

Shipping 2021

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Shipping 2021

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Lexology Getting The Deal Through is delighted to publish the thirteenth edition of *Shipping*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Angola, Ecuador, Mozambique, Portugal, Russia and United Arab Emirates.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Kevin Cooper and Kirsten Jackson of MFB Solicitors, for their continued assistance with this volume.



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Malaysia

Siva Kumar Kanagasabai and Trishelea Ann Sandosam

SKRINE

NEWBUILDING CONTRACTS

Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

Property in goods pass when parties intend it to pass. The parties' intention may be ascertained from the terms of the contract. In shipbuilding contracts, the terms of the contract usually state that title will pass upon execution of the protocol of delivery and acceptance.

Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

There is no prescribed form or wording required for a refund guarantee to be valid. However, there must be valid consideration for the guarantee to be enforceable. The terms of the refund guarantee are subject to the agreement of parties.

Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

An application may be made to court for an order for specific performance. Specific performance is a discretionary remedy that may be granted in relation to certain types of contracts that the Specific Relief Act 1950 prescribes as being specifically enforceable. It may be granted in situations where, among others, the plaintiff has done substantial acts or suffered losses, or where damages are not an adequate remedy.

Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

Claims for damages owing to a defective vessel can be founded on breach of contract, including breach of implied conditions under the Sale of Goods Act 1957, such as conditions as to quality and fitness, or in tort by a non-contracting party for negligence.

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

Vessels may be registered with the Malaysian Ship Register (MSR) or with the Malaysian International Ship Register (MISR), provided the conditions under the Merchant Shipping Ordinance 1952 (MSO 1952) are satisfied. Vessels under construction may only be provisionally registered, and such provisional registration may be for a minimum period of six months but not more than 12 months.

Currently, vessels which meet the ownership requirement can be registered under the Malaysian flag. For registrations with the MISR, only the following vessels may be registered:

- vessels fitted with mechanical means of propulsion;
- not less than 1,600 gross tonnage (GT); and
- not more than 15 years of age for tankers or bulk carriers, or not more than 20 years for other vessels.

The Merchant Shipping (Amendment) Act 2017 (MSAA 2017) introduced several amendments to the MSO 1952 in relation to, among others, requirements for registration of ships. The MSAA 2017 was gazetted on 1 December 2017, but has not come into force to date. Under MSAA 2017, the age and tonnage criteria for registration under MISR will be prescribed in regulations to be issued in due course.

- 6 | Who may apply to register a ship in your jurisdiction?

Currently, for MSR registration, section 11 of MSO 1952 provides that to register a ship as a Malaysian ship:

- the owners of the ship must be Malaysian citizens; or
- if the ship is owned by a company:
- the company must be incorporated in Malaysia;
- the company must have a principal office in Malaysia;
- the management of the company is carried out mainly in Malaysia;
- the majority of the shareholding must be held by Malaysian citizens; and
- the majority of the board of directors must be Malaysian citizens.

Further, currently under section 66B and 66D of MSO 1952, registration with the MISR may be done by a company:

- incorporated in Malaysia;
- with an office in Malaysia;
- with a majority of shareholding, including voting shares, held by non-Malaysian citizens; and

- with paid-up capital of at least 10 per cent of the value of the ship or 1 million ringgit, whichever is higher (only applicable to the first ship registered by the company).

Under the MSAA 2017:

- a person is qualified to own a Malaysian ship to be registered under the MSR if the person is a Malaysian citizen or, to the extent as may be determined by the Minister (usually by regulations to be issued in due course), a body corporate incorporated in Malaysia;
- any person or entity, regardless of citizenship or place of incorporation, may register a ship as a Malaysian ship with MISR. A non-Malaysian citizen or a body corporate incorporated outside Malaysia applying to register a ship as a Malaysian ship under MISR is required to appoint a representative person so long as the said ship remains registered. The representative person must be a Malaysian citizen who has his or her permanent residence in Malaysia or a body corporate incorporated in Malaysia that has its principal place of business in Malaysia; or
- a charterer of a ship under bareboat charter terms may also register a ship in the MSR or MISR.

Documentary requirements

7 | What are the documentary requirements for registration?

Currently, the main documents required for registration under the domestic registry or MISR include:

- forms: application to register a ship, application for allotment of an international call sign, declaration of ownership and nationality, appointment, cancellation or change of ship manager;
- statutory declaration of ownership containing the details set out in section 16 of MSO 1952;
- identity card or citizenship certificate (in the case of individuals) or article and memorandum of association (now known as constitution), certificate of incorporation and certificate of registry of business (in the case of bodies corporate);
- letter of authorisation appointing an officer to make declaration on behalf of the owner;
- certification from the customs department that import duty has been paid (if applicable);
- builder's certificate or deletion certificate;
- certificate of approved name;
- certificate of survey;
- bill of sale;
- memorandum as to the registration of the managing owners; and
- certification under the common seal of the corporation to the effect that the majority of shareholding, including voting shares, is held by Malaysian citizens.

There may be changes to the documentary requirements once the MSAA 2017 comes into force.

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Neither dual registration nor flagging out is permitted in Malaysia.

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

The register of mortgages is maintained by the domestic ship registry, which has offices in Port Kelang, Penang, Kuching and Kota Kinabalu; and the MISR, which is based in Labuan. The register of mortgages contains information such as the name of the vessel, the date and type of mortgage registered.

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

Malaysia applies three main limitation regimes, which are tonnage limitation, limitation under the Hague Rules and limitation for oil pollution liability.

For tonnage limitation, Peninsular Malaysia and Labuan apply the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC 1976), as amended by the 1996 Protocol. Sabah and Sarawak apply the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957 (1957 Convention).

The LLMC 1976 is set out in the 16th Schedule of the Merchant Shipping Ordinance (MSO) 1952 and to date, there have been no legislative amendments to adopt the new limits announced by the International Maritime Organization in April 2012 and June 2015. Under the LLMC 1976, insurers of liability for claims, shipowners, salvors and any person whose act, neglect or default the shipowner or salvor is responsible for are entitled to limit their liability. A shipowner includes a charterer, manager and operator of a ship. The claims that are subject to limitation of liability include:

- claims in respect of loss of life or personal injury or loss or damage to property, occurring on board, or in direct connection with the operation of a ship, and consequential losses arising; and
- claims in respect of loss caused by delay in the carriage of cargo or passengers.

Liability is limited based on the gross tonnage of the ship and the value of special drawing rights (SDR) (articles 6, 7 and 8, Part 1, of the Schedule).

Currently, the Hague Rules are compulsorily applicable in Malaysia through the Carriage of Goods by Sea Act 1950 (COGSA) in relation to and in connection with the carriage of goods by sea in vessels carrying goods from any port in Malaysia to any other port whether in or outside Malaysia. The Hague Rules provide for a package limitation where carriers may limit their liability for loss or damage to the gold value of £100 (which is determined in Malaysia by reference to the UK Coinage Act 1870) per package or unit, unless the nature and value of such goods have been declared by the shipper before shipment and have been inserted in the bill of lading. The Carriage of Goods by Sea (Amendment) Act 2020 (the 2020 Act) was gazetted on 4 February 2020, but has not come into force to date. The 2020 Act creates a mechanism for the implementation of the Hague-Visby Rules and the 1979 SDR Protocol (ie, by way of amendment to the Schedule of COGSA (which currently sets out the Hague Rules) by an order of the Ministry of Transport published in the gazette (Order)).

Limitation for oil pollution liability is provided under the Merchant Shipping (Liability and Compensation for Oil and Bunker Oil Pollution) Act 1994 (1994 Act). The limits are different for oil pollution and bunker oil pollution. In respect of the former, the registered owner of a ship is entitled to limit his liability in respect of any one incident to an aggregate amount of 4.5 million SDR for a ship not exceeding 5,000 units of

tonnage and, for ships exceeding this tonnage, 4.5 million SDR plus an additional 631 SDR for each additional unit of tonnage; with a maximum aggregate amount of 89,770,000 SDR. For bunker oil pollution, the registered owner, bareboat charterer, or manager or operator of a ship may limit its liability in accordance with the LLMC 1976 set out in the 16th Schedule of MSO 1952.

Procedure

11 | What is the procedure for establishing limitation?

A limitation action is usually commenced where there are several claims made or anticipated, whose total exceeds the limitation value. In the case of only one claimant, limitation can be raised as a defence. A limitation action can be commenced without admission of liability but liability must be established or admitted before a decree limiting liability can be granted.

Order 70, Rules 35 to 38 of the Rules of Court 2012 provide for the procedure to be followed in relation to limitation actions. The person seeking limitation relief (ie, the plaintiff in the limitation action) must be named in the writ by his name. The plaintiff must make one or more persons with claims against him the defendants in the writ, with at least one of the defendants named in the writ by his name. Service of the writ is only required on named defendants. The defendant(s) must then enter appearance and after seven days of entry of appearance or seven days after the time limit for entry of appearance has expired, the plaintiff may apply for a decree limiting his liability or for directions as to further proceedings. Where the only defendants in a limitation action are those named in the writ and all of them have either been served with the writ or entered appearance, the decree need not be advertised. Otherwise, it must be advertised, giving persons with claims a time limit to enter appearance and file their claims. Claimants should proceed to file their claims and serve a copy of their respective claims on every party pursuant to Order 70, Rules 39 to 41 of the Rules of Court 2012.

The plaintiff may constitute a limitation fund by paying into court the Malaysian ringgit equivalent of the number of SDR or gold francs to which he or she claims to be entitled to limit his or her liability, together with interest, from the date of the incident giving rise to his or her liability to the date of payment into court. Upon making such payment into court, the plaintiff must give notice in writing to every defendant.

For oil liability pollution, section 7 of the 1994 Act provides that after the court has determined liability and directed payment or deposit of a bank guarantee or security into court, the court will determine the amounts that would, apart from the limit, be due in respect of liability to the persons making the claims and then direct the proportionate distribution of the funds among the relevant persons.

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

Limitation under the LLMC 1976 and for oil pollution liability can be broken where the person seeking to break limitation proves that the loss resulted from his or her personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. Limitation has been broken in Malaysia in cases involving the 1957 Convention, which applies in Sabah and Sarawak, but has not been broken in cases involving the LLMC 1976.

There are no reported decisions in Malaysia on the effect to any fund that has been established if limitation is subsequently broken. The likelihood of such situation arising is low, given that a limitation decree needs to be obtained before a limitation fund is established and any claimant seeking to break limitation should have done so before the limitation decree is granted.

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

The LLMC 1976 applies in respect of passenger and luggage claims and the limits are set out in articles 6 and 7 of the LLMC 1976. The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea has not been ratified by Malaysia.

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

Malaysia is a member of the Memorandum of Understanding on Port State Control in the Asia-Pacific Region. The Ship Accreditation Unit of the Marine Department of Malaysia conducts port state control inspections. The Marine Department derives its authority from Malaysia's merchant shipping legislation.

Sanctions

15 | What sanctions may the port state control inspector impose?

The Minister of Transport or detaining officer (ie, port officer or surveyor-general of ships) may order the provisional detention of an unsafe vessel, that is, a vessel that is unfit to proceed to sea or within port limits of any port without serious danger to human life by reason of the defective condition of her hull, equipment or machinery, or under-manning or overloading or improper loading. If after a survey is conducted the vessel is still found to be unsafe, the Minister of Transport can order a final detention of the vessel.

Appeal

16 | What is the appeal process against detention orders or fines?

Before a final detention order is made, the owner or master of the vessel which has been provisionally detained may make an appeal to the Court of Survey within seven days' receipt of the surveyor's report. The Court of Survey consists of a judge sitting with two assessors who have nautical, engineering or other special skills or experience (section 343 of Merchant Shipping Ordinance 1952).

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

The following classification societies are recognised by the Malaysian Marine Department:

- American Bureau of Shipping;
- Bureau Veritas;
- China Classification Society;
- Det Norske Veritas;
- Germanischer Lloyd;
- Indian Register of Shipping;
- Korean Register of Shipping;
- Lloyd's Register of Shipping;
- Nippon Kaiji Kyokai;
- Registro Italiano Navale;
- Russian Maritime Register of Shipping; and
- Ship Classification Malaysia.

Liability

18 | In what circumstances can a classification society be held liable, if at all?

A classification society may be liable for breach of contract to the party that engaged it. However, while there have been no reported cases in Malaysia on tortious liability, it is anticipated that similar to the English courts, the Malaysian court will be slow to find classification societies liable in negligence for losses suffered by third parties.

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

Yes, the Director of Marine in Malaysia may order the shipowner to locate, mark and remove a wreck and take measures to prevent pollution from the wreck, if in the opinion of the Director of Marine, the wreck is or is likely to become a hazard to navigation or a public nuisance, or causes or is likely to cause inconvenience or harmful consequences to the marine environment.

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

Malaysia has adopted the following international conventions and protocols:

- the Nairobi Wreck Removal Convention 2007 (not in force in East Malaysia);
- the Protocol on Preparedness, Response and Co-Operation to Pollution Incidents by Hazardous and Noxious Substances 2000;
- the International Convention for the Prevention of Pollution from Ships 1973 and 1978 (MARPOL);
- the International Regulations for Preventing Collision at Sea 1972;
- the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990;
- the International Convention on Civil Liability for Oil Pollution Damage 1969, Protocol of 1992;
- the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992; and
- the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

Malaysia has not adopted the following international conventions and protocols:

- the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910; and
- the International Convention on Salvage 1989.

Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory local form of salvage agreement and the Lloyd's standard form is acceptable. The Merchant Shipping Ordinance 1952 does not impose restrictions on persons who may carry out salvage operations.

SHIP ARREST

International conventions

22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

Although Malaysia is not a party to either convention, the Malaysian High Court is vested with the same jurisdiction as the English High Court by virtue of section 24 of the Courts of Judicature Act 1964. Malaysia, therefore, applies the English Senior Courts Act 1981 (SCA 1981), which gives effect to the International Convention Relating to the Arrest of Sea-Going Ships 1952.

Claims

23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

A vessel can be arrested in Malaysian territorial waters for claims set out in section 20(2) of the SCA 1981, irrespective of the vessel's flag or law governing the claim. The categories of claims where the vessel with which the claim arises can be arrested are as follows:

- any claim to the possession or ownership of a ship or to the ownership of any share therein;
- any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;
- any claim in respect of a mortgage of or charge on a ship or any share therein; and
- any claim for the forfeiture or condemnation of a ship or of goods that 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.

The categories of claims where the vessel with which the claim arises, or a sister ship (Category B), can be arrested are as follows (section 20(2)(e)-(r), SCA 1981):

- any claim for damage done by a ship;
- 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:
 - the owners, charterers or persons in possession or control of a ship; or
 - the master or crew of a ship, or any other person 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;
- any claim for loss of or damage to goods carried in a ship;
- 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;
- any claim in the nature of salvage;
- any claim in the nature of towage in respect of a ship or an aircraft;
- any claim in the nature of pilotage in respect of a ship or an aircraft;
- any claim in respect of goods or materials supplied to a ship for her operation or maintenance;
- any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues;

- 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);
- any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;
- any claim arising out of an act that is or is claimed to be a general average act; and
- any claim arising out of bottomry.

For claims under Category B, an arrest of the vessel or a sister ship is only permissible provided the following criteria in section 21(4) of the SCA 1981 are met:

- the claim arises in connection with a ship;
- 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; and
- 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 bareboat charter (for arrest of the vessel), or the relevant person is the beneficial owner as respects all the shares in a sister ship (for arrest of a sister ship).

A time-chartered ship cannot be arrested for claims against its time-charterer, but where a time-charterer owns other ships, any other ship owned by the time-charterer may be arrested in relation to a claim against the time-charterer, provided the claim falls within section 20(2) (e)-(r) of SCA 1981, and the requirements in section 21(4) of the SCA 1981 are met.

Arrests of associated ships are not permitted in Malaysia.

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Yes. Claims that give rise to maritime liens are claims for damage done by a ship, master's disbursements, master and crew wages, bottomry and salvage.

Wrongful arrest

25 | What is the test for wrongful arrest?

To claim damages for wrongful arrest, the aggrieved party must show mala fide or gross negligence that implies malice by the arresting party. An action for wrongful arrest has been successful where the vessel has been arrested for a completely unmeritorious claim.

Bunker suppliers

26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

Generally, vessels may only be arrested pursuant to the admiralty jurisdiction of the High Court in Malaysia if the ownership requirement in section 21(4) of the Senior Courts Act 1981 are met (ie, that the person who would be liable in personam for the claim must be, at the time the action is brought, the beneficial owner or bareboat charterer of the vessel). Based on this, it would not be possible for a charterer to arrest a vessel for a claim for bunkers arising out of a contract between the charterer and the bunker supplier. However, if the charterer had the actual or apparent authority of the owner and the bunker supplier intended to contract with the owner, then the bunker supplier may be able to invoke the admiralty jurisdiction of the High Court.

Security

27 | Will the arresting party have to provide security and in what form and amount?

No, but an undertaking must be made to the court by the arresting party to pay on demand the fees and expenses incurred by the Admiralty Sheriff in relation to the arrest. A sum of 15,000 ringgit is also required to be deposited in court prior to arrest, although the arresting party may apply for leave to deposit the sum within five days of arrest.

28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

If the party wishes to provide security to secure the release of the vessel, the security may be provided in the form of bail, letters of undertaking or bank guarantees. Parties are free to negotiate the quantum of security, usually the value of the claim and expected interest and cost, which should not exceed the value of the vessel. If the sum requested by the arresting party is excessive, an application may be made to court to moderate the amount. The court will usually moderate the amount to the claim amount with interest and costs on the basis of the arresting party's best arguable case.

Formalities

29 | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

No document is required as proof of appointment when a lawyer appears in court and states that he or she is instructed. However, if this authority is challenged, the lawyer should furnish the court with a warrant to act or a board resolution appointing him or her to make the arrest application.

The following documents need to be filed for commencement of an admiralty action in rem and arrest application: writ in action in rem, praecipe for service of writ in rem by Sheriff, praecipe for Warrant of Arrest, affidavit Leading to Warrant of Arrest (arrest affidavit), Undertaking as to Sheriff's Costs and Expenses, Warrant of Arrest and Certificate of Urgency. The documents must be filed in the Malay language and may be accompanied by an English translation, but if the arrest affidavit is affirmed by a deponent outside Malaysia, the affidavit may be filed in the English language only. In cases of urgency, proceedings may be commenced or conducted partly or wholly in the English language provided that a certificate of urgency explaining the urgency of the matter is filed by the solicitor and copies of all such documents in the national language shall be filed within two weeks or such extended period as the court may allow.

The arrest affidavit must set out the matters specified in Order 70, Rules 4(6) and 4(7) of the Rules of Court 2012. The arrest affidavit needs to be affirmed by the deponent, before either a Commissioner for Oaths or notary public (if deponent is in a Commonwealth country), or before the Consular Officer of a Commonwealth country (if the deponent is outside a Commonwealth country). Malaysia is not a signatory to the Apostille Convention. An affidavit prepared in a foreign language must be filed with a translation of such affidavit by a qualified translator or solicitor by annexing the affidavit and the translation thereof as exhibits to an affidavit by the translator or solicitor verifying the translation.

The relevant documents are to be filed electronically, and original hard copies provided to court upon request. On average, one to two days' advice notice is required to prepare an arrest application.

Ship maintenance

30 | Who is responsible for the maintenance of the vessel while under arrest?

The sheriff. However, the arresting party will be responsible to first expend the amounts necessary for the maintenance and preservation of the vessel, which are eventually recoverable from the proceeds of sale of the vessel.

Proceedings on the merits

31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

A vessel cannot be arrested for the purpose of obtaining security for court proceedings outside Malaysia and the arresting party must pursue the claim on its merits in the Malaysian court. However, where the court stays or dismisses an action in rem on the ground that the dispute in question should be submitted to the determination of courts outside Malaysia, the court may order that any vessel that has been arrested be retained as security for the satisfaction of the foreign judgment. Arrests of vessels in Malaysia are permissible to secure the amount in dispute in respect of a foreign arbitration (section 11 of the Arbitration Act 2005). Further, where admiralty proceedings are mandatorily stayed in favour of a foreign arbitration, the court may order that the vessel that has been arrested be retained as security for the satisfaction of any award or order that the stay of those proceedings be conditional on the provision of equivalent security (section 10 of the Arbitration Act 2005).

Injunctions and other forms of attachment

32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

A *Mareva* or freezing injunction, either domestic or worldwide, may be obtained where there is a real risk of dissipation of assets prior to judgment. Some of the other factors the court will consider in granting a freezing injunction is whether there is a good arguable case and whether the balance of convenience lies in favour of granting the freezing injunction to freeze assets up to the value of the claim.

Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

Yes. The court has the discretion to grant an order:

- for detention, custody or preservation, or inspection of any property in a party's possession, which is the subject matter of the cause, or as to which any questions may arise; and
- to authorise any samples of property be taken or any observation or experiment made on such property to obtain full evidence in any matter.

For inspection by assessors, any party or witness of a ship or other property to obtain full information or evidence on any issue.

Bunker arrest and attachment

34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

It is not possible to arrest bunkers under the Malaysian admiralty jurisdiction but freezing injunctions may be obtained in respect of bunkers.

JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

The arresting party, the owner of the vessel or any party with a recognised in rem claim can apply for judicial sale of an arrested vessel. However, the application must be made in the action in which the vessel is arrested.

Procedure

36 | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

An order for appraisalment and sale must be obtained, after which a commission for appraisalment and sale must be filed in court. Once the vessel is valued by a court-appointed valuer, the vessel will be sold either by private treaty or public auction (rarely used). The private treaty exercise involves advertising the sale of the vessel and inviting sealed bids which are submitted to the Admiralty Sheriff. If after several rounds of tender the bids do not reach the appraised value, an application may be made to court to authorise sale below appraised value. Once the proceeds of sale are paid into court, the hearing to determine the priorities hearing will be held after 90 days of payment of proceeds into court (or such other period as the court orders) and the proceeds of sale will then be paid out in accordance with the order of priorities. Depending on the number of rounds of tender needed, a judicial sale may be concluded within approximately six to 12 months following an application for sale.

The main costs associated with judicial sale are filing costs (set out in the Rules of Court 2012), costs of valuation of vessel and costs of advertisements (incurred by the arresting party with the approval of the sheriff and recoverable from the proceeds of sale as sheriff's costs and expenses). The court's commission on sale is 5 per cent on the first 1,000 ringgit and 2.5 per cent on subsequent amounts.

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

The ranking of claims in order of priority is generally as follows:

- statutory claimants, namely through powers conferred by the port legislation of Malaysia on harbour and port authorities to detain and sell ships for unpaid dues;
- court's commission upon judicial sale;
- sheriff's expenses and costs;
- costs of the producer of the fund (usually arresting party's legal costs);
- maritime liens (except for possessory liens which accrue before the maritime liens);
- possessory liens;
- mortgages; and
- statutory liens, ranking *pari passu*.

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

A judicial sale in Malaysia extinguishes all claims, liens, maritime or otherwise, and encumbrances on the vessels and provides the purchaser with clean title.

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

There are no decided cases on this point but Malaysia is likely to follow the English position, which recognises the extinction of liens and encumbrances on vessels sold by a foreign court pursuant to a judgment in rem.

International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

No.

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

The Hamburg or Rotterdam Rules are not applicable in Malaysia by law. Currently, the Hague Rules are compulsorily applicable in Malaysia in relation to and in connection with the carriage of goods by sea in vessels carrying goods from any port in Malaysia to any other port whether in or outside Malaysia. The Hague Rules apply only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea. Carriage at sea covers the period from the time when the goods are loaded on the vessel to the time they are discharged from the vessel (article I(e) of the Hague Rules). When the 2020 Act and Order come into force, the Hague-Visby Rules will be compulsorily applicable in Malaysia in relation to the prescribed carriage of goods by sea.

Multimodal carriage

42 | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

Malaysia is not party to a combined transport or multimodal bill of lading convention, but is party to the following main road and air transport conventions:

- the Convention on Road Traffic 1949;
- the Convention for the Unification of Certain Rules relating to International Carriage by Air 1929 (Warsaw Convention); and
- the Convention for the Unification of Certain Rules for International Carriage by Air 1999 (Montreal Convention).

Title to sue

43 | Who has title to sue on a bill of lading?

Malaysia applies the provisions of the English Bill of Lading Act 1855. A shipper has title to sue on a bill of lading. Further, every consignee 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 or her all rights of suit, and be subject to the same

liabilities in respect of the goods as if the contract contained in the bill of lading had been made with himself or herself.

Charter parties

44 | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

The position under English law will be persuasive in Malaysia. Generally, clauses that are directly germane to the subject matter of the bill of lading can be incorporated by general reference and non-germane clauses, including arbitration and exclusive jurisdiction clauses would require clear and specific words for incorporation. The charter party clauses must also make sense in the context of the bill of lading and not be inconsistent with its terms.

Demise and identity of carrier clauses

45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

The Malaysian courts are likely to adopt the position under English law. Whether a demise clause or identity of carrier clause is binding on the owner will depend on the facts of the case. If the bill of lading contains a demise or identity of carrier clause stating that the shipowner is the carrier, the shipowner will not be considered the carrier if the face of the bill of lading contains wording identifying the charterer as carrier and the bill of lading is signed by agent for charterer (*The Starsin* [2003] 1 Lloyd's Rep. 571).

Shipowner liability and defences

46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

Where the shipowner is not the contractual carrier, the shipowner is not entitled to rely on, and is not subject to, the rights, immunities, responsibilities and liabilities set out in the Hague Rules, which is currently compulsorily applicable in Malaysia in relation to the carriage of goods by sea provided in the Carriage of Goods by Sea Act (COGSA). However, the shipowner may be liable in negligence and may rely on defences such as contributory negligence.

Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?

The English position will be persuasive in Malaysia. Unjustified deviation would amount to a breach of contract which will entitle the innocent party to discharge the contract. In those circumstances, the carrier cannot rely on the contractual defences.

Liens

48 | What liens can be exercised?

The liens that may be exercised are as follows:

- maritime liens: only for claims for damage done by a ship, master's disbursements, master and crew wages, bottomry or salvage. Maritime liens created under foreign law would not be recognised unless the underlying claim falls within the recognised categories;

- contractual liens: agreed in contract between parties; and
- common law and statutory possessory liens: exercisable by shipowners, warehousemen, shipbuilders or repairers, and port authorities (statutory possessory lien) for unpaid sums.

Delivery without bill of lading

- 49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

Carriers can be found liable for breach of contract, conversion or breach of the duty as bailees. They cannot avail themselves of the limitation of liability under the Hague Rules (which is currently compulsorily applicable in Malaysia in relation to the carriage of goods by sea provided in COGSA).

Shipper responsibilities and liabilities

- 50 | What are the responsibilities and liabilities of the shipper?

The responsibilities of the shipper include providing accurate details of the marks, number, quantity and weight of the goods at the time of shipment, and paying freight of the goods. The shipper is also liable for all damages and expenses directly and indirectly arising out of or resulting from the shipment of dangerous goods the shipment where the carrier has not consented with knowledge of the character of the goods.

SHIPPING EMISSIONS

Emission control areas

- 51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

There is no ECA in force in Malaysian territorial waters.

Sulphur cap

- 52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

Malaysia has ratified annex VI of MARPOL. As at 1 January 2012, the maximum sulphur content of any fuel oil used on board Malaysian and foreign vessels in Malaysian territorial waters shall be 3.5 per cent m/m and from 1 January 2020, reduced to 0.50 per cent m/m.

There is currently no penalty provided under Malaysian law for non-compliance.

SHIP RECYCLING

Regulation and facilities

- 53 | What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

There are ship-breaking facilities in Malaysia. However, Malaysia has not ratified the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, and there are no ship recycling regulations that are applicable in Malaysia.

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

- 54 | Which courts exercise jurisdiction over maritime disputes?

All high courts in Malaysia have jurisdiction over maritime disputes. Since 2010, an admiralty court based in Kuala Lumpur has been established to deal specifically with maritime-related disputes.

Service of proceedings

- 55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

Service of notice of writ on a defendant outside the jurisdiction is permitted with leave of court in relation to certain categories of claims and where the court has jurisdiction to determine the dispute (see Order 11 and Order 70, Rule 3 of the Rules of Court 2012). It is not permissible for in rem actions.

Arbitration

- 56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

Yes. The Asian International Arbitration Centre (formerly known as the Kuala Lumpur Regional Centre for Arbitration) has a panel of arbitrators who specialise in diverse areas, including maritime arbitration. As of 2019, AIAC has administered approximately 25 maritime arbitration cases.

Foreign judgments and arbitral awards

- 57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

The Reciprocal Enforcement of Judgments Act 1958 provides for the reciprocal enforcement in Malaysia of judgments of superior courts in Brunei Darussalam, Hong Kong, New Zealand, Singapore, Sri Lanka, the United Kingdom and specific districts in India. The judgments must be final and conclusive as between parties, be for monetary payment not in the nature of taxes or fines, and not be given on appeal from a court that is not a superior court. An application must be made within six years of the date of judgment (or last judgment, in case of appeal) to the Malaysian High Court for the judgment to be registered in the High Court. For judgments of other countries, fresh proceedings have to be initiated in Malaysia to obtain a judgment.

For arbitration awards, Malaysia is party to the New York Convention 1958. An award made in respect of an arbitration where the seat of arbitration is in Malaysia or from a country that is party to the New York Convention shall be recognised as binding and be enforced by entry as a judgment in terms of the award on an application in writing to the High Court. Recognition or enforcement of an award may be refused in limited circumstances set out in section 39 of the Arbitration Act 2005, such as where the arbitration agreement is not valid under the law to which the parties have subjected it, the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia or the award is in conflict with the public policy of Malaysia.

Asymmetric agreements

58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Yes. In the case of *Majlis Perbandaran Seremban v Maraputra Sdn Bhd* [2004] 5 MLJ 469, the High Court recognised that asymmetric arbitration clauses allowing only one party the right to refer matters to arbitration are valid and binding.

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

An application may be made to the court for an anti-suit injunction. The injunction may be granted to restrain the institution or prosecution of a foreign suit where this would result in multiplicity of proceedings. The court will not grant an injunction if it will unjustly deprive the claimant of advantages in a foreign forum.

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

The defendant may apply to court for a stay of proceedings where proceedings have been commenced in breach of a clause providing for a foreign court to have jurisdiction. However, the presence of a foreign jurisdiction clause does not automatically oust the jurisdiction of the Malaysian courts. The Malaysian court will consider whether it has jurisdiction to determine the dispute, and if so, whether Malaysia is the appropriate forum to determine the dispute.

In relation to clauses providing for jurisdiction to a foreign arbitral tribunal, section 10 of the Arbitration Act 2005 provides for a mandatory stay of proceedings where a party makes an application before taking any other steps in the proceedings, unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

Section 517 of Merchant Shipping Ordinance (MSO) 1952 provides for a time limit of two years for any action to enforce a claim or lien against a vessel or its owners for any damage or loss caused by the whole or partial fault of the vessel to another vessel or its cargo, freight or other property on board, or damages for loss of life or personal injuries suffered by any person on board.

The time limit of two years also applies to claims in respect of salvage services rendered. Further, an action under MSO 1952 to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries must be commenced within one year from the date of payment.

The time limit for claims founded on breach of contract and tort is six years from the date on which the cause of action accrued, but does not apply to any cause of action within the Admiralty jurisdiction of the High Court that is enforceable in rem other than an action to recover the wages of seamen (section 6 of the Limitation Act 1953). For claims falling within the scope of the Carriage of Goods by Sea Act 1950, which currently incorporates the Hague Rules, the time bar is one year after delivery of the goods or the date when the goods should have been delivered. It is possible to extend the time limits by mutual agreement.

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Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

The courts may extend the time periods provided under section 517 of MSO 1952, if it is satisfied that during such period there has not been any reasonable opportunity to arrest the defendant's vessel within the jurisdiction of the court, or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business. In relation to arbitration, section 45 of the Arbitration Act 2005 allows the High Court to extend time limits for commencement of arbitration specified in the arbitration agreement, if it is of the opinion that undue hardship would otherwise be caused.

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

Malaysia ratified the Maritime Labour Convention 2006 (MLC 2006) on 20 August 2013 and Merchant Shipping Ordinance 1952 was subsequently amended, effective 1 March 2017, to give effect to the provisions of MLC 2006. The bulk of the amendments apply to Malaysian ships, while a number apply to both Malaysian and foreign ships. The exempted categories of ships include government or state-owned ships, fishing vessels, pleasure yachts, Malaysian ships trading or operating exclusively within Malaysian ports, floating, production, storage and offloading vessels, and floating, storage and offloading vessels.

Relief from contractual obligations

64 | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

No.

Other noteworthy points

65 | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

Malaysia has ratified the Convention on Facilitation of International Maritime Traffic with its recent amendments up to 2016 on 10 April 2019 to better promote Malaysian ports and businesses.

UPDATE AND TRENDS**Key developments of the past year**

66 | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

No updates at this time.

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