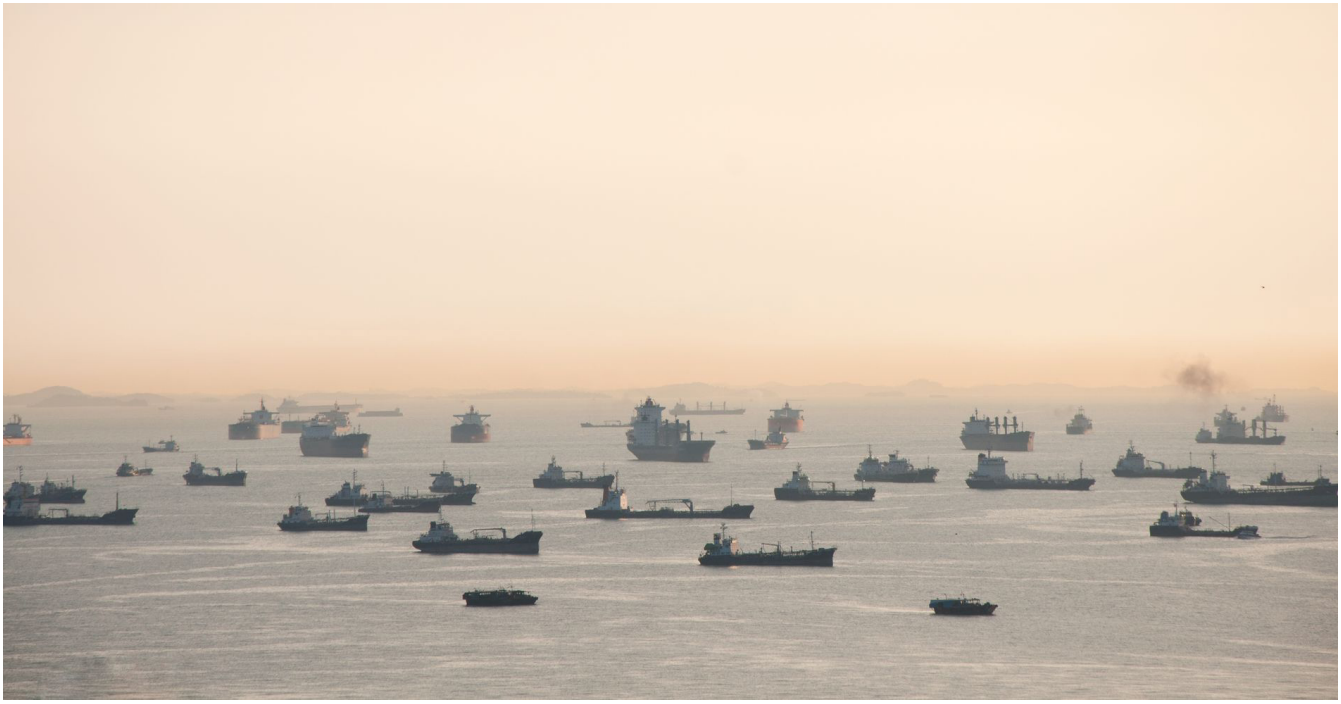

Marine casualties in the Straits of Malacca and Singapore — which regime?

In a casualty situation there are often disputes about which territorial waters the vessel was in where the incident occurred – not least to secure the most favourable jurisdiction from an owner's perspective. This article examines the differences between the jurisdictions involved in one of the world's busiest shipping lanes.

Published 14 December 2014

The Straits of Malacca and Singapore (SOMS) carry about one third of the world's traded goods. Unlike other major shipping lanes, the SOMS lie along three different states:

- Malaysia
- Singapore
- Indonesia.

When an incident happens within its jurisdictional waters, the authorities are authorised by statutes to investigate the incident to prevent a recurrence of the same incident.

Governing regimesA collision incident is governed by the Maritime Conventions Act 1911 in Singapore, which provides that generally, parties are liable for their proportionate degrees of fault in the event of a collision and where it is impossible to attribute fault to either vessel, blameworthiness is to be apportioned equally. The same legislation is also applicable in Malaysia by virtue of Section 5 of the Civil Law Act 1956 of Malaysia.

Under the relevant articles in the Indonesian Commercial Code, the liability of parties in a collision is similarly dependent on the proportion of fault that causes the collision. In Indonesia, the most crucial issue to be proven is the element of fault, which is regularly taken to be reasonably related to the professionalism of the crew, especially the master.

LimitationThe limitation of liability regime which currently applies in Singapore is the Limitation of Liability for Maritime Claims 1976 (the 1976 Convention). In Malaysia, however, the Limitation of Liability for Maritime Claims 1976 as amended by the Protocol of 1996 (the 1996 Protocol) now applies. Whilst Singapore has been enforcing the 1976 Convention (subject to Part VIII of the Merchant Shipping Act) since it came into operation on 1 May 2005, the relevant regulation in Malaysia was the Convention Relating to the Limitation of Liability of Owners of Seagoing Ships in 1957 (the 1957 Convention) until very recently. This changed earlier this year when the Merchant Shipping (Amendment and Extension) Act 2011 came into force in Malaysia making the 1996 Protocol the new regime for the limitation of liability in Malaysia from 1 March, 2014.

However, under Indonesia Law, the limitation of liability is governed by the Indonesian Commercial Code (ICC) which recognises two types of limitation:

- package limitation of liability
- tonnage limitation of liability.

If there is a collision, a ship may limit its liability to 50 Indonesian rupiah for each cubic metre of the net tonnage of the vessel, unless the collision occurred intentionally or was due to gross negligence or a major error. Neither the Indonesian Civil Code nor Indonesia's Shipping Law provide a definition of *gross negligence* or

irrespective of whether it is sourced from Gard AS, its shareholders, correspondents, or other contributors.

major error. However, it most likely relates to a material error or mistake committed by the ship's master in circumstances where he should have been fully aware that such an act or omission would compromise the safety of the ship, its passengers, crew and/or cargo.

Wreck removalWhen a vessel is declared a wreck, various authorities will take over the conduct of the wreck removal, if necessary. In Malaysia, the Director of Marine, who is the principal receiver of wrecks, is empowered under the Merchant Shipping Ordinance 1952 (MSO) to exercise general direction and supervision over all matters relating to wreck and salvage. Under the MSO, where a ship wreck is likely to become a hazard to navigation or a public nuisance or cause harmful consequences to the marine environment, the owner is obliged to locate, mark and remove the wreck promptly and take steps to prevent pollution from occurring. Any non-performance on the owner's part will result in fines. The Director of Marine may also demand financial security from the owner or master to ensure due performance of all actions which the owner or master has agreed to undertake with respect to the wreck removal. In addition, Malaysia has ratified the Nairobi Convention on the Removal of Wrecks 2007 and has enacted mirror provisions in its MSO which require a vessel entering or leaving a Malaysian port to have a contract of insurance or other financial security for wreck removal equal to the vessel's limitation of liability calculated under the 1996 Protocol. Any contravention will result in fines being imposed on the owner. Singapore and Indonesia have not ratified the Nairobi Convention and do not have similar provisions.

In Singapore, the Maritime and Port Authority of Singapore (MPA) has the general supervision of wreck removal and may appoint a wreck receiver. Anyone other than the owner of a shipwrecked vessel finding or taking possession of a wreck, must deliver it to the wreck receiver as soon as possible. If the finder fails to deliver the wreck, without reasonable cause, he will not be able to make a claim for salvage and may also be exposed to liability towards the owner or another who is entitled to the wreck under Section 153 of the Merchant Shipping Act.

The relevant authority for wreck removal in Indonesia is the Directorate General of Sea Communications of the Ministry of Transportation. Under Indonesia's Shipping Law, the Directorate General can direct that the owner remove the wreck and/or its cargo to a designated place where it interferes with maritime safety and security. The wreck removal operations must be conducted within 180 calendar days after the vessel is sunk. Failing this, the owner may be the subject of criminal sanctions and the Directorate General will conduct the operations and claim the costs against owners accordingly.

PollutionThere is a likelihood that a marine casualty incident may result in pollution of the territorial waters of the three states so they are working hard to try to avoid this.

Indonesia has ratified several conventions on pollution, such as the 1992 Protocol to amend the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1973 International Convention for the Prevention of Pollution from Ships and the related 1978 Protocol. Indonesian shipping law further regulates the disposal of waste in water resulting from ship operations and port activities and imposes criminal sanctions if breached. Vessel crews are prohibited from disposing of any waste, trash or dangerous and poisonous chemical substances in Indonesian waters.

They must prevent and mitigate the occurrence of a pollution incident, in addition to immediately reporting an occurrence of a pollution resulting from ship operations.

Malaysia, is also a party to numerous international conventions – the International Convention for the Prevention of Pollution from Ships 1973/1978; the International Convention on Civil Liability for Oil Pollution Damage 1992; and the International Convention for Compensation for Bunker Oil Pollution Damage 2001 – and has lawsi in place prohibiting the discharge of oil or harmful substances, such as oil, hazardous substances, pollutants or waste from any vessel into its territorial waters and economic zone. A person in contravention of the laws is liable to be fined or imprisoned or both. The Malaysian authorities are entitled to detain the offending vessel until they receive adequate security. As mentioned above, all vessels sailing into Malaysia waters or its economic zone, must have in place a certificate of insurance or other financial security equivalent to the owners' total liability under the applicable conventions.

Owners of vessels sailing into Singapore waters are liable for pollutants that are discharged from their vessels. *Pollutants* in Singapore cover more than oil and include garbage, waste matter and plastics as well. Under the Prevention of Pollution of the Sea Act, the master, owner and agent of a vessel shall be liable for a criminal offence where such pollutants are discharged from the vessel, unless the discharge incident falls within one of the exceptions, for example if it was necessary for the purpose of securing the safety of a ship or saving life at sea. Further, the owners of a vessel are liable to pay for the cost of the measures taken by the MPA to remove the pollutants and for the costs of preventing or reducing any damage caused by the discharge.

Slightly different regulations apply to discharges of oil or bunker fuel from vessels that are constructed or adapted for carrying oil in bulk as cargo. Civil liability is imposed on the owners of such vessels by the Merchant Shipping (Civil Liability and Compensation for Oil Pollution) Act . Under this Act, the owners of such vessels are strictly liable for the damagecaused by the discharge and the cost of the measures taken to prevent or reduce such discharge. Liability also extends to any damage that such preventive measures may cause. The owner can however escape liability under certain limited circumstances, for example if he can show that it was caused by the act or omission of a person with the intent to cause damage who is not an employee or agent of the owner. An owner who is found liable under this Act may limit his liability according to the Act, and this limitation is calculated based on the Vessel's tonnage. Limitation is however not allowed in cases where the discharge resulted from an act or omission of the owner done either with the intention to cause the damage or cost described in the Act, or recklessly and in the knowledge that any such damage or cost would probably result.

For discharge of bunker fuel (or its residues) from other types of vessels, civil liability is determined by the Merchant Shipping (Civil Liability and Compensation for Bunker Oil Pollution) Act 2008. This Act contains similar provisions to the Merchant Shipping (Civil Liability and Compensation for Oil Pollution) Act, however under this Act strict liability for the discharge is imposed not only on the registered owner of the vessel but also the bareboat charterer, manager and operator. An owner who is found liable under this Act may also limit his liability, however in these cases limitation is calculated in accordance with the provisions of the 1976 Convention.

Gard's office in Singapore is available to answer any queries and to respond to

correspondents, or other contributors.

incidents on Members' and clients' vessels calling in the region and sailing through the SOMS.

Acknowledgments: Thanks for providing useful comments go to: Oon & Bazul LLP, Singapore; TS Oon & Partners, Malaysia; and Christian Teo Purwono & Partners, Indonesia.

Questions or comments concerning this Gard Insight article can be e-mailed to the Gard Editorial Committee.

i Merchant Shipping (Liability and Compensation for Oil and Bunker Pollution) Act 1994 , Merchant Shipping Ordinance 1952, Environmental Quality Act 1974 , Exclusive Economic Zone Act 1984 .