

STRUCTURING VESSEL PURCHASE IN MALAYSIA

Introduction

This article seeks to explore the various points of consideration for Buyers and Sellers in the sale and purchase of a Vessel in Malaysia which consists of inter alia, the requisite procedures to be followed before a transfer of ownership can be completed. The sale and purchase of a Vessel are effected by two main agreements, namely the sale and purchase agreement which is commonly known as a Memorandum of Agreement ("**MOA**"), and the Bill of Sale ("**BoS**") which is the instrument to effect the transfer or registration of ownership of a Vessel.

Both documentations are distinct. The MOA is an agreement between the Buyer and the Seller for the sale and purchase of the Vessel; whereas, the BoS is a form of certificate to certify the successful purchase of the Vessel and transfer of ownership from the Buyer to the Seller.

Negotiation Stage

At the negotiation stage and from the perspective of a Buyer, there are a few important considerations to be taken into account before concluding the MOA. Firstly, the Buyer will have to perform its due diligence to determine the condition of the Vessel and to assess if the Vessel has any debts, mortgages, encumbrances, or liens attached to it.

This is to ensure that the Vessel which the Buyer intends to purchase is in a satisfactory condition and is a clean Vessel that does not carry with it any debts, mortgages, encumbrances, or liens.

Although it is common to include provisions in the BoS which guarantees that the Vessel sold is free of any debts, mortgages, encumbrances, or liens, it is still the duty of the Buyer to perform its due diligence to avoid any possible claims made against the Buyer.

Secondly, the financing of a Vessel has to be considered as well, whether the Vessel will be purchased by way of bank mortgage, lump sum payment, or any other payment arrangement. Such a decision on the payment method will have to be accurately reflected in the MOA.

It is also important to conduct a Vessel search at the port authorities to determine if there is any charge or mortgage attached to the Vessel. The Buyer will have to ensure that the Vessel purchased is free of any encumbrances or maritime lien which will be further discussed below.

Thirdly, the Buyer will have to take into consideration the “one ship one company” ownership structure. This essentially means that if the Buyer intends to own more than one Vessel, it should register each Vessel under a single entity within the Buyer’s group of companies (i.e a subsidiary). This allows the Vessel to have a separate entity and liability of its own.

If the Vessels are all registered under one company, in the event of a ship arrest, the arresting party may be able to arrest any other sistership (Vessel which is registered under the same ownership as the Vessel at fault).

The above is not an exhaustive list of considerations. Depending on the negotiations between both parties, there may be other concerns or considerations to be addressed.

Sale and Purchase Documentation

As mentioned above, to execute a transfer of title of the Vessel, the relevant documents required are the MOA and BoS, of which the BoS will be presented to the port authorities.

The MOA

As mentioned, the contract of sale and purchase of a Vessel is commonly known as a MOA. There are standard forms of MOA such as the recently published BIMCO SHIPSALE 22[1], Norwegian Sale Form 1993 and 2012, Singapore Ship Sale Form and so on. These are only standard forms consisting of the standard and important terms relevant in a Vessel sale and purchase, such as:

1. Parties involved

2. Description of the Vessel
3. Payment – which is crucial to state the exact agreed payment method
4. Condition of Delivery
5. Inspection
6. Notices, time, and place of delivery of the Vessel
7. Spares and bunkers
8. Rights of the Seller and Buyer in event that there is any breach of any terms in the MOA;
9. Documentation and exchange of documents before Closing;
10. The applicable law and arbitration.

The Seller and/or Buyer is free to make changes to the standard terms of the MOA to cater to the interests of the parties. Besides amendments, the parties can also freely include any other relevant terms that are of interest and agreed upon during the negotiation period to be included in the MOA.

The BoS

The BoS is another essential document which will be signed by both parties after the conclusion of MOA. As mentioned, the BoS certifies in writing the details of the sale of the Vessel or transfer of the ownership from the Buyer to the Seller.[2] Sample BoS can be obtained from the relevant authorities such as the Marine Department of Malaysia.

Most importantly, the parties will have to ensure that the BoS includes details such as the parties involved, details and descriptions of the Vessel, the purchase price of the Vessel, the payment method, and the warranty of the Vessel.

Some examples of provisions which could be inserted in a BoS include, “Upon receipt of the full purchase price of the Vessel, the Buyer agrees to transfer the title of the ownership of this Vessel to the Seller.” and “the Vessel is free of any debts, mortgages, encumbrances, and liens.”.

These clauses are important to be incorporated in the BoS, especially for the interest of the Buyer as the Vessel is exposed to risk of arrests if there are any encumbrances or maritime liens attached to the Vessel even if there had been a transfer of ownership to the Buyer. Sir John Jervis in the case of ***The Bold Buccleugh***[3] defined maritime lien as follows:

“... a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr Justice Story explains that process to be a proceeding in rem...”

This claim or privilege travels with the thing, into whosever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached."

Therefore, it is important that such risks are identified during the due diligence process and mitigated by incorporating clauses such as the above into the BoS or even the MOA. The transfer of ownership takes effect upon the executed BoS being presented and recorded at the relevant port authorities.

Conclusion

Despite there being various standard forms of MOAs to choose from, each containing its own distinctive features and structures, the Buyer and Seller must have a contract which accurately reflects a structure which safeguards the parties from evitable risks and one that is suitable to the needs of both.

Thus, it is important for potential Buyers and Sellers of Vessels to carefully consider the points discussed above before completing a sale and purchase of a Vessel to ensure that their interests remain protected.

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1. Lianjun Li and others, 'BIMCO releases new standard ship sale and purchase agreement', (Reed Smith, 18 May 2022), <<https://www.reedsmith.com/en/perspectives/2022/05/bimco-releases-new-standard-ship-sale-andpurchase-agreement>>.
 2. Adam Hayes, 'Bill of Sale: Definition, How It Works, Absolute Vs. Conditional', (Investopedia, 22 December 2022), <<https://www.investopedia.com/terms/b/bill-ofsale.asp>>.
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26 January 2024

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