

# Malaysia

*Jeremy M. Joseph*

*Matthew Jerome van Huizen*

## Part I. Arrest of Vessels

*This chapter has been reviewed by the Authors and  
is up-to-date as of June 2021*

JOSEPH/VAN HUIZEN

MALAYSIA

Table of Contents

Part I. Arrest of Vessels	1
INTRODUCTION	1
CHAPTER 1. Sources of Local Law	3
CHAPTER 2. International Conventions	4
2.1. Multilateral conventions	4
2.2. Consular representation in Malaysia: possession and wages claims	4
CHAPTER 3. Competence of Courts or Other Authorities	5
3.1. Outline of the system	5
3.2. Domestic arbitration clauses	6
3.3. Foreign arbitration clauses	7
3.4. Forum non conveniens and <i>lis alibi pendens</i>	7
CHAPTER 4. Immunity of State-Owned Vessels	9
4.1. Vessels belonging to the government of Malaysia	9
4.2. Vessels belonging to foreign states	9
CHAPTER 5. Types of Claims for Which an Arrest Can Be Requested	10
CHAPTER 6. Other Specific Preconditions to an Arrest	12
CHAPTER 7. Definition of ‘Ship’ and ‘Vessel’	12
CHAPTER 8. Evidence Required to Support an Arrest Application	13
CHAPTER 9. Sister Ships	14
CHAPTER 10. Demise- and Time-Chartered Vessels	14
10.1. Maritime liens	15
10.1.1. The damage lien	15
10.1.2. The salvage lien	15
10.1.3. The master and crew wages lien	15
10.1.4. The master’s disbursements lien	15

JOSEPH/VAN HUIZEN

10.2. Claims in rem other than maritime liens	15
CHAPTER 11. Form of Application	16
CHAPTER 12. Must the Arresting Party Put Up Security?	17
CHAPTER 13. Representation by Lawyers; Powers of Attorney	17
CHAPTER 14. Court Hearing	17
CHAPTER 15. Provision of Bail by Defendants	19
CHAPTER 16. Proceedings for Maintaining an Arrest	19
CHAPTER 17. Costs and Advances for Court Proceedings and Custody	20
CHAPTER 18. Enforcement of the Order of Arrest	20
CHAPTER 19. Service of the Order of Arrest	20
CHAPTER 20. Time Element	21
CHAPTER 21. Appeal by Defendant	21
CHAPTER 22. Forced Sale in the Arrest Procedure	22
22.1. Sale upon judgment	22
22.2. Sale pendente lite	23
CHAPTER 23. Claims for Damages by the Owners of an Arrested Vessel	24
CHAPTER 24. Special Remarks	24
24.1. Foreign flag vessels	24
24.2. Mareva injunctions	25
24.3. Security for foreign proceedings	25
24.4. An example of conditions of sale	27

MALAYSIA

*Jeremy M. Joseph*

Originally a marine insurance broker, Jeremy has knowledge of the shipping and insurance industry, and his first position in law was at the Singapore office of the international firm Holman Fenwick & Willan where he worked as an associate for several years until he set up Messrs Joseph & Partners in Kuala Lumpur. His firm has been consistently ranked in the top category every year since 2010 as a leading Malaysian shipping law firm by international law publications, such as *Legal 500* and *Chambers Asia*. The firm has also bagged the prestigious ‘ALB Malaysia Law Awards’ for Maritime Law Firm of the Year three years in a row hosted by Asian Legal Business and Thomson Reuters.

Jeremy currently serves as the President of the International Malaysian Society of Maritime Law.

*Matthew Jerome van Huizen*

Matthew’s practice focuses on domestic and cross-border shipping disputes, customs and excise advisory work, and the judicial arrest and sale of vessels (including superyachts, AHTS vessels and crude tankers). Matthew further advises on general maritime corporate matters, including the drafting of Ship-Management, Sea-Men Employment, and Joint-Venture contracts.

JOSEPH/VAN HUIZEN

## Part I. Arrest of Vessels

### INTRODUCTION

Malaysia is a federation, and law-making powers are shared between the Federal Parliament and the thirteen state legislative assemblies.

The eleven states of the peninsula of West Malaysia were the constituent units of the old Federation of Malaya which obtained its independence on 31 August 1957. The two states of East Malaysia, namely Sabah and Sarawak, were governed as British crown colonies, and they obtained independence by merging with the Federation of Malaysia in September 1963.

Because of the separate systems of administration which had been in existence, there are some differences between the laws of West Malaysia and the two East Malaysian states; however, in the course of time, full harmonization will take place.

The influence of the English common law in Malaysia is regulated by sections 3 and 5 of the Civil Law Act 1956 which read as follows:

#### Section 3

- (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:
  - (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;
  - (b) in Sabah, apply the common law of England and the rules of Equity, together with statutes of general application, as administered or in force in England on the 1 December, 1951;
  - (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12 December 1949, subject however to subsection (3)(ii):  
Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.
- (2) Subject to the express provisions of this Act or any other written law in force in Malaysia or any part thereof, in the event

of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail.

- (3) Without prejudice to the generality of subsection (1)(b) and (c) and notwithstanding subsection (1)(c):
- (i) it is hereby declared that proceedings of a nature such as in England are taken on the Crown side of the Queen's Bench Division of the High Court by way of habeas corpus or for an order of mandamus, an order of prohibition, an order of certiorari or for an injunction restraining any person who acts in an office in which he is not entitled to act, shall be available in Sabah to the same extent and for the like objects and purposes as they are available in England;
  - (ii) the Acts of Parliament of the United Kingdom applied to Sarawak under sections 3 and 4 of the Application of Laws Ordinance of Sarawak and specified in the Second Schedule to this Act shall, in the second column of the said Schedule, continue in force in Sarawak with such formal alterations and amendments as may be necessary to make the same applicable to the circumstances of Sarawak and, in particular, subject to the modifications set out in the third column of the said Schedule.

#### Section 5

- (1) In all questions or issues which arise or have to be decided in the States of West Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.
- (2) In all questions or issues which arise or which have to be decided in the States of Malacca, Penang, Sabah and Sarawak with respect to the law concerning any of the matters referred to in subsection (1), the law to be administered shall be the same as would be administered in England in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.



## MALAYSIA

### 1. SOURCES OF LOCAL LAW

The Malaysian Parliament has exclusive authority to make laws on admiralty matters. The entry 'admiralty jurisdiction' appears as Item 4(j) in the Federal List in the Ninth Schedule of the Constitution. There is no specific Act of Parliament dealing with admiralty matters in general.

The continuing influence of English law in admiralty matters can be seen in admiralty matters in section 24(b) of the Courts of Judicature Act 1964 which provides that the civil jurisdiction of every Malaysian High Court includes:

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 United Kingdom Supreme Court Act 1981 (now known as the Senior Courts Act 1981). Although section 24(b) of the Courts of Judicature Act 1964 incorporates 'English' admiralty jurisdiction into domestic law, this incorporation of English law is restricted to the admiralty jurisdiction from the Supreme Court Act 1981. Thus, it does not include other types of admiralty jurisdiction emerging from a different statute in English law, for example, the Civil Jurisdiction and Judgment Act 1982.

In an unreported decision in *The Vinta*, the Supreme Court of Malaysia held that, by virtue of the express stipulation by Parliament that the jurisdiction was to be determined by reference to the United Kingdom (UK) Supreme Court Act 1981, this was a clear intention by Parliament that any subsequent Acts in relation to the admiralty jurisdiction in the UK did not apply in Malaysia.

Decided cases on admiralty matters are published in the *Malayan Law Journal* and the *Malayan Law Journal Unreported*, the *Current Law Journal* and the *All Malaysia Reports*. English decisions are freely cited. Other statutes that contain provisions related to admiralty jurisdiction are:

- Arbitration Act 2005 (as amended by the Arbitration (Amendment) Act 2011 and the Arbitration (Amendment) (No. 2) Act 2018).
- Bintulu Port Authority Act 1981.
- Civil Law Act 1956.
- Courts of Judicature Act 1964.
- Environmental Quality Act 1974 (as amended by the Environmental Quality (Amendment) Act 2012).
- Exclusive Economic Zone Act 1984.
- Government Proceedings Act 1956.
- Merchant Shipping Ordinance 1952 (as amended by the Merchant Shipping (Amendment) Act 2017).

- Carriage of Goods by Sea Act 1950.
- Merchant Shipping (Liability and Compensation for Oil and Bunker Oil Pollution) Act 1994 (as amended by the Merchant Shipping (Oil Pollution) (Amendment) Act 2011).
- Penang Port Commission Act 1955.
- Port Authorities Act 1963.
- Ports (Privatisation) Act 1990.
- Sabah Merchant Shipping Ordinance 1960.
- Sabah Ports Authority Enactment 1981.
- Sabah Ports (Privatisation) Enactment 1998.
- Sarawak Merchant Shipping Ordinance 1960.
- Sarawak Port Authorities Ordinance 1961.

## 2. INTERNATIONAL CONVENTIONS

### 2.1. *Multilateral conventions*

Malaysia is yet to ratify any specific conventions relating to the arrest of ships. Still, many of the provisions of the 1952 Brussels Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships indirectly apply under Malaysian law via section 24(b) of the Courts of Judicature Act 1964 and the consequential application in Malaysia of the admiralty sections 20–24 of the Supreme Court Act 1981 (UK). The Supreme Court Act 1981 directly incorporates a range of provisions of the Convention. Section 21 of the Supreme Court Act 1981 provides the categories of cases in which action in rem may be brought against the vessel. Such an action in rem brought against the vessel is the very basis upon which the vessel's arrest is conducted.

### 2.2. *Consular representation in Malaysia: possession and wages claims*

The Rules of the High Court 1980 have since been replaced with the Rules of Court 2012.

Order 70, Rule 4(4) of the Rules of Court 2012 lays down a special condition which applies to arrest proceedings against any vessel registered in the port of a state which has consular representation in Malaysia. Unless the leave of the High Court is obtained, a warrant of arrest will not be issued in respect of a possession or wages claim against such a vessel until prior notice of the commencement of proceedings has been sent to the relevant consul. There is no specific requirement as to the period of such notice.

## MALAYSIA

### 3. COMPETENCE OF COURTS OR OTHER AUTHORITIES

#### 3.1. *Outline of the system*

The arrest of vessels in Malaysia in respect of civil claims is exclusively a matter for the High Courts. Every High Court in East and West Malaysia has admiralty jurisdiction by reason of section 24(b) of the Courts of Judicature Act 1964.

There are two High Courts in Malaysia. These are, first, the High Court of Malaya, whose territorial jurisdiction covers the eleven states of West Malaysia, namely Johore, Malacca, Negeri Sembilan, Selangor, Pahang, Perak, Kedah, Perlis, Penang, Kelantan and Terengganu and, second, the High Court of Sabah and Sarawak, whose territorial jurisdiction covers Sabah and Sarawak. Appeals from the High Courts are heard by the Court of Appeal and thereafter a party may appeal to the Federal Court against the decision of the Court of Appeal upon obtaining leave to do so from the Federal Court.

The territorial jurisdiction of the High Court of Malaya covers admiralty matters, including the arrest of vessels in West Malaysia, where the principal ports are Penang, Port Kelang, Port Dickson, Lumut, Malacca, Pasir Gudang, Tanjung Pelepas, Kuantan, Kuala Terengganu and Kerteh as well as the Federal Territory of Labuan which is located off the coast of Borneo.

The High Court of Sabah and Sarawak exercises jurisdiction over the East Malaysian states of Sabah and Sarawak. The major ports of Sabah are Kota Kinabalu, Kudat, Sandakan, Lahad Datu, Kunak, Semporna and Tawau. The major ports of Sarawak are Kuching, Sibut, Miri and Bintulu. All East Malaysian ports are under the jurisdiction of the respective state governments except Bintulu which has, by Royal Proclamation, been designated a federal port. The federal government exercises jurisdiction in respect of the management and development of Bintulu Port.

The Admiralty High Court is located in Kuala Lumpur. This specialist court is presided over by a judge who regularly hears commercial and admiralty cases. In addition, the Admiralty High Court has its own Registry and Court Bailiffs. Further, the Admiralty Sheriff is tasked with the arrest and sale of vessels that are the subject matter of the admiralty proceedings.

Two comprehensive Practice Directions concerning admiralty proceedings have been passed: (1) Practice Direction No. 2 of 2007, which deals with the procedural requirements concerning admiralty actions; and (2) Practice Direction No. 1 of 2012. Admiralty actions may be filed in any of the High Courts in East or West Malaysia. The establishment of the specialist Admiralty High Court sitting in Kuala Lumpur does not mean that an admiralty action cannot be filed before the High Courts of Malaya (in West Malaysia) other than Kuala Lumpur. Such actions may still be filed outside Kuala Lumpur, but they will be reported to the Admiralty Registry of the

Admiralty High Court in Kuala Lumpur. A transfer of the action to Kuala Lumpur can only take place with the consent of all parties.

### 3.2. Domestic arbitration clauses

The existence of a domestic arbitration clause in a contract does not preclude a plaintiff from issuing proceedings and arresting a vessel in respect of a claim, but upon application by the defendant, after entering an appearance and before taking any other step in the proceedings, the court may stay the action to allow an arbitration to proceed. An amendment to section 10(2A) of the Arbitration Act 2005 now allows a court that grants a stay of court proceedings to further order that the arrested vessel be retained under arrest as security for any possible arbitration award.

Under section 10 of the Arbitration Act 2005, if any party to an arbitration agreement commences legal proceedings against another party, the defendant may apply to the court to stay the proceedings. The court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, may make an order staying the proceedings. The Court of Appeal, in *Interscope Versicherung Sdn Bhd v. Sime Axa* [1999] 2 Current Law Journal 843 (on the law under the old section 6 of the Arbitration Act 1952), held that the entry of an unconditional appearance was tantamount to a step in the proceedings. The legal position has since changed. The Federal Court, in *Sanwell Corp v. Trans Resources Corp Sdn Bhd* [2002] 2 Malayan Law Journal 625, held that the entry of an unconditional appearance in court proceedings did not amount to a step in the proceedings, and a stay of court proceedings could nevertheless be granted under section 6 of the Arbitration Act 1952. Section 10 of the Arbitration Act 2005 has been interpreted in a similar, consistent fashion.

The application for stay must be made before any step in the proceedings is taken. In *PT Pelayaran Era Indonesia Fortune v. ZKZ Euphoria Sdn Bhd* [2019] Malayan Law Journal Unreported 310, for example, the appellant did not make any application to stay the proceedings or expressed their intention to participate in the proceedings. The High Court held that the appellant could not seek a stay of proceedings as they had waived their right to invoke arbitration.

There is further first instance authority to state that the provision of an unconditional bail bond is tantamount to a submission to the jurisdiction (*Concord Lines Co. Ltd v. The Owners of the Ship Molly* [1998] 1 All Malaysia Reports 26) and should the application for stay be made together with an application for striking out the writ, this is likewise tantamount to a submission to jurisdiction (*PP Persero Sdn Bhd v. Bimacom Property & Development Sdn Bhd* [1993] 3 All Malaysia Reports 3479).

## MALAYSIA

### 3.3. *Foreign arbitration clauses*

Malaysia had adopted the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 which came into force on 3 February 1986.

The Arbitration Act 2005 came into effect on 15 March 2006. It repealed the Arbitration Act 1952 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985. Malaysia remains a party to the New York Convention, and the High Court is empowered under section 38 of the Arbitration Act 2005 to register international arbitration awards as judgments of the High Court by making an application in writing with an authenticated original award or duly certified copy of the award and the original arbitration agreement or a certified copy of it. The Arbitration Act 2005 was amended in 2011 and subsequently in 2018. Pursuant to section 11 of the Arbitration Act 2005 (amended 2011) and the Arbitration (Amendment) (No. 2) Act 2018, a vessel arrested as security for court proceedings can continue as security for an award made either in a domestic or in an international arbitration, or a court may order that the stay of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award.

### 3.4. *Forum non conveniens and lis alibi pendens*

Where it is more convenient for a foreign court to hear and determine a matter, a Malaysian High Court may grant a stay of proceedings. In this matter, generally, the Malaysian court is guided by the practice prevailing in English admiralty jurisprudence. The principles enunciated by the House of Lords in *The Abidin Daver* [1984] AC 398 would be followed in Malaysia.

A plaintiff may wish to pursue his/her claim in Malaysia, even though proceedings are pending in a foreign jurisdiction which is the natural and appropriate forum. According to *BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors* [2000] 2 Malayan Law Journal 70, the Malaysian courts will exercise its discretion to stay domestic proceedings unless the plaintiff establishes that there is some personal or juridical advantage available to him/her only in Malaysia which is of such importance that it would be unjust to deprive him/her of it, or that justice might not be accorded to him/her in the foreign jurisdiction concerned.

If there is a valid exclusive foreign jurisdiction clause, the court may set aside the writ and hence the arrest, unless it can be shown that if the action is not allowed to continue, the plaintiff will be denied the relief he/she is entitled to, for example, if the clause is time-barred in the jurisdiction agreed upon. The court must therefore take into consideration factors such as the relative convenience and expense of trial as between the Malaysian and

foreign courts, the jurisdiction with which either party is connected and how close such a connection is, whether the plaintiff would be deprived of security (for instance, the vessel concerned) for the claim that is to be determined and heard by the foreign court and whether the defendant genuinely seeks trial in the foreign jurisdiction or is only seeking to gain some procedural advantage (*The Elefteria* [1969] 2 All ER 641 cited with approval by *Globus Shipping & Trading Co. (Pte) Ltd v. Taiping Textiles Bhd* (1976) 2 Malayan Law Journal 154). The Malaysian courts would generally follow the guidelines laid down by the English courts in such cases.

In *Globus Shipping & Trading Co. (Pte) Ltd v. Taiping Textiles Bhd* (1976) 2 Malayan Law Journal 154, the Malaysian Federal Court, applying the test as set out in, among others, *The Elefteria* [1969] 2 All ER 641, stated that an exclusive foreign forum clause in a contract as agreed to by the parties does not preclude the Malaysian courts from exercising their discretion to hear and determine the merits of a claim arising from the contract, provided that (1) the discretion is exercised pursuant to the established principles; and (2) the cause of action that arose from the contract falls within the jurisdiction of the Malaysian courts.

The decision in *Globus Shipping* has subsequently been approved and applied in the cases heard by all tiers of the Malaysian courts, including the Supreme Court case of *American Express Bank Ltd v. Mohammed Toufic Al-Ozier* [1995] 1 All Malaysia Reports 253, the Court of Appeal cases of *Inter Maritime Management Sdn Bhd v. Kai Tai Timber Company Ltd Hong Kong* [1995] 1 All Malaysia Reports 805 and *World Triathlon Corp v. SRS Sports Centre Sdn Bhd* [2019] 4 Malayan Law Journal 394, the apex court case of *Goodness for Import and Export v. Phillip Morris Brands Sarl* [2016] 5 Malayan Law Journal 171 and the High Court case of *Able Food Sdn Bhd v. Open Country Dairy Ltd* [2021] 9 Malayan Law Journal 723. However, there is a contrasting decision from the Court of Appeal in *World Triathlon Corp v. SRS Sports Centre Sdn Bhd* [2019] 4 Malayan Law Journal 394. The Court of Appeal observed that although the jurisdiction of the Malaysian courts cannot be ousted by an exclusive foreign forum clause, it is nonetheless mandatory for the courts to enforce the clause since this is the agreement of the parties. The courts are deemed to condone a breach of the agreement if they discount such a clause.

Where an action is stayed to allow proceedings to continue in another jurisdiction, any warrant of arrest issued in the Malaysian proceedings will be discharged.

MALAYSIA

4. IMMUNITY OF STATE-OWNED VESSELS

4.1. *Vessels belonging to the government of Malaysia*

Malaysian law relating to civil proceedings against the Government is contained in the Government Proceedings Act 1956, by section 37 thereof which provides:

- (1) Nothing in this Act shall authorize proceedings in rem in respect of any claim against the Government, or the arrest, detention or sale of any ships or aircraft, or of any cargo or other property belonging to the Government, or give to any person any lien on such ship, aircraft, cargo or other property.
- (2) Where proceedings in rem have been instituted in the High Court or in a subordinate court against any such ship, aircraft, cargo or other property, the court may, if satisfied, either on an application by the plaintiff for an order under this subsection or an application by the Government to set aside the proceedings, that the proceedings were so instituted by the plaintiff in the reasonable belief that the ship, aircraft, cargo or other property did not belong to the Government, order that the proceedings shall be treated as if they were in personam duly instituted against the Government in accordance with this Act, or duly instituted against any other person whom the court regards as the proper person to be sued in the circumstances, and that the proceedings shall continue accordingly.

The immunity accorded to Malaysian government vessels applies only in respect of actions in rem. The Government may therefore be held liable in personam in appropriate cases.

4.2. *Vessels belonging to foreign states*

Proceedings in rem cannot be maintained against a vessel owned by a foreign sovereign or sovereign State if an objection is raised by the defendant on the grounds of sovereign immunity.

Currently there is no law in Malaysia corresponding to the UK State Immunity Act 1978. Malaysia has not incurred any obligation by treaty whereby immunity from arrest should be granted to vessels belonging to the government of any foreign State.

## 5. TYPES OF CLAIMS FOR WHICH AN ARREST CAN BE REQUESTED

The admiralty jurisdiction of a High Court in Malaysia extends to the hearing and determination of any of the questions or claims set out in section 20(2) of the Supreme Court Act 1981 (UK):

### S.20(2)

- (a) any claim to the possession or ownership of a ship or to the ownership of any share therein;
- (b) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;
- (c) any claim in respect of a mortgage of or charge on a ship or any share therein;
- (d) any claim for damage done by a ship;
- (e) any claim for damage received by a ship;

*Note: This category of claim cannot be pursued in rem.*

- (f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or default of:
  - (i) the owners, charterers or persons in possession or control of a ship; or
  - (ii) the Master or crew of a ship or of any other persons for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship.
- (g) any claim for loss of or damage to goods carried in a ship;
- (h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;
- (j) any claim in the nature of salvage (including any claim arising by virtue of the application, by or under Section 87 of the Civil Aviation Act 1982 of the law relating to salvage to aircraft and their apparel and cargo);
- (k) any claim in the nature of towage in respect of a ship or an aircraft;
- (l) any claim in the nature of pilotage in respect of a ship or an aircraft;
- (m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;



MALAYSIA

- (n) any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues;
- (o) any claim by a Master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages);
- (p) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;
- (q) any claim arising out of an act which is or is claimed to be a general average act;
- (r) any claim arising out of bottomry;
- (s) any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty.

Admiralty jurisdiction may be invoked by an action in rem against the ship or property in question in each of the cases set out under section 20(2)(a)–(c) and section 20(2)(s) of the Supreme Court Act 1981 (UK).

Furthermore, where there is a maritime lien or other charges, then an action in rem may be brought against that ship or property (section 21(3) of the Supreme Court Act 1981 (UK)).

A maritime lien may exist in respect of the following claims:

- (a) Collision damage.
- (b) Salvage.
- (c) Wages of Master and crew.
- (d) Master's disbursements.
- (e) Bottomry.

If the claim gives rise to a maritime lien, the right of arrest survives the sale of the vessel.

Additionally, a party intending to arrest a vessel must also satisfy the requirements under section 21(4) of the Supreme Court Act (UK) which provides:

- (4) In the case of any such claim as is mentioned in section 20(2)(e) to (r), where-
  - (a) the claim arises in connection with a ship; and
  - (b) the person who would be liable on the claim in an action in personam ('the relevant person') was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, *an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against –*

JOSEPH/VAN HUIZEN

- (i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or
- (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

## 6. OTHER SPECIFIC PRECONDITIONS TO AN ARREST

As previously stated, the right to arrest a vessel in Malaysian territorial waters exists as an adjunct to proceedings issued out of the High Court by a plaintiff in respect of a claim or claims that may be legally pursued in rem. Provided those conditions are met, no other conditions are required to be satisfied.

Section 3 of the Territorial Sea Act 2012 provides:

- (1) The breadth of the territorial sea of Malaysia (except Sabah and Sarawak) shall for all purposes be 12 nautical miles.
- (2) The baselines from which the breadth of that territorial sea is to be measured shall, for all purposes, be as established in accordance with section 5 of the Baselines of Maritime Zones Act 2006.
- (3) The breadth of the territorial sea in Sabah and Sarawak shall be limited to 3 nautical miles.

Malaysia has deposited her instrument of ratification of the Law of the Sea done at Montego Bay on 10 December 1982.

Section 5(1) of the Baselines of Maritime Zones Act 2006 provides that for the purpose of determining the maritime zones of Malaysia (including Sabah and Sarawak), the baselines shall be (a) the low-water line along the coast as marked on large-scale charts; (b) the seaward low-water line of a reef as shown by the appropriate symbol on charts; or (c) the low-water line on a low-tide elevation that is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island.

## 7. DEFINITION OF ‘SHIP’ AND ‘VESSEL’

Several statutes contain definitions of the terms ‘ship’ and ‘vessel’.

The Merchant Shipping Ordinance 1952, Penang Port Commission Act 1955, Port Authorities Act 1963 and the Bintulu Port Authority Act 1981

## MALAYSIA

contain identical definitions of ‘ship’ and ‘vessel’ in their interpretation sections:

‘Ship’ includes every description of vessel used in navigation not propelled by oars.

‘Vessel’ includes any ship or boat or any other description of vessel used in navigation.

The Interpretation Act 1967 defines ‘ship’ as follows:

‘Ship’ includes every description of vessel used in the navigation of water, other than vessels exclusively propelled by oars, paddles or poles.

The same Act also defines ‘vessel’ as follows:

‘Vessel’ includes floating and submarine craft of every description.

Order 70, Rule 1(2) of the Rules of Court 2012 contains the following definitions:

‘Ship’ includes any description of vessel used in navigation.

The Carriage of Goods by Sea Act 1950 defines ‘ship’ as any vessel employed for the carriage of goods by sea.

As such, it is seen that ‘ship’ and ‘vessel’ bear the same meaning and the term is often used interchangeably.

## 8. EVIDENCE REQUIRED TO SUPPORT AN ARREST APPLICATION

According to, *inter alia*, Order 70 Rule 4(6) and 4(7) of the Rules of Court 2012, the plaintiff is required to submit an affidavit with all relevant details to demonstrate that he/she/it has reasonable grounds for establishing a maritime claim, and that such a claim is properly advanced against the vessel which is to be arrested. Evidence as to ownership of the vessel is usually provided by submitting certified extracts from Lloyd’s Register. However, the Federal Court of Malaysia held, in *The Loon Chong* (1982) 1 Malayan Law Journal 212, that an entry in Lloyd’s Register is not conclusive evidence of ownership. It might therefore be necessary to obtain evidence to corroborate the Lloyd’s Register entry to strengthen the case. Further details as to the form of affidavit and other relevant documents are given in section 11 below.

Ideally, a certificate of registration of ownership from the ship’s registry is the best form of evidence of ownership.

JOSEPH/VAN HUIZEN

In *Kawasaki Kisen Kaisha Ltd v. Owners of the Ship or Vessel 'Able Lieutenant'* [2002] 6 Malayan Law Journal 433, the High Court held that the ship register is conclusive proof of beneficial ownership save for error or fraud. The burden of proof is shifted to the defendant to prove that there is error or fraud. The decision was affirmed in *POSH Semco Pte Ltd v. The demise charterers and/or other persons interested in the ship or vessel 'POSH BALI' (IMO No. 9180736) of Port of Monrovia, Liberia* [2017] 8 Malayan Law Journal 365.

But in *Straits Bunkering Pte Ltd v. Ketua Pengarah Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Johor & Ors* [2020] 8 Malayan Law Journal 450 and *Dan-Bunkering (Singapore) Pte Ltd v. The Owners of The Ship or Vessel 'PDZ Mewah' (IMO No.: 9064009) of Port Klang & Anor* [2020] Malayan Law Journal Unreported 1574, the High Court held that the ship register is not conclusive evidence of the true proprietorship of the vessel because it solely furnishes prima facie evidence of the registered owner as the true beneficial owners. The onus of proof is then shifted to the defendant to disprove the prima facie evidence. If the defendant discharges the onus, the court would disregard the owner's name listed on the ship's register and 'look behind the register' to ascertain the real shipowner behind the purported one.

## 9. SISTER SHIPS

The plaintiff, in most cases properly falling within the admiralty jurisdiction, is entitled to arrest a vessel if the claim arises in connection with that vessel and if the person who is liable on the claim is the beneficial owner or demise-charterer of that vessel both at the time when the cause of action arose and at the time the action has commenced.

Where an owner or charterer of any vessel is personally liable in respect of a maritime claim against that vessel, then the claimant/plaintiff may arrest any other vessel, i.e., sister ship, which, at the time the proceedings are issued, is owned by such shipowner or charterer.

The various circumstances in which a claimant may arrest a sister ship are listed in section 20(2)(e)–(r) of the Supreme Court Act 1981 (UK) (section 21(4)(a) read with 21(4)(b)(ii) of the Supreme Court Act 1981) (refer to section 5 for the full text).

## 10. DEMISE- AND TIME-CHARTERED VESSELS

Where a vessel is on a demise-charter or time-charter at the time a claim arises, the existence or non-existence of a legal right to arrest that vessel will depend upon the nature of that claim.

## MALAYSIA

Section 21(3) of the Supreme Court Act 1981 (UK), which, by virtue of section 24(b) of the Courts of Judicature 1964, is applicable in Malaysia enables an action in rem to be brought against a vessel or property if there is a maritime lien on that vessel or property.

### *10.1. Maritime liens*

#### 10.1.1. The damage lien

In cases where damage is done by a vessel, a maritime lien arises against the vessel if, at the material time, the vessel was in the hands of the owner or a demise-charterer of the vessel or the servants or agents of either of them.

#### 10.1.2. The salvage lien

This lien arises, as a result of the successful performance of salvage services, over all salvaged property. The existence of a demise-charter or time-charter is irrelevant in this case.

#### 10.1.3. The master and crew wages lien

The crew has a lien over the vessel upon which they have actually performed their services, irrespective of the identity of their contractual employers. Demise-charters and time-charters are therefore irrelevant to a claim based on this lien.

#### 10.1.4. The master's disbursements lien

The master of a vessel has a lien against his/her vessel to the extent of his/her outstanding disbursements. However, this is conditional upon the true owner of the vessel being personally liable for the claim. No lien arises if the disbursements were incurred on behalf of a demise-charterer or any other person.

### *10.2. Claims in rem other than maritime liens*

The claims not giving rise to a maritime lien that may be brought against chartered vessels are set out in section 21(4) of the Supreme Court Act 1981 (UK) read with subsections (e)–(r) of section 20(2) of the Supreme Court Act 1981 (UK).

## 11. FORM OF APPLICATION

The form of application is set out in Order 70 of the Rules of Court 2012. Details of the requirements are as follows:

- (1) An action in rem must be begun by a writ of summons in Form 146.
- (2) A warrant of arrest may be issued after the issue of the writ in an action in rem at the instance of the plaintiff (or defendant in a counterclaim).
- (3) Before applying for the warrant of arrest the applicant must procure a search of the caveat book to ascertain if a caveat against arrest exists.
- (4) The applicant must file a *praecipe* in accordance with a set form requesting the issue of a warrant together with an affidavit.
- (5) The affidavit must state:
  - (a) the name, address and occupation of the applicant for the warrant;
  - (b) the nature of the claim or counterclaim in respect of which the warrant is required and that it has not been satisfied;
  - (c) the nature of property to be arrested and, if a vessel, the name of the vessel and the port to which it belongs;
  - (d) the amount of security sought, if any;
  - (e) if the action is against a vessel:
    - (i) whether the vessel is the vessel in connection with which the claim arose;
    - (ii) the deponent's belief that the person liable in personam on the claim was, at the time the action arose, the owner or charterer or in possession or control of the vessel in connection with which the claim arose and is the beneficial owner of all the shares in the vessel against which the action is brought;
    - (iii) the grounds of the deponent's belief.
  - (f) in an action in rem for possession of a vessel, or for wages, the nationality of the vessel subject to the arrest must be given and, if the relevant state has a consulate in Malaysia, notice that an action has commenced must be sent to the consul.

An application for arrest may therefore be made only as an adjunct to proceedings already commenced in the High Court.

## MALAYSIA

### 12. MUST THE ARRESTING PARTY PUT UP SECURITY?

While the vessel is under arrest, it is under the custody and control of the Sheriff and, consequently, it is incumbent upon the Sheriff to maintain the vessel. Prior to the warrant of arrest being issued, the arresting party must put up security with the court towards the arrest costs, including the interests and maintenance costs, and must provide an undertaking to the Sheriff that they will provide further security upon demand by the Sheriff. At present, the sum required by most of the courts is about MYR 15,000, although some courts may require up to MYR 40,000.00. This may be paid in cash or by a bank draft or solicitor's cheque.

### 13. REPRESENTATION BY LAWYERS; POWERS OF ATTORNEY

A litigant may choose to conduct his/her own case, but this is not advisable owing to the complexity of admiralty law and procedure.

Powers of attorney are not required either by lawyers or by the court for the purpose of commencing proceedings or for taking any other legal action.

In Malaysia the term 'lawyer' or 'counsel' refers to an advocate and solicitor, as the legal profession here is a 'fused' and not a 'divided' profession. Local counsel must be engaged. A body corporate may not commence, carry on or defend proceedings otherwise than by an advocate and solicitor.

Furthermore, as lawyers in West Malaysia do not have an automatic right of audience in the East Malaysian courts, it is best to instruct solicitors in the same jurisdiction as that where the arrest is contemplated.

### 14. COURT HEARING

The documents relating to the arrest application must be filed by the plaintiff's solicitors at the High Court Registry. The documents are filed alongside an undertaking to the court to pay on demand the fees and expenses incurred by the Sheriff in regard to the arrest. The documents will be considered by the Registrar, and a writ can be issued on the same day that it is filed. The affidavit leading to the arrest, if filed by a deponent residing outside Malaysia, must be affirmed before a Notary Public (for Commonwealth countries) or a Consular Officer of the Malaysian Consulate Office situated in that country (for non-Commonwealth countries). The court decides on the application for arrest without any hearing at this stage as to the substantive merits of the claim. If the evidence in support of the application is deemed to be sufficient, a warrant of arrest

will be issued as of right immediately subject to the compliance with the applicable law and rules.

However, in certain cases, a warrant of arrest may not be issued as of right and may only be issued provided that leave of court has been obtained. These cases are as follows:

- (1) since the issuance of the writ, property whose beneficial ownership has changed in the wake of a sale or disposal by a court exercising admiralty jurisdiction;
- (2) a claim in rem against a foreign ship owned by a port of a State having a consulate in Malaysia, being a claim for possession of the ship or for wages, until notice that the claim has been commenced has been sent to the consul; and
- (3) a claim in rem arising out of bottomry until the bottomry bond and, in the event the bond is in a foreign language, its notarial translation is submitted to the Registrar.

A person who desires to prevent the arrest of a ship can lodge in the Admiralty Registry a Praecipe for caveat against arrest in the prescribed form signed by him/her or his/her solicitor with an undertaking both to enter an appearance in any action that may be begun against the ship and to give bail in the action in a sum not exceeding an amount specified in the *praecipe* or to pay the amount into court. A caveat against the issue of a warrant to arrest the ship will then be entered in the caveat book. The validity period of a caveat against arrest is six months. Upon expiry thereof, fresh caveats may be entered.

However it must be borne in mind that Order 70, Rule 5(2) of the Rules of Court 2012 states:

The fact that there is a caveat against arrest in force shall not prevent the issue of a warrant to arrest the property to which the caveat relates.

A remedy exists for a party alleging arrest of a ship without good and sufficient reason. If a caveat against arrest *exists* in respect of a ship arrested by warrant, the person who entered the caveat, the caveator, may apply to the court by motion for an order. If the court is satisfied that the party procuring the arrest did not have a good and sufficient reason for so doing, the court may discharge the warrant and order damages to be paid to the caveator for loss suffered as a result of the arrest.



## 15. PROVISION OF BAIL BY DEFENDANTS

Order 70, Rule 15 of the Rules of Court 2012 provides for bail to be given by a party to an action in rem.

In practice the usual form of bail is a cash deposit, a bank guarantee or a Protection and Indemnity (P&I) Club undertaking. It is rare for cash to be offered as security. There is now some reluctance among solicitors to accept a P&I Club guarantee if it is from a Club that is not part of the International Group of P&I Clubs, but a bank guarantee is generally acceptable.

It is now rare for a bail bond to be provided. However, if the parties to an action are unable to agree upon the terms of the undertaking or the identity of the third party who is to provide it, it may be necessary to resort to a bail bond. In the event that the intention of the defendant is to challenge the jurisdiction of the court, it would be advisable that the bail bond or other security be expressed to be conditional on or qualified as to the right to make the application, failing which, the provision of the bond may be held to be a submission to the jurisdiction.

The Rules require the sureties to the bank to enter into this commitment before a Commissioner for Oaths or the Registrar. The Commissioner should not be the person who or whose partner is acting as solicitor or agent for the party on whose behalf bail is to be given.

The surety must declare in an affidavit that he/she is able to pay the amount for which the bond is given. If the surety is a corporation, then no affidavit is necessary unless the other party so requires it. Where such an affidavit is required, it shall be made by a director, manager, secretary or another similar officer of the corporation.

Notice of bail must be served on the other party. After twenty-four hours, the bond, the affidavit of the surety and the affidavit proving service of notice of bail must be filed.

## 16. PROCEEDINGS FOR MAINTAINING AN ARREST

It will be necessary for the plaintiff to proceed with the action initiated by the writ issued before the grant of the warrant of arrest. Should the plaintiff default in the service of a statement of claim on the defendant, the latter may apply for the action to be dismissed after the lapse of the relevant period, and the court may order dismissal or make such other order as it thinks fit.

## 17. COSTS AND ADVANCES FOR COURT PROCEEDINGS AND CUSTODY

The principal costs involved in arresting a ship in Malaysia are as follows:

<i>Deposit in Court to Cover</i>	<i>Ringgit Malaysia (MYR)</i>
Sheriff's expenses	15,000
Legal fees of solicitors	Between 20,000 and 75,000

There would be other expenses, such as watchmen's wages and supplies of necessities to the vessel under arrest. It is well-nigh impossible to estimate in advance how much all these costs will amount to, as much will depend on factors such as the location of the vessel, its physical condition, and the length of the period of arrest.

If the defendant owner is solvent and continues to pay the vessel's outgoings, such as berth and harbour dues, while the vessel is under arrest, then the costs of custody will be reduced. If the plaintiff's claim is ultimately successful, then the costs of arrest and custody may be recovered from the defendant.

## 18. ENFORCEMENT OF THE ORDER OF ARREST

A warrant of arrest may be executed only by the sheriff or his/her officer. The warrant is valid for six months beginning from the date of its issue. Any party who, without prior leave from the court, interferes with the enforcement or maintenance of a warrant of arrest may be liable to be held guilty of contempt of court.

## 19. SERVICE OF THE ORDER OF ARREST

A warrant of arrest may be executed only by the sheriff or his/her officer. Service of a warrant is effected by affixing it to the mast or superstructure of the vessel for a short time and, on removing the warrant, leaving a copy in its place. In *Kertih Port Sdn Bhd v. Owners of the Vessel 'Shema'* [2009] 2 Malayan Law Journal 589, the arresting party served the arrest warrant on the master of the ship. The High Court held that the service was defective since it did not comply with Order 70 Rule 10(1) of the Rules of Court 2012 which is mandatory in nature. Accordingly, the court set aside the warrant.

The COVID-19 pandemic has sparked concerns in relation to the form of service of the warrant arrest which requires the service to be effected on board the vessel, particularly the risk of exposure to the people on board the

## MALAYSIA

vessel who may be infected by the COVID-19 virus. Hence, to address these concerns, a recent amendment regarding service of the Arrest Warrant has been introduced in the Rules of Court (Amendment) 2020. Order 70 Rule 10(1A) of the Rules of Court 2012 (as amended by the Rules of Court (Amendment) 2020) provides that the service of the arrest warrant may now be affixed on the ship's hull or superstructure and followed immediately thereafter with an electronic communication, by email or other methods, of a copy of the warrant as notice to the relevant parties interested in the vessel under arrest.

If the warrant was issued against freight, then the warrant can be served on the cargo in respect of which the freight is payable or on the ship carrying the cargo or on both. The warrant may be affixed to the cargo itself or, if access to the cargo is not permitted, the warrant may be left with the person who has custody of the cargo (Order 70 Rule 10(2) of the Rules of Court 2012).

### 20. TIME ELEMENT

The warrant can be obtained as soon as the writ is issued, and the documentation pertaining to the arrest is submitted. The warrant may be issued immediately, but otherwise it is usually available within twenty-four hours of submission. The warrant may be executed simultaneously with the service of the writ or at a later time. The Admiralty Court is entitled to execute the warrant on any day it deems fit. Physical service of the warrant has been described in section 19.

A party that obtains the issue of the warrant may request to withhold the execution thereof. A third party having an interest in the vessel which is subject to the warrant may apply to the Admiralty Court for the warrant to be, *inter alia*, executed within a particular time.

The period of arrest of the ship as specified in the warrant starts from the time of execution of the warrant until the time of the release of the ship from arrest by the Admiralty Court, or alternatively, the time of the sale of the vessel pursuant to an order of the court.

### 21. APPEAL BY DEFENDANT

A warrant of arrest is issued on an *ex parte* application, that is, without the prior knowledge of the shipowner. The shipowner may decide to contest the decision to issue the warrant. A hearing will be arranged to provide an aggrieved party with an opportunity to state his/her case to the court. The High Court may in its discretion allow other interested parties to intervene in the proceedings. The defendant may apply for the writ and the warrant of arrest to be set aside upon the grounds, for example, that the action is

frivolous, vexatious and an abuse of the process of the court, or that the plaintiff does not have a good arguable case, or that the person sued is not the shipowner, or that the service of the warrant was defective.

If the High Court refuses to set aside the writ and the warrant of arrest, an appeal may be taken to the Court of Appeal in the first instance, without the necessity of obtaining leave of court, and thereafter by appeal to the Federal Court, but in the latter case only upon obtaining leave to file the appeal.

## 22. FORCED SALE IN THE ARREST PROCEDURE

### 22.1. *Sale upon judgment*

The procedure to be followed when the sale of a vessel has been ordered by a court is contained in Order 70, Rule 21 of the Rules of Court 2012.

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. In addition to the order for sale, the court may make a further order.

The Order for Sale will usually include an order specifying the period after which the court will determine the priorities between the competing claims. After the expiration of the period specified in the further order or after judgment is obtained, an application may be made to the court for an order to determine the order of priority of the claims against the proceeds of sale of the vessel.

A further order that may be made by the court is that within seven days after the date of payment into court of the proceeds of sale, the sheriff gazettes in the Government Gazette and advertises in any newspaper the court may specify, a notice in the form prescribed by the Rules of Court 2012. The notice must state that the vessel has been sold, and that the gross proceeds of the sale have been paid into court. Furthermore, the notice must mention that the order of priority of the claims against the proceeds will not be determined until after the expiration of a specific period mentioned in the order for sale and that any person with claims against the vessel or the proceeds of sale thereof is required to file his/her claim papers before the expiration of that period.

The prima facie ranking of claims in order of priority is generally as follows, from highest to lowest:

- (a) the sheriff's costs and expenses arising from the arrest and sale of the vessel;

## MALAYSIA

- (b) the costs of the arresting party up to and including the arrest and the costs of subsequent proceedings up to and including the order for appraisal and sale;
- (c) maritime liens;
- (d) possessory liens that arise after the maritime lien has accrued;
- (e) mortgages; and
- (f) statutory liens.

There is usually no interest payable on the proceeds paid into the court unless a special application is made that the sum be paid into an interest-bearing account. It would be in everybody's interest that an application to open such an account be made by the solicitors of the main claimant. Moreover, the solicitor could be liable for professional negligence if he/she omits to put the money into such an account with a reputable commercial bank.

### 22.2. *Sale pendente lite*

Where the vessel under arrest is deteriorating, or for some other good reason it appears to be in the interests of all parties concerned that it should be sold without further delay, the court may, on motion, order the vessel to be appraised and sold pending trial, i.e., sale pendente lite, and the proceeds thereof will be brought into court. All claims against the ship will thereupon be transferred to the fund in court and payment out of the fund will take place after priorities are determined. Sale pendente lite may also occur if the shipowner has ceased trading and is insolvent.

If the shipowner opposes the application for sale pendente lite, the court will take into consideration all relevant issues, such as why the shipowner has not provided security, the strength of the claim and whether the shipowner is likely to be capable of continuing to trade with the vessel if the claim fails.

In *Lai Lai Yin v. MV 'Yih Shen', Owners of and Other Persons Interested* [1985] 1 Legal Network Series 121, the High Court had the opportunity to consider the English decisions such as *The Myrto* [1977] 2 Lloyd's Law Rep. 243 and adopted the principles enunciated therein. *The Myrto* has been approved and followed in, among others, the cases of *Kingstar Shipping Ltd v. The Owners of the Ship or Vessel 'Sino Glory'* [1997] 4 All Malaysia Reports 3694 and *Timberail Sdn Bhd v. The Owners and/or Other persons interested in the Vessel 'San Yang 2'* [1998] 6 Malayan Law Journal 434 and *SK B&T Pte Ltd v. The Owners of the Ship or Vessel 'Silver Moon' of Port Klang* [2016] Malayan Law Journal Unreported 1329. In Malaysia, an application for sale pendente lite will be allowed where it is clear from the evidence before the court that the vessel is a deteriorating asset and that the

continued arrest will reduce the amount of security available to satisfy the various claims before the court.

### 23. CLAIMS FOR DAMAGES BY THE OWNERS OF AN ARRESTED VESSEL

An action for wrongful arrest may be brought against a plaintiff by way of an application to set aside the warrant of arrest on the grounds of *mala fides* or *crassa negligentia* on the part of the plaintiff (*The Evangelismos* (1858) 12 Moo PC. 352). The *Evangelismos* was cited with approval by several domestic cases, including *Ocean Gain Shipping Pte Ltd v. Owner and/or Charterer of Demise of Vessel Dong Nai Registered at Haiphong Port, Vietnam (The Dong Nai)* [1996] 4 Malayan Law Journal 454; *Shivnath Rai Harnarain (India) Ltd v. The Owners of the Ship or Vessel MV 'Win Moony'* (LR 8204846) of the Port of Valetta, Malta [2005] 1 Malayan Law Journal 141 and *The Owner of Ship or Vessel 'Lavela' v. The Owner of Ship or Vessel 'Basilia'* [2019] 9 Malayan Law Journal 188.

In this type of civil action, which will be heard by a judge sitting alone, the scale of damages will reflect the gravity of the case and all the relevant circumstances. In appropriate cases the court may award exemplary damages as per in the case of *Ocean Gain Shipping Pte Ltd v. Owner and/or Charterer of Demise of Vessel Dong Nai Registered at Haiphong Port, Vietnam (The Dong Nai)* [1996] 4 Malayan Law Journal 454. In general, an action for wrongful arrest has been successful where the vessel has been arrested for a completely unmeritorious claim.

Any prolonged detention of a vessel without legitimate reason to sustain an arrest is amount to wrongful continuation of arrest even though the arrest was properly carried out. The principle applicable for wrongful continuance of an arrest is the same as that applicable for wrongful arrest (*The Eymar* [1989] 2 Malayan Law Journal 460).

### 24. SPECIAL REMARKS

#### 24.1. *Foreign flag vessels*

Under Malaysian law, all vessels, whether Malaysian or foreign, are treated alike. Only State-owned vessels are clothed with immunity from arrest.

## MALAYSIA

### 24.2. *Mareva injunctions*

The Malaysian High Court grants Mareva injunctions in appropriate cases to restrain a party to any proceedings from removing from the jurisdiction of the High Court his/her assets located within the jurisdiction where it can be shown that there is a risk of dissipation of assets. There must be solid evidence to prove the existence of a risk of dissipation of assets such as the defendant's previous actions that demonstrated his lack of probity (*S & F International Ltd. v. Trans-Con Engineering Sdn Bhd* [1985] 1 Malayan Law Journal 62). Bare assertions that the defendant is likely to put the assets beyond the reach of the plaintiff do not, by themselves, suffice a risk of dissipation of assets (*Ph 385 Sdn Bhd v. Jps Holdings Sdn Bhd & Ors* [2020] Malayan Law Journal Unreported 1370). Hence, mere proof that the vessel is not within the jurisdiction per se will not suffice the same.

The term 'assets' covers ships and their cargo. A Mareva injunction will be granted only as an adjunct to proceedings which the claimant is pursuing in Malaysia. The claimant must also demonstrate to the court that he/she has a 'good arguable case' for invoking Malaysian jurisdiction, 'which is more than being barely capable of serious argument, but not necessarily one that the judge believes has got more than fifty per cent chance of success' (*Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft mbH & Co KG KG* [1984] 1 All ER cited with approval by *S & F International Ltd. v. Trans-Con Engineering Sdn Bhd* [1985] 1 Malayan Law Journal 62). Therefore, the mere presence of a vessel within that jurisdiction will not per se suffice a 'good arguable case' for the grant of a Mareva injunction. Any risk that the defendant will dispose of or remove his/her assets from the jurisdiction will provide a good case for a Mareva injunction.

It is trite law that in an application for a Mareva injunction, the claimant has a duty to make a full and frank disclosure of all the material facts (*Larut Consolidated Bhd & An Or v. Khoo Ee Bee & Ors* [1997] 5 Malayan Law Journal; *Toyota Tsusho (M) Sdn Bhd v. Lau Kum Foon & Ors* [2019] 10 Malayan Law Journal). It is relevant to note that the duty of disclosure in the context of an application for a Mareva injunction is comparatively more extensive than that in the context of an application for arrest (see *Premium Vegetable Oils Sdn. Bhd. v. The Owners and/or Demise Charterers of the Ship or Vessel 'Ever Concord' (IMO No. 9033347) of The Port of Zanzibar, Tanzania* [2020] Malayan Law Journal Unreported 1498).

### 24.3. *Security for foreign proceedings*

In *Vinta* (unreported), the Supreme Court held that the admiralty jurisdiction of the Malaysian High Court is as provided for under the UK Supreme Court Act 1981 and was only limited to the powers given thereunder. Accordingly, any powers granted by the English Parliament after

that Act did not apply in Malaysia. This decision was applied in *Asia Pacific Parcel Tankers Pte Ltd v. The Owners of the Ship or Vessel 'Normar Splendour'* [1999] 6 Malayan Law Journal 652.

This means that Malaysia cannot adopt *ipso facto* subsequent legislative powers from the Parliament in the UK. This would include the Civil Jurisdiction and Judgments Act 1982. There is no direct statutory provision that empowers the Malaysian courts to order that property arrested be retained to satisfy a judgment given in foreign court proceedings. In this respect, the position in Malaysia is not as clear as the position in England, in which the Civil Jurisdiction and Judgments Act 1982 empowers the courts to arrest a vessel as security for foreign proceedings. In the recent Singapore High Court decision of *The 'Eurohope'* [2017] SGHC 218, the High Court confirmed the position under Singapore law that a vessel cannot be arrested in Singapore in aid of foreign court proceedings. The *Eurohope* has made it clear that the Singapore High Court's admiralty jurisdiction cannot be invoked to obtain security in aid of foreign court proceedings because no such power has been provided in the High Court (Admiralty Jurisdiction) Act. In addition, the position in England differs from the position in Singapore because, in England, the Courts are empowered to order an arrest and retain a vessel as security in foreign court proceedings, through section 26(1) of the Civil Jurisdiction and Judgments Act 1982. In contrast, there is no statutory provision that empowers the Singapore courts to order that property arrested be retained for the satisfaction of a judgment given in foreign court proceedings.

In Malaysia, *Order 70 Rule 12(11) of the Rules of Court 2012* states that where the court stays or dismisses an action in rem on the grounds that the dispute in question should be submitted to the *determination of courts outside Malaysia*, the court may if in those proceedings, the res has been arrested or bail or other security has been given, make an order that the property arrested be retained as security for the satisfaction of a certain judgment. However, that judgment must be both enforceable in Malaysia and be given in respect of the dispute in favour of which those proceedings are stayed or dismissed.

Further, the court in this circumstance may make an order that the stay or dismissal of those proceedings is conditional on the provision of equivalent security for the satisfaction of any such judgment.

The court is also at liberty to attach any such condition to the order as it thinks fit in particular conditions concerning the institution or prosecution of the relevant legal proceedings (Order 70 Rule 12(12) Rules of Court 2012).

It is therefore arguable that Malaysia permits an arrest as security for foreign court proceedings.



MALAYSIA

24.4. *An example of conditions of sale*

*Conditions of Sale*

The ship or vessel [name of vessel]

- (1) In these conditions the expression ‘the vessel’ means the Vessel agreed to be sold with everything on board belonging to her but excluding any equipment on hire (*see* clause 14).
- (2) The Buyer shall take and pay for the unused bunker fuel and lubricants remaining on board her (if any) in accordance with clauses 6, 7 and 8 below.

*Basics of Sale*

- (3) The Buyer undertakes that in making his/her offer he/she has not relied upon any information which he/she may have been given by or on behalf of [*name of seller*] and that he/she has relied solely upon his/her own inquiries and/or inspection.
- (4) The Vessel is sold as lying at the date of the sale with all her faults and all errors of description whatever. The Buyer shall not be entitled to reject the Vessel and not to any damages or diminution in price, by reason of any fault of or in the Vessel or any error of description whatever.
- (5) The vessel is at present lying under arrest pursuant to a Warrant of Arrest issued by the High Court of Malaya at [...] and this sale is conditional upon the approval of the High Court of Malaya at [...] being given to the terms of this sale. In the event that the Court does not grant approval of the sale, the contract of sale is voided and is of no effect and [*name of seller*] shall repay to the Buyer, without interest, costs or compensation, any sums the Buyer has paid under clause 6. In such an instance, the buyer shall have no claim against [*name of seller*] for any ground whatsoever.
- (6) Payment shall be made by the Buyer in cash in Malaysian Ringgit to [*name of seller*], as follows:
  - (a) Upon the making of the offer, 10% of the price;
  - (b) within one week of the acceptance of the offer:
    - (i) the balance of 90% of the price and
    - (ii) a sum in respect of bunker fuel and lubricants (if any) calculated in accordance with clause 6.
- (7) The sum (if any) payable in respect of unused bunker fuel and lubricating oil shall be calculated by reference to:
  - (a) the quantities (if any) remaining on board unused at noon on the day one week after the acceptance of the offer or on

JOSEPH/VAN HUIZEN

- the day of the final payment, whichever shall be the earlier, and
- (b) the current market prices ruling in the port where the Vessel is lying. The quantities and prices shall be determined by the agent of *[name of seller]* so appointed for the purposes of the sale.

*Delivery*

- (8) On completion of the payments referred to in clause 5 *[name of seller]* shall give and the Buyer shall take immediate delivery of the Vessel (together with her bunker fuel and lubrication oil).
- (9) If the Buyer requires delivery of the Vessel to an Agent, such an Agent must produce the Buyer's written authority to that effect, signed by the Buyer and addressed to *[name of seller]*.
- (10) On delivery the Buyer shall have the Bill of Sale for the Vessel, together with any documents belonging to the Vessel which are in the possession of *[name of seller]* and/or the vessel.

*Risk, etc.*

- (11) The Vessel shall be at the Buyer's risk from the time when the payments referred to in clause 6(b) are made or become due, whichever is earlier, and from that time all expenses relating to the Vessel, including dock and other dues, shall be for the Buyer's account.
- (12) If the Vessel is lost, destroyed or damaged in any way whatsoever before the risk in the Vessel has passed to the Buyer under clause 11, *[name of seller]* may rescind the contract of sale by notice in writing to the Buyer and repaying to the Buyer, without interest, costs or compensation, any sums the Buyer has paid under clause 6.

*Default of Buyer*

- (13) If the Buyer is in default in making any of the payments referred to in clause 5, or is in any other respect whatever in breach of any of these conditions, *[name of seller]* may exercise all or any of the following rights:
  - (a) by notice in writing rescind the contract and/or sale;
  - (b) if the Buyer has made the payment referred to in clause 5(a), declare it to be forfeited to him;
  - (c) resell the Vessel by public or private sale;
  - (d) recover from the Buyer all losses, damages, costs and expenses caused by the Buyer's default, including, in the event of such resale, any loss suffered as a result thereof;

MALAYSIA

- (e) if the Buyer has made any further payments besides those referred to in clause 59(a), retain in satisfaction or part satisfaction of the right of recovery given by sub-clause (d) above, the whole or part of such further payment(s), but without prejudice to any other means of satisfying such a right.
- (14) If any equipment of any kind on board the Vessel is on hire, it shall not be included in the sale, but the Buyer shall make his/her own arrangements in respect of such equipment with its Owners, and, if he/she fails to do so, he/she shall indemnify *[name of seller]* in respect of any claims arising from such a failure.

*Tender of Sale and Purchase*

WE,  
Of [address]  
(if the above address is not in Malaysia then the following information must be given)  
whose agent(s) in Malaysia is/are  
of [agent's address]  
hereby offer to purchase at the price of Malaysian Ringgit the [name of vessel] now lying at [...] and at present under the arrest of the High Court of Malaya at [] This offer is to purchase the said [name of vessel] on the terms of [name of seller]'s Conditions of Sale. We recognise that [name of seller] is not bound to accept any offer.

Signed:  
Dated:  
Witnessed:

Practice Direction No. 1 of 2012 has been issued by the Office of the Chief Registrar of the Federal Court on 21 February 2012.

The Practice Direction refers to the establishment of the Admiralty Court in Kuala Lumpur in 2010 and states the purpose of its establishment to facilitate the efficient administration of admiralty claims in one centralized court. The centralization of information on admiralty and maritime claims is another reason for the centralization of the Admiralty Court in Kuala Lumpur.

The Practice Direction does not have the effect of removing the local jurisdiction of the High Courts of Malaya and Sabah and Sarawak to hear and determine admiralty and maritime claims. Instead, the Practice Direction allows for an admiralty action occurring anywhere in East or West Malaysia to be filed in the Admiralty Court in Kuala Lumpur subject to the consent of all parties.

The Practice Direction sets out all maritime claims that the High Court may hear under section 24(b) of the Courts of Judicature Act 1964 read with the Supreme Court Act 1981 (UK), including claims relating to the carriage of goods by sea; limitation of maritime claims; disputes relating to marine insurance, reinsurance, shipbuilding agreements, the sale and purchase of ships; claims arising out of marine pollution; marine or shipping-related agency, freight and multimodal transport and warehousing of goods at any port in West Malaysia; claims relating to financing and documentary credit for the carriage of goods by sea; death, personal injury, loss or damage arising out of marine activity; claims arising from any breach of marine rules and regulations; claims pertaining to seamen, including wages and their contracts of service; applications in relation to maritime arbitrations; and appeals in respect of maritime claims determined by the subordinate courts.

When any admiralty writ, warrant of arrest, instrument of release or caveat is filed in any High Court, the Registrar of that High Court will notify the Registrar of the Admiralty Court in Kuala Lumpur within a prescribed time together with a copy of the document so filed. The Admiralty Court is required to maintain a Register of Maritime Claims Cause Book complete with details of all admiralty claims, warrants and caveats filed before the High Courts. This information is to be made available on the judiciary's website: <http://efiling.kehakiman.gov.my/>.

Warrants of arrest may be heard by a judge or registrar and will be valid from twelve months from the date of issue. All admiralty and maritime claims, whether in rem or in personam can now be filed by electronic filing and in urgent matters, once filed, the Registrar is to be informed as soon as the documents are filed. The arresting party is to attend court on the day of filing with printed copies of the documents filed for issuance. A registrar will be on duty, after hours, to attend to urgent arrests. The Deputy Registrars and Senior Assistant Registrars will act as the Admiralty Court's Sheriff and Assistant Sheriffs, respectively, and will execute and serve all warrants of arrests and writs, orders, notices, commands and other Court processes.

The arresting party is to appoint a shipping agent to assist the Sheriff and Assistant Sheriff in the preservation, management or control of the property under arrest. The arresting party shall pay for all expenses incurred by the shipping agent. The shipping agent shall lodge daily reports on the management and control of the property under arrest to the Sheriff or Assistant Sheriff. All expenses reasonably and properly incurred by the shipping agent and paid for by the arresting party shall stand as the Sheriff's expenses.

Upon the arrest of the vessel, the repatriation of the master and/or crew of the vessel will take place with consultation with the Sheriff or Assistant Sheriff once an appropriate Court order is obtained. A substitute Master and crew may be engaged for the ship in such instance. These costs will be borne by the arresting party and will stand as the Sheriff's expenses.

## MALAYSIA

Where a warrant of arrest is executed and no further steps are taken in the proceedings, the Sheriff or Assistant Sheriff may direct the arresting party to take necessary measures under the rules of court. Where there is default in carrying out these steps, the property arrested shall be released.

Once arrested, a vessel cannot continue to work without the Sheriff's express permission. If the arrest took place during loading, all loading operations must cease on direction by the Sheriff or Assistant Sheriff. However, where cargo (which is not under arrest) is being unloaded at the time of arrest, the Sheriff or Assistant Sheriff can allow the unloading to continue. In such instance, the Sheriff or Assistant Sheriff can require the ship, or their agents, to furnish a letter of indemnity with regard to the Sheriff's liability if there should be an accident during unloading. If unloading is not permitted to continue, the person entitled to immediate possession of the cargo can have the cargo discharged without having to intervene in the action. This can be done by requesting the Sheriff or Assistant Sheriff to take appropriate steps for the discharge of the cargo. If the Sheriff, Assistant Sheriff or the arresting party considers the request reasonable, an application may be made to the court for the appropriate orders. As an alternative, the cargo owners can intervene in the court action to have the cargo discharged at their cost.

Where the ship is not under arrest but the cargo on board the ship is and the shipowner's wish to have the cargo discharged, they may, without intervening in the court action, request the arresting party, the Sheriff or the Assistant Sheriff to take steps to have the cargo discharged. If a sufficient undertaking to bear all costs is given in conjunction with this request, an application may be made to the court by the Sheriff, Assistant Sheriff or the arresting party to have the cargo discharged.

JOSEPH/VAN HUIZEN

# Malaysia

*Jeremy M. Joseph*

*Matthew Jerome van Huizen*

## Part III. Judicial Sales of Vessels and Priority of Claims

*This chapter has been reviewed by the Authors and  
is up-to-date as of June 2021*

JOSEPH/VAN HUIZEN



## Table of Contents

Part III. Judicial Sales of Vessels and Priority of Claims	1
<i>A. Judicial Sales</i>	1
CHAPTER 1. Sources of Law	1
1.1. National law	1
1.2. Applicable international conventions	2
CHAPTER 2. Preconditions to a Judicial Sale	2
2.1. General position	2
2.2. Sale pendente lite	2
2.3. Foreign judgments and arbitration awards	3
2.4. Mortgage title	4
2.5. Possessory lien	4
CHAPTER 3. Custody and Maintenance of the Vessel Pending Sale	5
3.1. The Sheriff	5
3.2. The duties of the Sheriff	5
3.3. The Sheriff's costs	5
3.4. Insurance	6
CHAPTER 4. Preparations for Sale	6
4.1. Reserve price and valuation	6
4.2. Advertisement	8
4.3. Notification to creditors	8
4.4. Inspection of the vessel	8
4.5. Preconditions to bidding	8
4.6. Terms of the contract of sale	9
4.7. Determination of date of auction	11
CHAPTER 5. The Sale Procedure	11
5.1. Bidding	11
5.2. Reserve price	12
5.3. Set-off of judgment debt	12
5.4. Currency	12
CHAPTER 6. Post-Sale Arrangements	13
6.1. Legal title	13
6.2. Appeal	13

JOSEPH/VAN HUIZEN

6.3.	The fund in court	13
6.4.	Determination of priorities	14
CHAPTER 7.	National and International Recognition of Judicial Sales	14
7.1.	Evidence of title	14
7.2.	Recognition of Malaysian judicial sales	14
7.3.	Malaysia's recognition of other judicial sales	14
7.4.	Documentation required for registration	15
<i>B.</i>	<i>Priorities</i>	15
CHAPTER 8.	Priorities: Sources of Law	15
8.1.	General	15
8.2.	International conventions	16
CHAPTER 9.	Claims Falling Outside the Priorities System	16
9.1.	The possessory lienholder	16
9.2.	Statutory rights of port and other authorities	16
9.3.	Tonnage and registration charges	17
9.4.	Outstanding classification society charges	17
CHAPTER 10.	Prior Charges on Gross Sale Proceeds	17
10.1.	Sheriff's expenses	17
10.2.	Recoverable costs of proceedings	18
CHAPTER 11.	Preconditions to Participation in the Priorities Contest	18
11.1.	Judgment in rem	18
11.2.	Foreign judgment or arbitration award	19
11.3.	Cut-off date for priorities	19
CHAPTER 12.	First-Priority Claims	19
12.1.	General	19
12.2.	Damage lien	20
12.3.	Salvage lien	21
12.4.	Seamen's and master's wages	21
12.5.	Master's disbursements	21
12.6.	Bottomry and Respondentia Bonds	21
CHAPTER 13.	Second-Priority Claims	22
13.1.	Mortgages	22
CHAPTER 14.	Third-Priority Claims	22
14.1.	Judgments in rem	22

MALAYSIA

CHAPTER 15. Non-preferred Claims	22
15.1. Judgments in personam	22

JOSEPH/VAN HUIZEN

## MALAYSIA

### *Jeremy M. Joseph*

Originally a marine insurance broker, Jeremy has knowledge of the shipping and insurance industry, and his first position in law was at the Singapore office of the international firm Holman Fenwick & Willan where he worked as an associate for several years until he set up Messrs Joseph & Partners in Kuala Lumpur. His firm has been consistently ranked in the top category every year since 2010 as a leading Malaysian shipping law firm by international law publications, such as *Legal 500* and *Chambers Asia*. The firm has also bagged the prestigious ‘ALB Malaysia Law Awards’ for Maritime Law Firm of the Year three years in a row hosted by Asian Legal Business and Thomson Reuters.

Jeremy currently serves as the President of the International Malaysian Society of Maritime Law.

### *Matthew Jerome van Huizen*

Matthew’s practice focuses on domestic and cross-border shipping disputes, customs and excise advisory work, and the judicial arrest and sale of vessels (including superyachts, AHTS vessels, and crude tankers). Matthew further advises on general maritime corporate matters, including the drafting of Ship-Management, Sea-Men Employment, and Joint-Venture contracts.

JOSEPH/VAN HUIZEN

## Part III. Judicial Sales of Vessels and Priority of Claims

### A. *Judicial Sales*

#### 1. SOURCES OF LAW

##### 1.1. *National law*

Malaysia has several procedures for the judicial sale of vessels. Judicial sales are to be construed as any sale pursuant to a court order. The sale procedures are:

- (a) Pursuant to the admiralty jurisdiction of the High Court under Order 70 of the Rules of Court 2012, in order to preserve or realize the security after arrest of the vessel.
- (b) Pursuant to Order 46 of the Rules of Court 2012 after judgment has been given and the judgment creditor takes out a writ of seizure and sale.
- (c) Upon the application by the court-appointed liquidator of a shipowning company, in order to realize the assets and discharge the liabilities of the said company.
- (d) Upon the application by the Director General of Environmental Quality after detention of a vessel which has caused pollution, in order to recover the expenses of the clean-up operation, pursuant to section 48(3) of the Environmental Quality Act 1974.
- (e) Upon the application by a person unqualified to own a Malaysian-registered ship, to transfer the ship pursuant to section 39 of the Merchant Shipping Ordinance 1952.
- (f) Upon the application by a second or subsequent mortgagee under a Malaysian-registered mortgage, pursuant to section 45 of the Merchant Shipping Ordinance 1952, on the grounds that the prior mortgagee will not consent to the sale of the vessel.

1.2. *Applicable international conventions*

Malaysia is not a party to the 1926 or 1967 Brussels Convention on Maritime Liens and Mortgages, and it has not incorporated these Conventions into local legislation.

2. PRECONDITIONS TO A JUDICIAL SALE

2.1. *General position*

Where the judicial sale arises out of Order 70 Rule 21 and Rule 22 of the Rules of Court 2012 (i.e., the rules governing the admiralty procedure of the High Court), it is necessary under Order 70 Rule 2(1) and Rule 4(1) for an action in rem to be commenced by way of a writ and a warrant of arrest to be issued and for both to be served upon the vessel. The courts in Malaysia will make an order of sale only in respect of a vessel which is under arrest, during which time the vessel will not be allowed to trade. The sale could occur in two distinct situations, which are:

- (i) Sale pendente lite.
- (ii) Sale order upon judgment.

2.2. *Sale pendente lite*

Sale pendente lite is a sale which takes place before a judgment on the merits is given or, in cases of urgency, pending trial. Generally, upon arrest of a vessel, most owners would provide a letter of undertaking or guarantee through their protection and indemnity club, or put up bail, in order to secure the release of the vessel. Should no security be put up, then the vessel remains under arrest until the determination of the merits of the claim. It is then open to the plaintiffs to take out a summons supported by affidavit to have the vessel sold before judgment.

The grounds of the application will be that vessels, while lying under arrest, are wasting assets. In *United States of America v. The Owners of & Other Persons Interested in the Vessels 'Jade Phoenix' & Golden Phoenix of the Port of Philadelphia* [1998] 2 CLJ 536, the court, in deciding whether a sale pendente lite should be ordered, applied principles as elucidated by Brandon J. in the English case of *The 'Myrto'* [1977] 2 Lloyd's Rep 243. In Malaysia, a sale of a vessel pendente lite will be ordered if the courts are satisfied that the value of the security would be continually diminished by the cost of maintaining the vessel, or that there is deterioration of the vessel during the period of arrest, or there are good reasons and fairgrounds to



## MALAYSIA

make the order. In *Timberail Sdn Bhd v. The Owner and/or Other Persons Interested in the Vessel 'San Yang 2'* [1998] 6 MLJ 434, the plaintiff filed a notice of motion for an order that the vessel 'San Yang 2' (the vessel) which is under arrest be appraised and sold *pendente lite* on the grounds that she was rusting away and the continuation of the arrest could only reduce its value as security.

After judgment, if the vessel has not been sold *pendente lite*, the judgment creditor in an *in rem* action may apply to the court for an order of appraisal and sale of the vessel in order to satisfy the judgment. In light of this circumstance, a stay of execution of such order will not be granted unless the party seeking can prove exceptional circumstances.

In the case of an ordinary judgment creditor whose judgment was obtained in an *in personam* action, the proper procedure to adopt is to obtain a writ of seizure and sale pursuant to Orders 46 and 47 of the Rules of Court 2012. Such a judgment creditor cannot arrest a vessel in satisfaction of the judgment. This is consistent with the definition of 'arrest' under Article 1(2) of the 1952 Brussels Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships which specifically excludes 'seizure of a ship in execution or satisfaction of a judgment'. Such a writ of seizure and sale may be issued by filing the writ in the registry together with the prescribed praecipe. The writ would be executed by the Sheriff of the High Court.

### 2.3. *Foreign judgments and arbitration awards*

A foreign judgment or arbitration award must first be registered before it can be enforced in Malaysia. By virtue of section 24(b) of the Courts of Judicature Act 1964, the admiralty jurisdiction of the High Court of Malaya is similar to that of the Royal Courts of Justice of England under the English Supreme Court Act 1981 (now known as the Senior Courts Act 1981). Accordingly, the Malaysian High Court can make a sale order only in an action *in rem* which has been issued out of that court.

However, a judgment creditor may obtain satisfaction of a judgment by judicial sale of a vessel by first registering the judgment in the High Court of Malaya, thereby making it a judgment of the High Court of Malaya, and thereafter issuing a writ of seizure and sale. The mode of registration depends on whether the judgment is from a reciprocating country listed under the Reciprocal Enforcement of Judgments Act 1958. In the case of a judgment from a reciprocating country, the party may apply under the Reciprocal Enforcement of Judgments Act 1958 and Order 67 of the Rules of Court 2012 to have the judgment registered as a judgment of the High Court. For a judgment from a non-reciprocating country, the party will have to issue an *in personam* writ and, if the defendant enters an appearance, take out a summons under Order 14 of the Rules of Court 2012, which is an

application for summary judgment where the plaintiff will raise issue estoppel, by record by way of the foreign judgment and preclude the defendant from raising a defence. Upon the judgment being registered as a judgment of the High Court of Malaya, execution then lies in the normal fashion.

Where it is an arbitration award, registration could be done in one of two ways. If the award is from a country which is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, then the award may be registered under section 38 of the Arbitration Act 2005. If the award is from a country that is not a party to the Convention, then the award will have to be registered as a judgment of the court of that country and that foreign judgment can thereafter be registered in Malaysia as stated in the preceding paragraph.

#### 2.4. *Mortgage title*

In Malaysia, unless specifically provided for in the relevant deed of covenant, it is not possible to obtain a judicial sale on the basis of a Malaysian-registered mortgage title alone. Section 45 of the Merchant Shipping Ordinance 1952 allows the mortgagee to have the right of foreclosure on the vessel. However, where there is more than one mortgagee, then the subsequent mortgagee may not sell the vessel without the concurrence of every other previous mortgagee, except by order of court. The proper procedure in this jurisdiction is still to issue a writ in rem and obtain a warrant of arrest and thereafter to obtain an order of judicial sale, either *pendente lite* or upon judgment.

#### 2.5. *Possessory lien*

Where the vessel is subject to a possessory lien and is in the hands of the lienholder at the time of the application for judicial sale, a conflict will arise, but this will not prohibit an order for sale of the vessel. The lienholder will be reluctant to give up possession of the vessel, and this conflict will probably be resolved by the Malaysian Courts by means of the procedure laid down in the English case of *Tergeste* [1903] P 26, whereby the lienholder will be ordered to give up possession of the vessel to the Sheriff of the High Court on the basis that the court will place the possessory lienholder in the same position vis-à-vis the other competing claimants as if he/she had continued to enforce his/her rights directly against the vessel.

## MALAYSIA

### 3. CUSTODY AND MAINTENANCE OF THE VESSEL PENDING SALE

#### 3.1. *The Sheriff*

The warrant of arrest is executed by the Sheriff exercising the admiralty jurisdiction of the High Court and upon the vessel being arrested, the safe custody, valuation, sale and release of the vessel are the responsibilities of the Sheriff.

#### 3.2. *The duties of the Sheriff*

The primary duty of the Sheriff is to keep the vessel safe during the period of arrest and to prevent the vessel from departing unlawfully. To this end, the Sheriff may depend on the crew of the vessel if the crew is still on board or, if not, appoint a lay-up crew to deal with the mooring of and watching over the vessel. The vessel is prevented from departing unlawfully by the service of a copy of the warrant of arrest, together with a letter from the High Court directing that the vessel not be released to, first, the Harbour Master's Office (so that no port clearance will be issued), second, the Marine Police, and third, the Customs and Excise Division.

The Sheriff must take all steps necessary to keep the vessel in good order and may direct that the vessel be moved if it is in danger. Any repairs done to the vessel will only be to preserve the property under arrest, and there will be no attempt to increase the value of the vessel by any repair work. Any repair work to increase the value of the vessel will still be the responsibility of the shipowner.

#### 3.3. *The Sheriff's costs*

The arresting party must, before a warrant of arrest will be granted, through his/her solicitors, give an undertaking to indemnify the Sheriff against all expenses incurred by reason of the arrest. It is also necessary, before the warrant is served, to place as a deposit in court for the Sheriff's expenses a sum of money, which currently is MYR 15,000. If the Sheriff has to bear any expenses, these expenses are defrayed by the sum on deposit and, when this is exhausted, the Sheriff will call upon the arresting party to deposit any such further sum as will be stipulated. If the arresting party does advance funds, these are recoverable as Sheriff's expenses, in priority to all other claims, as if the Sheriff were claiming them.

### 3.4. *Insurance*

It is currently not the practice of the Sheriff to take out insurance on the vessel for any incidents which might occur during the period of arrest or lay-up awaiting sale. Nor is it the practice of the court to require the claimants to take out insurance on the vessel. However, should the vessel break free of the moorings and collide with another vessel, then the owner of the other vessel may pursue his/her claim against the vessel, and this may have priority over the arrestor's claim, as the damage lien is a maritime lien that would be given the highest priority and the result will be a diminution of the fund in court. Second, the damage to the vessel would reduce the amount of sale proceeds. Therefore, a prudent solicitor would advise his/her client, the arresting party, to effect port risk insurance to cover this possibility.

## 4. PREPARATIONS FOR SALE

### 4.1. *Reserve price and valuation*

Upon the order for sale being made by court, the party obtaining the sale order would take out a summons for directions under Order 70 Rule 24 of the Rules of Court 2012 for the procedure for the sale to be set out by court. The directions shall be heard by the judge in Chambers. Normally, the entire sale procedure is left to the Sheriff. He/she will appoint a shipbroker, who will act in the interest of the Sheriff, to arrange for the survey of the vessel and to prepare the prospectus which 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 an appraisalment of the vessel.

Due to the specialized market in the sale of certain vessels, for example, the niche market for superyachts, certain judicial sales of vessels require an expert broker to assist the Admiralty Sheriff in obtaining a suitable buyer. In the case of the superyacht *Equanimity*, for example, the broker, an expert in the superyacht market, was roped in to assist the Sheriff pursuant to an Order from the Admiralty High Court of Malaya. The particular set of expertise possessed by the brokers provided the needed assistance to the Admiralty Sheriff by pointing out the unique features of the *Equanimity* to the superyacht market vide brochures, video presentations and live inspections of the yacht, in order to garner potential buyers' interest in the judicial sale. Given the exceptional feature of the superyacht, *Equanimity*, particularly her high valuation, and she being a pleasure craft, it was necessary for the court to draw resources from external parties.

Alternatively, the appraisalment may be conducted by independent professional appraisers. The value of the appraisalment will be kept confidential. A reserve price is normally fixed by the judge hearing the

## MALAYSIA

summons for directions, which will be based upon the valuation, as advised by the appraisers, as to the commercial value of the vessel, and has no relationship to the extent of the claims against the vessel.

The mode of auction will also be fixed at this stage and may be either by sealed bids or by oral bids.

A party applying for a commission for the appraisal and sale of the vessel is to file a praecipe for commission for appraisal and sale in the prescribed form alongside the commission for appraisal and sale in the prescribed form.

In cases of urgency which requires appraisal and the sale of the vessel to be conducted on an expedited basis, the party is to file in the court the relevant applications or motions pursuant to Order 70 Rule 21 and Rule 22 together with a Certificate of Urgency.

Generally, the sale procedure would be through a bidding process conducted under the auspices of the Admiralty Sheriff. There are exceptional circumstances under which a sale can be made directly. In the Singapore High Court in the *'Turtle Bay'* [2013] 4 SLR 615 and the *'Sea Urchin'* [2014] SGHC 24 said that unless 'powerful special features' or 'special circumstances' exist, a judicial sale of a ship must go through the ordinary process of appraisal by the Sheriff, and the advertisement of the sale of the ship by sealed bidding or public auction that is accessible to the general public.

The court in the *'Turtle Bay'* and the *'Sea Urchin'* placed a premium on following the complete and well-established judicial sale procedure in order to preserve all creditors' interests as well as the procedure's legitimacy and integrity. Through this approach, the court is confident that the judicial sale will result in a clear title in exchange for the greatest feasible price in open bidding for all interested parties. A deviation from this approach could indicate that a fair transaction is unlikely. After all, the court would have no way of knowing the ship's fair market value or whether the set amount is the highest achievable. Along with the risk that one claimant is given preferential treatment over the others, judicial sales would lose their credibility and standing. In the premises, the court found that 'powerful special features' or 'special circumstances' are required before it would order a direct judicial sale to a named buyer.

These decisions mean that some creditors, such as mortgagees, will have to work within the confines of an ordinary judicial sale to obtain a judicial sale of the vessel at second-hand prices (and there are ways to do so), unless they can show proof that there are 'powerful special features' or 'special circumstances.' Some examples of special circumstances may include:

- (1) The ship has onboard a cargo of a nature that if the ship is not sold swiftly, the cargo may adversely impact the condition and seaworthiness of the ship or may damage the ship, affecting the sale price.

- (2) There is some evidence that a prompt sale of the ship will afford the buyer to retain a long term charter of the ship and thus secure the jobs of the crew and shore-based personnel of the ship.

#### 4.2. *Advertisement*

Thereafter, an advertisement will be drawn up by the Sheriff's brokers and placed in *Lloyd's List* and *The Shipping Times* for the international market and in the 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 to inspect the vessel if necessary. This 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 himself/herself and the plaintiff's solicitors.

#### 4.3. *Notification to creditors*

The advertisement will specify the date of the auction and the reserve price. This will be the only notification to the parties and thereafter it is left to them to protect their own interests.

#### 4.4. *Inspection of the vessel*

Inspection of the vessel is possible. It may be that the advertisement will stipulate a date and time when the vessel may be inspected. If a prospective purchaser is not able to attend at that time, an inspection may be arranged by making the necessary appointment with the Sheriff's broker.

#### 4.5. *Preconditions to bidding*

Depending upon the terms of the order for directions, it may be necessary for a prospective purchaser to lodge monies in advance in order to be permitted to bid for the purchase of the vessel. Normally a sum of 10% of the reserve price must be lodged with the Sheriff.

Where no sum need to be lodged with the Sheriff in order to bid, then a sum equivalent to 10% of the price must be paid to the Sheriff immediately by the successful bidder. The payment for the remaining 90%, and for any unused bunkers must be made within one week thereafter.

MALAYSIA

4.6. *Terms of the contract of sale*

The contractual terms of the sale will be stipulated by the Sheriff and notice of the terms will be given in the proclamation of sale, which is also advertised. The normal terms are:

EXAMPLE:

*The Admiralty Sheriff's Conditions of Sale of the ship or vessel 'Pelagus Satu'*

1. In these conditions the expression 'the vessel' means the Vessel agreed to be sold with everything onboard belonging to her but excluding any equipment on hire (*see* clause 13).
2. The Buyer shall take and pay for the unused bunker fuel and lubricants remaining on board her (if any) in accordance with clauses 5, 6 and 7 below.

*Basis of Sale*

3. The Buyer undertakes that in making his/her offer he/she has not relied upon any information which he/she may have been given by or on behalf of the Admiralty Sheriff and that he/she has relied solely upon his/her own inquiries and/or inspection.
4. The Vessel is sold as lying at the date of the sale with all her faults and all errors of description whatever. The Buyer shall not be entitled to reject the Vessel nor to any damages or diminution in price, by reason of any fault of or in the Vessel or any error of description whatever.
5. Payment shall be made by the Buyer in cash in Malaysian Ringgit to the Admiralty Sheriff or to Caleb Brett (M) Sdn. Bhd., his/her brokers, as follows:
  - (a) immediately upon the acceptance of the offer, 10% of the price;
  - (b) within one week of the acceptance of the offer:
    - (i) the balance of 90% of the price and
    - (ii) a sum in respect of bunker fuel and lubricants (if any) calculated in accordance with clause 6.
6. The sum (if any) payable in respect of unused bunker fuel and lubricating oil shall be calculated by reference to:
  - (a) the quantities (if any) remaining on board unused at noon on the day one week after the acceptance of the offer or on the day of the final payment whichever shall be the earlier, and

- (b) the current market prices ruling in the port where the Vessel is lying. The quantities and prices shall be determined by the Admiralty Sheriff or his/her agent.

*Delivery*

- 7. On completion of the payments referred to in clause 5, the Admiralty Sheriff shall give and the Buyer shall take immediate delivery of the Vessel (together with her bunker fuel and lubricating oil).
- 8. If the Buyer requires delivery of the Vessel to an Agent, that Agent must produce the Buyer's written authority to that effect, signed by the Buyer and addressed to the Admiralty Sheriff.
- 9. On delivery the Buyer shall have the Admiralty Sheriff's Bill of Sale for the Vessel, together with any documents belonging to the Vessel which are in the Admiralty Sheriff's possession.

*Risk, etc.*

- 10. The Vessel shall be at the Buyer's risk from the time when the payments referred to in clause 5(b) are made or become due, whichever is earlier, and from that time all expenses relating to the Vessel, including dock and other dues, shall be for the Buyer's account.
- 11. If the Vessel is lost, destroyed or damaged in any way whatever before the risk in the Vessel has passed to the Buyer under clause 10, the Admiralty Sheriff may rescind the contract of sale by notice in writing to the Buyer and repaying to the Buyer, without interest, costs or compensation, any sums the Buyer has paid under clause 5.

*Default of Buyer*

- 12. If the Buyer is in default in making any of the payments referred to in clause 5, or is in any other respect whatever in breach of any of these conditions, the Admiralty Sheriff may exercise all or any of the following rights:
  - (a) by notice in writing rescind the contract and/or sale;
  - (b) if the Buyer has made the payment referred to in clause 5(a) declare it to be forfeited to him;
  - (c) resell the Vessel by public or private sale;
  - (d) recover from the Buyer all losses, damages, costs and expenses caused by the Buyer's default, including, in the event of such a resale, any loss suffered as a result thereof;



MALAYSIA

- (e) if the Buyer has made any further payments besides that referred to in clause 5(a), retain in satisfaction or part satisfaction of the right of recovery given by sub-clause (d) above the whole or part of such further payments but without prejudice to any other means of satisfying such a right.
13. If any equipment of any kind on board the Vessel is on hire, it shall not be included in the sale, but the Buyer shall make his/her own arrangements in respect of such equipment with its Owners, and if he/she fails to do so shall indemnify the Admiralty Sheriff in respect of any claims arising from such failure.

*Tender of Sale and Purchase*

WE,  
Of [address]  
(if the above address is not within Malaysia then the following information must be given) whose agent(s) in Malaysia is/are of [address]  
hereby offer to purchase at the price of Malaysian Ringgit [price] say the MV 'Pelagus Satu' now lying at Teluk Intan and at present under the arrest of the High Court of Ipoh. This offer is to purchase the said MV 'Pelagus Satu' on the terms of the Admiralty Sheriff's Conditions of Sale printed herein and shall remain open for three business days after the date appointed for receiving offers. We recognise that the Admiralty Sheriff is not bound to accept any offer.

Signed  
Dated  
Witnessed

*4.7. Determination of date of auction*

The actual date of the auction is determined by the judge during the summons for directions stage.

5. THE SALE PROCEDURE

*5.1. Bidding*

Bidding in the sale can be done in a number of ways, and the exact mode is normally determined by the court. So far, the auction has been done by sealed bids, which then have to be in the hands of the party nominated in the

proclamation of sale, which is normally the Sheriff's shipbrokers, before 12.00 p.m. on a nominated date, which is advertised in the proclamation. If the bidding is done orally, then a time and the place of auction are specified in the proclamation of sale.

### 5.2. *Reserve price*

The reserve price for the vessel is decided by the judge, having regard to the valuation report of the appraisers, which is linked to the commercial value of the vessel rather than the extent of claims. The proclamation of sale will have the reserve price on it as notice to prospective buyers and will also contain a statement that the auctioneer is entitled not to accept the highest bid. If the reserve price is not met, then the sale will be aborted and the matter remitted to the judge for further directions as to whether the reserve should be brought down. In such cases, the length of the resultant delay would depend on various factors, such as the time taken to get a fresh appraisal, to have the matter fixed before the judge, and for a fresh auction date to be fixed. All this would take approximately six to nine months.

### 5.3. *Set-off of judgment debt*

It is permissible for a judgment creditor to purchase the vessel and to set off the amount of the judgment against the purchase price. Of course this would very much depend on the priority of the judgment creditor, and the court will impose conditions before allowing this. In *United States of America v. Shearn Delamore & Co and Drew & Napier & Ors, Jade Phoenix and Golden Phoenix* [2007] 8 MLJ 654 (also refer to section 2.2 Sale of Pendente Lite) upon default by the Phoenix Companies in the performance of their obligations to the plaintiff, they sought to arrest and foreclose on the vessels. Consequently, both the vessels, *Jade Phoenix* and *Golden Phoenix* were seized and sold through a public auction pursuant to an order of Judicial Sale on or about 26 January 1990. The sales were conducted by the Sheriff. The Plaintiffs themselves were the sole bidders, and the vessel was sold at a credit bid of USD 25.1 million.

### 5.4. *Currency*

Normally, the sale takes place in local currency. If the party at whose instance the sale is ordered requires the funds in a foreign currency, such an order should be sought at the 'summons for directions' stage.

## MALAYSIA

### 6. POST-SALE ARRANGEMENTS

#### 6.1. *Legal title*

Upon the sale being completed and the purchase price being paid in full, the buyer will receive a bill of sale of the vessel from the person named in the order of sale handed down by the court who will have, pursuant to section 39 of the Merchant Shipping Ordinance 1952, the power to give good title as if he/she were the registered owner of the vessel. Where the vessel is a Malaysian-registered vessel, and upon transmission of the ownership of the vessel to someone who is not qualified to own a Malaysian vessel, the owner must within fourteen days deliver up the certificate of registration, and the Registrar will cause an entry to be made in the Register of this fact. Thereafter, the vessel's registration will be regarded as closed, except in relation to any unsatisfied mortgages.

To have the vessel registered in Malaysia, under section 21 of the Merchant Shipping Ordinance, the new owner will have to provide to the registrar a builder's certificate and a bill of sale if there has been a sale, or just a bill of sale under section 21(2) if there is no builder's certificate. Therefore, no deletion certificate is required.

#### 6.2. *Appeal*

The sale itself cannot be set aside for any reason – least of all that the price was too low.

#### 6.3. *The fund in court*

The fund that is produced from the sale is paid into the central treasury funds and is always converted into local currency, as the court treasury does not operate foreign currency accounts. The account also does not earn interest and therefore no tax liability accrues. When payment to judgment holders is eventually made and funds are to be taken out of the jurisdiction, exchange-control regulations are imposed by the central bank, which require approval of certain foreign payments by Bank Negara (the central bank). Currently, approval is required for sums exceeding MYR 50,000.

In exceptional cases, such as the judicial sale of the superyacht *Equanimity* (unreported), the Admiralty Court ordered the sale proceeds to be kept in a Foreign Currency Interest Bearing Fixed Deposit Account opened between an independent third party firm of solicitors and the Sheriff of the High Court of Malaya in order to prevent foreign exchange losses.

#### 6.4. *Determination of priorities*

After the fund in court has been constituted, any party who has obtained a judgment can, pursuant to Order 70 Rule 21 of the Rules of Court 2012, apply by way of notice of application for an order determining the priority against the proceeds of sale. The order of sale may also provide that priorities shall not be determined within ninety days, or any other such period as the court may fix, from the date the proceeds of sale are paid into court and that within seven days from the date of the payment into court, the Sheriff shall take out a notice in the Gazette, and any other publication that the court may specify, stating that the vessel has been sold and that the sale proceeds have been paid into court and that priorities shall not be determined within ninety days, or any other such period as the court may fix, and that whoever must proceed to judgment must do so within the period. It would be open for any party who has not proceeded to judgment to apply under Order 70 Rule 21(2)(b) to extend the period.

### 7. NATIONAL AND INTERNATIONAL RECOGNITION OF JUDICIAL SALES

#### 7.1. *Evidence of title*

Upon the sale being completed, the Sheriff will provide the buyer with a bill of sale, which is the only evidence of title supplied, together with such other documentation of the vessel that is within the possession of the Sheriff. In Malaysia, the buyer receives title to the vessel free of all claims, liens and encumbrances arising up to the date of the sale. As in English law, the legal effects of the sale are derived from English common law, not from any statute, and Malaysia is not a party to any international convention on the recognition of judicial sales of vessels.

#### 7.2. *Recognition of Malaysian judicial sales*

Even though Malaysia is not a party to any international convention on the reciprocal recognition of foreign judicial sales, a Malaysian judicial sale should be recognized in other jurisdictions on the basis of international comity and the law of the high seas.

#### 7.3. *Malaysia's recognition of other judicial sales*

Similarly, Malaysia would, on the basis of international comity and the law of the high seas, recognize the judicial sale of a Malaysian-registered vessel or of a foreign-registered vessel.

## MALAYSIA

### 7.4. *Documentation required for registration*

In terms of documentation, a buyer of a vessel which has been sold by a Malaysian Court will receive only a bill of sale, which is the evidence of transfer of title to him. Under section 21 of the Merchant Shipping Act 1952, in order for a person to register a vessel, he/she has to produce a bill of sale and the builder's certificate if it is in his/her possession, or a bill of sale with a declaration that he/she does not have the builder's certificate. The documentation required for registration in other jurisdictions would depend on the requirements of the local law of the other jurisdictions.

## *B. Priorities*

### 8. PRIORITIES: SOURCES OF LAW

#### 8.1. *General*

In Malaysia, with the exception of the priority of Malaysian-registered mortgages, which is set out in section 43 of the Merchant Shipping Ordinance 1952, there are no Malaysian statutory provisions as to priorities. Therefore, the court, in determining the order of priorities applies the *lex fori*.

As a general rule, the prima facie ranking of claims in order of priority is as follows:

- (a) statutory claimants, namely harbour and port authorities that are empowered by the Malaysian port statute to detain and sell ships for unpaid amounts;
- (b) Admiralty Court's commission upon judicial sale;
- (c) Admiralty Sheriff's expenses and costs;
- (d) costs of the producer of the fund (generally the legal costs of the arresting party);
- (e) maritime liens (save for possessory liens which accrue before the maritime liens);
- (f) possessory liens;
- (g) mortgages; and
- (h) statutory liens.

In addition, under the Malaysian Courts of Judicature Act 1964, the admiralty jurisdiction and authority of the High Court of Malaya are the same as the High Court of England under the Senior Courts Act 1981. Therefore, the Courts of Malaysia would apply the English Courts' treatment of the question of priority of claims.

### 8.2. *International conventions*

Malaysia is not party to any international convention on the treatment of priorities of claims.

## 9. CLAIMS FALLING OUTSIDE THE PRIORITIES SYSTEM

Four claims are recognized by Malaysian law that fall outside the priorities system, either because they are not included within section 20(2) of the English Senior Courts Act 1981 or because the claimant is allowed by law to pursue his/her claim in some manner other than a writ in rem. These four claims are dealt with below.

### 9.1. *The possessory lienholder*

Under Malaysian admiralty law, a party who carries out services for a vessel has a right to retain possession of the vessel until payment has been received. Where possession is retained, as stated earlier, a conflict will arise as to the possession of the vessel if it is simultaneously ordered to be sold by the court. This conflict will probably be resolved by the Malaysian Courts by means of the procedure laid down in the English case of *Tergeste* [1903] P 26, whereby the lienholder will be ordered to give up possession of the vessel to the Sheriff of the High Court on the basis that the court will place the possessory lienholder in the same position vis-à-vis the other competing claimants as if he/she had continued to enforce his/her rights directly against the vessel. Therefore, in such an instance, the possessory lien will rank below only to the Sheriff's expenses and the maritime liens which had accrued prior to the date of the possessory lien.

### 9.2. *Statutory rights of port and other authorities*

There are various statutory provisions which allow the sale of the vessel without a court order.

First, sections 378, 390 and 381 of the Merchant Shipping Ordinance allow the Receiver of Wrecks to sell any wreck which in his/her opinion is unlikely to be able to pay for the warehousing or, if the wreck is unclaimed within a year of discovery, it may be sold and, if a danger to navigation, may be sold immediately.

Second, certain contraventions of the Merchant Shipping Ordinance, in respect of markings on the vessel, etc., may make the vessel liable to forfeiture and sale by the Government. These sales do not require the approval of a court.

## MALAYSIA

There are no Malaysian case authorities on how these expenses rank as against the other claims, but it is very likely that the Malaysian Courts would adopt the English authorities and hold that these statutory rights should take priority over all other claims.

### 9.3. *Tonnage and registration charges*

As in English admiralty law, unpaid tonnage and registration charges levied by the flag state of a vessel prior to the sale do not qualify as a maritime claim and therefore cannot be enforced in rem. Accordingly, such a claim falls outside the priorities regime. As to the Malaysian-registered vessel, if the vessel is to be reregistered in Malaysia by the purchaser, it is very likely that the Registry would take a policy decision and insist that the previous charges be paid before the new registration is effected.

### 9.4. *Outstanding classification society charges*

Outstanding classification society charges are not a claim in rem and accordingly are not considered as a priority claim. Where the classification society refuses to allow the prospective bidders to inspect the records pertaining to the sale, then the Malaysian Courts will adopt the practice of the English Courts in *'Parita'* [1964] 1 Lloyd's Rep 199, and allow the charges, after being paid by the Sheriff, to be part of the Sheriff's expenses.

## 10. PRIOR CHARGES ON GROSS SALE PROCEEDS

The charges that would be paid out of the fund, before any question of the priorities arises, are the expenses of the Sheriff and the recoverable costs of the arresting party.

### 10.1. *Sheriff's expenses*

In Malaysia, prior to any arrest, the arresting party must through his/her solicitors give an undertaking indemnifying the Sheriff against the expenses to be incurred in effecting the arrest: keeping the vessel under arrest and, if applicable, the sale of the vessel. In line with this undertaking, the arresting party must deposit as security for the expenses a sum of money (currently MYR 15,000). As soon as this sum is exhausted, the Sheriff will call upon the undertaking and request such further sums as are required.

These sums are recoverable from the fund in court and are considered to be part of the Sheriff's expenses. As soon as the sale has been effected and the

fund has been constituted, the Sheriff will apply for payment out. This sum includes: the costs as stated above; the expenses for the sale which comprises of the court fees; the brokerage fee; the surveyor's fee; costs of documentation, including advertising fees; any sums paid, for example, to discharge classification and registration fees prior to sale; and any sums that were paid pursuant to any undertaking given to a possessory lienholder.

### *10.2. Recoverable costs of proceedings*

The other sum that would count as a prior charge on the fund are the costs to be paid in the proceedings. The general principle applied in an award of costs is that costs follow the event and the successful party is normally awarded costs. These costs are normally taxed by the Registrar, unless otherwise agreed upon by the parties. Normally, the effect of an order is that the party will not recover all his/her costs, but will recover a substantial portion of them upon taxation. Where the proceedings are in rem, the party entitled to costs will recover them from the fund in court. These costs form part of the judgment and are recoverable together with the judgment which is subject to the system of priorities.

However, as in England, the costs to be recovered in respect of the arrest, custody and sale of the vessel are treated differently. These costs are treated in priority as the court proceeds, on the reasoning that it was in the interest of all claimants that the vessel be arrested, kept safe and eventually sold to produce the fund in court. These costs therefore attract a higher priority and are paid in advance. Where there is only one claimant when the vessel is arrested, then the plaintiff must prove his/her claim on the merits and obtain a judgment before he/she can claim the expenses of the arrest. If there are more than one claimants, and the vessel is sold in a subsequent action, then the first plaintiff may apply to be paid the costs of his/her arrest, which the court will normally permit. It may be that the first arresting party will discontinue the arrest once a higher-priority claim (e.g., the claim of the mortgagee) appears. In such a case, the first arresting party may take the necessary steps to have his/her costs of the arrest paid in priority out of the fund upon the sale.

## 11. PRECONDITIONS TO PARTICIPATION IN THE PRIORITIES CONTEST

### *11.1. Judgment in rem*

Any party who has obtained an in rem judgment can apply for priorities to be determined and payment out to be effected, to realize his/her judgment. Such an application must be served upon every other judgment holder.



## MALAYSIA

Normally, the priority battle is conducted between judgment holders in rem only. In certain circumstances, the court may allow payment out to a claimant who has not obtained a judgment, where the court is satisfied that no interested party suffers any prejudice and they have consented. These applications are treated with intensive scrutiny.

### 11.2. *Foreign judgment or arbitration award*

Where the claimant has obtained a judgment or an arbitration award in a foreign jurisdiction, or even in Malaysia, in personam, then unless the claimant has also issued an in rem action and pursued it to judgment, he/she cannot take part in the priorities battle. He/she must fall within sections 20 and 21 of the Senior Courts Act 1981 to be able to issue an in rem action in Malaysia. As a cause of action in rem is different from one in personam, the fact that the in personam action has been decided upon is no bar to the subsequent commencement of an admiralty action against the *res*.

Where the claimant has obtained an in rem judgment in a foreign court, the Malaysian Court, following the English practice as elucidated in *'The Despina GK'* [1982] 2 Lloyd's Rep 555, may allow the claimant to commence another in rem action if this is necessary in order to enforce the judgment.

### 11.3. *Cut-off date for priorities*

The order of sale will stipulate that the priorities will not be determined within ninety days, or any other such period as the court may fix, from the date the proceeds of sale are paid into court, and that within seven days from the date of the payment into court, the Sheriff will take out a notice in the Gazette, and any other publication that the court may specify, stating that: the vessel has been sold; the sale proceeds have been paid into court; priorities shall not be determined within ninety days or any other such period as the court may fix; and whoever must proceed to judgment must do so within the period. It would be open for any party who has not proceeded to judgment to apply under Order 70 Rule 21(2)(b) to extend the period.

## 12. FIRST-PRIORITY CLAIMS

### 12.1. *General*

As stated earlier, there is no statutory framework for the determination of priorities. In Malaysia, under section 24(b) of the Courts of Judicature Act 1964, the admiralty jurisdiction of the High Court of Malaya is the same as that of the English Courts under the Senior Courts Act 1981. The English

system of priorities has been developed by case law. The underlying principle in determining priorities is that of an exercise of discretion based on principles of equity and public policy. Therefore, it is difficult to pinpoint exactly when one category of lien would outweigh another. As regards foreign claims, as stated earlier in section 11.2, to be able to take part in the distribution of the fund, a claimant must have issued a writ in rem and pursued it to judgment. As to how the claim is to be treated, and in what priority the court is to apply the fund with regard to the claim, the Privy Council's decision in respect of an appeal from the Court of Appeal in Singapore, *The Halcyon Isle* [1980] 2 MLJ 217, clearly stipulates that the *lex fori* determines this.

The first-priority claims, after the Sheriff's expenses and the recoverable costs of the arresting party in respect of the costs of the arrest, are maritime liens. Maritime liens have been defined as 'a claim or privilege upon a thing to be carried into legal effect'.

The various categories enumerated below rank as maritime liens only when pursued by the claimant against the vessel in respect of which the claim arose. Where the claimant arrests a sister ship, then the claim falls into the maritime claim category, which is not treated as a maritime lien, and this has important consequences which will be discussed below.

In Malaysia, following English admiralty practice, the maritime liens that are recognized are: the damage lien; salvage; crew wages and emoluments; master's disbursements and bottomry and respondentia bonds.

### 12.2. *Damage lien*

The damage lien arises out of section 20(2)(e) of the Senior Courts Act 1981 and refers to damage done by a ship. These include: claims by another vessel owner for collision damage; claims by owners of fixed or floating objects for contact damage; claims by another vessel for death or personal injury to passengers, damage and loss to baggage or cargo carried aboard the other vessel and even wash damage caused by the vessel.

The public policy element of encouraging safe navigation gives this lien the highest priority, and it is only subordinated to a lien arising subsequently which preserves the *res*. A damage lien therefore has priority over all prior liens, but the authorities of *The Elin* [1882] 8 P.D. 39, *The Aline* [1839] 1 W. Rob. 111 and *The Chimera* [1852] 11 L.T. 113 show that the damage lien is subject to a subsequent salvage lien, a bottomry lien so long as it preserves the *res*, and a wages lien. As between other damage liens, it ranks *pari passu*.

## MALAYSIA

### 12.3. *Salvage lien*

The salvage lien is for salvage services and, as the service would have preserved the *res* to which the other liens have attached, it follows logically that the salvage lien has priority over all other prior claims. As to any subsequent liens, it is subject to only a later damage lien and any other lien that preserves the *res*. As between other salvage liens, the later takes priority over the earlier, because the later service will have preserved the *res*.

### 12.4. *Seamen's and master's wages*

The public policy requirement of ensuring payment of seamen's and master's wages gives this lien the third highest priority. This claim is inferior to a damage or salvage lien which arose subsequently to the earning of the wages, unless the wages can be seen to have been earned preserving the *res*. The priority as between the master and seamen, as seen in the *Royal Wells* [1984] 2 Lloyd's Rep 255, is that the master and the seamen stand equally, and their claims rank *pari passu*.

### 12.5. *Master's disbursements*

This category of maritime lien is encountered very rarely these days. A master has a lien for payments made by him/her in respect of necessities required immediately for the vessel. In *The Mons* [1932] P 109, the court held that the disbursement lien has the same priority as the master's lien for wages and that, among themselves, disbursement liens rank *pari passu*.

### 12.6. *Bottomry and Respondentia Bonds*

This category of maritime lien ranks lowest in the ladder of priority between different types of maritime lien. In *St George* [1926] P 217 at 229, in the judge's opinion that bottomry and respondentia bonds are uncommon and today both are obsolete in practice. However, the actions of bottomry and respondentia are still part of the jurisdiction in rem and in personam of the Admiralty Court under Senior Courts Act 1981 (UK) section 20(2)(r) which is also recognized in Malaysia.

JOSEPH/VAN HUIZEN

### 13. SECOND-PRIORITY CLAIMS

#### 13.1. *Mortgages*

In Malaysia, after the maritime lien claims enumerated above, mortgages themselves rank in priority to all other claims. In Malaysia, section 41 of the Merchant Shipping Ordinance 1952 provides for the registration of mortgages of a Malaysian-registered vessel. Where the vessel is unregistered, then the best form of mortgage that the mortgagee can obtain is a legal mortgage. Only the mortgage of a Malaysian-registered ship may be registered here. In respect of two or more registered mortgages, section 43 makes it clear that the mortgage registered earlier in time ranks in priority over other registered mortgages. Malaysian law also recognizes foreign-registered mortgages. A Malaysian-registered mortgage will rank in priority to other foreign and Malaysian unregistered mortgages.

If the vessel was under arrest by a claimant in respect of a non-preferred claim when the mortgage was created, then, following the decision in *The Rana* [1921] 8 Lloyd's Rep 369, the mortgage ranks *pari passu* with the non-preferred claims.

As to the priority of foreign-registered mortgages, this is determined in accordance with the law of the relevant foreign jurisdiction.

### 14. THIRD-PRIORITY CLAIMS

#### 14.1. *Judgments in rem*

In Malaysia, the next category of claims is all other maritime claims referred to in sections 20 and 21 of the Senior Courts Act 1981 which do not qualify as maritime liens or mortgages. These claims include: cargo damage and loss; claims for bunkers and other necessities; ship repairs; and those claims which would have ranked as maritime liens but do not, by reason of the claimant pursuing his/her claim against a sister ship rather than the ship in connection with which the claim arose. All these claims rank *pari passu*. Where the fund is insufficient to pay both of these and the non-preferred claims, the court will not take heed of the non-preferred claims, but will apply the fund pro rata among the maritime claimants only.

### 15. NON-PREFERRED CLAIMS

#### 15.1. *Judgments in personam*

Where, after payment out of all prior claims, there are funds still in court, these funds are normally returned to the shipowner upon application to

## MALAYSIA

court by the shipowner. However, an in personam judgment creditor may apply to obtain this fund in satisfaction of his/her judgment, by way of a charging order.

JOSEPH/VAN HUIZEN