
THE SHIPPING LAW REVIEW

SECOND EDITION

EDITORS

JAMES GOSLING AND TESSA HUZARSKI

LAW BUSINESS RESEARCH

THE SHIPPING LAW REVIEW

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Editors

JAMES GOSLING AND TESSA HUZARSKI

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EDITORS' PREFACE

This book aims to provide those involved in handling wet and dry shipping disputes in multiple jurisdictions with an overview of the key issues relevant to each jurisdiction. We have sought contributions on the law of leading maritime nations, including both major flag states and the countries in which most shipping companies are located. We also include chapters on the law of the major shipbuilding centres and a range of other jurisdictions.

Building on our first edition last year, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry internationally: competition and regulatory law, marine insurance, ocean logistics, piracy, ports and terminals, shipbuilding and environmental issues.

Each jurisdictional chapter then gives an overview of the procedures for handling shipping disputes in each country, including arbitration, court litigation and any alternative dispute resolution mechanisms. Jurisdiction, enforcement and limitation periods are all covered. Contributors have summarised the key provisions of local law in relation to shipbuilding contracts, contracts of carriage and cargo claims. We have also asked each author to address limitation of liability, including which parties can limit, which claims are subject to limitation and the circumstances in which the limits can be broken. Ship arrest procedure, which ships may be arrested, any security or counter-security requirements and the potential for wrongful arrest claims are also included.

The authors review the vessel safety regime in force in each country, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, along with the local rules in respect of collisions, wreck removal, salvage and recycling.

Following the entry into force of the 2002 Protocol to the 1974 Athens Convention last year and the Maritime Labour Convention in 2013, passenger and seafarer rights are also examined and contributors set out the current position in each jurisdiction. The authors have then looked forward and have commented on what they believe are likely

to be the most important forthcoming developments in their jurisdictions over the coming year.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations estimating that commercial shipping represents around US\$380 billion in terms of global freight rates, amounting to around 5 per cent of global trade overall. More than 90 per cent of the world's freight is still transported by sea. The law of shipping remains as interesting as the sector itself and the contributions to this book reflect that.

This past year, a key issue within the shipping industry has been environmental regulation, which is becoming ever more stringent. From January 2015, the limit for sulphur content within emissions control areas has fallen from 1 per cent to 0.1 per cent. Tier II limits on nitrogen oxides emissions have been in place globally since 2011. Tier III, which represents a significantly more stringent regime than Tier II limits, will be implemented in emissions control areas from 2016. Further, also from 2016, the United States Clean Air Act will introduce a target of an 80 per cent reduction in nitrogen oxides emissions from vessels by 2030.

The International Maritime Organisation (IMO) has so far not introduced similar limits on the emission of greenhouse gases, such as carbon dioxide (CO₂), although it is generally perceived that the IMO is in the future likely to further regulate global CO₂ emissions from vessels. Outside of the IMO, the EU and individual countries are focusing on greenhouse gas-reduction policies. In particular, the European Commission's current proposal is that, from 2018, vessels calling at ports in the EU should be expected to monitor, report and verify CO₂ emissions. The strategy is intended to evolve into CO₂ reduction targets and market-based measures in the longer term, in line with the EU's approach to land-based greenhouse gas emissions.

Another challenge facing the shipping industry relates to the handling of ever-larger casualties. The most recent high-profile container ship casualties, such as the *MSC Napoli* or the *Rena*, involved relatively small vessels with a maximum capacity of up to 4,688 containers; however, the latest mega-containerships can carry up to 15,000 containers. It is likely that at some stage there will be a casualty involving one of these new larger vessels and this may prove a major test for the industry. It has been suggested that the current salvage industry may find it difficult to deal with the scale of any wreckage. The regulatory environment is becoming increasingly stringent, with far stricter controls on both clean-up and wreck removal, which will also make handling any mega-container ship casualty more challenging. The London underwriting community has responded to concerns about the general average implications by evolving a new insurance product, which, it is suggested, could replace the traditional approach to general average for large container ships. It remains to be seen whether this will be accepted by the market.

Piracy remains a considerable issue for the shipping industry worldwide. There has been a decline in the number of incidents off Somalia since the peak in 2010/11, but an increase in West Africa and (to an extent) elsewhere. Although the use of armed guards and increased naval policing in recent years have undoubtedly contributed to the decline, challenges remain and the shipping industry must continue to be alive to the threat.

We would like to thank all the contributors for their assistance with producing this second edition of *The Shipping Law Review*. We hope that this volume will provide a useful source of information for those in the industry handling cross-jurisdictional shipping disputes.

James Gosling and Tessa Huzarski
Holman Fenwick Willan LLP
London
June 2015

Chapter 28

MALAYSIA

Jeremy M Joseph¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The operating landscape in 2015 will be challenging due to global economic uncertainties, battered crude oil prices and the weakening of the ringgit, which will ultimately increase the cost of importing and exporting of goods. On 1 April 2015, the Malaysian government introduced a 6 per cent goods and services tax (GST) and alongside a cut in fuel subsidies, this will reduce domestic spending. As for the container sector, which deals mainly with consumer goods, freight rates continue to be on a downwards trend as capacity continues to exceed demand, and the current supply–demand gap will likely remain unchanged, at least in 2015. The tanker market in general, on the other hand, has been enjoying one of its best periods.

Contributing factors such as massive drop in Brent crude oil, which was at US\$110 a barrel compared with US\$57 at the time of writing, has stimulated a lot of activity such as stockpiling of low-priced crude, particularly in China where imports in 2014 were reported to have increased by 10 per cent. Local maritime players are confident and foresee that demand for small to medium-sized vessels will increase. Under the Malaysian Economic Transformation Programme, Petronas (the Malaysian national oil company) is responsible for finding deep-sea oil wells and marginal oil fields within the Malaysian waters, which calls for more complex medium-sized ships, which local shipbuilders are capable of manufacturing nationwide.

The local shipyard sector, however, which is heavily dependent on energy-related projects, is facing a difficult year ahead as oil companies reduce offshore exploration and production activities due to the slump in global crude oil prices. If this situation persists, it will certainly affect the number of new builds and force local shipyards to operate at

¹ Jeremy M Joseph is the principal partner at Joseph & Partners.

a lower margin to remain competitive. The anticipated value of investments for 2015 is discouraging.

This is because the shipbuilding and ship repair sector has been removed from the scope of the Malaysian Promotion of Investment Act since 2011. The Act enabled investors to enjoy 'pioneer' status privileges and other government perks. But not all prospects are gloomy, with China's introduction of the 21st Century Maritime Silk Road (MSR) initiative, which is backed by a US\$40 billion development fund, Malaysia and China will establish series of cooperative projects in the future which includes high-speed railway link, industrial parks and ports. Soon after China identified Malaysia's Malacca state as part of its 21st Century Maritime Silk Road economic belt, an international shipping port is currently being planned for the state of Malacca. It has also been suggested that cruise liners will ferry tourists from China directly to Malacca through the MSR maritime route. Great opportunity awaits Malacca. However, the slowdown in China, one of Malaysia's key trading partners, will restrain export demand and this will certainly result in slower export growth in 2015.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Much of the Malaysian legal framework is inherited from the English legal system. The laws of the United Kingdom were adopted and either turned into local legislation or simply applied as case law. The Malaysia maritime legislative framework is an amalgamation of local legislation, international treaties and conventions. The Malaysian courts have applied international treaties to which Malaysia is a party provided that the treaty concerned has been incorporated into Malaysian law by means of a parliamentary statute.

The Malaysian courts have applied relevant rules of customary international law but only through the medium of English common law.

Malaysia has ratified various international conventions adopted by the IMO:

- a* the Load Lines Convention;
- b* the Convention on the International Maritime Organization 1948;
- c* the Colregs, as amended;
- d* SOLAS, as amended, and the 1978 SOLAS Protocol;
- e* Tonnage Convention;
- f* the INMARSAT Convention, as amended;
- g* the STCW Convention, as amended.
- h* MARPOL 73/78, Annexes I to VI;
- i* the OPRC Convention;
- j* Amendments to the Convention of the International Maritime Organization (Institutionalization of the Facilitation Committee);
- k* the CLC Convention;
- l* the Oil Pollution Fund Convention;
- m* the Bunker Convention;
- n* the LLMC Convention 1976 as amended by the 1996 Protocol;
- o* the Anti-Fouling Convention; and
- p* the Ballast Convention (yet to enter into force).

III FORUM AND JURISDICTION

i Courts

The Admiralty Court in Kuala Lumpur hears maritime-related cases. It is, however, the prerogative of the claimant to file in any other relevant state court but parties are encouraged to use the Admiralty Court.

The limitation period to bring a cause of action will depend on what has been stipulated in the contract or any specific statute. Should no such provision be stipulated, the general limitation period of six years will apply under Section 6 of the Limitation Act 1953 for contract and tort claims.

ii Arbitration and ADR

Malaysia has no procedure specific to maritime arbitration; however, the Fast-Track Arbitration Rules (revised 2013) are suitable for commercial claims, including maritime claims. Further, the Kuala Lumpur Regional Arbitration Centre (KLRCA) is fast becoming a centre for maritime arbitration disputes. The procedure for arbitration is contained in the applicable arbitration rules on procedure and also in the Arbitration Act 2005.

The Act does not contain any provision on limitation period, but Section 30(1) of the Malaysian Limitation Act 1953 provides that the Limitation Act and any other written law relating to the limitation of actions apply to arbitration; however, the Limitation Act only applies in West Malaysia. According to Section 6(1) of the Limitation Act, the general length of the limitation period for contract and tort and certain other actions is six years from the date on which the cause of action accrued. Sabah has its own Limitation Ordinance (Chapter 72) and Sarawak, the Limitation Ordinance (Chapter 49). They differ from the Limitation Act 1953 in that they provide detailed schedules of the periods of limitation applicable to various different forms and causes of action, with commencement dates stated for each action.

iii Enforcement of foreign judgment and arbitral awards

Certain foreign judgments are enforceable in Malaysia by virtue of the Reciprocal Enforcement of Judgments Act 1958 (REJA). However, before a foreign judgment can be enforced, it has to be registered. The registration of foreign judgments is only possible if the judgment was given by a Superior Court from a country listed in the First Schedule of the REJA.²

Malaysia is a party to the New York Convention. The two features under the New York Convention³ that spell out the conditions for enforcement, reciprocity and the commercial nature of the dispute are absent under the 2005 Act. Therefore, foreign arbitral awards can be enforced in Malaysia regardless of whether reciprocity is accorded to Malaysian awards in another state.

2 Countries listed in the First Schedule include the United Kingdom, Singapore, India, Hong Kong and New Zealand.

3 Article 1(3).

An application in writing is made to the High Court with an authenticated original award or a duly certified copy of the award and the original arbitration agreement or a certified copy of it. Once approved, the foreign arbitration award is recognised as binding and enforced by an entry as a judgment.

If a claimant, in breach of a judicial clause, institutes proceedings outside Malaysia, those affected may apply for a stay of proceedings. Similarly, a defendant can apply for a stay of proceedings on the basis that the domestic tribunal lacks jurisdiction if domestic proceedings breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction.

IV SHIPPING CONTRACTS

i Shipbuilding

In Malaysia shipyards are mainly located in Lumut, Miri, Kuching, Port Klang, Kemaman, and Pasir Gudang. Currently, there are about 120 registered shipyards in Malaysia and Malaysian-built ships account for 1.07 per cent of the world's total deadweight tonnage.

Shipbuilding contracts in Malaysia are carried out using the standard form. Generally, under the terms of a typical shipbuilding agreement, the title in the ship remains vested in the shipbuilder until delivery and payment in full of the purchase price, which is normally evidenced by the protocol of delivery and acceptance signed by the shipbuilder and shipowner. Title will formally pass on the date specified in the protocol, and passing of title will depend on the terms of the shipbuilding contract.

The buyer makes payment of the purchase price for shipbuilding in tranches, usually at different stages of completion. These payments, made by the buyer as part of the purchase price, are secured with a refund guarantee issued by a bank on behalf of the shipyard as guarantee for the completion of that stage as agreed by the shipyard in the contract. Certain formalities need to be complied with for a refund guarantee to be valid. A refund guarantee will fall under the ambit of Sections 79 and 80 of the Contracts Act 1950. Section 79 defines a 'contract of guarantee' as a contract to perform the promise or discharge the liability of a third party in the event of default, and Section 80 provides that consideration for the guarantee may be anything done or any promise made for the benefit of the principal debtor.

A refund guarantee can be given by way of:

- a* a bank guarantee by a bank that operates in Malaysia, licensed under the Bank and Financial Institution Act 1989;
- b* a finance company's guarantee from a finance company that operates in Malaysia, licensed under the Bank and Financial Institution Act 1989;
- c* an insurance guarantee from an insurance company that operates in Malaysia, licensed under the Insurance Act 1996;
- d* an Islamic bank guarantee from a licensed bank under the Islamic Bank Act 1983;
- or
- e* a takaful guarantee from Syarikat Takaful under the Takaful Act 1984.

If a yard refuses to deliver a vessel once the purchase price has been paid or agreed in the contract, an application for an order for specific performance can be made to the court

by the shipowner, which is a discretionary remedy. It has to be proved by the shipowner that damages for breach of contract would not be sufficient compensation for its loss.

If the vessel is found to be defective, then the following legislation would be applicable:

- a* Section 16 (1)(a) of the Sale of Goods Act 1957, which provides liability for breach of implied terms of quality and fitness;⁴
- b* the Contracts Act 1950 for breach of contract; and
- c* liability under the common law tort of negligence.

ii Contract of carriage

In 2010, the Malaysia Shipowners' Association stated that an estimated 95 per cent of Malaysia's international trade was carried out by merchant ships, and that 95 per cent of its international trade was carried out by foreign vessels.

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

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

There are no combined transport or multimodal bill of lading conventions in force at present in respect of road, rail or air transport that apply to the stages of transport other than by sea under a combined transport or multimodal bill of lading in Malaysia.

The cabotage policy was implemented in Malaysia by amending Section 65 (KA) of the Merchant Shipping Ordinance 1952 (MSO). The policy states that domestic trade between any two ports in the country are only to be served by Malaysian-owned shipping companies.

Malaysia has not yet declared whether it will ratify, approve or accede to the Rotterdam Rules.

iii Cargo claims

Cargo claims are typically brought by a writ application in the High Court of Malaya, High Court of Sabah or Sarawak. The Sale of Goods Act 1957 (Revised 1989) applies to the sale of goods.

⁴ Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply (whether it is the manufacturer or producer) there is an implied condition that the goods shall be reasonably fit for such purpose.

The English Bill of Lading Act 1855 (the Act) applies in Malaysia by virtue of Section 5(1) of the Civil Law Act 1956. Malaysia has therefore adopted Section 1 of the Act, which provides as follows:

Every consignee of Goods named in a Bill of Lading and every endorsee of a Bill of Lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods as if the contract contained in the Bill of Lading has been made with himself.

The extent to which the terms of the charterparty can be incorporated in the bill of lading will depend on how the bill of lading has been worded.

Although Section 1 of the Act was intended to give the consignee or endorsee of the bill of lading a right to sue the carrier in contract, it provides that such rights of suit are only transferred to and vested in the consignee and endorsee when property in the goods has passed to it upon or by reason of such consignment or endorsement.

However, to sue the carrier in contract, the buyer of the goods must establish:

- a* that the buyer is the consignee named in the bill of lading or the endorsee of the bill of lading; and
- b* that possession of the goods must have passed to it 'upon or by reason of such consignment or endorsement'.

Provided the above requirements have been met, it would appear that the arbitration clause in the charterparty, where incorporated into the bill of lading, can be binding on a third party.

An owner of a Malaysian ship or of any share therein will not be liable to make good any loss or damage happening without actual fault on its part, any privity where loss or damage is caused by fire, where the value of goods is not ascertained or where the loss or damage is as a result of robbery, theft, breach of trust or misappropriation.⁵

There have been no relevant cases on the effect of deviation from a vessel's route in Malaysia but the position is likely to be the same as under English law.⁶

Common law liens can be exercised in Malaysia. The responsibilities and liabilities of the shipper are those stated in the COGSA 1950, which has incorporated the Hague Rules.

Under Section 517 of the MSO, any claim or lien against a vessel must be brought within two years from the date when the damage or loss or injury was caused or the salvage service were rendered. In contrast, any claim based on a bill of lading incorporating the Hague Rules or the Hague-Visby Rules provides a time bar of one year. As for other general causes of action founded in tort or contract, Section 6 of

5 Section 359 of the MSO.

6 See *The 'Al Taha'* [1990] 2 Lloyd's Rep 117; *The 'Isla Fernandina'* [2000] 2 Lloyd's Rep 15; *The 'Irbensky Proliv'* [2005] 1 Lloyd's Rep 383; *Renton v. Palmyra* [1957] AC 149; *Hain v. Tate & Lyle* (1936) 2 All ER 597.

the Limitation Act 1953 provides that the limitation period is six years from the date on which the cause of action arose. It is possible to extend time by mutual agreement between the parties.

The courts can also extend the time limit provided the party seeking to extend the time period has a persuasive reason and the requirements of the Rules of the Court 2012 are abided by. In arbitration matters, the time limit can be extended pursuant to Section 21 of the 2005 Act provided that the arbitral tribunal conducts the arbitral proceedings in the manner that it considers appropriate if parties to the arbitral proceedings are unable to come to an agreement. These include powers of the arbitral tribunal to fix and amend time limits.

The demise clause or identity of carrier clause is recognised and binding if the Malaysian courts can be persuaded to follow the decision of the English courts in *The 'Starsin'*.⁷

iv Limitation of liability

With respect to the carriage of goods and any goods that are damaged or lost, the shipowner has another option of limiting liability under Article IV, Rule 5 of the Hague Rules, which were incorporated under the First Schedule of the COGSA 1950. The £100 is gold value and not its paper value.⁸ Although the Hague Rules were subsequently amended by the Hague-Visby Rules, the Hague-Visby Rules are yet to be adopted by Malaysia.

As for oil pollution, the Merchant Shipping (Oil Pollution) Act 1994 (1994 Act) implements the provisions of the CLC Convention as amended by the 1976 Protocol, which applies to West Malaysia, Sabah and Sarawak. This 1994 Act applies to seagoing vessels or any seaborne craft of any type whatsoever actually carrying oil in bulk or cargo.

Limitation of liability is encapsulated in Part IX of the MSO, in particular Section 360, which ratifies the LLMC Convention 1976 and the LLMC Protocol 1996. Under Section 360 of the MSO, Malaysian and foreign shipowners can limit liability for certain cases of loss of life, injury or damages, provided these occurrences were not due to the shipowner's wilful and reckless act.

It should be noted that the states of Sabah and Sarawak (East Malaysia) have not incorporated the LLMC Convention 1976 or the LLMC Protocol 1996. These states still follow the 1957 Convention for limitation of liability and are hence subject to the provisions under this convention.

Section 360 of the MSO provides for general limitation for maritime claims. The limits of liability for claims other than those mentioned in Article 7 of the LLMC Convention, arising on any distinct occasion, are calculated as follows:

- a in respect of claims for loss of life or personal injury, 2 million SDRs⁹ for a ship with a tonnage not exceeding 2,000; for a ship with a greater tonnage, 800 SDRs

7 [2003] 1 Lloyd's Rep. 571.

8 *The 'Rosa S'* (1989).

9 The SDR is converted to Malaysian ringgit in which the limitation is sought and the value will be ascertained on the date the limitation fund is constituted; see Article 8 under the

- for each tonne from 2,001 to 30,000 tonnes; 600 SDRs for each tonne from 30,001 to 70,000 tonnes; and 400 SDRs for each tonne over 70,000 tonnes; and
- b* in respect of any other claims, 1 million SDRs for a ship with a tonnage not exceeding 2,000; for a ship with a greater tonnage, 400 SDRs for each tonne from 2,001 to 30,000 tonnes; 300 SDRs for each tonne from 30,001 to 70,000; and 200 SDRs for each tonne over 70,000.

In cases of oil pollution, Section 6(2) of the 1994 Act provides that shipowners may only limit their liability under Section 3 of the 1994 Act if the incident was caused without their actual fault or privity.

A limitation fund as provided for under Section 6(2) of the 1994 Act allows shipowners to limit their liability. The aggregate of liabilities under Section 3 of the 1994 Act in respect of any single incident for a ship under 5,000 GT will be 4.51 million SDRs and for a ship of over 5,000 GT, there will be an additional 631 SDRs for each additional tonne, provided that this aggregate amount does not exceed 89.77 million SDRs. Furthermore, as defined in Section 2(4) of the 1994 Act, the ship's tonnage will be the gross tonnage calculated in accordance with the tonnage measurement regulations contained in Annex I of the Tonnage Convention.

Limitation funds were established under the Oil Pollution Fund Convention as amended by the 1972 Protocol. Funds, as provided for under Section 16 of the 1994 Act, have a legal personality that is capable of assuming rights and obligations and of being a party in legal proceedings.

The limit under the LLMC Convention as incorporated in the MSO can only be broken if the person seeking to exclude the limitation can prove that the loss was a result of a personal act or omission, committed with the intent to cause such loss or recklessly and with knowledge that such loss would result (Article 4). A subjective intent to cause such loss must be proven.

In cases of oil pollution, Malaysia has adopted the CLC Convention and the Oil Pollution Fund Convention by passing the Merchant Shipping (Oil Pollution) Act 1994 (MSOPA). Under Section 5 of the MSOPA, crew members, pilots, charterers and salvors are not liable unless the pollution damage results from their intentional or reckless acts or omissions, committed with the knowledge that such damage would probably result.

Although economic conditions may be considered as a factor in enforcing strict rights and liabilities, the courts are nevertheless generally inclined to enforce the express terms agreed between the parties. Alternatively, one would be able to enforce rights or to obtain relief pursuant to the Specific Relief Act 1950.

V REMEDIES

i Ship arrest

Malaysia has neither acceded to nor ratified the Arrest Convention; however, by virtue of Section 24 of the Malaysian Courts of Judicature Act 1964, the civil jurisdiction of the

Sixteenth Schedule of the Merchant Shipping (Amendment and Extension) Act 2011.

High Court of Malaya will include the same jurisdiction as the English High Court of Justice, under the English Supreme Court Act 1981.

Following the provisions of the English Supreme Court Act 1981, the circumstances under which a ship may be arrested include:

- a* any claims to the possession or ownership of a ship or share in a ship;
- b* disputes between co-owners of a ship as to, for example, her employment;
- c* claims in respect of a mortgaged ship;
- d* claims for damage suffered or done by a ship;
- e* claims for death, or personal injury caused by a defect in a ship or negligence of the owners, charterers or persons in possession of such ship;
- f* claims for loss or damage to goods carried;
- g* claims for breach of contract of carriage, for example, charterparty, bills of lading (related to carriage on a specified vessel, see *The 'Lloyd Pacifico'* (1995)); and
- h* claims relating to salvage.

Common law tests can be carried out to ascertain wrongful arrest, for example, where the arrest of a ship has been carried out with *mala fide* intention or gross negligence so as to imply malice on the part of the arresting party, which results in damage to the owner of the arrested property.

In Malaysia, generally, bunker suppliers will not be able to arrest the vessels or bring a claim against the owners of the vessel for non-payment of dues pursuant to contract with the charterers.¹⁰ This is the case even under circumstances where the invoice is addressed to both the shipowner and the charterer. Malaysia follows the same principle as is applicable under English law;¹¹ however, in *The MV 'Ira'*,¹² in an interim application, the question of liability was left to trial because there was some suggestion in the documentary evidence that supply was made to the shipowner, although the charterer was responsible for ordering bunkers, as there were some indication that the order for bunkers was authorised by the shipowner.

The court may order the shipowner to furnish security to the extent of the claim and, if such claims fall under limitation of liability, to the amount so limited by the Act. The sheriff is responsible for the maintenance of the vessel while it is under arrest.

It is not possible to arrest a vessel in Malaysia as security for court proceedings elsewhere. The arresting party must pursue the claim on its merits in Malaysia if it intends to arrest a vessel in Malaysia. As for the arrest to obtain security for a foreign arbitration proceeding, the position in Malaysia is now similar to the English and Singapore positions. According to Sections 10 and 11 of the Arbitration Act 2005 read together with Sections 4 and 5 of the Arbitration (Amendment) Act 2011, the Malaysian court has the power to order the arrest of a vessel to satisfy an arbitral award or order that alternative security be provided for its release.

10 See *Sunly Petroleum Co Ltd v. The Owners of the Ship or Vessel* (1996 Unreported).

11 See *The 'Fesco Angara'* [2011] 1 Lloyd's Rep 61.

12 [1996] 4 MLJ 109.

An applicant may also apply to the court for a *Mareva* injunction to obtain security, which is essentially a freezing of assets. Although a *Mareva* injunction is not strictly meant for security purposes, it is nonetheless a means of preventing a defendant from taking actions to dissipate its assets beyond the jurisdiction of a court so as to frustrate a potential judgment.

Pursuant to Order 29, Rule 2 of the Rules of Court 2012, the court has the discretion to grant an order to detain, take into custody or to preserve any property that is the subject of the cause or matter. Under Rule 3 of the Order, a court can also authorise or require any sample to be taken, any observation to be made or any experiment to be tried for the purpose of obtaining full information or evidence in any cause or matter.

Further, in accordance with Order 70, Rule 27 of the Rules of Court 2012, the court may, on the application of any party, make an order for the inspection of any ship that may be necessary or desirable for the purpose of obtaining full information or evidence in connection with any issue in the action.

Alternatively, the applicant could seek a '*Mare Del Nord*' order from the court to inspect the ship documents onboard the ship.

There are no legal provisions governing the arrest of bunkers in Malaysia. It may, however, be possible to obtain a freezing injunction against the bunkers on board the vessel.

ii Court orders for sale of vessel

The arresting party, the owner of the vessel or any party with an *in rem* claim against the vessel may apply for the judicial sale of an arrested vessel.

The first step towards obtaining the judicial sale of a vessel is for an application to be made for an order for appraisal and sale by a sheriff of the High Court. The order for sale will usually include an order specifying the period after which the court will determine the priorities between the competing claims.¹³ The claimant must seek from the court a commission for the appraisal and sale of the property arrested to put the order into effect. The commission, according to Order 70, Rule 22(1) of the Rules of Court 2012, may not be issued until the party applying for it has filed a request in the prescribed form. The commission cannot be executed by the sheriff until a satisfactory undertaking to the sheriff in writing to pay his or her fees and expenses on demand has been lodged with the sheriff's office.¹⁴

The sale of the vessel by the sheriff is usually by public auction or private tender. The duration of the sale depends on the response from potential buyers to the auction or the sheriff's call for tender. If no bids or tenders above the appraised price are received by the sheriff, the normal procedure is for the sheriff to hold another auction or call for fresh bids. The vessel can only be sold below its appraised values with the approval of the court.

The court costs of filing the summons and supporting affidavit to obtain an order for appraisal and sale, and for the appointment of an appraiser (excluding his or her fees) are prescribed in the Rules of Court and are in the region of 100 ringgit. In

13 Order 70, Rule 22(2) of the Rules of Court 2012.

14 Order 70, Rule 22(3) of the Rules of Court 2012.

addition, if the vessel is sold by way of a public auction, the court's commission is 5 per cent of the first 1,000 ringgit and 2.5 per cent upon the amount above that sum. The court's commission in the event of a private sale is half those amounts.

The order of priority of claims against the proceeds of sale is generally as follows, from highest to lowest:

- a* the sheriff's costs and expenses arising from the arrest and sale of the vessel;
- 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 appraisalment and sale;
- c* maritime liens;
- d* possessory liens that arise after the maritime lien has accrued;
- e* mortgages; and
- f* statutory liens.

The effect of a judicial sale is to transfer all claims in the vessel to the proceeds of sale. The sale therefore frees the vessel from all claims, liens and encumbrances, including maritime liens and gives the purchaser clean title to the vessel. The court retains the proceeds of sale to answer all claims that may be made against the vessel.

A judicial sale effected by a foreign court in an action that, in the eyes of Malaysian law, is either an action *in rem*, or has the same effect as an action *in rem*, will be recognised by the Malaysian courts. The court will recognise that such judicial sale in a foreign jurisdiction has the effect of giving the purchaser clean title to the vessel.

VI REGULATION

i Safety

Part V of the MSO addresses issues relating to marine safety. Malaysia has also ratified several international conventions adopted by the IMO as safety regime. These include:

- a* the Colregs, as amended;
- b* SOLAS, as amended;
- c* SOLAS 1978 Protocol, as amended;
- d* the STCW Convention, as amended.;
- e* MARPOL 73/78, Annexes I to VI;
- f* OPRC Convention;
- g* CLC Convention;
- h* the Oil Pollution Fund Convention;
- i* the Bunker Convention; and
- j* the Anti-Fouling Convention.

ii Port state control

Malaysia is a member of the Tokyo MoU, which came into effect in April 1994. The Maritime Industrial Control Division of the Marine Department, is the agency that conducts port state control in Malaysia.

The port state control for foreign-registered ships and flag control for Malaysian-registered or licensed boats is normally carried out within the gazetted harbour

limit to ensure the safety of ships or boats before berthing in any wharf or being given clearance to unload from the port.

Under Section 302 of the MSO, the port officer has the power to detain an unsafe ship. By virtue of Section 302(d) of the MSO, before a detention order is made final, a shipowner or master of the ship may appeal to the court of survey at the port where the ship was detained.

iii Registration and classification

Under the provisions of the MSO in West Malaysia, the MSO (Sarawak) 1960 and the MSO (Sabah) 1960 as amended by the Merchant Shipping (Amendment) Act 1998, which now provides for a Malaysian International Ship Registry, vessels are eligible for registration under the Malaysian flag if they are wholly-owned by Malaysian citizens or Malaysian corporations. Under Section 66E of the MSO a ship may be registered unless:

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

It is not possible to register vessels under construction under the Malaysian flag.

Pursuant to Section 11 of the MSO, a ship may be registered in Malaysia by:

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

Alternatively, under Section 66B of the MSO, irrespective of where the ship was built, a ship can be registered in the Malaysian International Ship Registry (MISR) if the ship is owned by a corporation:

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

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

An application for the registry of a ship is made pursuant to Section 16 of the MSO. In particular, a statutory declaration must be prepared containing the following details:

- a* the name of the ship and its existing tonnages;

- b* a statement of the date when and the place where the ship was built or if unknown, a statement that the declarant does not know the date and place of the building of the ship;
- c* a statement as to the owner of the ship and the citizenship of the owner and, if the ship is owned by more than one person, the number of shares each is entitled to;
- d* a statement of the name of the master of the ship and his or her citizenship;
- e* a statement that no other person is entitled as owner to any legal or beneficial interest in the ship or any share thereof;
- f* except where the operator and the owner are the same person, the name and citizenship of the operator of the ship; and
- g* a declaration that the particulars stated in the form are true to the best of his or her knowledge and belief.

Besides a statutory declaration, a surveyor's certificate of measurement must be provided to the registrar¹⁵ and marking of ships must take place¹⁶ before registration. A registrar will further, on registering the ship, retain in his or her possession a copy of the surveyor's certificate of measurement, the builder's certificate, bill of sale (if any), and condemnation certificate (if any) in accordance to Section 23 of the MSO.

The Register of Mortgages is maintained by the Registrar of Ships, which has offices in Port Klang, Labuan, Kuching and Penang. The information it contains is a description of the type of mortgage being registered. It can either be a mortgage to secure the principal sum and interest or a mortgage to secure the current account.

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

It is provided under Part IIC of the MSO that the following are the approved classification societies:

- a* the American Bureau of Shipping;
- b* Bureau Veritas;
- c* Det Norske Veritas;
- d* Germanischer Lloyd;¹⁷
- e* Lloyds Register of Shipping; and
- f* Nippon Kaiji Kyokai.

Classification societies could theoretically be held liable under the common law principles of the tort of negligent misrepresentation.

15 Section 17 of the MSO.

16 Section 18 of the MSO.

17 In September 2013, Det Norske Veritas and Germanischer Lloyd merged to form DNV GL.

iv Environmental regulation

Currently, the sulphur limit for petrol and diesel is 0.05 per cent m/m; however, there is no regulatory enforcement relating to low-sulphur marine fuel that has yet been implemented.

v Collisions, salvage and wrecks

The following conventions or protocols are in force in relation to collision, salvage and pollution:

- a* the Salvage Convention 1989;
- b* the Colregs;
- c* the SR Convention;
- d* the OPRC Convention;
- e* the Merchant Shipping (Oil Pollution) Act 1994;
- f* MARPOL 73/78;
- g* the CLC Convention; and
- h* the Funds Convention.

There is no standard form of salvage agreement required for use in Malaysia.

vi Passengers' rights

Passengers' rights for loss of life and personal injury are covered under Section 360 of the MSO (Article 7 of the Merchant Shipping (Amendment and Extension) Act 2011). Malaysia is not a signatory to the Athens Convention.

vii Seafarers' rights

In Malaysia, seafarers' rights are broadly covered under Part III of the MSO. They include the right to wages, medical examination and attendance in the event of injury or illness, and compensation for improper discharge. The Maritime Labour Convention 2006 will enter into force in Malaysia on 20 Aug 2014.

VII OUTLOOK

Malaysia is strategically located at the middle of a global shipping trade route, the Asia–Europe network, and it will remain an important maritime highway. The industry is expected to continue to grow but at a much slower pace and scale, at least for 2015. The government must take proper steps to foster the growth of the industry by formulating supportive policies and measures such as subsidies, direct financial aid, easy finance, tax benefits, R&D support and loan deferments. The formulation of such policies will not only allow local players to weather turbulent times but will provide them with an edge when competing with international players from Korea, China and Japan, where the maritime industry receives substantial support from government. Local maritime banks and financial institutions must understand that the capital-intensive shipping market needs huge investment and the payback period is long. Constrained capital and large production output is the basic problem that plagues the cyclical shipping industry. Banks

must be more understanding in areas such as market players' needs, concerns, limitations and expectations. Despite positive developments in the Asian region, the outlook for the Malaysian shipping industry outlook is poised to remain bleak as overcapacity is still a looming issue for all major parts of the sector.

Malaysia urgently needs to realign its maritime sector to develop such soft skills in the maritime sector. A well-defined strategy should be in place, with good infrastructure, an environment conducive to promoting research, development and innovation, entrepreneurship and risk-taking, as well as incentives for public-private partnership. Above all, there must be a change in attitude among local players in the maritime sector.

Appendix 1

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Jeremy M Joseph is the principal partner and founder of Joseph & Partners, a specialist maritime law firm. He has a master's degree in maritime law from the University of Southampton and was a recipient of the Chevening Scholarship from the British High Commission.

Originally a marine insurance broker, Mr Joseph has knowledge of the shipping and insurance industry. His first position in law was at the Singapore office of Holman Fenwick & Willan where he worked as an associate for several years until he set up Messrs Joseph & Partners in Kuala Lumpur. He regularly works as counsel and co-counsel in various shipping, insurance and maritime arbitration matters.

Mr Joseph currently advises all sorts of companies and organisations from shipowners and P&I clubs, to insurers, banks, charterers, and a variety of other commercial establishments. In addition, he has authored numerous articles that have been subsequently published in the *Malayan Law Journal* and other international publications such as *Getting the Deal Through*. He has also written the 'Shipping, Insurance and Carriers' volumes of *Halsbury's Laws of Malaysia* and the LexisNexis *Malaysian Encyclopedia of Forms and Precedents for Marine Insurance*.

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