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# Shipping

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## Law and Practice

Contributed by Joseph & Partners

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## 1. Maritime Finance: Legal Incentives for Maritime Finance Entities and Projects

### 1.1 Draft of Maritime Finance Law

Not applicable in our jurisdiction.

## 2. Substantive Provisions for Limitation of Liability for Maritime Claims

### 2.1 LLMC 76

Conventions for vessel limitation are applied differently in Malaysia. Malaysia is not a party to LLMC 76 itself, but it did assent to LLMC 76 as amended by the 1996 protocol (LLMC 96), which came into force on 10 February 2009 and is applicable to the West Malaysia states of Peninsula Malaysia and the Federal Territory of Labuan. The East Malaysia states of Sabah and Sarawak, however, have not incorporated LLMC 76 or LLMC 96, but instead apply the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957 (LLSGS 57).

### 2.2 1996 Protocol

To reiterate, Malaysia is a party to LLMC 76 as amended by LLMC 96.

### 2.3 Limitation of Liability Time Bar

Under Section 517 of the MSO, any claim or lien against a vessel must be brought within two years of the date when the damage or loss or injury was caused, or when salvage services were rendered. In contrast, any claim based on a bill of lading incorporating the Hague Rules or the Hague-Visby Rules provides a time bar of one year.

The Hague Rules apply in Malaysia under the authority of the Carriage of Goods by Sea Act (COGSA) 1950 (revised 1994). As for other general causes of action founded in tort or contract, Section 6 of the Limitation Act 1953 provides that the limitation period is six years from the date on which the cause of action arose. It is possible to extend time by mutual agreement between the parties.

### 2.4 Claims Subject to Limitation of Liability

Under Article No 2 of LLMC 76, the following claims (regardless of the basis of liability) are subject to limitation of liability:

- claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation) occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;

- claims with respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
- claims in respect of other loss resulting from infringement of rights aside from contractual rights, occurring in direct connection with the operation of the ship or salvage operations;
- claims involving the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including miscellaneous items that are or were aboard the ship;
- claims of a person for the removal, destruction or the rendering harmless of the cargo of the ship; and
- claims of a person other than the person liable in respect of the measures taken in order to avert or minimise loss, for which the person liable may limit his or her liability in accordance with LLMC 76, and further loss caused by such measures.

Limitation of liability is encapsulated in Part IX of the MSO, in particular Section 360, which ratifies LLMC 76 and LLMC 96. Under Section 360 of the MSO, Malaysian and foreign shipowners can limit liability for certain cases of loss of life, injury or damages, provided these occurrences were not due to the shipowner's willful and negligent acts.

It should be noted that the states of Sabah and Sarawak (East Malaysia) have not incorporated LLMC 76 or LLMC 96. Nonetheless, said states maintain adherence to LLSGS 57 for limitation of liability and are hence subject to the provisions under this convention. Notably, Section 360 of the MSO provides for general limitation for maritime claims.

The limits of liability for claims other than those mentioned in Article No 7 of the LLMC Convention, arising on any distinct occasion, are calculated as follows:

- in respect of claims for loss of life or personal injury:
  - (a) 2 million Special Drawing Rights (SDR) for a ship with a tonnage not exceeding 2,000; and
  - (b) for a ship with a tonnage in excess thereof, the following additional amounts would apply:
    - (i) SDR800 for each tonne from 2,001 to 30,000 tonnes; plus
    - (ii) SDR600 for each tonne from 30,001 to 70,000 tonnes; and
  - (c) SDR400 for each tonne over 70,000 tonnes; and
- in respect of any other claim:
  - (a) SDR1 million for a ship with a tonnage not exceeding 2,000; and
  - (b) for a ship with a tonnage in excess thereof, the following additional amounts would apply:
    - (iii) SDR400 for each tonne from 2,001 to 30,000 tonnes; plus
    - (iv) SDR300 for each tonne from 30,001 to 70,000; and
  - (c) SDR200 for each tonne over 70,000.

- (d) SDR is converted to Malaysian ringgit (MYR), in which the limitation is sought. The value is ascertained on the date the limitation fund is constituted.

## 2.5 Claims not Subject to Limitation of Liability

The following claims are excluded from limitation:

- damage caused by an intentional or reckless act or omission of the person liable;
- claims for salvage or contribution in general average;
- claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage 1969 or any amendment or protocol thereto which is in force;
- claims subject to any international convention or national legislation governing or prohibiting limitation of liability for nuclear damage;
- claims against the shipowner of a nuclear ship for nuclear damage; and
- claims by servants of the shipowner or salvor whose duties are connected with the ship or the salvage operations, including claims of their heirs, dependants or other persons entitled to make such claims if:
  - (a) under the law governing the contract of service between the shipowner or salvor and such servants the shipowner or salvor is not entitled to limit his or her liability in respect of such claims; or
  - (b) he or she is by such law permitted to limit liability only to an amount greater than that provided for in Article No 6 of the convention.
- Section 360(5) of the MSO provides that there shall be no limitation of liability in respect of loss of life or personal injury, loss or damage to any property or infringement of any right of a person who is on board or employed in connection with the ship under a contract of service with all or any of the persons whose liabilities are limited by Section 360 of the MSO if that contract is governed by the laws of any country outside Malaysia and that law either does not set any limit to that liability or sets a limit exceeding those set in this provision of the MSO.

## 2.6 Conduct Barring Right to Limitation of Liability

The following claims are excluded from limitation:

- damage caused by an intentional or reckless act or omission of the person liable;
- claims for salvage or contribution in general average;
- claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage 1969 or any amendment or protocol thereto which is in force;
- claims subject to any international convention or national legislation governing or prohibiting limitation of liability for nuclear damage;
- claims against the shipowner of a nuclear ship for nuclear damage; and

- claims by servants of the shipowner or salvor whose duties are connected with the ship or the salvage operations, including claims of their heirs, dependants or other persons entitled to make such claims if:
  - (a) under the law governing the contract of service between the shipowner or salvor and such servants the shipowner or salvor is not entitled to limit his or her liability in respect of such claims; or
  - (b) he or she is by such law permitted to limit liability only to an amount greater than that provided for in Article No 6 of the convention.
- Section 360(5) of the MSO provides that there shall be no limitation of liability in respect of loss of life or personal injury, loss or damage to any property or infringement of any right of a person who is on board or employed in connection with the ship under a contract of service with all or any of the persons whose liabilities are limited by Section 360 of the MSO if that contract is governed by the laws of any country outside Malaysia and that law either does not set any limit to that liability or sets a limit exceeding those set in this provision of the MSO.

### 2.7 Limitations of Liability

As specifically mentioned in Article No 4, “personal acts or omissions, committed with the intent to cause such loss or recklessly and with knowledge that such loss would result” bar the right to limit liability. A subjective intent to cause such loss must be proven by the person seeking to exclude the limitation.

### 2.8 Breaking Shipowners’ Right to Limit Liability

Limitation of liability was originally developed to reduce the personal exposure of the shipowner, as well as its property, in circumstances where the ship’s master and/or crew acted negligently or intentionally. By capping the limitation at a certain sum, unlimited exposure to carriers was eliminated for shipowners as well as insurers, thereby encouraging shipowners to stay in business and insurers to offer insurance risk for liabilities.

### 2.9 Acceptable Guarantees

The limit under the LLMC Convention as incorporated in the MSO can be broken only if the person seeking to exclude the limitation can prove that the loss was a result of a personal act or omission, committed with the intent to cause such loss or recklessly and with knowledge that such loss would result (Article No 4). Under standard principles, a subjective intent to cause such loss must be proven.

### 2.10 P&I Clubs’ IOUs

A limitation fund may be constituted by either a cash payment to the court or a guarantee acceptable under domestic legislation. In accordance with Section 7(2) of the Merchant Shipping (Oil Pollution) Act 1994 (the 1994 Act), the forms of guarantee acceptable to a court are a cash payment or

deposit of a bank guarantee or security of a sum determined by the court itself.

### 2.11 Other Claims

In accordance with Section 8 of the 1994 Act, where the court has found that a person who has incurred a liability under Section 3 of the act is entitled to limit that liability under Section 6 of the same act, and that person has paid a sum or deposited a bank guarantee or security into the court for a sum not less than that amount:

- the court shall order the release of any ship or other property arrested in connection with the claim in respect of that liability or any bail or other security given to avoid such arrest; and
- no judgement or order in respect of any such claim shall be enforced, other than for costs, if the claimant has access to the court and if the payment or the bank guarantee or security or such part thereof as corresponds to the claim will be actually available to the claimant.

## 3. Procedure for Judicial Sale of Vessels Before Maritime Courts

### 3.1 Local Maritime Courts

It must have an application for judicial sale of a vessel tendered by either the arresting party, the owner of the vessel or any party with an in rem claim against the vessel. The application must be made in the action in which the vessel is arrested.

The court may, after a full hearing or on hearing of the motion for judgment in default of the defendant entering an appearance or filing a defence, and if satisfied that the plaintiff’s claim is well founded, give judgment for the claim, and it may order that the vessel be sold.

Next, an order for appraisal and sale by a sheriff of the High Court must be obtained. Further, the claimant must seek from the court a commission for the appraisal and sale of the property arrested to effect the order. Pursuant to Order 70, Rule 22(1) of the Rules of Court 2012, the commission may not be issued until the party applying for it has filed a request in the prescribed form (Form 156 & 157 of Appendix A to the Rules of Court 2012). The sheriff may execute the commission only once a satisfactory undertaking in writing to pay his or her fees and expenses on demand has been lodged with the sheriff’s office.

### 3.2 Notification of Judicial Sale

The sale of the vessel is either by private tender or public auction. The ways to notify the interested parties are through advertising the sale and inviting sealed bids to be submitted to the Admiralty Sheriff.

An advertisement will be drawn up by the sheriff's brokers and placed in international publications, such as Lloyd's List and The Shipping Times, and in local newspapers, such as the New Straits Times and the Star. This advertisement is normally placed at least one month before the sale, to allow prospective buyers the opportunity to inspect the vessel.

The advertisement will normally run for three days consecutively and will contain the necessary particulars of the vessel, together with the terms of the sale, which will include the mode of auction. The advertisement will also specify the parties from whom the terms and conditions of the sale may be obtained – normally the auctioneers, the sheriff and the plaintiff's solicitors.

### 3.3 Appraisal of Vessels

Upon the order for sale being made by the court, the party obtaining the sale order takes out a summons for directions under Order 70 Rule 24 of the Rules of Court 2012 for the sale procedure to be set out by the court. The directions shall be heard by the judge in chambers.

Normally, the entire sale procedure is left to the sheriff, who will instruct a shipbroker to arrange for the survey of the vessel and to prepare the required prospectus. This will contain all the necessary information on the vessel, including the fact that this is an 'as is-where is' sale.

Thereafter the brokers will, on the basis of the surveyor's report and an analysis of the market conditions, arrive at a valuation of the vessel. A reserve price is normally fixed by the judge hearing the summons for directions, which is based upon the valuation and has no relationship to the extent of the claims against the vessel.

The Admiralty Sheriff is required under the commission for appraisal and sale to sell at the highest price that can be obtained for the ship or maritime property.

### 3.4 Judicial Sale Proceedings

To date, there exists no limitation on the number of rounds that can take place in a judicial sale proceeding. The duration of the judicial sale proceeding depends on the response from the potential buyers to the auction or the sheriff's demand for the tender. If all the bids or tenders fall short of the appraised price, the normal procedure is for the sheriff to facilitate another auction or call for fresh bids. The vessel may be sold below its appraised value only with the approval of the court, unless an application is made to the court seeking authorisation of a sale below the appraised value.

### 3.5 Minimum Bids

There are no minimum bids required in the first, second and third round of a judicial sale.

### 3.6 Judicial Sale Auction Date

The following are the procedures in a judicial sale auction by private treaty:

- confirm the dates regarding the tender period with the client (eg, one-month tender period from 1 September to 1 October) at least two weeks prior to the sale date to allow sufficient time to arrange advertising;
- tender notice to the Admiralty Sheriff via email to obtain approval to begin the tender;
- formulate a notice of advertisement describing ship details, the tender period and person in charge to contact for purchase of the information pack;
- formulate an information pack containing all requisite information of the vessel, including an appendix, the forms needed to inspect a vessel and place a bid, and the sheriff's terms and conditions of sale;
- contact two publications to advertise the new tender period. Before now, we have generally communicated with two local publications, namely the Star and the NST, in addition to international publication Tradewinds;
- publish the advertisements in the two publications;
- await interested persons and/or parties to establish contact, then distribute the information pack for MYR50 a copy;
- occasionally, an interested party intends to inspect the vessel prior to placing a bid – the party should be advised to fill in the form pertaining to inspection in the appendix of the information pack, with copies of the Identity Card (IC) or passport (if foreign) of those persons intending to inspect and the inspection date. Finally, the inspecting party is reminded that they bear the cost of the inspection;
- write to the Admiralty Sheriff for approval regarding the request for inspection, attaching the relevant form, copies of IC/passport and date of inspection;
- upon the sheriff's approval, facilitate the inspection by liaising with the ship managers and the inspecting party;
- upon the close of the tender period, received bids that include a banker's draft for 2% of the bid price (constituting part payment of a 10% deposit), ought to be sealed in an envelope, to be subsequently opened by the Admiralty Sheriff. Afterwards, write to the sheriff to say that the tender period is over and to fix an appointment for the opening of the bids;
- attend the appointment with the sheriff for the opening of the bids and record the amounts thereof;
- determine with the sheriff whether any bids are acceptable;
- if the Admiralty Sheriff declines to accept any of the bids offered, immediately inform the bidders and begin the next tender process; and
- if the sheriff chooses to accept any of the bids, inform the bidders, then inform the winning bidder in writing that there is to be an immediate payment of the remaining 8% deposit, and that the winning bidder has seven days to

furnish the remaining 90% of the bid in accordance with the sheriff's terms and conditions.

### 3.7 Prospective Bidders

It is not necessary for a prospective bidder to make an appearance in a judicial sale proceeding with an attorney.

### 3.8 Actions Required to Participate

Prospective bidders must purchase an information pack and submit a bid within the tender period with a 2% deposit.

### 3.9 Sale Price Timeline

An immediate payment of the remaining 8% deposit is due once a vessel is provisionally sold, and the winning bidder has seven days to furnish the remaining 90% of the bid in accordance to the sheriff's terms and conditions.

### 3.10 Other Bids

A party that has a judicially recognised credit against a vessel may not place a bid during the judicial sale auction. This is because there would exist a conflict of interest in the determination of priorities.

### 3.11 Winning Bidder and Arrest Expenses

A maritime judge can approve sale to the winning bidder even if the bid does not cover the arrest expenses incurred within the claim that gave rise to the judicial sale proceeding, by means of an application to the Admiralty Court for an Order for Sale below Value.

## 4. Carriage of Goods by Sea Claims

### 4.1 Carriage of Goods

The Hague Rules apply in Malaysia by way of the COGSA 1950 (Revised 1994) and the English Bills of Lading Act 1855 pursuant to the provisions of Section 5 of the Civil Law Act 1956, which provides for the application of English law in commercial matters.

At present, the applicable legislation in Malaysia in this area is the COGSA 1950 (Revised 1994) in West Malaysia; the Merchant Shipping (Implementation of Convention relating to Carriage of Goods by Sea and to Liability of Shipowners) Regulation in Sarawak; and the Merchant Shipping (Applied Subsidiary Legislation) Regulation 1961 in Sabah.

### 4.2 Rules Applicable to Cargo Claims

Section 24(b) Courts of Judicature Act 1964 stipulates that the civil jurisdiction of every high court (including the Admiralty Court) has "the same jurisdiction and authority in relation to matters of admiralty as is for the time being exercisable by the High Court of Justice in England under the UK Supreme Court Act 1981" (see *The Owners of the Ship or Vessel Siti Ayu and Melati Jaya v Sarawak Oil Palm Sdn Bhd* ([2006] 1 MLJ 630).

Further, under the Admiralty Court Practice Directions, 18 categories of admiralty matters, which comprise the claims relating to carriage of goods by sea (cargo claim) within s.24 (b) of UK Supreme Court Act 1981 (applied by the Courts of Judicature Act 196) can be heard by the Admiralty Court.

### 4.3 Scope of Rules

The COGSA 1950 (Revised 1994) adopts the Hague Rules scheme.

### 4.4 Bill of Lading Evidence

Once it has been signed to a third party, a bill of lading is treated as the actual contract under the law.

### 4.5 Contracting Parties

The contracting parties are the carrier (shipowner or charterer) and consignor (shipper).

### 4.6 Cargo Claims

The buyer taking delivery at the end of a chain of sale contracts under which risk passes on shipment, and the original shipper or a bank that has made payment in respect of the goods under a letter of credit.

### 4.7 Suing for Cargo Claims

The carrier or its subcontractors can be sued for cargo claims.

### 4.8 Carrier

The shipowner or charterer (under the terms of charter party) is considered the carrier.

### 4.9 Suing the Vessel

A vessel can be sued in rem for cargo claims.

### 4.10 Right in Rem or Maritime Lien

In rem claims recognised to give rise to maritime liens comprise salvage, damage done by a ship, seamen's and masters' wages, bottomry and masters' disbursements.

### 4.11 Tort

A claimant can sue in tort.

### 4.12 Himalaya Clauses

The mechanism of the Himalaya clause is effective to extend the defences.

### 4.13 Immunities

The defences available are those stipulated under Article No 4 Rule 2 of the Hague Rules:

- act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or management of the ship;
- fire, unless caused by the actual fault or privity of the carrier;

- perils, dangers and accidents of the sea or other navigable waters;
- act of God;
- act of war;
- act of public enemies;
- arrest or restraint of princes, rulers or people, or seizure under legal process;
- quarantine restrictions;
- act or omission of the shipper or owner of the goods, his agent or representative;
- strikes or lockouts, or stoppage or restraint of labour from whatever cause, whether partial or general;
- riots and civil commotions;
- saving or attempting to save life or property at sea;
- wastage in bulk of weight or any other loss or damage arising from inherent defect, quality or vice of the goods;
- insufficiency of packing;
- insufficiency or inadequacy of marks;
- latent defects not discoverable by due diligence; and
- any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier. The burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

#### 4.14 Limitation of Liability Regime

For tonnage limitation, West Malaysia applies LLMC 76 as amended by the 1996 protocol. Limitation of liability is encapsulated in Part IX of the MSO, in particular Section 360, which ratifies LLMC 76 and the 1996 protocol. Section 360 of the MSO provides for general limitation for maritime claims.

The limits of liability for claims (other than claims for loss of life or personal injury) are calculated based on tonnage of the vessel. They are:

- SDR1 million for a ship with a tonnage not exceeding 2,000; and
- for a ship with a tonnage in excess thereof, the following additional amounts apply:
  - (a) SDR400 for each tonne from 2,001 to 30,000 tonnes; plus
  - (b) SDR300 for each tonne from 30,001 to 70,000; and
  - (c) SDR200 for each tonne over 70,000.
- The carrier may invoke this limitation provision as long as the incident that resulted in the loss or damage to property or merchandise happened without their actual fault or privity.

Sabah and Sarawak apply LLSGS 57 and have not incorporated LLMC 76 or LLMC 96. The amount to which a ship-owner may limit its liability under LLSGS 57 in respect of loss or damage to property is XFO1,000 (ie, 1,000 gold francs,

which has been gazetted to be the equivalent of MYR203.07) for each ton of the ship's tonnage.

Besides, the Hague Rules are compulsorily applicable in Malaysia through the COGSA 1950 in relation to and in connection with the carriage of goods by sea from any port in Malaysia to any other port whether in or outside Malaysia. Article No 4 Rule 5 of the Hague Rules provides for a package limitation whereby carriers may limit their liability for loss or damage to the gold value of GBP100 (which is determined in Malaysia by reference to the UK Coinage Act 1870) per package or unit, unless the nature and value of such goods have been declared by the shipper before shipment and have been inserted in the bill of lading.

#### 4.15 Burden of Proof in Cargo Claim

The buyer of the goods must establish that it is the consignee named in the bill of lading or the endorsee of the bill of lading. Furthermore, possession of the goods must have passed to them "upon or by reason of such consignment or endorsement".

The general nature of such loss or damage must be given in writing to the carrier or its agent at the port of discharge before or at the time of the removal of the goods into the custody of the party entitled to delivery thereof under the contract of carriage.

If the loss or damage is not apparent within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

#### 4.16 Time Bar in Cargo Claims

One year under Article No 3 rule 6 of the Hague Rules – this period runs from the delivery of the goods or from the date when they should have been delivered.

#### 4.17 Time Bar Extension

The one-year time bar can be extended by the parties after the cause of action arises pursuant to the third paragraph of Article No 3 rule 6.

However, this does not qualify the rights of the parties to agree to a time extension before the cause of action has arisen.

#### 4.18 Validity of Jurisdiction and Choice of Law Clauses

Article No 10 of the Hague Rules requires any bill of lading issued in a contracting state to contain an express clause incorporating the Rules. Moreover, this requirement is stated under Section 4 of the COGSA, where it provides that every bill of lading or similar document of title issued in Malaysia that contains or is evidence of any contract to which the rules apply shall contain express statement that it is to have effect subject to said Rules as applied by this act. However,

COGSA 1950 was revised in 1994 and Section 2 of the Act now applies the provisions of the Hague Rules to outward shipments from Malaysia.

## 5. Marine Accidents in Waterways

### 5.1 Marine Accidents Law

The domestic laws that cover the marine accidents in waterways are:

- the Merchant Shipping Ordinance 1952;
- the Merchant Shipping (Collisions Regulations) Order 1984;
- the Merchant Shipping (Liability and Compensation for Oil and Bunker Oil Pollution) Act 1994;
- the Environmental Quality Act 1974; and
- the Exclusive Economic Zone Act 1984

In addition, Malaysia adopted the following international conventions:

- the International Convention of the Safety of Life at Sea 1974 (SOLAS);
- the Convention on the International Regulations for Preventing Collisions at Sea 1972 (COLREGS);
- the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978; and
- the International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC).

### 5.2 Definition of Waterways

There is no law in Malaysia that specifically defines waterways. However, under the British Waterways Act 1995, waterways are classified and defined as follows:

- *inland waterway* – any canal or inland navigation belonging to or under the control of the Board, including any works, lands or premises belonging to or under the control of the Board and held or used by them in connection with such canal or inland navigation;
- *commercial waterway* – a waterway which is principally available for the commercial carriage of freight;
- *cruising waterway* – a waterway which is principally available for cruising, fishing and other recreational purposes; and
- *remainder waterway* – an inland waterway of the Board which is not for the time being a commercial waterway or a cruising waterway.

In Malaysia, the law indirectly defines ‘inland waterway’ in the Environmental Quality Act 1974. Under Section 2, ‘inland waters’ refers to any reservoir, pond, lake, river, stream, canal, drain, spring or well, or any part of the sea above the low water line along the coast, or any other body of natural or artificial surface or subsurface water.

### 5.3 Pilotage

Some ports require compulsory pilotage within their limits, as is the case with Penang Port, Port Klang and Bintulu Port.

### 5.4 Damage Recovery by Shipowners

Recovery of damages is possible only with respect to physical damage and financial loss, excluding economic loss. In addition, it is governed by the usual principles of negligence law. The losses must be directly caused by the negligent act and must not be extremely remote.

### 5.5 Inspectors

According to the MSO and the Malaysian Maritime Enforcement Agency (MMEA) Act 2004:

- the Surveyor of Ships (appointed under the MSO) carries out the inspection of lights and fog signals, and inspection with respect to life-saving appliances; and
- the MMEA Director of Marine and officers carry out the inspection and detention of ships if satisfied that there is a contravention of any provision of Part Va of the MSO.

The MMEA shall, subject to the 2004 Act, be employed in the Malaysian Maritime Zone for the maintenance of law and order, the preservation of the peace, safety and security, the prevention and detection of crime, the apprehension and prosecution of offenders and the collection of security intelligence.

### 5.6 Marine Accident Investigations

Under the code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident (Casualty Investigation Code), investigation was made mandatory for very serious marine casualties, involving death, serious injury, total loss of a ship or serious damage to the environment.

### 5.7 Types of Marine Accident

A marine safety investigation should be conducted into marine incidents and casualties (other than very serious marine casualties, which are addressed in chapter 6 of the Casualty Investigation Code) by the flag state of a ship involved, if it is considered likely that it will provide information that can be used to prevent such incidents and casualties in the future.

### 5.8 Hearing Procedure Before Board of Inspectors

According to Section 306J & 306JA of the MSO:

- the master of a ship in Malaysian waters or the exclusive economic zone which experiences a maritime casualty as defined in Section 360I of the MSO or has discharged any oil or harmful substance shall report such incident to a port officer within 24 hours, or as soon as possible if the ship is in a port. If the ship is outside the port, however,

the master shall report to the Director of Marine as soon as possible;

- after receiving the report, the Director of Marine may order an investigation, to be conducted by a port officer or other authorised officer, to determine the nature and cause of the maritime casualty or the damage the ship has sustained; and
- to report any incident or accident to the Director General, prescribed form KEM/LAUT 1 must be used.

The investigation procedure must comply with the SOLAS Casualty Investigation Code.

### 5.9 Initiating Claims for Damages

The shipowner who suffered personal injury or loss or damage to property can initiate a claim against the given authority either under statute, in contract or tort, in salvage or in general average. Further, a claimant is entitled to commence an in rem action against the vessel, for example by arresting the vessel as security for its claim for damage for loss as provided under Section 20(2)(e) of the Senior Courts Act of 1981. Under Malaysian law, the claimant is also entitled to a maritime lien or damage lien.

### 5.10 Time Bar for Filing Administrative Claims

The claimant can claim physical damage, financial loss and, under negligence, salvage, general average and towage. In addition, the claimant is entitled to a maritime lien or damage lien.

### 5.11 Types of Damages Claimable

Pure economic loss can be claimed against the authority.

### 5.12 Unrecoverable Damages

Damages cannot be recovered from the authority when the accident was inevitable and could not have been possibly prevented with the exercise of ordinary care, caution and maritime skill.

### 5.13 Events That Cannot Give Rise to Claims

The procedural rules are set out in the User Guide of the Admiralty Court and under Order 70 of the Malaysian Rules of Court 2012, as well as in Practice Directions. They are:

- issuance and service of a writ by claimant;
- the defendant then has 14 days in which to enter the appearance;
- within two months of service of the writ and the defendant entering appearance, both parties must lodge in the Admiralty Registry a 'Preliminary Act' containing a statement of collision incident as provided for under Order 70 rule 17(1); and
- both parties must serve a notice of filing of their Preliminary Act on the other. If the plaintiff fails to do so, the defendant may apply to the court for the dismissal of the action. By contrast, the plaintiff may seek for judgment if the defendant fails to lodge a Preliminary Act.

### 5.14 Procedure for Filing Judicial Claims

The time bar for collisions claims in Malaysia is two years from the date of collision, as stated under Section 517 of the Merchant Shipping Ordinance.

Article No VIII and Section 10 of Merchant Shipping (Liability and Compensation for Oil and Bunker Oil Pollution) Act of 1994 provide that the right of compensation under the CLC is extinguished unless an action is brought within three years from the date on which the damage occurred. In no case may an action be brought after six years from the date of the incident that caused damage.

### 5.15 Exclusive Jurisdiction

By Section 24(b) of the Courts of Judicature Act of 1964 and subject to Sections 20-24 of the UK Senior Court Act 1981 (previously known as the Supreme Courts Act 1981), the Malaysian Admiralty Court shall have jurisdiction to hear and determine any claim in relation to the damages done by ships.

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