

JAMAICAN BAR ASSOCIATION SHIP REGISTRATION SEMINAR

SATURDAY 30 SEPTEMBER 2000

**NEW INTERNATIONAL SHIP REGISTRY FOR JAMAICA:
LAW, PRACTICE AND OPPORTUNITIES**

by

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NEW INTERNATIONAL SHIP REGISTRY FOR JAMAICA: LAW, PRACTICE AND OPPORTUNITIES

I will be covering the following matters in this presentation:

- The practical challenges and issues for lawyers arising from the launch of the Jamaica International Register
- The requirements and expectations of banks, shipowners and overseas lawyers representing banks
- The transactions which relate to ship registration
- The opportunities for you and your firms

I will do this by:

- describing how a typical ship finance transaction proceeds
- telling you what is required of a foreign correspondent lawyer in the flag state of a vessel, particularly:
 - at the start of a transaction
 - if things go wrong
- giving you my view on the opportunities the Jamaica International Register could bring you and your firms

A TYPICAL SHIP FINANCE TRANSACTION

A ship finance transaction generally starts when a shipowner (or a shipowner to be) approaches a bank (the "Bank") with a request to borrow monies to purchase either a second hand vessel or a vessel to be built to its order. The Bank will consider the shipowner's request and issue an offer letter setting out the main terms and conditions on which the loan will be made, either by the Bank alone or by a syndicate of banks. If the loan is syndicated, it is usual for the Bank to act as the agent for the syndicate banks since it is with this bank that the shipowner has a relationship.

Once the shipowner has accepted the loan offer the Bank will instruct its lawyers to prepare the loan agreement and security documents based on the terms and conditions set out in the offer letter. The documents are then negotiated between the shipowner and the Bank often with the assistance of their respective lawyers. Redrafting of the documents to reflect the negotiations follows. I must add here that the shipowner is not usually the borrower of the loan; typically the shipowner sets up a single purpose company to borrow the loan and own the vessel. This is attractive to banks since it ring fences each financing and may prevent sister ship arrest. For the shipowner it may have the affect of limiting its liability should a disaster, particularly a pollution

- a confirmation that the mortgage has been duly registered over the vessel and is valid and enforceable against the Borrower

In the majority of ship finance transactions the Bank will be looking primarily to the value of the vessel to secure the repayment of its loan rather than to the balance sheet of the Borrower or any guarantor.

WHAT IS REQUIRED OF A FOREIGN CORRESPONDENT LAWYER OF THE FLAG STATE

At the start of a transaction

Sadly not many shipowners arrange finance to purchase a vessel until a few weeks before they need funds particularly if the vessel to be purchased is second hand. Since a ship finance transaction is often completed over a very short period of time prompt assistance is therefore required and expected from both the co-ordinating lawyers i.e. those lawyers advising on the chosen law of the loan agreement, and any foreign correspondent lawyers appointed.

You will typically be instructed on behalf of the Bank by its co-ordinating lawyers and will liaise with these lawyers on the form of your opinion.

If the Borrower is established in Jamaica, your legal opinion will cover:

- the registration of the vessel
- the validity and enforceability of all documents which will be governed by Jamaican law (typically this will be the statutory mortgage (the "Mortgage") and sometimes a charge over the shares in the Borrower) and any other documents to which the Borrower is a party e.g. assignments of the earnings and insurances of the vessel

The Jamaica International Register (the "International Register") is to be an open register however i.e. with limited ownership restrictions. In some cases therefore the Borrower will not be established in Jamaica. Your legal opinion will then cover:

- the registration of the vessel
- the validity and enforceability of the Mortgage
- depending on the chosen law, the deed which is collateral to the Mortgage and contains covenants of the Borrower as to the insurance, operation and maintenance of the vessel (known as the deed of covenants)

I will use the term "Relevant Documents" below to describe the documents which will be the subject of your legal opinion.

For a "vanilla" ship finance transaction the Bank will require an opinion covering the following issues (those opinions marked with an asterisk will only be applicable if the Borrower is established in and subject to the laws of Jamaica):

- the valid existence of the Borrower in Jamaica*

- whether any filings must be made or consents obtained to ensure the legality, validity, effectiveness or enforceability of the Relevant Documents
- whether the execution and delivery of the Relevant Documents violates the constitutional documents of the Borrower* or any Jamaican law
- the position with regard to withholding tax and stamp duties or similar taxes
- the validity of a choice of a law in a Relevant Document other than the law of Jamaica or a submission to the jurisdiction of a court other than a Jamaican court
- whether the Borrower or any of its assets is immune from prosecution or the bringing of enforcement proceedings in Jamaica
- whether the Bank could be deemed to be domiciled or subject to taxation in Jamaica as a result of it entering into the Relevant Documents or receiving payments under such documents
- whether the Bank must be licensed to carry on business in Jamaica in order to make a loan to a Jamaican entity*
- the admissibility of a foreign judgment
- whether any order has been made for the winding up of the Borrower* or there are any actions pending against the Borrower in Jamaica

If a security party other than the Borrower is incorporated in Jamaica, your legal opinion will also cover this security party and the security documents to which it is a party. For the purposes of this presentation, however, I have assumed that the only Jamaican entity is the Borrower. It may also be necessary to supplement your legal opinion should the transaction be complicated by, for example, the vessel's registry in Jamaica being suspended and the vessel being flagged out to another jurisdiction as provided for in section 19 of the Shipping Act 1998.

Before the legal opinion stage can be reached however the Bank must accept the Borrower's proposal that it registers its vessel under the laws and flag of Jamaica. While the launch next Wednesday and the similar events which will take place in the major shipping centres around the world over the next few months will introduce the benefits of the International Register, before the Bank will agree to accept a Jamaican mortgage as security it will wish to ascertain that:

- it can obtain evidence of the valid registration of the vessel in the name of the Borrower
- it can obtain evidence of the due registration of a valid and enforceable mortgage over the vessel
- there is a legal profession able to advise on all relevant matters
- the International Register has satisfactory standards in respect of such matters as inspections, surveys and crewing and monitors compliance diligently and effectively

The Borrower will wish to be satisfied that:

issues and ensuring that the Maritime Authority provides you with the documentation and support you need at the relevant time. The advice sought by the Bank to enable it to consider the Borrower's request to register its vessel in the International Register will be on such diverse topics as:

- the ownership requirements for registration of a vessel under Jamaican flag
- what types of vessels are eligible to fly the Jamaican flag
- the requirements of the International Register as to technical matters
- any restrictions as to names for a vessel
- the procedure for a first registration
- what the owner must do (if anything) following first registration and within what time periods
- the procedure for the re-registration of a vessel
- what documents are issued to the Borrower on registration of its vessel and their validity
- whether the documents of title to a vessel can be issued in advance and sent to the vessel wherever she is to be delivered
- the procedure and cost of deletion of a vessel from the International Register
- whether it is possible for a vessel to be transferred to another register while encumbered with a mortgage
- if the vessel is provisionally registered, what is the status of the mortgage on that vessel if the vessel is not permanently registered within any applicable time period
- the form and content of a Jamaican mortgage
- where and when a mortgage may be registered
- the rights of a first and subsequent mortgagee on default of the mortgage
- the order of priorities
- the procedure and cost of registration of a second or subsequent mortgage
- the facilities available to the Borrower and the co-ordinating lawyers for registration of a vessel and/or a mortgage in a location outside Jamaica e.g. in London or New York
- the procedure and cost of deletion of a mortgage over a vessel
- how to register a vessel registered in another state in the International Register pursuant to the Ship Registration Act 1998 (the "Act")

If things go wrong

Sadly loans do go into default despite the best efforts of the Borrower and the Bank. At this time the Bank will require your advice and assistance with regard to the enforcement of the Mortgage. If the vessel has been arrested in a foreign jurisdiction you may be called on to give affidavit evidence as to the validity of the Mortgage and even, in the early days of the International Register, on the authority of the International Register. You may also be asked to advise on the procedure for deletion of the Mortgage and vessel after enforcement of the Mortgage. If the vessel is trading to Jamaica the Bank may wish to arrest the vessel here when your advice will be sought regarding the Bank's right of arrest, the remedies available to it and the priority of its claim against any sale proceeds arising from the enforcement of the Mortgage.

MY VIEW ON THE OPPORTUNITIES THE INTERNATIONAL REGISTER COULD BRING YOU

You must expect I am afraid that many questions will be asked by banks about the International Register (usually through their co-ordinating lawyers) before they are prepared to lend money secured by a mortgage over a vessel registered in the International Register. The upside however is that this will provide you and your firms with an opportunity to impress the co-ordinating lawyers and thereby the Bank.

There are perhaps 15 firms in London and I believe fewer in New York which handle ship finance transactions regularly. Whilst you could wait to be approached by these firms with their questions, you may wish to consider promoting your firms and indirectly the International Register by producing a paper e.g. answering the questions commonly put by shipowners and banks to a register. My firm has a library dedicated to information about shipping registries of the world and I have no doubt that the other firms are the same. We keep papers of the type I have just referred to in this library. It only takes one lawyer after all to need some information on the International Register and to find your paper particularly helpful for instructions to follow!

In anticipation of your firm receiving instructions, you may also wish to consider preparing a pro forma legal opinion for ship finance transactions which can be adapted as necessary to each transaction. This will enable you to respond quickly should you receive a request for assistance. As I have already said, often time is of the essence of a ship finance transaction and accordingly one of the criteria on which we judge correspondent lawyers is the promptness of service, although quality should not be sacrificed for speed of course.

The International Register will need your support to succeed. I think however it is a cause worth supporting since it should provide you with an exciting new area of the law to practice and bring an international dimension to your work.

I wish you, your firms and the International Register much success in the future.