Malaysia – recent legal developments

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- Enactment of significant IMO conventions brings Malaysia up to date ahead of its regional neighbours.
- Concerted effort to modernise Malaysia's legal infrastructure and establish its position as a regional forum for dispute resolution.

Recognising the need to update its maritime laws, on 1 March 2014 Malaysia enacted certain significant maritime conventions simultaneously. Combined with efforts to modernise its legal infrastructure, Malaysia is looking to establish itself as a regional forum for dispute resolution. This article looks in more detail at these recent legal developments.

Enactment of maritime conventions

Three significant maritime conventions have recently been enacted in Malaysia. The International Convention for Civil Liability for Oil Pollution Damage 1969 (CLC), the International Convention on the Establishment of an International Fund for Oil Pollution 1992 (The Funds Convention) and the Bunkers Convention 2001 were all enacted with effect from 1 March 2014 through the Merchant Shipping (Oil Pollution) (Amendment) Act 2011 (the Merchant Shipping Act). These conventions, which contain a strict liability regime, provide compensation in respect of oil pollution damage from trading tankers carrying oil as cargo in the case of the CLC Funds Convention and bunker pollution damage in respect of all other categories of ships. It further provides for the requirement of compulsory insurance or other financial security with a right of direct action against the insurer.

A 'ship', for the purposes of the Bunkers Convention, is defined as any seagoing vessel or seaborne craft of any type. However, as Malaysia has kept the offshore craft exclusion in its enactment of the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC), it is arguable that a floating production storage offtake unit (FPSO) and floating liquefied natural gas unit (FLNG) may not have the right to limit for bunker oil spill claims.

The Merchant Shipping Act

The Merchant Shipping Act brings into force the LLMC as amended by the 1996 Protocol, which for the time being only applies in Peninsular Malaysia (aka West Malaysia) and the Federal Territory of Labuan. The LLMC as enacted retains the Article 15 offshore craft exclusion and, as such, would exclude FPSO and FLNG units. The 1957 Limitation Convention, however, remains applicable in the States of Sabah and Sarawak (East Malaysia).

The apparent reason is the reluctance of the East Malaysian shipowners to agree to the higher limits of the LLMC as amended, despite the precarious threshold of the "*actual fault or privity of the owner*" rule in the 1957 Convention, which can quite easily prevent a shipowner from limiting his liability and thus render a claim potentially unlimited under the convention. Contrast this with the LLMC threshold of "*personal act or omission, committed with intent to cause such loss or recklessly and with knowledge*" constituting as conduct barring limitation, which makes the liability limits in the LLMC practically unbreakable.

Though provisions have been made in the enacting legislation for exclusion, Malaysia has not yet opted to exclude from limitation the wreck removal provisions of Article 2 paragraph 1 (d) and (e) of the LLMC. Presently, therefore,

a shipowner can limit in respect of wreck removal of the entered ship, her cargo and/or property on board.

Curiously, however, the enacting legislation makes it compulsory for a ship to have in force: firstly, a contract of insurance or other financial security in respect of the ship "satisfying the requirements of the Convention" in respect of the limits of liability under the LLMC and, secondly, a contract of insurance or other financial security in an amount equal to the amount calculated pursuant to Article 6, paragraph 1(b) of the LLMC for removal of the wreck as well.

Malaysia is party to the Nairobi Wreck Removal Convention 2007, which does not come into force until 14 April 2015. In both cases, failure to have such insurance or financial security in place could lead to fines being imposed on ships when in Malaysian waters and the EEZ (ships transitting on an international voyage are exempted) in respect of the LLMC and for any ship when in Malaysian waters in respect of the wreck removal.

P&I Clubs will not issue blue cards in respect of the LLMC as amended as this is not a compensation regime; correspondingly, there is no requirement for compulsory insurance or financial security in the Convention itself, and the Wreck Removal Convention is not yet in force and, as such, P&I Clubs are not presently required[1] to issue blue cards for this liability and compensation regime, so it will be interesting to see how the authorities reconcile this anomaly. In the final analysis, the practical solution would be that the ship's P&I certificate of insurance would suffice.

Conclusion

By establishing an Admiralty Court in October 2010 with two dedicated High Court Judges to hear all admiralty and maritime related matters, Malaysia has made a push to be a desired forum for adjudication. Complementing the Admiralty Court is the Kuala Lumpur Regional Centre for Arbitration (KLRCA) set up in 1978, the first regional centre at that time but practically dormant until 2010. In 2010, an initiative to revitalise the KLRCA, led to some 22 matters being referred to arbitration. As at 31 August 2014, this number stands at 253. The modernisation of Malaysia's legal maritime infrastructure will certainly place Malaysia on the map of regional forums for legal adjudication, including in respect of offshore energy and marine matters, complemented by the legislative changes outlined above.

1 Once the Wreck Removal Convention is in force, the Standard Club will issue certificates evidencing that insurance is in place (rule 4.5(6)) in compliance with Article 12 of the Convention.