



**Ship Finance 2014**

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*Getting the Deal Through* is delighted to publish the first edition of *Ship Finance*, a new volume in our series of annual reports, which provide international analysis in key areas of law and policy.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 18 jurisdictions featured.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are always referring to the latest print edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com)

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**Getting the Deal Through**

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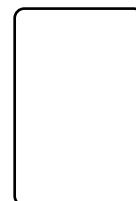


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# Malaysia

**Melanie Mishra Pillai**

Joseph & Partners

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## Due diligence

- 1** How does one demonstrate title to or legal ownership of a vessel registered under the laws of your jurisdiction?

The persons whose names appear as owner in the register will, for the purposes of the Merchant Shipping Ordinance 1952 (MSO), be considered the owners of the ship. Title or legal ownership of the vessel may be established by submission of a builder's certification naming the applicant for documentation as the person for whom the vessel was built or to whom the vessel was first transferred and a description of the vessel and the time and place where she was built. In the case of a previously owned vessel, the applicant must present bills of sale or other evidence showing transfer of the vessel from the person who last documented, titled or registered the vessel, or to whom the vessel was transferred on a builder's certification or manufacturer's certificate of origin.

- 2** How can one determine whether there are any liens recorded over a vessel?

In Malaysia it is not possible to register a lien over the vessel. As a general practice, a person purchasing the vessel obtains a letter of indemnity from the owner of the vessel for any claims that may arise from liens that are attached to the vessel before the sale the vessel.

- 3** How does one determine whether there are any security agreements, liens, charges or other encumbrances granted by a vessel owner or affiliated party who might be a borrower, guarantor or other credit party in connection with a vessel finance transaction?

In Malaysia it is necessary for any lender or interested party holding the vessel as security to safeguard its financial interest to register its mortgage with the Malaysian Ship Registry (the Registry) to ascertain its priority of the mortgage over other interested parties. As stated under section 42 of the MSO, where a registered mortgage is discharged, the registrar shall make an entry in the register book to that effect and the property (if any) shall revert to the mortgagor. Therefore, unless discharged by the mortgagor, the mortgage will remain recorded in the books of the Registrar General of Ships (the Registrar). If one wishes to verify any recorded mortgage over the vessel, they are advised to check with the Registry.

As stated above, for a mortgage to take priority over other prospective claimants, it must be registered with the Registrar, failing which, the lien will only rank in equity and may be unsecured thereby subject to *pari passu* in rank. Section 41 of the MSO provides that a registered ship or the share therein may be made in security for a loan or other valuable consideration. It further states that the Registrar shall record them in the order in which they were produced to him. That said, some liens such as maritime liens cannot be recorded and the mortgagee or the subsequent purchaser will run the risk of claims that may arise from such lien, except after a judicial sale.

- 4** Can one determine whether an obligor registered in your jurisdiction is duly organised and in good standing from a search of a public registry?

To determine whether an obligor is registered and in good standing or is 'solvent' as defined in Malaysia, the party seeking such information can obtain it from a corporate financial search of the Companies Commission of Malaysia. There is also a private agency, CTOS, a credit-reporting agency that provides background information and creditworthiness of a person or a company.

- 5** Can the shareholders or other equity interest holders, directors and officers or other authorised signatories of an obligor organised in your jurisdiction be determined from a search of a public registry? If not, how are these parties customarily identified?

A search on the Companies Commission of Malaysia will provide information on the company profile; company name; company registration number and check digit; previous name and date of change; total authorised and total issued; directors, managers, shareholders and officers; company charges; and summary of the latest financial information.

- 6** What corporate or other entity action is necessary for an obligor to enter into or guarantee a debt obligation? When is action by the board of directors or other governing body required? Must shareholders approve a guarantee?

The borrowing powers of an obligor and its ability to stand guarantee for obligations of a third party is covered under the Third Schedule of the Companies Act 1965 (the Companies Act). It provides for the company 'To borrow or raise or secure the payment of money in such manner as the company may think fit.' It further provides for the company to:

*Guarantee and give guarantees or indemnities for the payment of money or the performance of contracts or obligations by any person or company; to secure or undertake in any way the repayment of moneys lent or advanced to or the liabilities incurred by any person or company; and otherwise to assist any person or company.*

Therefore, under the Companies Act, there is no restriction on the obligor to borrow or stand guarantee for the indebtedness of a third party. This is so unless explicitly excluded or restricted in the memorandum or articles of association of the company. Although the Companies Act does not explicitly state the requirement of shareholders' approval for the company to act as the guarantor, companies are encouraged to follow the guidelines proposed by the Malaysian Code of Corporate Governance 2012, which provide guidelines to strengthen the relationship between the company and its shareholders and recommends improved participation by the shareholders.

- 7** Must foreign lenders qualify to do business in your jurisdiction to extend credit to a borrower organised in your jurisdiction? Will foreign creditors be deemed resident as a consequence of making a loan or other extension of credit to an obligor within your jurisdiction?

Currently, foreign equity participation in Malaysian banking and financial institutions can be up to 70 per cent in investment banks, insurance companies and Islamic banks and up to 30 per cent in conventional commercial banks.

### Repayment

- 8** Is central bank or other regulatory approval required for repayment of a loan in foreign currency?

Under the Exchange Control Act 1953, resident companies are free to obtain any amount of foreign currency borrowing from:

- licensed onshore banks;
- non-resident non-bank-related companies; and
- resident related companies.

Foreign currency borrowing by resident companies from non-resident banks and other non-resident companies (non-related) is subject to a prudential limit of 100 million ringgit equivalent in aggregate on a corporate group basis. Foreign currency borrowing by resident individuals from licensed onshore banks and any non-residents is subject to an aggregate limit of 10 million ringgit equivalent. Malaysian investors borrowing in foreign currency, exceeding the aggregate of 5 million ringgit equivalent will need approval from the Central Bank.

- 9** Do usury laws limit the interest payable to a lender in respect of a vessel financing?

The lending rates are governed by legislation or as prescribed by Bank Negara Malaysia in conjunction with the Financial Services Act 2013 and the Islamic Financial Services Act 2013.

- 10** Are withholding taxes payable on principal or interest payments to non-resident lenders?

Withholding tax would be applicable in relation to interest payments made to non-residents who do not carry out business in Malaysia. Failure to comply with the withholding tax would result in the imposition of late-payment penalty.

### Registration of vessels

- 11** What vessels are eligible for registration under the flag of your country? Are offshore drilling rigs or mobile offshore drilling units considered vessels under the laws of your jurisdiction? What is the effect of registration?

Under the provisions of the MSO in West Malaysia, the MSO (Sarawak) 1960, and the MSO (Sabah) 1960 as amended by the Merchant Shipping (Amendment) Act 1998, which now provides for a Malaysian International Ship Registry, vessels are eligible for registration under the Malaysian flag if they are wholly-owned by Malaysian citizens or Malaysian corporations. Under section 66E of the MSO no ship shall be registered unless:

- it is fitted with mechanical means of propulsion;
- it is not less than 16,000 GT;
- the age of ship is not more than 15 years if it is a tanker or a bulk carrier; and
- the age of ship is not more than 20 years if it is of a type other than a tanker or bulk carrier.

Offshore drilling rigs or mobile offshore drilling units to be considered as ship or vessel will depend on their intended function, where the function is to be performed, the degree of attachment to the seabed and the extent as well as frequency of any movement.

Once the ship is registered, it will establish the identity of the shipowner as well as proof of flag state and the registration state of a ship. Registration also allows recording or registering of information related to mortgages where the ship is pledged as security. Furthermore, registered ships can claim privileges and sovereign protection from the flag state where the ship is registered. Non-registration will also hinder the transferring of ownership or financing of the sale and purchase of the ship, because a certificate of registration is required for such transaction.

- 12** Who may register a vessel in your jurisdiction?

Pursuant to section 11 of the MSO, a ship may be registered in Malaysia provided it is wholly-owned by:

- Malaysian citizens; or
- corporations:
  - that are incorporated in Malaysia;
  - that have their principal office and the management of the corporation is carried out mainly in Malaysia;
  - that have the majority of their shareholding held by Malaysian citizens free from any trust or obligation in favour of non-Malaysians; and
  - of which the majority of the directors are Malaysian citizens.

- 13** Is there an alternate registry for international shipping operations?

The Malaysian International Ship Registry (MISR) is located at the Marine Department Federal Territory of Labuan and deals with international shipping operations.

Under section 66B of MSO, irrespective of where the ship was built, a ship can be registered in the MISR if the ship is owned by a corporation:

- that is incorporated in Malaysia;
- with an office established in Malaysia; and
- the majority of the shareholding of which is not held by Malaysian citizens.

It must, be noted, however, that under section 66D(1) of the MSO, a ship shall not be registered in the MISR unless the corporation has a minimum paid-up capital of 10 per cent of the value of the ship or 1 million ringgit, whichever is higher.

The application for registration in the MISR is through the Registrar. To register a ship in the MISR, the ship must meet the following criteria:

- equipped with mechanical propulsion system;
- not less than 1,600 GT;
- not more than 15 years old if it is a tanker or a bulk carrier; and
- not more than 20 years old if it is other than above.

### Ship mortgages and other liens over vessels

- 14** What types of ship mortgages exist and what obligations may a ship mortgage secure? Can contingent obligations, including swap obligations, be secured? Are there standardised forms?

Ships can be mortgaged either through statutory means or equity. Under section 41 of the MSO, a registered ship or a share in it can be mortgaged for a loan or other valuable consideration. There are two kinds of mortgages, one to secure a loan of a principal sum with interest and another to secure a current account or similar transactions. The application to register a mortgage must be accompanied with the appropriate mortgage forms and an original or certified true copy of the deeds of covenant. There are fees to be paid, which are calculated based on the tonnage of the ship. Contingent obligations including swaps can be secured provided the wording in the security agreement is sufficiently wide.

An equitable mortgage may be created when a mortgage in a statutory form is executed but not registered or by depositing the ship's documents of title with the mortgagee. This means that there

was no transfer of legal title of the ship from the mortgagor to the mortgagee for the debt secured on the ship. An equity mortgage can be used for foreign-owned or unregistered ships. That said, an equity mortgage stands lower in priority when compared to a statutory mortgage.

The rights of the mortgagee are not unlimited. As provided under section 44 of the MSO, the mortgagee shall not by reason of the mortgage be deemed to be the owner of the ship or the shareholder. In other words the mortgagee shall have only such rights as may be necessary to make the mortgaged ship available as security for the purpose of preservation and enforcement of the mortgagee's security interest in the ship. The preliminary remedies available to the mortgagee include:

- possession;
- interception of freight;
- arrest;
- foreclosure; or
- sale.

For these remedies to be exercised by the mortgagee, it will be necessary to ascertain whether the right to these remedies has arisen and whether the enforcement of these rights will interfere with third-party rights and who can restrain the enforcement of these remedies or be liable to them in any way.

**15** Give details of any required form for ship mortgages in your jurisdiction.

Form 11a is used for registering a ship mortgage in Malaysia.

**16** Who maintains the register of mortgages? What information does it contain and where are such filings to be made? What is the effect of registration?

The Register of Mortgages is maintained by the Ship Registry, which has offices in Port Klang, Labuan, Kuching and Penang.

The information the Register contains is a description of the type of mortgage being registered. It can either be a mortgage to secure a principal sum and interest or a mortgage to secure a current account.

The registrar of the ship's port of registry shall record mortgages in the register book. Under section 41(2) of the MSO, on production of the instrument to the registrar of the ship's port of registry, the registrar shall record such instrument in the register book and when there is more than one mortgagee, in the order in which they were produced to him and by memorandum notifying each mortgagor of the mortgage recorded by him.

Under section 108 of the Companies Act, where the mortgagor is a Malaysian company, the salient particulars of the mortgage will need to be registered with the Registrar of Companies within 30 days of creation; otherwise it will be void in relation to the liquidation in the event of liquidation.

The instrument of mortgage must be submitted upon registration, together with the document of title of ownership and a letter from the previous port of registry (if any) to state that the vessel is free from any encumbrance.

Once the mortgage has been registered, the mortgagee will take priority as a secured creditor in the order they were submitted and will take precedence over any equitable mortgage. Where there is more than one person registered in respect of the same ship or share, a subsequent mortgagee may not, except under an order of a competent court, sell the ship or share without the agreement of every prior mortgagee.

**17** Must the total amount of the mortgage be stated therein? Must the mortgage contain a maturity date? Must the underlying debt instrument be filed with or attached to the recorded mortgage?

There is no specific requirement for the total amount of the mortgage to be mentioned; however, as a general practice, the loan amount is included in the mortgage form. The maturity date is not

specified in the mortgage form. The supporting documents as evidence of the mortgage debt will need to be provided at the time of mortgage registration.

**18** Can a mortgage be registered in the name of an agent or trustee for the benefit of multiple lenders?

Yes, a trustee or security agent can be used in the Malaysian jurisdiction for the purpose of holding and administering the security.

**19** If the mortgagee is an agent or trustee for a lending syndicate, must any filings be made upon transfer of a portion of the underlying debt among existing lenders or to a new lender?

Although it is not necessary to make any fresh filing on transfer of a portion of the underlying debt among existing lenders to a new lender, as a matter of good practice, financial instructions usually amend their filings to accommodate such modifications.

**20** If the mortgagee transfers its interest to a new lender, agent or trustee, what filings are required? Is the mortgagor's consent required?

The MSO does not prescribe consent from the mortgagor when the mortgagee transfers its interest to a new lender, agent or trustee. Section 48 states that:

*[W]here the interest of the mortgage in a ship or share is transferred, otherwise than by a transfer under this Ordinance, the person to whom the interest of the mortgage in the ship or share is transferred shall make a declaration in a manner as may be prescribed by the Ministry, supported by the same evidence as required by this Ordinance.*

**21** What other maritime liens over vessels are recognised in your jurisdiction? Do these claims give rise to a right to arrest a vessel? In what circumstances may associated ships be arrested?

Ships can be arrested in Malaysia for claims arising out of a maritime lien. They include crew wages, master's wages and his disbursements incurred on account of the ship, salvage claims and claims for damage done by ship. As a general principle, these claims cannot be enforced against sister ships.

**22** What maritime liens rank higher than a mortgage lien?

Crew wages, master's wages and his disbursements incurred on account of the ship, salvage claims and claims for damage done by ship will rank ahead of a mortgage lien.

**23** May non-mortgage liens be recorded over a vessel?

Non-mortgage liens cannot be recorded over the vessel.

**24** Will mortgages on 'foreign' flag vessels be recognised in your jurisdiction? If so, do they share the same priority as those on vessels registered under the laws of your jurisdiction?

Mortgages over foreign-flagged ships will be treated as equitable mortgages. Equitable mortgages will have lower priority than a registered mortgage.

**25** What is the procedure for enforcing a mortgage in your jurisdiction by way of foreclosure? Are interlocutory sales permitted? How long does a judicial sale take? What are the associated court costs and how are they calculated?

The mortgagee has the right to enforce the mortgage either by statute or incorporating terms in the covenant to that effect. Pursuant to admiralty law, once the mortgagee arrests the vessel, it has an in rem right against the vessel or other property for claims against the defaulting mortgagor.



In Malaysia, the power and jurisdiction of the High Court in admiralty matters is governed by section 24(b) of the Courts of Judicature Act 1964, which provide that Malaysia shall have the same jurisdiction and authority of an English High Court under the Supreme Court Act 1981. Section 20(7) of the Supreme Court Act 1981 provides that a right in rem accrues insofar as it relates to mortgages and charges, to all mortgages and charges, whether registered or not or whether legal or not. Section 45 of the MSO provides that every registered mortgagee may, on the foreclosure of the mortgage, dispose of the ship or share in respect of which she is registered, and give effectual receipts for the purchase money. Although section 44 of the MSO does recognise the mortgagee as the owner of the ship whenever necessary to avail the property as security and foreclosure is essentially a relief in the realisation of the security. The specific procedure for foreclosure proceedings is not provided for, in particular the manner of perfecting the title of the enforcing mortgagee in the Register.

Under the Rules of the Court 2012, Order 70, Rule 22 the courts have power to make an order for appraisal and sale pending litigation. However, this is to be exercised in conjunction with Order 29, Rule 4, regarding goods – including ships – which are likely to deteriorate if kept. There is no fixed time span within which the judicial sale should take place, but it normally takes about between two and three months.

A commission is payable on the gross amount realised upon the sale of ship in execution or otherwise under the direction of the court, namely: 5 per cent of the first 1,000 ringgit and 2.5 per cent of the subsequent amount. Where the sale is made by a private contract, only half the commission will be payable.

**26** May a vessel be sold privately by a mortgagee? Will the sale discharge liens over the vessel?

A vessel can be sold privately by a mortgagee provided the mortgagee is in fact entitled to sell, but that sale will not discharge other liens, especially a maritime lien attached to the vessel at the time of sale. It is also a common practice for mortgagees to appoint receivers and managers to exercise their right of sale over the vessel provided under a debenture as security for a financial or other consideration.

**27** What are the limitations on rights of self-help by a mortgagee?

Although it is possible for the mortgagee to sell the ship privately, it may be more conducive to arrange for a private sale of a ship where the borrower is cooperative. The mortgage will provide the bank with the power to sell the vessel, which right also exists in common law. A private sale by a mortgagee is not the most favourable mode of sale as the borrower's creditors may stake a claim for their liabilities, which will then have to be settled by the mortgagee before the sale.

**28** What duties does a mortgagee owe to an owner or third-party creditors?

As between the mortgagor and a mortgagee, the collateral deed may expressly create a trust. However, in the absence of such provision the mortgagee will be a constructive trustee of any surplus left after discharge of all mortgages. Under section 44 of the MOS, unless the collateral deed provides otherwise, the mortgagee cannot interfere with the owner's operation or employment of ship. His right to possession only arises when the mortgagor is in default of the mortgage or when the security is being impaired or when the right otherwise arises under the terms of the collateral deed. This means that where a mortgagee, while in possession, has chartered the vessel, a mortgagee cannot interfere with the rights of a charterer.

### Collateral

**29** May finance leases or other charters be recorded over vessels flagged under the laws of your jurisdiction?

No.

**30** May finance leases be re-characterised by a court as a financing contract? If so, is there any procedure for protecting the lessor's interest against third-party creditors?

There is no precedent in Malaysia on whether a financial lease will be re-characterised by a court as a financing contract.

**31** How is a security interest created over earnings of a vessel, charter contracts, insurances, etc? How are these security interests perfected?

These types of security interest can be perfected by registering them with the Registrar of Companies as a debenture having a fixed or floating charge depending on the nature of the security. Although in the case of *Malaysia National Insurance Berhad & Anor v Suruhanjaya Syarikat Malaysia & Anon* [2004], the High Court found that a charge over insurance proceeds was not a book debt and thus not registrable.

**32** Must security interests against non-vessel collateral be registered to be enforceable? If so, where are such filings made?

Security interests over a non-vessel collateral can be registered and made enforceable and such filings are to be made with the companies' registrar.

**33** How is a security interest over a deposit account established? How is a security interest perfected?

Security interests over non-vessel collateral will fall under section 108 of the Companies Act, which can be registered as a fixed or a floating charge and these filings are to be registered with the Registrar of Companies.

**34** How are security interests in non-vessel collateral enforced?

In the event of default, the creditor will have to issue a notice of demand to the defaulting party and if the party does not rectify the default thereafter, the creditor can take possession of the property. In the case of floating charges, they will crystallise to a fixed charge upon the event of default. The secured party may dispose of the collateral by exercising a power of sale. Before the sale, the secured party undertaking enforcement must give a notice of the intended disposal to the grantor and other secured parties with a higher priority security interest. The notice must include particulars of the collateral, the enforcing secured party and the manner of sale.

The secured party exercising its power of sale has a duty to obtain market value for the price of the collateral or otherwise obtain the price that is reasonably obtainable.

The purchaser takes the collateral free of the security interests of the grantor and all subordinate security interests as well as the grantor of the security interest. The proceeds of the sale are distributed among secured parties in the order of priority with any residual proceeds given to the grantor.

**35** How are share pledges for vessel financings established? Are share pledges or share charges common in your jurisdiction?

A share pledge agreement is signed by the pledgor and the pledgee and usually provides that, in order to perfect the security created under the pledge, the following documents will be delivered to the pledgee at the same time as the agreement is signed:

- the original share certificate(s) representing the pledged shares;
- an undated blank instrument of transfer of the shares duly signed by the pledgor in favour of the pledgee;

- an irrevocable proxy and power of attorney in respect of the pledged shares from the pledgor;
- undated, signed letters of resignation from the company secretary and each director;
- a certified copy of a resolution from the board of directors of the company approving the pledge of the shares under the share pledge agreement and the transfer of the shares to the pledgee (in the event that the pledge is enforced); and
- a letter of authority and undertaking from the company secretary and each director.

Section 57 of the Companies Act prohibits the issue of bearer shares. Furthermore, it is no longer a commercial practice for companies to issue bearer shares. The transfer of shares other than bearer shares is regulated by transfer procedures that are provided for in the Companies Act and in the company's constitution.

Share pledges or share charges are common in Malaysia provided:

- the articles of association of the company whose shares are to be pledged allow the granting of such a security and there are no specific restrictions;
- all appropriate corporate approvals and board resolutions have been obtained;
- there are no other charges or encumbrances registered against the pledged shares; and
- the pledged shares are fully paid up at the time of taking the security.

- 36** Is there a risk that a pledgee, before or after exercise of the share pledge, may be exposed to debts or other liabilities of the pledged company?

The liability if any, before or after exercising of the share pledge by the pledgee will be limited to the value of the shares.

#### Tax considerations for vessel owners

- 37** Is the income earned by the owners of vessels registered in your jurisdiction subject to domestic taxation? At what rate?

The income of a resident person from the business of transporting passengers or cargo is taxable within the scope of subsection 4(a) of the Income Tax Act 1967 (ITA), unless it qualifies for exemption under paragraph 54A(1) of the ITA. Ships that do not qualify for tax exemption include ocean liners, petroleum or oil tankers, LNG carriers, container ships and chemical tankers.

As the income tax rate for companies is 25 per cent under paragraph 2 Part 1 of the Schedule 1 to the Act, this will require the deduction of income tax rate at 1.25 per cent from the gross freight income derived from Malaysia by the non-resident sea transport operator. In the case of countries that have signed a double tax treaty with Malaysia, such treaty will have provisions for the income of an enterprise of that country from operation of ships in international traffic to be taxable only in their home country.

Similarly, income from participation in a pool, a joint business or an international operating agency is also to be taxed in the country of residence of the enterprise (article 9 of the Malaysia Tax Treaty).

- 38** Is there an optional tonnage tax exempting vessel owners from tax on income?

There is no annual tonnage tax in Malaysia.

- 39** What special tax incentives are available to shipowners registering vessels in your jurisdiction?

To qualify as a Malaysian ship under the ITA, a vessel has to be a seagoing ship that goes beyond port limits besides being registered as a Malaysian ship under the MSO. In addition, it should not fall within the exclusion clause of subsection 54(A) of the ITA. The

vessels that fall under the exclusion clause are ferries, barges, tug-boats, supply vessels, crew boats, lighters, dredgers, fishing boats or other similar vessels.

Pursuant to subsection 54A(1) of the ITA, where a person who is resident in Malaysia during the assessment year carries on the qualifying business of transporting passengers or cargo by sea on a Malaysian ship, or letting out on charter a Malaysian ship owned by him on a voyage or time charter basis, he will then be exempt from up to 70 per cent of statutory income tax (for the year 2014).

There is no capital gains tax in Malaysia. Nor, at present, is there any goods and service tax or VAT applicable in Malaysia. However, Malaysia has a regime of sales and service tax in relation to certain taxable goods and services.

- 40** Are there any other noteworthy tax provisions specifically applicable to shipping, shipping income or ship finance?

Where there is more than one Malaysian ship involved in determining the income of a person exempt under section 54A of the ITA 1967, the business income derived from all the Malaysian ships shall be treated as one source.

The income of any person derived from exercising an employment on board a Malaysian ship is exempted from tax. Income received by non-residents from the rental of ISO containers to Malaysian shipping companies is also exempted from income tax.

#### Labuan tax structure

Labuan, which is part of Federal Territory of Malaysia has an international offshore financial centre. Labuan is a free port and therefore charges no indirect taxation such as sales tax, import duties, surtax, excise duties and export duties.

Companies that operate in Labuan are governed by the Labuan Offshore Business Activity Act 1990 and, for taxation purposes, the Labuan Business Activity Tax Act 1990. The relevant tax provisions are:

- an elective tax on Labuan trading activities of either:
  - 3 per cent of net profits as per audited accounts; or
  - 20,000 ringgit;
- withholding tax exemption on dividend and interest payments made to non-residents;
- no stamp duty on all instruments relating to offshore business activities including share transfer;
- no import duty or sales tax;
- no foreign exchange controls;
- no capital gains tax or inheritance tax;
- double tax agreements between Malaysia and over 70 countries;
- 50 per cent tax abatement for expatriate professionals and managers employed under Labuan companies; and
- 100 per cent exemption from director's fees received by non-citizen directors of Labuan companies.

#### Insolvency and restructuring

- 41** Is there a general scheme of reorganisation or insolvency administration in your jurisdiction?

Section 176 of the Companies Act provides for a statutory mechanism to facilitate a court-sanctioned compromise that binds dissenting participants as long as the statutory majority has been achieved. This overcomes the difficulty of a company trying to implement an informal compromise with all its creditors since it would require unanimous agreement and the company would have to approach each and every creditor.

In the case of winding-up of a company, a debtor can avoid transfers made within 90 days before the filing of the petition to a creditor on account of a pre-existing debt, if such a transfer has allowed the creditor to receive more than it would have received compared with other creditors. A debtor can also avoid fraudulent transfers made within one year before the filing of the petition. In

this context, a fraudulent transfer is one that is made with the intent to hinder, delay or defraud a creditor.

**42** Will the courts of your jurisdiction respect the rulings of a foreign court presiding over reorganisation or liquidation proceedings?

The courts in Malaysia will respect the ruling of a foreign court presiding over reorientation and liquidation proceedings, provided there is a court order enforceable in Malaysia by virtue of the Reciprocal Enforcement of Judgments Act 1958 (REJA). For the order to be enforceable, it must be from a superior court of the country listed in the First Schedule of the REJA and has to be registered. The countries include Brunei, Hong Kong, India, New Zealand, Singapore, Sri Lanka and the United Kingdom.

**43** What is the order of priority among creditors? In what circumstances will creditors be required to disgorge payments from an insolvent company?

In determining the priorities between mortgages, it is necessary to ascertain whether the mortgage is equitable or legal and if the ship concerned is a foreign ship or a Malaysian ship. The general principle is that a legal mortgage will prevail in the order of their creation. If the legal mortgage is obtained for value without notice of the equitable mortgage, then clearly by the operation of the doctrine of a bona fide purchaser, the legal mortgage will take priority. However, if the legal mortgagee had notice of the equitable mortgage before the creation of his mortgage then he may run into some difficulty. Where the equity is equal, equitable mortgages will rank in the order of their creation. Under sections 238 and 239 of the Insolvency Act 1986 (IA), creditors may be required to disgorge payment from an insolvent company if the transaction was undervalued at the time of transfer or given as a result of fraudulent preference. The condition for the exercise of power conferred by this section in relation to such a transaction or preference are that: the transaction or preference must have been undertaken at a time when the company was unable to pay its debts; the time must be within a relevant period; and the company must subsequently have gone into, and still be in liquidation or administration.

**44** May a vessel owner provide security on behalf of other related or unrelated companies? What are the requirements for it to be enforceable?

Yes, provided the constitutional documents of the company do not restrict the vessel owner from providing security to related or unrelated companies.

**45** Is there a law of fraudulent transfer that permits a third-party creditor to challenge, for example, the grant of a mortgage because of insolvency of the mortgagor or insufficient consideration received by the mortgagor in exchange for the grant of the mortgage?

Anyone prejudiced or capable of being prejudiced by a fraudulent transfer can apply to the court to have the transaction set aside. This can be invoked when the administrator or the liquidator refuses to take action either under section 238 or section 423 of the IA or where the company is neither in liquidation nor administration. However, the victim will need to prove that the company is trying to make its assets out of reach so as to prejudice a claim that the victim may be making against the company in the future.

**46** How may a creditor petition the courts of your jurisdiction to declare a debtor bankrupt or compel liquidation of an insolvent obligor?

Any creditor or creditors, including a contingent or prospective creditor can petition the court to declare the debtor bankrupt. But if it is a prospective debt and is subject to a bona fide dispute, then it may not support a winding-up petition. The petition must be verified by affidavit and if it is in respect of several debts due to different creditors, then the debt of each creditor must be separately filed. The proceedings will be as per the Companies (Winding-Up) Rules 1972.

**47** Has your jurisdiction adopted the Model Netting Act of the International Swaps and Derivatives Association (ISDA)? If not, may a swap provider exercise its close-out netting rights under an ISDA master agreement despite an obligor's insolvency?

Although there is a certain statutory protection for netting, there is no Model Netting Act in Malaysia. A mandatory set-off is available upon insolvency, provided such provisions are incorporated in the agreement. However, in certain circumstances close-out netting may not be enforceable, especially during moratoria pursuant to the Danaharta Act 1998 and the Deposit Insurance Corporation Act 2005. Otherwise, the scope of counterparties, (excluding insurance companies) and transactions are fairly wide.



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