

WATSON FARLEY & WILLIAMS

BRIEFING

MALAYSIA SHIP REGISTRY

NOVEMBER 2016

- MALAYSIA DOES NOT ALLOW PARALLEL REGISTRATION, WHETHER BAREBOAT CHARTER IN OR OUT
- SHIPS REGISTERED UNDER THE MALAYSIAN INTERNATIONAL SHIP REGISTRY WILL CARRY A MALAYSIA FLAG AND ARE CONSIDERED AS MALAYSIAN SHIPS
- A REGISTERED MALAYSIAN SHIP OR A SHARE THEREIN MAY BE TRANSFERRED TO A PERSON OR COMPANY ELIGIBLE TO OWN A MALAYSIAN SHIP



The flag/registry

Malaysia operates a Dual Registry system, namely: (i) a closed domestic registry with its domestic ports – principally Port Klang and Penang¹ – for the Traditional Ship Registry (“TSR”); and (ii) an open/international registry at the port of Labuan for the Malaysian International Ship Registry (“MISR”).

The Malaysian authorities do not want its MISR to be viewed as a flag of convenience and, accordingly, have taken measures to curtail such a view.

A cabotage policy is in operation and acts to reserve “domestic shipping”² to the country’s own flagged vessels and a domestic shipping licence is required to engage in domestic trade unless an exemption applies. In order to be eligible for a domestic shipping licence, the ship-owning entity must be at least 51% owned by Malaysians, the board of directors and the workforce must also have no less than 30% “Bumiputra” representation, and at least 75% of the crew on board must be Malaysians. We understand that it is possible to obtain a temporary or conditional domestic shipping licence if the above conditions are not satisfied, but these will be

¹ Note: The other parts of registry are Kota Kinabalu and Kuching.

² Section 65A of Part II B of the Merchant Shipping Ordinance 1952 (“MSO”) defines “domestic shipping” as the use of a ship:

“(a) to provide services, other than fishing, in the territorial waters of Malaysia or the exclusive economic zone; or

(b) for the shipment of goods or the carriage of passengers (i) from any port or place in Malaysia to another port or place in Malaysia; or (ii) from any port or place in Malaysia to any place in the exclusive economic zone or vice versa.”

for a shorter duration of up to three months (for a temporary licence) and up to one year (for a conditional licence).

It is worth noting that Malaysia does not allow parallel registration, whether bareboat charter in or out.

The TSR

Pursuant to Part IIA of the MSO, ownership of a ship registered on the TSR is restricted to:

- a) Malaysian citizens; or
- b) Malaysian-incorporated corporations where:
 - (i) the principal office of the corporation is in Malaysia;
 - (ii) the management of the corporation is carried out mainly in Malaysia;
 - (iii) the majority (currently 51%) of directors are Malaysian citizens and the majority of the shareholding of the corporation (including voting shares) are held by Malaysians free from any trust or obligation in favour of non-Malaysians.

“THE DOMESTIC SHIPPING LICENSING BOARD CONSIDERS APPLICATIONS FOR A DOMESTIC SHIPPING LICENSE FROM FOREIGN REGISTERED SHIPS IN CASES WHERE NO MALAYSIAN REGISTERED SHIPS ARE AVAILABLE TO CARRY PARTICULAR CARGOES FOR CERTAIN INDUSTRIES.”

The Domestic Shipping Licensing Board considers applications for a domestic shipping license from foreign registered ships in cases where no Malaysian registered ships are available to carry particular cargoes for certain industries. Applications will typically need to be supported by offering evidence to show that all possible efforts have been taken to engage a locally registered vessel to meet such transportation requirement. The applicant usually seeks the endorsement of the Malaysian Shipowners Association (“MASA”) with regard to the non-availability of appropriate Malaysian-flagged vessels.

The MISR

The MISR seeks to attract individuals and foreign shipping companies to register ships through Labuan without the need to comply with the Malaysian majority shareholding requirement specified above. Ships registered under MISR will carry a Malaysian flag and are considered as Malaysian ships.

Specific requirements for registering a ship or vessel under the MISR can be found in Part IIC of the MSO. A non-Malaysian company wishing to register a vessel under the MISR will typically form a Labuan company as a vehicle to own a merchant vessel capable of being registered under MISR. The procedure for forming a Labuan company is straightforward and companies can be formed fairly quickly (the process of applying for approval takes approximately one month, assuming all documents are in order). The MSO provides that the relevant ship-owning company with a ship registered on the MISR must fulfil the following conditions:

- (i) be incorporated in Malaysia and have its principal and office in Malaysia;
- (ii) have at least one shareholder and director; and
- (iii) the majority (currently 51%) of the shareholding (including voting shares) are held by non-Malaysians free from any trust or obligation in favour of non-Malaysians.

However, all vessels registered on the MISR must be managed by a ship manager who is either:

- (i) a Malaysian citizen whose permanent residence is in Malaysia; or
- (ii) a company incorporated in Malaysia and whose principal place of business is in Malaysia.

Ship-owning entities have to be capitalised up to 10% of the relevant ship value (or of its most valuable ship where there are more than one), or MYR1m, whichever is higher.

“IT IS IMPORTANT TO NOTE THAT LABUAN COMPANIES WISHING TO CARRY OUT LEASING BUSINESS... MUST ALSO APPLY FOR APPROVAL FROM THE LABUAN FINANCIAL SERVICES AUTHORITY.”

It is important to note that Labuan companies wishing to carry out leasing business (such as charters of Malaysian vessels) must also apply for approval from the Labuan Financial Services Authority as conducting a leasing business is a regulated activity in Malaysia.

Title, transfer of title and reflagging

A registered Malaysian ship or a share therein may be transferred to a person or company eligible to own a Malaysian ship. The transfer is effected by way of a prescribed Malaysian Bill of Sale form. It must be executed by the transferor and the transferee, and witnessed by two witnesses. The transferee is not entitled to be registered as the owner thereof, until the person authorised to make declarations on behalf of the corporation has made and signed a declaration of transfer referring to the ship and containing:

- (i) a statement of the eligibility of the transferee to own a Malaysian ship, or if the transferee is a corporation, of such circumstances of the constitution and business thereof as proof it is eligible to own a Malaysian ship; and
- (ii) a declaration to the best of his or her knowledge and belief that no ineligible person or corporation is entitled as owner to any legal, beneficial or equitable interest in the ship or any share therein.

The owner of a registered Malaysian ship may transfer the ship to a foreign registry if no claims are outstanding against the ship in Malaysia. This requires the approval of the relevant Malaysian Registrar of Ships, and the application should be made in writing by the owner to the relevant Malaysian Registrar of Ships.

Any registered mortgages will also have to be discharged prior to the transfer of title and/or reflagging.

Security

The MSO permits a Malaysia-flagged ship (or a share of such ship) to be mortgaged for a loan or other valuable consideration. The statutory mortgage must be in a prescribed form and needs to be lodged with the relevant Registrar of Ships. The statutory mortgage is customarily accompanied by an ancillary deed of covenant. The usual terms of a deed of covenant would include representations and warranties and undertakings relating to the operation of the ship and other customary mortgagee protection provisions.

Foreign lenders financing of ships in Malaysia should be mindful of withholding tax issues and must adhere to the provisions relating to exchange controls in the

“THE MSO PERMITS A MALAYSIA-FLAGGED SHIP (OR A SHARE OF SUCH SHIP) TO BE MORTGAGED FOR A LOAN OR OTHER VALUABLE CONSIDERATION.”

“THE TSR DOES NOT CATER FOR THE PROVISIONAL REGISTRATION OF MORTGAGES AND, AS SUCH, THE SHIP WILL FIRST NEED TO COMPLETE AND OBTAIN PERMANENT REGISTRATION OF TITLE IN ORDER TO ENABLE A MORTGAGE TO BE REGISTERED AGAINST THE SHIP.”

Financial Services Act 2013³ (and the directions issued thereunder) before extending credit facilities to Malaysian residents.

The credit facilities extended may only be in foreign currency (up to MYR5m).

It is worth noting that stamp duty is payable in respect of the mortgage and the deed of covenant and these documents should be stamped upon execution. The deed of covenant is also likely to contain a power of attorney, which should be registered with the High Court of Malaysia.

The mortgage and ancillary deed of covenant should also be registered at the Companies Commission of Malaysia (if the ship owner is a domestic Malaysian company) or the Labuan Financial Services Authority (if the ship owner is a Labuan registered company), in each case within 30 days after the creation of the relevant charge.

TSR

The TSR does not cater for the provisional registration of mortgages and, as such, the ship will first need to complete and obtain permanent registration of title in order to enable a mortgage to be registered against the ship. For newbuildings, the permanent registration process can take up to two weeks from the date of delivery of the ship.

MISR

The MISR, however, does cater for the provisional registration of mortgages on ships that have only provisional registration status. Typically ships are registered on a provisional basis for a minimum period of six months, but not more than 12 months.

In the event that a ship has been only provisionally registered, the mortgage will be recorded only upon presentation of the following documents:

- (i) document of title of ownership;
- (ii) a letter of confirmation from the previous port of registry that the vessel is free from any encumbrances; and
- (iii) a letter to the previous port of registry from a lawyer’s office acting on behalf of the owner making it known that the ship has been provisionally registered under a Malaysian flag and indicating that necessary arrangements will be undertaken to close the ship’s previous registry.

Transcripts of the relevant ship (in Malay) can be provided from both the TSR and the MISR to ascertain if there are any registered mortgages on that ship.

³ Please note that an earlier version of the briefing referred to the Exchange Control Act. This has now been updated to refer to the Financial Services Act 2013.

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FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with one of the authors below or your regular contact at Watson Farley & Williams.



MEI LIN GOH
Partner
Singapore

+65 6551 9125
mlgoh@wfw.com



SHAWN ER
Partner
Singapore

+65 6551 9186
ser@wfw.com

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