

SHIP REGISTRATION AND JAMAICA

- Some Preliminary Considerations



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Introduction

This paper seeks to provide some introductory perspectives (both international and national) on the development of a new international ship registry for Jamaica.

Firstly, it is proposed to look at Ship Registration per se, particularly from the standpoint of international law. This is considered a useful point of departure if only because as a “law-abiding” country, Jamaica is obliged to have regard to its international obligations as pertains to the subject. Moreover, international law informs and underpins Jamaica’s legislation on ship registration.

Secondly, note will be taken in broad terms of the previous approach to ship registration in Jamaica as reflected in prior applicable legislation, so as to better appreciate the basic changes being brought about by the establishment of the new international registry.

Thirdly, consideration will be given briefly to the need to have special “bypass” legislative provisions to circumvent stipulations in existing legislation, which although not dealing with ship registration per se, would likely be a hindrance to both the process and prospects of ship registration in Jamaica.

Ship Registration - the International Law Perspective

From an international law perspective, **Ship Registration** is basically the process by which nationality is conferred on a ship. The **nationality** of a ship refers to the state which has authority and responsibility over and in respect of the ship. The ship's **flag** symbolizes its nationality and the term "**flag state**" generally denotes the state whose nationality the ship has.

The Granting of Nationality - International Law Implications and Obligations

The granting of nationality to a ship gives rise to a number of consequences. It implies the acceptance of responsibility to exercise control over such a ship. Hence, there is the concept of **flag state control**. Accordingly, **Article 94** of **The United Nations Convention on the Law of the Sea (UNCLOS)**¹ provides:-

- “1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters of ships flying its flag.*
- 2. In particular every State shall:*
 - (a) maintain a register of ships containing the name and particulars of ships flying its flag, except those which are excluded from generally accepted*

international regulations on account of their small size; and

(b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.

3. *Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:*

(a) the construction, equipment and seaworthiness of ships;

(b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;

(c) the use of signals, the maintenance of communications and the prevention of collisions.

4. *Such measures shall include those necessary to ensure:*

(a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment

¹ Signed in Montego Bay on December 10, 1982.

and instruments as are appropriate for the safe navigation of the ship;

- (b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and number for the type, size, machinery and equipment of the ship;*
- (c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.*

- 5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.”*

Obligations similar to those outlined in **Article 94** of UNCLOS are also to be found in **Article 5** of **The United Nations Convention on Conditions for**

Registration of Ships, 1986 which specifies several duties of the flag state as regards the exercise of jurisdiction and control over its ships.²

Under UNCLOS, additional flag state duties as a consequence of granting nationality to a ship are laid down in respect of other matters, including:-

- (a) the duty to render assistance to persons imperiled at sea,³
- (b) the prohibition of the transportation of slaves,⁴
- (c) co-operation in the repression of piracy,⁵

² *Article 5 of that Convention under the caption National Maritime Administration provides as follows:-*

- “1. The flag State shall have a competent and adequate national maritime administration, which shall be subject to its jurisdiction and control.
2. The flag State shall implement applicable international rules and standards concerning, in particular, the safety of ships and persons on board the prevention of pollution of the marine environment.
3. The maritime administration of the flag State shall ensure:
 - (a) That ships flying the flag of such State comply with its laws and regulations concerning registration of ships and with applicable international rules and standards concerning, in particular, the safety of ships and persons on board and the prevention of pollution of the marine environment;
 - (b) That ships flying the flag of such State are periodically surveyed by its authorized surveyors in order to ensure compliance with applicable international rules and standards;
 - (c) That ships flying the flag of such State carry on board documents, in particular those evidencing the right to fly its flag and other valid relevant documents, including those required by international conventions to which the State of registration is a Party;
 - (d) That the owners of ships flying the flag of such State comply with the principles of registration of ships in accordance with the laws and regulations of such State and the provisions of this Convention.
4. The State of registration shall require all the appropriate information necessary for full identification and accountability concerning ships flying its flag.”

³ per Article 98, *ibid.*

⁴ Article 99, *ibid.*

⁵ per Article 100.

- (d) the enactment of legislation for preventing, reducing and controlling pollution of the marine environment by the flag state's vessels⁶; and
- (e) the enactment of legislation to punish the willful or reckless breaking or injury to submarine cables.⁷

In addition to the International Conventions already mentioned, others including many developed under the auspices of the International Maritime Organization⁸ specify various duties and rights of flag States in respect of their vessels.

The Registration Process

The registration process is both **legal** and **administrative**. A ship may be registered if it meets the relevant national requirements. Registration is effected by entering the ship unto the list of ships on the national ship's register after which a Certificate of Registry is issued. The process is very much geared towards publicly acknowledging and protecting the title of the shipowner to the vessel and protecting others' rights *in rem* in the ship, such as those of mortgagees.

⁶ per Article 211, para. 2.

⁷ per Article 113, *ibid*.

⁸ These include the following Conventions to which Jamaica is a party:-

- (a) *The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 as amended in 1995 (The STCW Convention)*
- (b) *The International Convention for the Safety of Life at Sea, 1974 (SOLAS Convention)*
- (c) *The International Convention on Load Lines, 1966 (The Loadlines Convention)*
- (d) *The Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREG); and*
- (e) *The International Convention for the Prevention of Pollution, 1973 (& its Protocol of 1978 (MARPOL 73/78).*

Mortgagees will invariably register their interests in the ship in the national register and as with other systems of registration are generally afforded protection inter se on a “first in time-first in line” basis.

Stipulating Conditions for Registration

According to international law each state may fix the conditions which govern the granting of its nationality. More specifically as regards ships, a state is allowed to determine the requirements by which a ship may be registered under its registry and fly its flag.

This principle has been long recognized by courts in both the international law context and domestic law context.

Thus in 1905, the principle was recognized by the **Hague Court of Permanent Arbitration** in the **Muscat Dhows Case** (France v Great Britain),⁹ in which the court stated:

*“generally speaking it belongs to every sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants.”*¹⁰

The principle was followed by the USA Supreme Court in the case of **Lauritzen v Larsen**,¹¹ in which the Court stated:

⁹ *Muscat Dhows* (1916) *Hague Court Reports* 93, *Permanent Court of Arbitration*, 1916.

¹⁰ *Ibid.*, p. 101.

“Each State under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship’s papers and its flag. The USA has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state.”¹²

The principle was restated in the **1958 Geneva Convention on the High Seas**¹³ and was again adopted in **The United Nations Convention on the Law of the Sea (UNCLOS)**.

Article 91, paragraph 1 of The United Nations Convention on the Law of the Sea (UNCLOS) provides as follows:-

“Each state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.”

It is therefore a matter of national policy as to what conditions a ship has to meet in order to be granted nationality.

¹¹ *Lauritzen v Larsen*, 345 US571, 1953 AMC 210 (1953).

¹² *Ibid.*

However, this is at least subject in theory to the “*genuine link*” qualification set out in **Article 91**.

In practice, the concept of “*genuine link*” has proven to be evasive of a definition that attracts international consensus. Indeed, it has been bluntly stated that:

“There are no legal criteria to measure or assess the true existence of a genuine link.”¹⁴

The “*genuine link*” concept suffered a debilitating setback when in 1960, the International Court of Justice (ICJ) in its advisory opinion held that registered tonnage was the only test for determining the eight “largest” ship-owning nations referred to in **Article 2(a)** of the Convention governing the then International Maritime Consultative Organization, now International Maritime Organization (IMO).

The ICJ rejected the test of the nationality of the beneficial owners of the ships, which was found to have “*no basis in international practice*”.¹⁵

In neither the **Geneva Convention of 1958** nor **The United Nations Convention on the Law of the Sea** is there any criteria set out for establishing the existence of a “*genuine link*”.

However, as has been observed:

¹³ per *Article 5(1)*.

*“...The link seems to arise ex post facto, being expressed in terms of the jurisdiction and control exercised by the flag state over the ship. Patently such jurisdiction and control can only arise after the ship has been registered in that state”.*¹⁶

If the genuine link is seen in these terms, there seems no reason to deny the existence of such a link in the case of ships entered in a given properly administered registry.

Attempts have been made at setting international standards for the granting of nationality to a ship. These have culminated in the adoption of **The United Nations Convention on the Conditions for Registration of Ships of 1986**.

The Convention, inter alia, aims at “ensuring or, as the case may be strengthening the genuine link between a state and ships flying its flag...”¹⁷

The implications of the Convention as regards the “genuine link” concept are well summarized by Ready:¹⁸

*“Whilst the earlier conventions envisaged the “genuine link”
... in terms of jurisdiction and control, the 1986
Convention introduces the concept of the economic link,
providing for the participation by nationals of the flag*

¹⁴ Vide: Registration of vessels – K. X. Li & J. Wonham, *The International Journal of Marine and Coastal Law*, Vol. 14, No. 1, Kluwer Law International, 1999.

¹⁵ (1960) ICJ Rep. 160-170.

¹⁶ N. P. Ready, *Ship Registration (3rd Edition)*, LLP, 1998 at p. 12.

¹⁷ Per Article 1.

state in the ownership, manning and management of ships.

The relevant provisions are contained in Articles 7,8,9 and 10.

Article 8 requires the flag State to make provision in its laws and regulations for participation “by that State or its nationals as owners of ships flying its flag or in the ownership of such ships and for the level of such participation”. Article 9 requires the State of registration to “observe the principle that a satisfactory part of the complement consisting of officers and crew of ships flying its flag be nationals or persons domiciled or lawfully in permanent residence in that State”.

Article 7 grants States an option: either they may comply with the ownership requirements in Article 8 or the manning requirements in Article 9 – they may, however, comply with both!

Article 10 sets out the role of the flag State in respect of the management of shipowning companies and ships on its register. Before entering a ship in its register, the State of registration “shall ensure that the shipowning company or a subsidiary shipowning company is established and/or has its principal place of business within its territory in

¹⁸ *Ibid.*, pp. 13-14.

accordance with its laws and regulations". However, where these circumstances do not exist, the requirement may be satisfied by the appointment of a "representative or management person who shall be a national of the flag State or be domiciled therein".

It appears therefore that after much ado, states remain practically unfettered as regards laying down the conditions under which they may register a ship and allow that ship to fly its flag. Jamaica, can therefore, in full compliance with its obligations under UNCLOS, proceed to lay down conditions for the registration of ships as it deems fit. It may thus enact legislation accordingly. However as has been intimated earlier, it will have to remain ever conscious of its obligations qua flag state.

Different types of Registries

By considering the criteria used by different countries for registering vessels, such as the ownership, management and manning of the vessel by nationals, registration regimes have been broadly categorized as open, closed, compromise or second registers.

Like the concept of "*genuine link*", that of an "*open registry*" or "*flag of convenience*" has no universal clear cut definition.

An often quoted definition is that of Boczek¹⁹ who in 1962 stated that:

“Fundamentally, a “flag of convenience” can be defined as the flag of any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever the reasons, are convenient and opportune for the persons who are registering the vessels.”

The concept of an “open registry” has traditionally pointed to registries of flag states which make it relatively easy for ships beneficially owned by non-nationals to fly their flags.

However, as international shipping and economic realities change so have shipping registries providing facilities or services to non-nationals. Their quality and labels have also changed. There is thus the simple and more palatable (and marketable) concept of an “international register”.

Stopford²⁰ describes an “international register” as

“one that has been set up with the specific aim of offering shipowners internationally competitive terms, often as a means of earning revenue for the flag state. The terms and conditions offered by international registers vary considerably, depending upon the policy of the country concerned. Some are highly professional and

¹⁹ B. A. Boczek, *Flags of Convenience – An International Legal Study* (Cambridge, MA,) Harvard University Press, 1962 at p.2..

²⁰ M. Stopford, *Maritime Economics* (1988).

enforce international conventions on safety, whilst others are less vigilant, allowing shipowners to cut corners. However, all aim to offer terms that are favourable to an international shipowner.”

As you no doubt would have gleaned, Jamaica is setting up a high quality international register – nothing less. Here, the policy is to observe, inter alia, stipulations of international maritime conventions as regards safety and protection of the marine environment as well as the highest international standards of professional service to shipowners.

Closed Registers

At the other end of the spectrum from the open registry is that of the closed registry.

Such a registry typically stipulates stringent requirements as to defacto national ownership, management and manning of a vessel for it to be registered.

Compromise Registers

Shipping Registers which provide registration using conditions intermediate between the closed and open registers are often referred to as “*compromise registers*”.

Second Registers

There is also the relatively recent development of the “*Second Registers*” whereby “*Offshore National Registers*” are established by traditional shipowning

countries (such as the United Kingdom and Norway) offering many of the advantages of flags of convenience, but nonetheless retaining a link between beneficial ownership or management and the national flag.

Ship Registration in Jamaica – Prior to the 1998 Shipping Act

Prior to the coming into force on January 1, 1999 of **The Shipping Act, 1998**, ship registration in Jamaica was governed by an Imperial United Kingdom statute: **The Merchant Shipping Act, 1894 (U.K.)**.²¹

Two features of the approach to ship registration as reflected in the Act may be highlighted here. These may be considered under the headings of:-

1. Qualification for ownership
2. Administrative responsibility for effecting registration

Qualification for Ownership

Section 1 of the old 1894 statute provided that:-

“A ship shall not be deemed to be a British ship unless owned wholly by persons of the following description (in this Act referred to as persons qualified to be owners of British ships); namely, -

(a) ...British subjects:

...(d) Bodies corporate established under and subject to the laws

*of some part of Her Majesty's dominions, and having
their principal place of business in those dominions... ”*

Thus a “British” ship would have to be one owned by British interests with the ‘double’ requirement that , if owned by a company, the company should not only be registered within Her Majesty’s Dominions, but also have its “principal place of business there, which was interpreted to mean that place from where the effective control was maintained.”²²

These requirements as regards registration of a “British Ship” applied mutatis mutandis as regards registration of a Jamaican ship.²³

Administrative Responsibility for effecting registration

Section 4 of the **1894 Act** provided, inter alia, for the “chief officer of customs” to be a registrar of British ships.

Jamaica, following the policy inherited from the U.K. as reflected in the 1894 statute operated what could be described as a “compromise registry”. It was not entirely closed to ships beneficially owned by non-nationals but such non-nationals would have to incorporate a company here as well as have the company’s principal place of business here.

²¹ Now repealed per Section 461 of *The Shipping Act, 1998*.

²² Vide: *The Polzeath (1916)* p. 241, CA.

²³ Vide: *Section 43, The Interpretation Act*.

There was no policy, legislation nor facility for encouraging foreign shipowners to register their ships here. Ship registration was limited and was carried out in the offices of the Customs Department.

The Shipping Act, 1998

With the enactment of the Shipping Act, there have been substantial departures from what obtained under the old **1894 Act** in, inter alia, the areas just considered.

Qualification for ownership

Section 20 provides that:-

“The following are persons qualified to own a Jamaican ship, namely –

- (a) citizens of Jamaica;*
- (b) persons who pursuant to the Immigration Restriction (Commonwealth Citizens) Act²⁴ are deemed to belong to Jamaica;*
- (c) bodies corporate established under and subject to the law of*

²⁴ **“Section 2(2) of that Act provides that:-**

“... a Commonwealth citizen shall be deemed to belong to the Island if he –

- (a) was born in the Island or of parents who at the time of his birth were domiciled or ordinarily resident in the Island; or*
- (b) is domiciled in the Island; or*
- (c) has been ordinarily resident in the Island continuously for a period of seven years or more and since the completion of such period of residence has not been ordinarily resident in any other part of Her Majesty's dominions or any territory under the protection of Her Majesty continuously for a period of seven years or more; or*
- (d) became a citizen of Jamaica by registration or by naturalization; or*
- (e) is a dependent of a person to whom any of the foregoing paragraphs applies”.*

*Jamaica and having a place of business or a managing owner
or agent in Jamaica;*

*(d) such other persons as the Minister may specify by order subject
to affirmative resolution of the House of Representatives.”*

This list of qualified persons is being widened by pending amendments to the **Section**. However, the **Section** as quoted has already done away with the requirement that the principal place of business should be in Jamaica in order for a company incorporated here to be qualified to own a Jamaican ship.

Administrative responsibility for effecting registration

The responsibility for administering the registration of ships is now that of The Maritime Authority²⁵ to be carried out by a Registrar General of Ships and registrars employed by the Authority for that purpose.²⁶ **The Shipping Act**²⁷ makes specific provision for the employment and engagement of a number of maritime professionals to carry out not only registration but also various flag state responsibilities (including a number of those already considered in respect of **UNCLOS, Article 94**). This, of course, stands in sharp contrast to what obtained previously.

²⁵ *Vide: Section 8(1)(a), The Shipping Act, 1998.*

²⁶ *Vide: Section 11; ibid.*

²⁷ *Vide: Ibid; Section 12 as regards the appointment of surveyors and utilization of classification societies.*

Reasons for Developing an International Registry

Essentially, countries promote international shipping registries for economic reasons. The main income to these registries come from the registration and annual fees.

The registration fee is based on the tonnage of the vessel.

Clearly, the more ships²⁸ on register - the more income.²⁹

There are now several countries, including a growing number of Caribbean countries with international registries and competition to attract tonnage and in particular worthy tonnage is fierce.

Shipowners naturally try to minimize costs - both direct and indirect. Thus a country seeking to attract tonnage needs to, inter alia, carefully balance any desire to attract tonnage with any over reaching national policy imperatives or international obligations.

Apart from direct income accruing from fees or levy, economic benefits may accrue indirectly through employment of nationals whether directly or indirectly in respect of the ships concerned as regards the provision of various services.

The development of an international registry may also be integrated into broader offshore economic endeavours and developments.

²⁸ Especially the larger, newer, safer and generally trouble free ones.

²⁹ Between the early 1950s to the mid 1980s the Liberian Registry earned for Liberia in excess of Two Hundred and Fifty Million United States Dollars (U.S.\$250,000,000.00)!!

Factors which aid the development of a high quality competitive international ship registry

Here a basic objective is that of striking a good balance between adherence to high international shipping safety and other standards and the commercial concerns of the shipowner.

Factors which facilitate or help to promote the development of such a registry include the following:-

- (a) a high standard of safety with internationally accepted standards such as those of the International Maritime Organization Conventions being generally utilized as the minimum requirements
- (b) competitive fees (with e.g. special discount schemes for large tonnage)
- (c) competitive fiscal and other incentives (tax exemptions, double taxation reliefs and other benefits)
- (d) efficient and effective legal and administrative infrastructure providing a high level of professional service
- (e) supporting mortgage and other security, financial and commercial regulations and infrastructure
- (f) simplicity and user-friendliness of documentation and registration process (e.g. facility for data access and provisional registration via

the Internet, availability of service 24 hours 7 days a week confidentiality, easy access to Registry overseas – through Embassies/representatives)

- (g) flexible manning regulations (e.g. absence of restrictions placed upon crew nationality – although usage of national seafarers may be encouraged by special discount fees)
- (h) special schemes to assist the ship owner such as provisional registration and Bareboat Charter Registration
- (i) investor friendly labour and industrial relations laws and practices
- (j) trainable workers
- (k) generally investor friendly shipping laws, legal and other infrastructure
- (l) good communications infrastructure
- (m) favourable geographic location
- (n) political, social and economic stability
- (o) strong and effective marketing

Bearing in mind these various factors, a review of the stipulations of various pieces of commercial, revenue and labour and industrial relations legislation, leads inevitably to the conclusion that for the successful establishment of a competitive international ship registry in Jamaica, special provisions needed

to be made to render it possible for the owner of a Jamaican ship, or particular transactions concerning the ship, or persons who work on such a ship not to be caught in the tentacles of particular “investor-unfriendly” stipulations, procedures and practices.

This is so as regards, for instance, the time taken to incorporate a company or the myriad of obligations under **The Companies Act** consequent on such incorporation or liability for tax under legislation such as **The Income Tax Act**, **The Stamp Duty Act** and **The Transfer Tax Act** or the freedom of a seafarer engaged to work on a Jamaica ship to agree to terms which, but for such special provisions would be rendered null and void by existing labour and industrial relations legislation.

Concluding Comments

An attempt has been made in this paper to raise some points with a view to providing a background for a fuller appreciation of some of the considerations which inform and indeed have prompted the establishment of an international shipping registry in Jamaica and the concomitant legislative provisions.

These points are by no means exhaustive of the gamut of issues. However, my co-presenters will no doubt address a number of the other important issues not

raised in this paper including more of the “nuts and bolts” issues. It is already clear however that proper consideration of Ship Registration as pertains to Jamaica entails not only the legal “nuts and bolts” but broader legal and critically important extra-legal considerations.

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