



Legal Update – June 2014

Limitation of Liability under Malaysia Merchant Shipping Ordinance 1952 – A New Regime

The Convention on Limitation of Liability for Maritime Claims 1976 **as amended by the Protocol of 1996** to amend the Convention on Limitation of Liability for Maritime Claims 1976 (referred to as the “1976 Convention”) came into force in Malaysia on 1st March 2014 when the Merchant Shipping (Amendment and Extension) Act 2011 (“the 2011 Act”) was gazetted.

The 1996 Protocol replaced the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships signed in Brussels in the 10th October 1957, which was previously in force in Malaysia.

The 1976 Convention

Pursuant to the 2011 Act, the 1976 Convention is made applicable in Malaysia as set out in the sixteenth schedule of the Merchant Shipping Ordinance 1952 (“MSO”).

A. Persons entitled to limit under the 1976 Convention-Article 1

The 1976 Convention shall apply whenever any person referred to in Article 1 of the said Convention seeks to limit his liability before the Court¹ of a State Party² or seeks to procure the

release of a ship or other property or the discharge of any security given within the jurisdiction of any such state.

Under Article 1, the following people are entitled to limit under the 1976 Limitation Convention:

- a) Shipowner – shall mean the owner, charterer, manager and operator of a seagoing ship³;
- b) Salvor – any person rendering services in direct connection with salvage operations;
- c) Any person for whose act, neglect or default the shipowner or salvor is responsible;
- d) Insurer of liability for claims subject to limitation in accordance with the 1976 Convention shall be entitled to the benefits of the 1976 Convention to the same extent as the assured himself.

B. Claims that are subjected to limitation under the 1976 Convention-Article 2

Under Article 2, the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:

- a) Claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins

¹ Section 8, Part II of Sixteenth Schedule of MSO – Reference to “the Court” are references to the High Court.

² Section 10, Part II of Sixteenth Schedule of MSO – An order made by the Minister in charge of merchant shipping declaring that any State specified in the order is a party to the 1976 Convention shall, subject to the provisions of any subsequent order made for those purposes, be conclusive evidence that the State is a party to the Convention.

³ Section 2, Part II of Sixteenth Schedule of MSO – The right to limit liability under the 1976 Convention shall apply in relation to any ship whether seagoing or not, and the definition of “shipowner” in paragraph 2 of Article 1 shall be construed accordingly. Further, pursuant to Section 9, Part II of Sixteenth Schedule MSO, references to a “ship” in the 1976 Convention and the Sixteenth Schedule include references to any structure (whether completed or in the course of completion) launched and intended for use in navigation as a ship or part of a ship).

- and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;
- b) Claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
 - c) Claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations;
 - d) Claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;
 - e) Claims of a person of the removal, destruction or the rendering harmless of the cargo of the ship;
 - f) Claims of a person other than the person liable in respect of the measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.

Claims set out above shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise. However, claims set out under items (d), (e) and (f) above shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable.

C. Claims that are excepted from limitation under the 1976 Convention - Article 3

Pursuant to Article 3, the following claims are not subject to limitation:

- a) Claims for salvage, including, if applicable, any claim for special compensation under Article 14 of the International Convention on Salvage 1989, as amended, or contribution in general average;
- b) Claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage, dated 29th November 1969 or of any amendment or Protocol thereto which is in force;
- c) Claims subject to any international convention or national legislation governing

or prohibition limitation of liability for nuclear damage;

- d) Claims by servants of the shipowner or salvor whose duties are connected with the ship or the salvage operations, including claims of their heirs, dependants or other persons entitled to make such claims, if under the law governing the contract of service between the shipowner or salvor and such servants the shipowner or salvor is not entitled to limit his liability in respect of such claims, or if he is by such law only permitted to limit his liability to an amount greater than that provided for in Article 6.

D. Limitation Amounts under the 1976 Convention

The limitation amounts under the 1976 Limitation Convention are expressed in Units of Accounts.

Pursuant to Article 8, the Unit of Account is the special drawing right (SDR) as defined by the International Monetary Fund. The limitation amounts under the 1976 Limitation Convention shall be converted into the national currency of the state in which limitation is sought, according to the value of that currency at the date the limitation fund shall have been constituted, payment is made, or security is given which under the law of that state is equivalent to such payment.

• **General Limits – Article 6**

The limits of liability for claims other than those mentioned in Article 7 (i.e. passenger claims) of the Convention shall be calculated as follows:

- a) In respect of claims for loss of life or personal injury,
 - i) 2 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,
 - ii) For a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in i):
 - For each ton from 2,001 to 30,000 tons, 800 Units of Account;
 - For each ton from 30,001 to 70,000 tons, 600 Units of Account; and
 - For each ton in excess of 70,000 tons, 400 Units of Account.
- b) In respect of any other claims,

- i) 1 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,
- ii) For a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in i):
 - For each ton from 2,001 to 30,000 tons, 400 Units of Account;
 - For each ton from 30,001 to 70,000 tons, 300 Units of Account; and
 - For each ton in excess of 70,000 tons, 200 Units of Account.

Where the amount calculated under paragraph (a) above is insufficient to pay the claims therein, the amount calculated under paragraph (b) shall be available for payment of the unpaid balance of claims under paragraph (a) and such unpaid balance shall rank ratably with claims mentioned under paragraph (b).

The limits of liability for any salvor not operating from any ship or for any salvor operating solely on the ship to, or in respect of which he is rendering salvage services, shall be calculated according to a tonnage of 1,500 tons.

For the purpose of the 1976 Limitation Convention, the ship's tonnage shall be the gross tonnage calculated in accordance with the tonnage measurement rules contained in Annex 1 of the International Convention on Tonnage Measurement of Ships, 1969.

- **Limit for Passenger Claims - Article 7**

Claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the shipowner thereof shall be an amount of 175,000 Units of Account multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate⁴.

"Claims for loss of life or personal injury to passengers of a ship" shall mean any such claims

⁴ Section 3(1), Part II of Sixteenth Schedule of MSO – In the case of a ship there is in force a Passenger Ship Safety Certificate or Passenger Certificate, as the case may be, issued under or recognized by safety regulations, the ship's certificate mentioned in Article 7 paragraph 1 shall be that certificate.

brought by or on behalf of any person⁵ carried in that ship:

- a) under a contract of passenger carriage, or
- b) who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods.

How to convert Units of Account to Ringgit Malaysia for the purpose of calculating the limitation amounts under the MSO?

The answer to this question is explained in Section 4, Part II of Sixteenth Schedule of MSO which states as follows:

"4 (1) For the purposes of converting the amounts mentioned in Articles 6 and 7 from special drawing rights into Ringgit Malaysia, one special drawing right shall be treated as equal to such a sum in Ringgit Malaysia as the International Monetary Fund has fixed as being the equivalent of one special drawing right for:

- a) *the relevant date under Article 8, paragraph 1; or*
- b) *if no sum has been so fixed for that date, the last preceding date for which a sum has been so fixed.*

(2) A certificate given by or on behalf of the Minister of Finance stating:

- a) *that a particular sum in Ringgit Malaysia has been fixed as mentioned in subparagraph (1) for a particular date; or*
- b) *that no sum has been so fixed for that date and that a particular sum in Ringgit Malaysia has been so fixed for a date which is the last preceding date for which a sum has been so fixed,*

shall be conclusive evidence of those matters for the purposes of those Articles; and a document purporting to be such a certificate shall in any proceedings be received in evidence and, unless the contrary is proved, be deemed to be such a certificate."

E. Conduct Baring Limitation- Article 4

A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent

⁵ Section 3(2), Part II of Sixteenth Schedule of MSO – Reference to claims brought on behalf of a person in Article 7, paragraph 2 includes a reference to any claim in respect of the death of a person under any written law in Malaysia.

to cause such loss, or recklessly and with knowledge that such loss would probably result.

F. Counterclaims – Article 5

Where a person entitled to limitation of liability under the rules of this 1976 Convention has a claim against the claimant arising out of the same occurrence, their respective claims shall be set off against each other and the provisions of this 1976 Convention shall only apply to the balance, if any.

G. Aggregation of Claims- Article 9

The limits of liability determined in accordance with Article 6 shall apply to the aggregate of all claims which arise on any distinct occasion:

- a) against owner, charterer, manager and operator of a sea going ship and any person for whose act, neglect or default he or they are responsible; or
- b) against the shipowner of a ship rendering salvage services from that ship and the salvor or salvors operating from such ship and any person for whose act, neglect or default he or they are responsible; or
- c) against the salvor or salvors who are operating from a ship or who are operating solely on the ship to, or in respect of which, the salvage services are rendered and any person for whose act, neglect or default he or they are responsible.

The limits of liability determined in accordance with Article 7 shall apply to the aggregate of all claims subject thereto which may arise on any distinct occasion against owner, charterer, manager and operator of a sea going ship and any person for whose act, neglect or default he or they are responsible.

H. Limitation Fund-Article 11

Pursuant to Article 11(1), any person alleged to be liable may constitute limitation fund with the court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation.

Fund shall be constituted in the sum of such amounts set out in Articles 6 and 7 as are applicable to claims for which that person may be liable, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund.

Where the fund is constituted by any one of the several persons mentioned in Article 9 or by an insurer of one of these persons, the fund will be regarded as having been constituted 'by all persons mentioned' in Article 9.

- How to constitute Limitation Fund in Malaysia?
 - Depositing the sum;
 - Producing a guarantee acceptable under the legislation of Malaysia and which is considered to be adequate by the Malaysia Court or other competing authority.

I. Limitation Fund-Article 11

According to Article 12(1), the fund shall be distributed among the claimants in proportion to their established claims against the fund.

If, before the fund is distributed, the person liable, or his insurer, has settled a claim against the fund such person shall, up to the amount he has paid, acquire by subrogation the rights which the person so compensated would have enjoyed under the 1976 Convention.

The right of subrogation mentioned above may also be exercised by persons other than those therein mentioned in respect of any amount of compensation which they may have paid, but only to the extent that such subrogation is permitted under the applicable national law.

No lien or other right in respect of any ship or property shall affect the proportions in which under Article 12 the fund is distributed among several claimants⁶.

J. Effect of Constituting Limitation Fund- Bar to other Actions-Article 13

Pursuant to Article 13 (1) and (2), once a limitation fund has been constituted:

- a) Any person having made a claim against the fund shall be barred from exercising any right in respect of such a claim against any other assets of a person by or on behalf of whom the fund has been constituted.
- b) Any ship or other property, belonging to a person on behalf of whom the fund has been constituted, which has been arrested or attached within the jurisdiction of a State

⁶ Section 5(6), Part II of Sixteenth Schedule of MSO.

Party for a claim which may be raised against the fund, or any security given, may be released by order of the court or other competent authority of such state. However, such release shall always be ordered if the limitation fund has been constituted:

- i) at the port where the occurrence took place, or, if it took place out of port, at the first port of call thereafter; or
- ii) at the port of disembarkation in respect of claims for loss of life or personal injury; or
- iii) at the port of discharge in respect of damage to cargo; or
- iv) in the State where the arrest is made.

Important thing to note: Where the release of a ship or other property is ordered under Article 13(2), the person on whose application it is ordered to be released shall be deemed to have submitted to the jurisdiction of the court to adjudicate on the claim for which the ship or property was arrested or attached [Section 7, Part II of sixteenth schedule of MSO]

Further, where a fund is constituted with the court in accordance with Article 11 for the payment of claims arising out of any occurrence, the court may stay any proceedings relating to any claim arising out of that occurrence which are pending against the person by whom the fund has been constituted.

K. Limitation of Liability Without Constitution of a Limitation Fund-Article 10

Limitation of liability may be invoked notwithstanding that a limitation fund as mentioned in Article 11 has not been constituted.

If limitation of liability is invoked without the constitution of a limitation fund, the provisions of Article 12 shall apply correspondingly.

Questions of procedure arising under the rules of this Article shall be decided in accordance with the national law of the State Party in which action is brought.

L. Governing Law- Article 14

The rules relating to the constitution and distribution of a limitation fund, and all rules of

procedure in connection therewith, shall be governed by the law of the State Party in which the fund is constituted.

M. Scope of Application - Article 15

The 1976 Convention shall apply whenever any person referred to in Article 1 seeks to limit his liability before the Court of a State Party or seeks to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of any such State.

This Convention shall not apply to:

- a) Air-cushion vehicles;
- b) Floating platforms constructed for the purpose of exploring or exploiting the natural resources of the sea-bed or the subsoil thereof.

Is the 1976 Limitation Convention also applicable to Sabah and Sarawak?

Yes, pursuant to Section 34 of the Merchant Shipping (Amendment and Extension) Act 2011.

Other provisions under the MSO in connection with the 1976 Convention

A. Compulsory insurance or other financial security for ship

Section 361 provides as follows:

- 1) Any ship shall not enter or leave a port in Malaysia, or any part of Malaysian waters or the exclusive economic zone, unless there is in force in respect of the ship a contract of insurance or other financial security satisfying the requirements of the 1976 Convention in respect of the limits of liability.
- 2) This section shall not apply to:
 - a) A foreign ship while it is exercising:
 - i) The right of innocent passage; or
 - ii) The right of transit passage through straits used for international navigation.
 - b) Ships of war and troopships
 - c) (c) Any ship for the time being used by the government of any State for purposes other than commercial purposes.
- 3) If a ship enters or leaves, or attempts to enter or leave, a port in Malaysia or any part of Malaysian water or the exclusive economic zone in contravention of

subsection (1), the master or the owner of the ship shall be guilty of an offence and shall be liable on conviction to a fine of not less than two hundred thousand ringgit and not more than five hundred thousand ringgit.

- 4) If a ship attempts to leave a port in Malaysia or any part of Malaysian waters or the exclusive economic zone in contravention of this section, the ship may be detained.
- 5) Any contract of insurance or other financial security required by this section to be in force in respect of a ship shall be carried in the ship, and shall on demand be produced by the master to the Director of Marine or any person authorized in writing by the Director of Marine.
- 6) If a ship fails to carry, or the master of the ship fails to produce, a contract of insurance or other financial security as required by subsection (5), the master of the ship shall be guilty of an offence and shall be liable on conviction to a fine of not less than twenty thousand ringgit and not more than one hundred thousand ringgit.

B. Compulsory insurance or financial security for master and seaman

Section 365A provides as follows:

- 1) The owner of every Malaysian ship shall maintain a contract of insurance or other financial security in respect of the master and every seaman carried on board the ship, to cover all claims arising out of a contract or otherwise in respect of the death, personal injury or abandonment of the master or seaman.
- 2) If the owner of a Malaysian ship fails to comply with subsection (1), he shall be guilty of an offence and shall be liable on conviction to a fine of not less than fifty thousand ringgit and not more than one hundred thousand ringgit.

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