inspecting it before lodging a claim. Although importers and shipowners differed on the exact time required, in the end a one year time bar was said to be equitable. One year was the time limit before a claim would be barred under the Hague Rules scheduled to the 1940 Act. It seemed sensible that cargo owners should be able to apply the same period when filing claims against the New Zealand agent of the overseas shipowner. Thus the problems of wharf delays and the difficulties created by the initial move to containerisation were dealt with by the new subsection (2).

As to nullifying the effect of jurisdiction clauses in bills of lading, s 3 of the 1968 amendment Act introduced a new s 11A to the *Sea Carriage of Goods Act* 1940. No longer were New Zealand courts to be prevented by the contract of carriage from adjudicating claims between New Zealand residents and New Zealand agents of a foreign carrier. The new s 11 A, following s 9 of the Australian *Sea Carriage of Goods Act* 1924, stated that any stipulation or agreement purporting to oust or restrict the jurisdiction of the courts of New Zealand in respect of the carriage of goods in or out of New Zealand was to be of no effect. So the way was clear once more for New Zealand cargo claimants to economically pursue cargo claims, large or small.

The desired effect of the 1968 amendments was to create a watertight right to proceed against ships' agents. Some points of practical importance should be noted.

The first is that the vessel must be registered somewhere other than New Zealand. This is fairly easy to check. The latest version of the Lloyd's Shipping Index is usually reliable, and sometimes the port authorities can confirm a vessel's registry.

Secondly, the demise charter or demise clause problems do not arise. Section 11 caught the agent of the owner and charterer alike.<sup>18</sup>

New Zealand Parliamentary Debates, p 1513.

<sup>17</sup> Section 11A(1).

<sup>18</sup> See McKay, *supra* at footnote 12.

The agent had to be the one designated for the particular port of discharge.<sup>19</sup> It may not be apparent to the uninitiated just who the port agent is. Identity is not particularly obvious from the documents. Port authorities can usually provide the name of the agent but the claimant had to double-check that the correct party was named in the proceedings.

The claim had to be for damage, pillage or short-delivery. Admittedly these criteria were wide. But it is possible to conceive a situation where the agent would not have been responsible for the actions of its principal under s 11.

Section 11(2) was potentially fatal for cargo claimants. While increasing to one year after the (scheduled) delivery of the cargo the period in which proceedings can be issued, the subsection required notice of the claim to be given to the agent before the proceedings could be commenced. It appeared that a pro-forma claim was not enough. Formal notice detailing the basis of the claim and indicating with reasonable clarity that proceedings will be taken against the agent unless the claim is paid was required.<sup>1</sup>

Ships' agents could still repudiate liability for the cargo claims from a particular vessel. It seems unusual that this provision was simply repeated from earlier legislation. HM Customs is primarily concerned with collecting revenue for excise duties and charges, and is not interested on a day-to-day basis with policing cargo claims procedures. In any case the 24 hour notice required meant that the agent had to give notice to the Collector before the vessel had even arrived in port because turnaround times have decreased since the provision was first introduced in 1903. Finally in relation to this point, the lack of an effective mechanism for communication between cargo claimants and Customs as to the existence of a security

<sup>19</sup> *Keith Ramsay v Bing, Harris and Co Ltd* supra at footnote 13.

<sup>20</sup> Say for delay, unspecified oncarriage, or non-delivery (failure to deliver any cargo).

<sup>21</sup> In *A.E. & C.I. v King & Sons, Dunn & Co Ltd* 1979 (2) SA 36, Corbett JA (dealing with a provision similar to NZ's s.11) stated that notice should indicate to the agent the general nature of the claim: to what cargo it relates, on what basis the claim is made and the extent or amount of the claim even if a precise quantification is not possible. In this case the notice given was held to be insufficient and the agent was relieved from liability.

bond and as to how cargo interests can stake some claim to it was clumsy. Fortunately perhaps agents rarely utilised this provision.

Section 11(3) was inserted in 1968 to make it clear that agents have available the same defences to a claim as the carrier or shipowner would have. The intention of s 11(1) was to place the agent in the shoes of its principal, with the principal's rights and liabilities. But whether this has occurred is uncertain. Section 11A(3) stated that:

Nothing in section 11A shall be construed as limiting or affecting any stipulation or agreement to submit any dispute to arbitration in New Zealand or to arbitration in any other country which is a party to an international convention to which New Zealand is also a party.

It will be recalled that s 11(3) stated that nothing in s 11 should prevent the agent raising any *defence* available to its principal. So could an agent apply for a stay of proceedings on the basis of an arbitration clause in the bill of lading? In *New Zealand Ltd v 'Contship America'* Greig J stated that:

'an arbitration clause is not a defence or a limitation of liability. It is merely a procedural arrangement as to the form in which claim(s)... are to be made ...

If this was the case one could conclude that an agent which did not repudiate liability by notifying a Collector of Customs in the manner specified would be well and truly caught with responsibility for cargo claims under s 11. However in *Mobil Oil NZ Ltd v The Ship 'Stolt Sincerity' and Columbus Maritime Services Limited* the High Court stayed proceedings brought by Mobil against Columbus as s 11 agents. Columbus relied on s 4 of the *Arbitration (Foreign Awards and Judgments) Act* 1982 which provides that the court must order a stay of proceedings where there is an underlying arbitration agreement which at least some of parties may be subject to. The court in the *Mobil* case went even further. It decided that because Mobil was

22 [1992] 1 NZLR 425 at 434.

23 Unreported, HC, Ak, AD 628/93 per Temm J 24 March 1995.

claiming against an agent of the vessel/owner, it was effectively claiming through Stolt, a party to the arbitration agreement. Accordingly, Columbus was entitled to rely on the arbitration agreement, even though it was not a party to it. The proceedings were stayed in favour of arbitration in London.

Many bills of lading contain arbitration clauses. So the effect of *Stolt Sincerity* is to weaken the very purpose of s 11.

Apart from the difficulty of arbitration clauses, it seems that New Zealand had a reasonably effective regime which provided importers with a method of enforcing most cargo claims locally — either a local agent, the vessel itself, or a bond was available as a target for litigation. More importantly, the procedural importance of s 11 probably outweighed its actual legal effect. The lack of reported cases indicate the section's functional simplicity. Ships and their cargoes should be kept moving. Section 11 prevented ships being arrested over small or moderate sized cargo claims.

It is unusual then that cargo owners and insurers should find it difficult to improve their recovery rates from sea carriers. But two factors probably account for this:

- (1) The application of international conventions such as the Hague Rules, Hague-Visby Rules and Hamburg Rules which can severely limit the amount recoverable;
- (2) Where s 11 is for some reason not used as a shortcut procedure, it is becoming increasingly difficult to identify who the responsible party is, particularly where freight forwarders or NVOCCs have an involvement.

Section 11 helped out when it could. The need for it in 1995 is the same as, if not greater than, the need for it in 1903. So it seems incredibly simplistic that the *Maritime Transport Act* 1994 terminated the facility to sue ships' agents. Section 213 of the Act repeals the *Sea Carriage of Goods Act* 1940. Although many of the *Sea Carriage of Goods*

24 Note *Fletcher Industries Ltd v Japan Line (NZ) Ltd* (Unreported, HC Wellington, Jeffries J, 18/10/84 (A313 & 314/83)).

25 See Davies, 'The Elusive Carrier' (1991) 19 Australian Business Law Review 230.

*Act* provisions are recreated elsewhere in the Act, agents no longer become liable to pay cargo claims under statute law.

For many years South Africa's *Merchant Shipping Act* contained a section unashamedly copied from New Zealand's *Sea Carriage of Goods Act* 1940. Section 311 of the *Merchant Shipping Act* stated that no clearance would be granted to a foreign ship unless her owner or charterer appointed an agent to undertake all liability for cargo claims. Section 311 was repealed in 1986 by the Carriage of Goods by Sea Act. The reasons given were:

- (1) The section was unduly harsh on local agents who were exposed to large claims. Although liability was joint and several with the shipowner, the agent could be left to stand alone if sued by a local claimant and the shipowner reneged on the indemnity agreement. By the time the agent (or anyone) could recover to commence new proceedings against the shipowner, the next best tactic (arresting the ship) was not economic as the ship usually had sailed away.
- (2) The *Admiralty Jurisdiction Regulation Act* 1983 gave the cargo claimant new rights to arrest 'associated ships' and arrest ships as pre-judgment security.
- (3) The operation of s 311 was said to hinder the sailing of foreign ships from South African ports.

It seems that only (1) above would have any relevance to the New Zealand situation. Much of the thrust behind the *Maritime Transport Act* 1994 is concerned with the deregulation of local and trans-Tasman shipping. Increasing numbers of tramp ships or less reputable liner services could result in a higher incidence of ships' agents being left responsible for claims following the financial (or moral) collapse of their shipowning principals. The *Admiralty Act* 1973 will not be amended to reflect the wider arresting provisions of the South

26 See Staniland, *'The New Carriage of Goods by Sea Act in South Africa'* [1987] LMCLQ 305 at p315-316. The concept of an 'associated ship' is wider than the New Zealand definition of 'sister ship'.

27 Ibid.

African legislation as in (2) above. But far from hindering the departure of foreign vessels from New Zealand ports as was said to be the case in (3) above, s 11 was intended to facilitate the departure of such vessels.

It was expected that the repeal of the South African equivalent to s 11 would require all future claims to be instituted directly against the shipowner or the carrier. This would mean that claimants would be obliged to arrest or attach the property of the shipowner (the ship) prior to the determination of cargo claims. Accordingly it was predicted that ships would be arrested more frequently. However, port agents would no longer run the risk of being abandoned by unscrupulous principals.

If s 11 disappears from New Zealand law then cargo owners and insurers will generally find it more difficult to pursue shipowners for cargo claims recoveries. As a result it is predicted that small claims will not be pursued and marine insurers' recovery rates will drop significantly. Large claims will still result in vessels being threatened with arrest until a Protection and Indemnity club guarantee is put up. The change in the frequency of arrests will occur in the medium-sized claims bracket, where it may be economic for subrogated insurers to issue proceedings in rem rather than try to proceed against an overseas shipowner. It may be possible to circumvent this process by increasing the settling authority of local P & I club correspondents, but this would require a major change to current procedures. It could probably be argued that reputable shipowners would not be too concerned if s 11 were to survive the *Maritime Transport Act's* claws on the basis that ship arrests should be avoided whenever possible. Cargo owners and their insurers likewise would be much better off with s 11, especially as, by volume, the small claims are those where s 11 is most efficient as a procedural tool for making recoveries.

It seems that ships' agents are the only ones to benefit from the demise of s 11. But while the frequency of agents being abandoned

by overseas principals is still comparatively low it seems difficult to accept that any real good can be achieved by repealing legislation that has worked so well for 90 years. After all, often the ship's agent will be in a better position to find out exactly how cargo has come to be pillaged, damaged or short delivered and imposing liability for such incidents can only serve as an incentive to agents to do their jobs as well as possible. In any case the agents themselves could arrange P & I insurance cover for their liability as a backstop to indemnity agreements with their principals.

It is unfortunate that, at a time when cargo claims recovery rates were improving due to increased package and kilogram limitations, the *Maritime Transport Act* places an obstacle in the path of those wishing to pursue such recoveries. With a little forethought and one or two small amendments, a replacement for s 11 could have been included in the 1994 reforms. At a time of pending economic recovery the encouragement of foreign carriers to New Zealand ports is vital. Legislative incentive for local agents to improve service and pay claims on behalf of their overseas principals will benefit both importers and exporters, and their marine insurers could get on with the task of underwriting new business instead of struggling with difficult task of sorting out who is to blame for cargo claims.

29 Suggested amendments would be a streamlined and better defined way of collecting and administering security bonds when an agent disclaims liability and a precise ruling on whether an agent can avail itself of an arbitration clause in the terms of carriage.