GETTING THE DEAL THROUGH

Shipbuilding

in 20 jurisdictions worldwide

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Malaysia

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1 Restrictions on foreign participation and investment

Is the shipbuilding industry in your country open to foreign participation and investment? If it is open, please specify any restrictions on foreign participation.

Malaysia encourages investment in its manufacturing sector and promotes joint ventures between Malaysian and foreign investors. Foreign investors, since June 2003, have been permitted to hold 100 per cent of the equity in all investments in new projects, as well as investments in expansion or diversification projects by existing companies.

A company whose equity participation has been approved by the relevant authority will not be required to restructure its equity at any time as long as the company continues to comply with the original conditions of approval and retain the original features of the project.

Malaysia's government has concluded investment guarantee agreements (IGAs) to increase confidence among foreign investors. IGAs will:

- protect against nationalisation and expropriation;
- ensure prompt and adequate compensation in the event of nationalisation or expropriation;
- provide free transfer of profits, capital and other fees; and
- ensure settlement of investment disputes under the Convention on the Settlement of Investment Disputes of which Malaysia has been a member since 1966.

To further protect foreign investment, the Malaysian government has ratified the provisions of the Convention on the Settlement of Investment Disputes. The Convention, established under the auspices of the International Bank for Reconstruction and Development (IBRD), provides international conciliation or arbitration through the International Centre for Settlement of Investment Disputes located at IBRD's principal office in Washington, DC.

2 Government ownership of shipbuilding facilities

Does government retain ownership or control of any shipbuilding facilities and if so, why? Are there any plans for the government divesting itself of that participation or control?

Malaysia's largest shipyard – Malaysia Marine and Heavy Engineering Holdings Berhad (MMHE) – is partly owned and controlled by the Malaysian government, which indirectly has part ownership through MISC, which is a subsidiary of the national oil company Petronas. MISC is a shipping line listed on the Bursa Malaysia that has a 64.6 to 66.6 per cent stake in MMHE, and the other main shareholder is Technip, a French multinational engineering group that has an 8 to 9 per cent shareholding. Other shipyards in Malaysia are either wholly or partly owned by Malaysians and many are traded on the Bursa Malaysia as is MMHE, which has recently been listed.

3 Statutory formalities

Are there any statutory formalities in your jurisdiction that must be complied with in entering into a shipbuilding contract?

Shipbuilding contracts are based on common law principles of the law of contract as embodied in the Contracts Act 1950 and the Sale of Goods Act 1957 (SOGA).

4 Choice of law

May the parties to a shipbuilding contract select the law to apply to the contract and is this choice of law upheld by the courts?

The parties to a shipbuilding contract are free to select the governing law of the contract.

There are no known circumstances where the mandatory laws of the seat of another jurisdiction will prevail over the law chosen by the parties.

For example, in arbitration matters, section 30 of the Arbitration Act 2005 and the Arbitration Amendment Act 2011 make it clear that in respect of domestic and international arbitrations, the applicable substantive law shall be as agreed upon by the parties. However, when there is an absence of such an agreement in domestic arbitration, Malaysian law will apply as substantive law in the dispute. For international arbitrations, the parties shall leave the matter to be determined by the arbitral tribunal, who shall decide based on the conflict-of-laws rules.

Where a choice of law is stipulated in the contract, the Malaysian courts will generally enforce the express choice of governing law, so long as the chosen governing law had some connection with the contract, it was a bona fide choice and not made to evade a rule of law that would have applied to the contract had the express choice of law not been made, and it would not be contrary to public policy to enforce the same.

5 Nature of shipbuilding contracts

Is a shipbuilding contract regarded as a contract for the sale of goods, as a contract for the supply of workmanship and materials, or as a contract sui generis?

Shipbuilding contracts are generally regarded as contracts for the sale of goods rather than those for the provision of work and materials. Shipbuilding contracts also recognised as 'maritime contracts' and they fall within the admiralty jurisdiction of the High Court (see section 20(2)(n) of the UK Senior Courts Act 1981, which applies in Malaysia by virtue of section 23 of the Courts of Judicature Act 1964); a shipbuilder may thus bring in rem proceedings to enforce his claims under a shipbuilding contract.

6 Hull number

Is the hull number stated in the contract essential to the vessel's description or is it a mere label?

The hull number is a mere label and not essential to the vessel's description. Accordingly, where the vessel otherwise complies with the requirements of the contract and specification, the buyer cannot refuse to accept delivery of the vessel merely because her hull number is different from that contained in the contract.

7 Deviation from description

Do 'approximate' dimensions and description of the vessel allow the builder to deviate from the figure stated? If so, what latitude does the builder have?

Any deviations from 'approximate dimensions and description' of the vessel by the builder must comply with and be approved by the safety and quality standards and rules for classification and construction of the vessel as accepted by the classification society. The construction standard provides guidance on shipbuilding quality standards for the hull structure during a newbuilding and such standard would be expressly or impliedly incorporated into the contract by virtue of the general principles of contract law.

8 Guaranteed standards of performance

May parties incorporate guaranteed standards of performance whose breach entitles the buyer to liquidated damages or rescission?

Yes, it is common for there to be guarantees for standards of performance depending on the type and class of vessel.

9 Quality standards

Do statutory provisions or previous cases in your jurisdiction give greater definition to contractual quality standards?

Under SOGA, quality standards in a contract could be treated as a condition to be fulfilled by the shipyard or seller. However this condition or quality standard can be waived by the buyer or shipowner, who can elect to treat the breach of condition as a breach of warranty and not as a ground to treat the contract as repudiated (section 13(1) SOGA).

Where a shipbuilding contract is not severable and the buyer has accepted the goods or part thereof or where the property (title) in the goods has passed to the buyer or shipowner, the breach of condition to be fulfilled by the seller can be treated as a breach of warranty and not as a ground for rejecting the goods entitling the buyer to repudiate the contract unless there is an express term of the contract or implication to that effect (section 13(2) SOGA).

Where the buyer expressly or by implication makes known the purpose for which the goods are required (ie, the specification for the newbuild) thereby indicating that the buyer or shipowner relies on the seller's skill or judgement, and the goods are of a kind which it is in course of the seller or shipbuilder's business to supply, there is an implied condition that the goods shall be reasonably fit for that purpose (section 16(1)(a) SOGA; *Union Alloy (M) Sdn Bhd v Sykt Pembenaan Yeoh Tiong Lay Sdn Bhd* (1993); *Jumbohan Omh Sdn Bhd v Kian Joo Can Factory Berhad* (2010).

There is also an implied condition that the goods shall be of merchantable quality (section 16(1)(b) SOGA). The burden of proof is on the person (usually the buyer) claiming that goods were not of merchantable quality, that is 'the goods in the form in which they were tendered were of no use for any purpose for which such goods would normally be used and hence were not saleable under that description' (*Seng Hin v Arathoon Sons Ltd* (1968), followed by *Panglima Aces Sdn Bhd v Highway Brick Works (Serendah) Sdn Bhd* (2006).

There is also an implied warranty or condition as to quality or fitness for a particular purpose (section 16 SOGA).

10 Classification society

Where the builder contracts with the classification society to ensure that construction of the vessel leads to the buyer's desired class notation, does the society owe a duty of care to the buyer, or can the buyer successfully sue the classification society, if certain defects in the vessel escape the attention of the class surveyors?

There is no Malaysian case law on this area but as Malaysia is a common law jurisdiction, the English cases of *The Morning Watch* and *The Nicholas H* on the liability of classification societies would have persuasive value. The court's decision in *The Morning Watch* lists the requirements for establishing of a duty of care under English law, in that it must be reasonably foreseeable for the defendant that the plaintiff would rely upon his statement, (in this instance the class certificate) there must be necessary proximity between the pure economic loss and the role of the class society and finally it should be 'fair, just and reasonable' in the circumstances to impose such a duty of care. The court found that the claimant purchaser had not been able to prove a sufficient relationship of proximity in this case and stated that the primary purpose of the classification system is, as Lloyd's Register rules make plain, to enhance the safety of life and property at sea, rather than to protect the economic interests of those involved in shipping.

11 Flag-state authorities

Have the flag-state authorities of your jurisdiction outsourced compliance with flag-state legislation to the classification societies? If so, to what extent?

The law governing ship registration in Malaysia is the Merchant Shipping Ordinance 1952, which was extended to Sabah and Sarawak on 1 June 1991. The survey requirements under the provisions of this ordinance for the purposes of registration states that surveys of ships are conducted by the surveyor of the ship working under the direction of the surveyor-general who may designate an authorised classification society to survey the ship on his behalf.

Malaysia has its own classification society known as Ships Classification Malaysia Sdn Bhd (SCM), which was established in 1994 and began operations in 1997. It is the only organisation mandated and recognised by the Malaysian Marine Department to classify Malaysian-flag vessels operating within Malaysian near-coastal trading limits and to undertake the classification of Malaysian registered ships within the country.

In addition to the above the vessel may be classified with one of the following classification societies:

- Bureau Veritas;
- Det Norske Veritas;
- Germanischer Lloyd;
- Lloyd's Register of Shipping;
- Nippon Kaiji Kyokai; and
- American Bureau of Shipping.

12 Registration in the name of the builder or the buyer

Does your jurisdiction allow for registration of the vessel under construction in the local ships register in the name of the builder or the buyer? If this possibility exists, what are the legal consequences of this registration?

The buyer or owner of the vessel cannot register a vessel under construction and can only do so after construction. A shipowner can register a ship on a provisional basis under the provisions of the Merchant Shipping Ordinance (MSO) part IIC.

Once constructed, vessels can be registered in Malaysia under Part IIA of the MSO at the Malaysian ship registry or at the Malaysia International Ship Registry (MISR) under the new part IIC. Labuan has been designated the port of the MISR.

To register a vessel the owner must submit a form of declaration of ownership and nationality together with a statutory declaration giving details of the ownership of the ship including the citizenship of the owner and if the shares are owned by more than one person, the number of shares each is entitled to.

The ownership of a Malaysian-registered ship is restricted to Malaysian citizens or Malaysian-incorporated corporations where the principal office of the corporation is in Malaysia, the management of the corporation is carried out mainly in Malaysia and the majority of the directors are Malaysian citizens and the majority of the shareholding of the corporation is held by Malaysian citizens free from any trust or obligation in favour of non-Malaysians (part IIA of the MSO).

Non-Malaysians who wish to register a ship in Malaysia can do so in the MISR provided the vessel is owned by a Malaysian incorporated corporation with an office in Malaysia and the majority of its shareholding, including voting shares, held by non-Malaysians (section 66B, part IIC of the MSO). The registrar-general, however, has the discretion to refuse registration and the minister of transport may, if he thinks fit, prescribe additional requirements for registration.

Where the majority of the shareholding for a vessel is held by Malaysian citizens, the vessel can be registered as a Malaysian ship under then MISR (part IIA of the MSO).

13 Title to the vessel

May the parties contract that title will pass from the builder to the buyer during construction? Will title pass gradually, upon the progress of the vessel's construction, or at a certain stage? What is the earliest stage a buyer can obtain title to the vessel?

The basic principle applying in the context of transfer of title is that title to the vessel passes to the buyer at such time as the parties to the shipbuilding contract intended it to be passed (section 19(1) SOGA). 'Unless a different intention appears', when the vessel in a deliverable state is unconditionally appropriated to the shipbuilding contract, the title thereupon passes to the buyer (section 23 SOGA). Because the vessel is in a deliverable state only where the buyer is contractually bound to take delivery, section 23 presumes that title to the vessel passes upon their delivery and acceptance. Further, it seems that the 'unconditional appropriation' of future goods must normally involve their physical delivery to the buyer.

There is no law to prohibit parties from contracting that title will pass during construction or before delivery. Parties are at liberty to agree to 'continuous transfer of title' clauses where title to the vessel, her machinery and equipment passes as and when these are constructed and assembled at the builder's shipyard.

14 Passing of risk

Will risk pass to the buyer with title, or will the risk remain with the builder until delivery and acceptance?

It is usually provided in the shipbuilding contract that regardless of the time of transfer of title, the risk of loss or damage remains with the builder until the vessel's delivery and acceptance by the buyer, at which time the risk passes to the buyer. The logical and practical reason for this is that the vessel is likely to remain until such time of delivery and acceptance at the builder's premises and that it is the acts and omissions of the builder's employees which are most likely to cause loss or damage. To mitigate the risk, the builder will usually insure against such risk.

Where the shipbuilding contract makes no provision for the passing of risk of loss or damage, which is unusual, the risk is presumed by law to pass to the buyer with the passing of title of the vessel, whether delivery of the vessel has been made or not. However, where delivery has been delayed through the fault of either builder or buyer, the vessel is at the risk of the party at fault as regards any loss that might not have occurred but for such fault (section 26 SOGA).

15 Subcontracting

May a shipbuilder subcontract part or all of the contract and, if so, will this have a bearing on the builder's liability towards the buyer?

The shipbuilder may, under the general law of contract, subcontract part of the contract but the builder as main contractor will generally be expected to bear responsibility to the buyer for subcontracted work.

16 Extraterritorial construction

Must the builder inform the buyer of any intention to have certain main items constructed in another country than that where the builder is located, or is it immaterial where and by whom certain performance of the contract is made?

It would be advisable for the shipbuilder to inform the buyer or shipowner of any intention to have certain items of the ship constructed in another country and to obtain the buyer's consent. There is a requirement under the principles of the law of contract that parties must be ad idem on all the main terms of the contract.

17 Fixed-price and labour-and-cost-plus contracts

Does the law in your country have different provisions for 'fixed-price' contracts and 'labour-and-cost-plus' contracts?

The parties to a shipbuilding are free to choose how they wish to price the contract and the law of contract recognises the right of parties' freedom to contract.

18 Price increases

Does the builder have any statutory remedies available to charge the buyer for price increases of labour and materials despite the contract having a fixed price?

The builder is limited by the terms of the contract and the general principles of contract law and the Contracts Act 1950 on his ability to claim for price increases or costs overruns. The builder may claim from the buyer through a variation order for any costs overruns, which could also include a claim for loss and damages.

19 Retracting consent to a price increase

Can a buyer retract consent to an increase in price by arguing that consent was induced by economic duress?

The buyer could in principle retract his consent on the basis that it was induced by economic duress but must prove that the terms that he agreed to were objectionable terms and were imposed on him in a morally reprehensible manner, that is to say, in a way that affects his conscience or have procured the terms by some unfair means (see, for example, *Fui Lian Credit & Leasing Sdn Bhd v Kui Leong Timber Sdn Bhd* (1991).

20 Exclusions of buyers' rights

May the builder and the buyer agree to exclude the buyer's right to set off, suspend payment or deduct certain amounts?

There is nothing to prevent the parties to a shipbuilding contract from excluding the ordinary common law rights of set-off or deduc-

tion, provided they do so expressly in the contract or by clear implication. However, on the basis of the expressio unius principle, the express enumeration of permitted set-off or deduction, in cases where it is not excluded, can imply that it is limited to making such set-off or deduction as falls strictly within the scope of the permitted set-off or deduction, and nothing else (*Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* (1995).

21 Refund guarantees

If the contract price is payable by the buyer in pre-delivery instalments, are there any rules in regard to the form and wording of refund guarantees? Is permission from any authority required for the builder to have the refund guarantees issued?

There is no form or wording for a refund guarantee, however, the terms of the refund agreement are generally agreed to by both parties before it is issued by a bank acceptable to the buyer.

22 Advance payment and parent company guarantees

What formalities govern issuance of advance payment guarantees and parent company guarantees?

The advance payment guarantee is given by the builder to the buyer at the beginning of the contract, usually in the form of a bank guarantee or undertaking acceptable to the buyer.

The parent company guarantee is given by the buyer's parent company to guarantee the payments to the builder under the shipbuilding contract.

Both guarantees are governed by the provisions of the Contracts Act 1950, sections 79 to 100.

23 Financing of construction with a mortgage

Can the builder or buyer create and register a mortgage over the vessel under construction to secure construction financing?

Under the provisions of the MSO, which were extended to Sabah and Sarawak on 1 June 1991, a mortgage on a ship may be recorded in the register as soon as the ship is registered upon presentation of the instrument of mortgage. A mortgage on a ship may be recorded in the register as soon as the ship is registered and a ship can be registered only after it has been completed and the vessel has been delivered to the buyer through the Protocol of Acceptance and Delivery.

24 Liability for defective design (after delivery)

Do courts consider defective design to fall within the scope of poor workmanship for which the shipbuilder is liable under the warranty clause of the contract?

As there appears to be no Malaysian case on the point of whether 'defective design' falls within the scope of 'poor workmanship', the English case of *Aktiebolaget Gotaverken v Westminster Corporation of Monrovia* (1971) may be persuasive in that design falls within the ambit of workmanship and therefore could attract liability under the builder's standard warranty clause in the shipbuilding contract.

To avoid any uncertainty, a shipbuilding contract may include an express provision that the builder's warranty encompasses (or otherwise) defects resulting from inadequate or erroneous design.

25 Remedies for defectiveness (after delivery)

Are there any remedies available to third parties against the shipbuilder for defectiveness?

Unless the builder is prepared to consent, the benefit of builder's warranty against defects after delivery to the buyer cannot be effectively assigned to a third party. The buyer may, however, be entitled to enforce the warranty against the builder for the benefit of the third party (usually on-buyer or bareboat charterer) (*Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* (1994).

In the Singapore case of *Man B & W SE Asia v PT Bumi* (2004) where the ship was constructed in Malaysia at MSE (now known as MMHE) it was held that the shipowner could not sue in tort a third party who was the engine manufacturer and its supplier for pure economic loss that it suffered as a consequence of defects in the engine on the basis that there was no contract between the owner and the third party. It was also held that the third party did not owe a duty of care to the shipowner especially as the shipowner was content to accept the limited recourse available to it under the terms of the shipbuilding contract.

Alternatively, a third party may seek from the buyer a warranty in identical terms to that contained in the shipbuilding contract to protect his rights against defects.

26 Liquidated damages clauses

If the contract contains a liquidated damages clause or a penalty provision for late delivery or not meeting guaranteed performance criteria, must the agreed level of compensation represent a genuine link with the damages suffered? Can courts mitigate liquidated damages or penalties agreed in the contract and for what reasons?

Section 75 of the Contracts Act 1950 provides an instance in which Malaysian law follows Indian contract law and departs significantly from the English position in that the section does away with the distinction between 'liquidated damages' and 'penalty' as commonly understood under English law. The Federal Court in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* (1995) established the principle that damages, as a general rule, must be proven notwithstanding there is a liquidated damages clause and despite the clear words 'whether or not actual damage or loss is proved to have been caused thereby' in section 75.

However, in cases where it is difficult to assess damages for the actual loss (eg, there is no known measure of damages employable), a plaintiff only needs to prove that the liquidated damages sum is a reasonable compensation for the actual loss suffered.

27 Preclusion from claiming higher actual damages

If the building contract contains a liquidated damages provision, for example, for late delivery, is the buyer then precluded from claiming proven higher damages?

The buyer is precluded from claiming proven higher damages than the liquidated damages sum stipulated in the shipbuilding contract by virtue of the words 'not exceeding the amount so named or, as the case may be, the penalty stipulated for' in the same section 75 of the Contracts Act 1950.

In other words, the liquidated damages sum serves as a maximum cap for the amount of damages payable by the builder in the event of breach but if the damages sum proven by the buyer is lower than the stipulated sum, the builder is only liable to pay the lower proven damages.

28 Force majeure

Are the parties free to design the force majeure clause of the contract?

The parties are free to design the force majeure clause of the contract.

Force majeure events are circumstances or events that are beyond the control of any of the party to a contract. A well-crafted force majeure clause will indicate with clarity the agreed definition of force majeure events, notification procedure, limitations and disclaimers

Update and trends

Malaysia has set up the Malaysian Industry-Government Group for High Technology (MIGHT) to encourage local companies to venture into the shipbuilding industry by injecting instant funding of $163 million to be allocated to shipbuilding and ship repair firms in MIGHT's high technology sector.

This is a revolving fund which will be channelled through venture fund institutions for distribution to local companies keen to enter MIGHT's high technology sector. Foreign companies could partner with local companies to access this fund.

(if any), and the limit and duration of relief and termination rights.

Open-ended provisions in such clauses are interpreted restrictively by the use of the ejusdem generis rule of construction. For open-ended lists, the extrapolation would be a continuation of things similar in nature to the item specifically listed. (For example, if you have a clause stating that a force majeure event will include floods, earthquakes, hailstorms, tsunamis, hurricanes and any other causes beyond the parties' reasonable control, this will be limited to natural disasters and not to wars, strikes, epidemics and governmental intervention, etc). Relief under force majeure clauses will not apply where the event or occurrence is caused by or comprised a breach of contract or negligence on the part of the party claiming relief.

A force majeure clause in a shipbuilding contract will usually provide for a right of termination where the force majeure event exceeds a certain period (ie, 90 to 120 days). In such cases, the parties should also decide what their respective rights would be once the contract is terminated. They could agree that the seller will be paid for all work done up to the date of the supervening event. The affected party will usually be required to take reasonable steps to mitigate the effect of the supervening event.

In practice, parties could make contingencies for a situation where the vessel under construction has suffered damage due to force majeure or other factors. They could provide that where a vessel has sustained partial loss, parties could provide for a contractual right to utilise the insurance proceeds for necessary repairs and replacement under an extended schedule. It is also possible to make provision for a new alternative construction where the vessel under construction had suffered an actual or constructive total loss by using the insurance proceeds thereof.

As soon as a party is affected by a force majeure event, they must serve a written notice on the other party within the stipulated time frame (usually five days), accompanied by a statement setting out the particular nature and cause of the event and its likely impact on the contract schedule.

The burden of proof is on the party claiming relief to show that the supervening event is within the contractual definition of force majeure and that it has been adversely affected despite effort to mitigate its impact.

29 Umbrella insurance

Is certain 'umbrella' insurance available in the market covering the builder and all subcontractors of a particular project for the builder's risks?

'Umbrella' insurance in the form of the contractors all-risks (CAR) policy is available in the market, which provides comprehensive coverage of risks inherent in construction projects, from project inception through completion and beyond.

30 Disagreement on modifications

Will courts or arbitration tribunals in your jurisdiction be prepared to set terms if the parties are unable to reach agreement on alteration to key terms of the contract or a modification to the specification?

In Malaysia, the courts and arbitration tribunals neither interfere nor dictate terms to parties where the terms are not already present in the agreement. The courts are not prepared to impose such terms relating to alteration to key terms in the contract or a modification to the specification.

31 Acceptance of the vessel

Does the buyer's signature of a protocol of delivery and acceptance, stating that the buyer's acceptance of the vessel shall be final and binding so far as conformity of the vessel to the contract and specifications is concerned preclude a subsequent claim for breach of performance warranties or for defects latent at the time of delivery?

The protocol of delivery and acceptance stating the buyer's acceptance of the vessel does not preclude a subsequent claim for breach of performance warranties or for defects latent at the time of delivery.

32 Liens and encumbrances

Can suppliers or subcontractors of the shipbuilder exercise a lien over the vessel or work or equipment ready to be incorporated in the vessel for any unpaid invoices? Is there an implied term or statutory provision that at the time of delivery the vessel shall be free from all liens, charges and encumbrances?

A supplier or subcontractor of a shipbuilder who has been unpaid, that is where the whole fee has been unpaid (section 45(1) SOGA), has by implication of the law a lien on the goods for the price while he is in possession of the goods even though the title to the goods may have passed (section 456(1) SOGA).

Where the title to the goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the title has passed to the buyer (section 46(2) SOGA).

The 'unpaid seller' includes any person who is in the position of seller, such as an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price (section 45(2) SOGA).

33 Reservation of title in materials and equipment

Does a reservation of title by a subcontractor or supplier of materials and equipment survive affixing to or incorporation in the vessel under construction?

Provided the reservation or retention of title (ROT) clause is effectively incorporated into the contract of sale or supply of materials or equipment, title of the materials or equipment does not pass until a certain condition, usually of full payment, is fulfilled. This kind of clause is provided for under section 25(1) SOGA.

Such ROT clause usually survives the affixing or attachment to the vessel so long as the material or equipment remains identifiable in its original state and is reasonably detachable from the vessel without causing substantial damage to the vessel. Where the material (eg, paint already painted on parts of vessel) is no longer in its original state, the ROT clause would no longer be valid.

34 Subcontractor's and manufacturer's warranties

Can a subcontractor's or manufacturer's warranty be assigned to the buyer? Does legislation entitle the buyer to make a direct claim under the subcontractor's or manufacturer's warranty?

A subcontractor's or manufacturer's warranty can be assigned to the buyer. There is no legislation to entitle the buyer to make a direct claim under the subcontractor's or manufacturer's warranty based on the terms of the contract. (*MAN B & W S E Asia Pte Ltd and Another v PT Bumi International Tankers* (2004)).

35 Default of the builder

Where a builder defaults in the performance of the contract, what remedies will be open to the buyer?

Where the builder seriously defaults in the performance of his obligations in the shipbuilding contract, the buyer may treat the breach as a repudiatory breach and elect to rescind the contract. The builder's primary obligation to construct the vessel will then cease and he is then obliged to pay damages to the buyer for losses caused by such breach that were reasonably foreseeable when the contract was signed.

Although it is within the court's discretion to decree specific performance, such discretion is granted only exceptionally, and guided by judicial principle (section 21(1) of the Specific Relief Act 1950). The remedy of specific performance is not normally available to the buyer under a shipbuilding contract because of the nature and complexity of a shipbuilding contract.

Section 20(1)(b) of the Specific Relief Act 1950 provides that a contract with minute or numerous details or otherwise from its nature is such that the court cannot enforce specific performance of its material terms, cannot be specifically enforced. Further, section 20(1)(a) of the Act forbids the remedy of specific performance in cases where compensation in monetary damages would be an adequate relief.

36 Remedies for protracted non-performance

Are there any remedies available to the shipowner in the event of protracted failure to construct or continue construction by the shipbuilder apart from the contractual provisions?

Apart from contractual remedies available, for example, under the refund guarantee, the buyer may seek a right to take possession of the unfinished ship and to remove the vessel from the builder's yard for completion elsewhere. In these circumstances the builder will have an obligation to cooperate with the removal and any assignments of subcontracts required by the buyer, and the buyer will continue to have a claim against the builder for any additional costs incurred or losses suffered as a result of any delay and increased costs caused by the requirement to finish the ship elsewhere. In the event the builder does not cooperate, the buyer may apply to the courts for a mandatory injunction under the Specific Relief Act 1950 (section 53) and order 29 of the Rules of the High Court to compel removal of the unfinished vessel provided, of course, that it is practical to do so.

If the dispute has been referred to arbitration, a party may either before or during the arbitral proceedings apply to a high court for any interim measure and the court may make an order for the preservation, interim custody or sale of any property that is the subject matter of the dispute (section 11 of the Arbitration Act 2005).

37 Judicial proceedings or arbitration

What institution will most commonly be agreed on by the parties to decide disputes?

Where both parties are Malaysians, it is common to find arbitration clauses where the seat of arbitration is in Malaysia and the arbitration would be subject to the Rules of the Kuala Lumpur Regional Centre for Arbitration (KLRCA). In 2012, the KLRCA launched their Fast Track Rules to allow for disputes to be resolved by a sole arbitrator (unless the parties agree otherwise) within 100 days.

In contracts that do not provide for the applicable rules (eg, ad hoc arbitration) the provisions of the Arbitration Act 2005 and the Arbitration Amendment Act 2011 will apply accordingly. Malaysia has also recently established an admiralty court in Kuala Lumpur with a specialised judge, hearing all types of maritime-related disputes (not only admiralty cases). Shipbuilding contract disputes would fall within the purview of the admiralty court. However, it is also common for parties to agree to SIAC, SCMA, ICC or LMAA arbitrations although KLRCA would still in most cases be the preferred choice in terms of managing costs.

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38 ADR/mediation

In your jurisdiction do parties tend to incorporate an ADR clause in shipbuilding contracts?

Yes, mediation is developing as a trend particularly in terms of attempting to mediate before going to court or arbitration. The Malaysian Bar Council has set up a Malaysian Mediation Centre to address both commercial and non-commercial disputes. The KLRCA also has a vibrant panel of mediators as part of their conciliation and mediation services. The KLRCA adopts their Conciliation and Mediation Rules 2011 (which incorporate the UNCITRAL Conciliation Rules) for mediation cases. Notwithstanding, it is often the case in shipbuilding disputes that a mediator is recommended and appointed independently through the parties' own sources. The mediator is usually accredited by a professional body or institution and someone who is a recognised name in the market.

39 Standard contract forms

Are any standard forms predominantly used in your jurisdiction as a starting point for drafting a shipbuilding contract?

There is no standard form of shipbuilding contract in Malaysia.

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