

THE JAMAICAN INTERNATIONAL SHIP REGISTRY:

A ONE STOP SHOP

BY

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1. INTRODUCTION

Several years of deliberation on the formulation of national maritime policy and the preparation of requisite legislation finally culminated into the enactment in 1998 of a modern, up to date Shipping Act of Jamaica.

Shipping is inherently an international activity, and as such, is largely regulated by international conventions relating to maritime safety and marine environmental protection emanating from the International Maritime Organization (IMO). The concept of maritime safety extends to the safety and welfare of seafarers and their vocational and professional standards. Some of these matters are covered by legal instruments (Conventions and Recommendations) of the International Labour Organization (ILO). Jamaica is a party to several of these major IMO and ILO Conventions. The Jamaica Shipping Act, 1998 reflects the up to date law of these conventions and instruments or provides for their incorporation through subsidiary legislation.

The provisions in the Act relating to registration of ships are basic, in the sense that the promulgation of a Ministerial Order is contemplated to provide for a detailed regime for the registration of ships and ship mortgages. It is evident that Jamaica intends to develop and establish a viable international ship registry that, it is anticipated, will stimulate the advancement of the Jamaican maritime sector as a whole. Needless to say, Jamaican thinking in this regard is keyed into the dramatically changing seascape in world shipping in relation to the international regime of nationality, ownership and registration of ships.

Where a country aspires to be a flag state, its maritime administration must necessarily be structured to administer flag state interests and responsibilities. Similarly, where a country is predominantly a port state or a coastal state without any significant merchant fleet, its maritime administration is structured to cater to the relevant needs of such a state. In the case of Jamaica, so far the predominant interest has been in the field of maritime education and training (MET). The Jamaica Maritime Institute is well known throughout the Caribbean region. As such, Jamaica can be considered to be a significant crew supplying country. In developing an international ship registry, due consideration should be given to this existing attribute of the Jamaican maritime sector. Furthermore, related service industries, some of which may already be in existence, could be further developed within the overall framework of an international registry most important among these is ship financing. Marine insurance is another service of growing importance and interest within a local scenario. This is the concept of a "one stop shop" which is an attractive marketing device.

Thus, essentially, a maritime administration of an aspiring flag state will have a major component that will deal with ship registration including registration of mortgages, and another that will administer MET and the supply of crews as well as their welfare pursuant to international convention law. Last but not least, there must be a technical component consisting of the requisite survey, certification and inspection expertise to carry out the various flag state responsibilities required under the relevant international maritime conventions.

2. NATIONALITY, REGISTRATION AND OWNERSHIP OF SHIPS

2.1 The Legal Concepts of Nationality and Registration

The concept of the flag in maritime law and practice is virtually synonymous with ship registration. Indeed, the terms nationality, flag and registration are often used interchangeably. However, there are certain legal implications that need to be appreciated in light of the distinctions among these terms; and furthermore, the interrelationship between the nationality, registration and ownership of ships needs to be clearly understood.

The conceptual theory of ship nationality stems from the functional characteristic of mobility of a ship beyond the jurisdictional limits of a state into the high seas where no jurisdictions would otherwise prevail. As a self-contained communal unit, where people live, work and interact, a ship must, of necessity, be subject to some legal regime at all times. In waters rather than the high seas, a ship could well be subject to the laws of a littoral state, at least in some respects. But upon the high seas, without the benefit of flag or nationality, she would, metaphorically speaking, float in a legal vacuum. This is the rationale underlying the legal concept of ship nationality.

It is the law of the flag state, therefore, that is the operative law on board although the ship may be subject to dual or concurrent jurisdiction when she is within the waters of another state. This "extension of territory" theory, otherwise known as the "floating island doctrine" has been judicially confirmed in a number of cases. In the celebrated *LOTUS* case, the Permanent Court of International Justice held that-

... a ship on the high seas is assimilated to the territory of the state the flag of which it flies, for just as in its own territory, that state, exercises its authority upon it, and no other state may do so¹.

In *R. v. Anderson*, Byles J. referred to a ship being "like a floating island" and Blackburn J. said the following-

... a ship on the high seas, carrying a national flag, is part of the territory of that nation whose flag she carries; and all persons on board her are to be considered as subject to the jurisdiction of the laws of that nation, as much so as if they had been on land within that territory².

In *People v. Tyler*³, an American case, Christiancy J. referred to vessels on the high seas as "elongations of the territory of the nation under whose flag they sail". In Article 97 of the United Nations Convention on the Law of the Sea (UNCLOS), it is stated that in the event of a collision or other navigational incident on the high seas, only flag state jurisdiction may prevail over any penal or disciplinary matter.

Under public international law, which is reflected in Article 91 of UNCLOS, states are required to fix conditions for the grant of ships' nationality. This Article provides as a fundamental principle that "there must exist a genuine link between the state and the ship". The doctrine of the genuine link has been imported into the law of ship nationality from the *Nottebohm* case⁴ which involved the nationality of an individual. At least in the context of maritime law, it is unclear as to what constitutes genuine link for example, would it include

¹ (1927), P.C.I.J. Series A, No. 10 at 25.

² (1868), II Cox Crim. Cas. 198.

³ (1859), 7 Mich. 160.

⁴ *Liechtenstein v. Guatemala* (1955), I.C.J. Rep. p. 4.

political and sociological link? One commentator has described it as an elusive concept⁵. Flag states, in the absence of any definitive jurisprudential elaboration of the term, tend to interpret it in a way that best suits their national needs and interests. An indication of what might constitute genuine link is contained in Article 1 of the United Nations Convention on Conditions for Registration of Ships, 1986 (UNCCROS), where reference is made to the flag state's jurisdiction and control over ships with respect to "administrative, technical, economic and social matters".

What has evolved out of state practice, particularly in relation to the open registry states, is that the nationality of the beneficial owner of a ship does not appear to be of any consequence. Those who subscribe to this view would point to the decision of the International Court of Justice in the IMO Reference case⁶. In that case, traditional maritime states challenged the contentions of Liberia and Panama as to their entitlement to membership of the Maritime Safety Committee of the IMO. The Court ruled in favour of Liberia and Panama and held that the entitlement of membership of the Maritime Safety Committee was based on the size of national tonnage and not on the nationalities of the beneficial owners of ships.

Whereas nationality is a matter of substantive law, registration is the procedural mechanism through which nationality is conferred and evidenced. Registration, *per se*, means "the entering of a matter in the public records"⁷. In the context of ships, registration has a two-fold function. The public law function is concerned with administrative matters pertaining to national interests. These comprise, *inter alia*, the following:

- (a) conferment of nationality and the right to fly the national flag;
- (b) national regulatory jurisdiction over matters such as maritime safety, pollution control, manning and labour conditions, and shipboard discipline;
- (c) the right of the ship to diplomatic protection of the flag state including consular services;
- (d) the right of the ship to naval protection by the flag state;
- (e) the right of the ship to engage in cabotage activities;
- (f) the right of the state to engage a ship for auxiliary services in times of war or emergencies.

The private law function of registration is concerned with the protection of private proprietary interests in ships, such as-

⁵ Moira McConnell, "Business as Usual: An Evaluation of the 1986 United Nations Convention on Conditions for Registration of Ships" 18 *J. Mar Law & Comm* 435 (Jul 1987). See also Ready, *infra* footnote 7 at pp. 13-15.

⁶ *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, (1960) I.C.J. Rep., p. 23. See Harris, *International Law* at p. 406.

⁷ N.P. Ready, *Ship Registration* (2nd Ed.), LLP 1994, p. 6.

- (a) providing *prima facie* evidence of title and ownership; and
- (b) protecting the interests and priority rankings of holders of security interests in ships such as mortgages and hypothèques⁸.

Both the public and private law functions of ship registration have public policy implications. The national interest is obviously a matter of public policy. But there is also an element of public policy involved in the private law function. The mechanism of registration affords to the public, knowledge and notice of who owns, or has a proprietary interest in a ship which is entitled to the privileges of the national flag. These two facets of public policy in the context of ship registration were well articulated by Wood V.C. in the case of *Liverpool Borough Bank v. Turner*⁹. As a matter of procedure, a certificate of registry is issued by the flag state, which serves as evidence of registration and nationality of the ship. This certificate is part of the ship's documentation that is kept on board. By analogy to an individual, it is akin to a passport.

The flag, on the other hand, is a symbol; an external manifestation of the ship's nationality. The term "flagging" or "flag" is however, often loosely used to refer to a ship's nationality, *i.e.*, her state of registration. In recent convention law, as well as in state practice, distinctions have been drawn between "flag state" and a "state of registration" which is often misleading¹⁰.

2.2 Types of Ship Registries

2.2.1 The Traditional Closed Registry System

By conferring nationality on a ship, a flag state acquires certain rights as well as responsibilities over it. For example, it is the responsibility of the flag state to ensure that ships flying its flag comply with international maritime conventions to which the state is a party. It is therefore necessary for them to be subject to exclusive control of the flag state. It is said that the term "flag" denotes conferment of nationality on a ship by state, and flowing from it, the right of the state to exercise exclusive jurisdiction and control over the ship. In practical terms, this can be best effectuated where the ship owner himself is amenable to the laws and jurisdiction of the flag state. Traditionally, flag states have achieved this by adopting a policy of conferring nationality only on ships owned by nationals of that state. This is the basic premise, on which is founded the closed registry system which most traditional maritime states follow.

There are, of course, varying degrees of "tightness" with respect to closed registries. For example, in the case of a ship owner who is an individual, a tightly closed regime may only consider a natural born citizen as a national. In a less tightly closed jurisdiction, a national may include a domicile; a permanent resident or a subject; who may not necessarily be a citizen. In the case of corporate ship owners, the usual requirement in a closed registry system is that the entity must be a body corporate established under the laws of the flag state and must have its principal place of business in the flag-state. The law may require that all of the officers as well as shareholders of the corporation be nationals of the flag-state.

⁸ *Ibid.* at pp. 6-7.

⁹ (1860), 29 L.J. Ch. 827 at 830.

¹⁰ International Convention on Maritime Liens & Mortgages, 1993, Art. 16; UNCCROS Art. 2.

In addition, there may be a requirement that all the officers and crew of the ship must be nationals; all certificates and licences held by the personnel must be issued by the national authorities; or that the ship must be classed only by a nationally recognised classification society. There is thus a relatively rigid perception of genuine link in the closed registry system. Such strict requirements may be viewed by some ship owners as being excessively onerous and detrimental to their economic interests. To escape these strictures, shipowners tend to flag out to registries which are economically and functionally more attractive or, as many would say, more convenient.

2.2.2 The Open Registry System or The International Registry

It is well known that states which permit the registration of ships in their jurisdictions without any or all of the strictures of the closed registry system have been referred to as flags of convenience (FOC). In recent times, the term FOC has become stigmatised and even the term open registry is not so much in vogue. The more popular term today is “international registry” which is probably a more accurate description of its character. In this Report, both these terms are used interchangeably. Proponents of the open registry system, view ship registration as a service provided for a fee, rather than as an assertion of national sovereignty over its ships.

Typical characteristics of an international registry are described as follows:

- (a) the country of registry allows ownership and/or control of its merchant vessels by non-citizens;
- (b) access to the registry is easy. A ship may usually be registered at a consul’s office abroad. Equally important, transfer from the registry at the owner’s option is not restricted;
- (c) taxes on the income from the ships are not levied locally or are low. A registry fee and an annual fee, based on tonnage, are normally the only charges made. A guarantee or acceptable understanding regarding future freedom from taxation may also be given;
- (d) receipts from very small charges on a large tonnage may produce a substantial effect on its national income and balance of payments; and
- (e) manning of ships by non-nationals is freely permitted¹¹.

2.2.3 The Secondary Registry

To counteract the effects of the open registry system on their shipping, several traditional maritime states have adopted the system of secondary or offshore registry. Prior to the advent of these registries, traditional maritime countries were offering various subsidies and other forms of financial incentives to ship owners. The secondary registry system is viewed as a better alternative. Its eventual objective is the phasing out of subsidy and incentive schemes. These maritime countries claim that their international registries

¹¹ *Supra*, footnote 7 at p. 18.

afford their ship owners the opportunity to operate within a more favourable economic environment without sacrificing maritime safety by enforcing strict adherence to international regulations. By and large, secondary registries permit, as an economic incentive the hiring of foreign crews at wages lower than those payable to domestic crews.

2.2.4 The Hybrid Registry

The impetus for the emerging hybrid registry appears to have come from the provisions of UNCCROS¹². This convention, in attempting to articulate in definitive terms, the meaning of genuine link also addresses some aspects of the requirements. Without dictating any specific qualifications for ownership, the convention requires that the laws of the flag state pertaining to qualifications be sufficient to permit it to exercise effective jurisdiction and control over its ships. The convention also permits partial manning of ships by non-nationals, but their level of competence and conditions of employment must conform to applicable international rules and standards.

The Convention requires a corporate ship owner to be established within the territory of the state of registration and have its principal place of business located there. Where such is not the case, there must be a representative or management person, natural or juridical, who or which, must be a national of the flag state and must be available to meet all legal, financial and other obligations of the ship owners. It is noteworthy that the current ship registration regime of the United Kingdom, which has traditionally been a closed registry state largely fits the above description of the typical hybrid system. Ironically, Malta, which is considered an FOC by the ITF also, fits the above description. Some registries such as Liberia and the Cayman Islands which are open registries have strictures pertaining to maritime safety which are characteristic of, and sometimes higher than, the standards of many closed registry flags.

UNCCROS provides for the registration of bareboat chartered-in vessels subject to conditions contained in the convention. It also provides for the promotion of joint ventures for the development of national shipping industries. There are also provisions relating to the protection of labour supplying countries.

2.2.5 Bareboat Charter Registration

Among various flagging options, the bareboat charter registration is becoming increasingly popular. In essence, it is a temporary change of flag for the duration of the charter. Bareboat chartering involves two parties, the owner and the charterer; and two states, the state of registration of the owner and the flag state of the charterer. The involvement of two registries in the context of bareboat charters has virtually created a regime of dual or parallel registration¹³. The system provides considerable advantages to the parties involved. The owner earns charter revenue without having to operate a ship. The charterer acquires a ship without having to purchase one and enjoys the benefits offered by a flagging-in state. The flagging-in state enjoys economic gains from more tonnage added to

¹² Proshanto K. Mukherjee, "Flagging Options: Legal & Other Considerations" in *Mariner*, Journal of the Master Mariners Society of Pakistan, Vol. 4; No. 1, Jan/Mar 1993, p. 31 at 35.

¹³ Although these two terms are used widely, they are misleading. Registration, in law, is *prima facie* evidence of nationality; and dual flagging; i.e., dual nationality is prohibited by UNCLOS Art. 92. See also Frank Wiswall (ed.) in *Bareboat Charter Registration, Legal Issues and Commercial Benefits*, International Chamber of Commerce, 1988; and *infra*, at p. 33.

its national fleet and, possibly, more employment for its seafarers. In this arrangement, as will be seen later, the state of registration of the owner must ensure that proprietary interests in the ship including those of purchasers, mortgagees and other creditors are adequately protected.

At present, there is no uniform international regime governing bareboat charter registrations. The concept, however, is recognised and defined in UNCCROS, which makes a distinction between a state of registration and a flag state, *i.e.*, the flagging-out and the flagging-in states, respectively. The Convention also provides some procedural guidance.

Most states allow the flagging-out registration to remain open in respect of proprietary interests. Some flagging-in states require such interests to be recorded in their registers. Recording should not be construed as registration; otherwise legal problems will inevitably arise by way of conflicts regarding the disposition of proprietary interests if the law of the flagging-out state requires that either the mortgages, hypothèques or charges be discharged and satisfied, or that they remain in the registry. Many civil law jurisdictions have a dual system of registration. There is a maritime or navigation register through which the public law functions are executed. In the event of a bareboating-out, this register, if temporarily closed, but the commercial register through which the private law functions are executed, is kept open in respect of proprietary interests.

3. MORTGAGES AND THEIR REGISTRATION

Maritime trade has a history that is virtually lost in antiquity. Its customs and practices have survived the test of time and are with us even today; some in the form of custom, others in the form of codified law. In those times, the shipping entrepreneur assumed several roles. He was at once the shipowner, the cargo owner as well as the master of his vessel¹⁴.

The financing of a maritime adventure was usually through such devices as bottomry and respondentia. Bottomry was the practice of pledging one's bottom, *i.e.*, the ship, in consideration for advances of monies to finance the voyage. Respondentia meant the pledging of one's cargo against advances of funds. Bottomry and Respondentia were not only the forerunners of marine insurance; they were mortgages in the sense that the ship or cargo was offered as a security for the loan which obviously entailed a charge against the *res*. They were a form of insurance in the sense that the advancer of monies was only entitled to the return of the loan if the ship returned safely to port. In other words, the transaction involved the indemnification of marine risks or perils by the lender¹⁵.

3.1 Ship Mortgages

Ship acquisitions are typically financed by commercial lenders, with the ship as the primary form of security, together with collateral securities such as assignments of charterparties, proceeds of insurance, debentures and personal guarantees. A mortgage registered in accordance with statutory provisions is a statutory mortgage and a registered

¹⁴ Rubina Khurram, "Ship Acquisition and Mortgages: Some Legal Aspects," in *Mariner*, Journal of the Master Mariners Society of Pakistan, Vol. 4; No. 1, Jan/Mar 1993, p. 11.

¹⁵ *Ibid.*

ship or a share therein may be the subject of a statutory mortgage. An equitable mortgage is one that is not a statutory mortgage such as the kind given in respect of a ship under construction. Another example of an equitable mortgage would be on a ship that is not registrable either by reason of its size or some other factor. In the case of an equitable mortgage, the mortgagee acquires only an equitable interest. The cumbersome practice of certificates of mortgage has now been replaced by a system of priority notices. Provision for this is made in section 69(2) of the Jamaica Shipping Act, 1998.

Besides the inherent right and statutory right of power of sale of the mortgagee, there is also the common law right of foreclosure. This is a procedure by which the mortgagee may obtain first, a Foreclosure Order Nisi from the Court and six months thereafter obtain an Order Absolute. The legal effect of the second order is that the mortgagee becomes the absolute owner of the ship and the mortgagor's right of redemption is extinguished. However, the mortgagor always has the right to redeem the ship within the six-month interim period. It should be noted that this is not a statutory but a common law right.

Another right available to the mortgagee is the action *in rem*. In jurisdictions where such actions prevail, the ship can be arrested and a judicial sale may ensue. The mortgagee is granted the proceeds as the Court sees fit. The mortgage is said to be in the nature of a maritime lien and is therefore a right *in rem* exercisable by an action *in rem*¹⁶.

3.2 The Position of a Mortgage in a Bareboat Charter Registration

In the context of bareboat charter registration, it is important to understand the legal implications with regard to mortgages. The International Convention on Maritime Liens and Mortgages, 1993 explicitly recognises that temporary flag change through the bareboat charter mechanism has now become common practice. This Convention provides for the protection of mortgage and hypothec interests by imposing certain obligations on the flagging-out and the flagging-in states. The salient features of these provisions are as follows-

- (1) matters relating to mortgages, hypothecques and other charges and interest are to be governed by the law of the flagging-out state;
- (2) both the flagging-out as well as the flagging-in states are required to make corresponding entries in their respective registers identifying the other state;
- (3) a flagging-out state is not to permit a vessel registered therein to flag out, unless all registered mortgages, hypothecques and charges are either discharged, or written consent is obtained from the holders of those interests or charges;
- (4) in the event of a judicial sale, the competent authorities of the flagging-in state must be notified;
- (5) upon the production of a deregistration certificate following a judicial sale, the competent authorities of the flagging-in state must, at the request of the purchaser issue a certificate stating that the right to fly the flag of that state is revoked.

¹⁶ *Ibid.* at p. 82

The above-noted provisions reflect, by and large, state and market practice in the field of temporary flag change through bareboat charters although practices do vary as indicated earlier¹⁷.

3.3 Ships Under Construction

Common law jurisdictions which have opted to follow the United Kingdom do not provide for registration of ships under construction. The underlying rationale is that a craft or structure of any description whatsoever cannot be afforded the privileges of registration until and unless it is a ship by definition. There is thus the element of doubt as to when a ship under construction becomes a ship. Furthermore, there is the complex question of who is the owner of the heap of steel at any given time from the moment construction commences. The passing of property from the builder to the party who has ordered the construction depends on the terms of the particular ship building contract.

However, until the craft or structure in question is a ship by definition, it is nevertheless property, and as such, would possess the normal legal attributes of property. For example, it could stand as security for a loan and the lender would have certain rights over it. However, if the security for the loan is in the form of a mortgage, it would only enjoy the status of an equitable mortgage. In contrast, a ship's mortgage would enjoy the status of a legal mortgage and consequently, would rank higher in priority in the event of contesting claims against the *res*. It is mainly due to the above mentioned reasons that the United Kingdom has up to now declined to register ships under construction. There are several European jurisdictions that provide for such a regime. Germany and the Scandinavian countries are examples.

From the perspective of aspiring open registry states, this is yet another avenue which can be explored in terms of marketing the registry and thereby attracting prospective foreign as well as domestic tonnage. The legal implications referred to earlier in the discussion regarding the United Kingdom rationale can be dealt with by learning from the practices and procedures of those jurisdictions that do have such a regime. It is evident that there is growing interest with regard to registering ships under construction among prospective shipowners seeking international registries. One Caribbean international registry has recently experienced a flurry of inquiries relating to registration of ships under construction and has promptly amended its legislation to afford this facility to prospective shipowners. The Isle of Man and Gibraltar are British registries with a common law legal system that have also gone this route. It is apparent that this is a viable avenue for potential growth of open registries and would warrant serious consideration.

3.4 Provisional Registration

The Jamaica Shipping Act, 1998 in section 41 provides for the issue of a provisional certificate of registry in certain circumstances, which is valid for six months. These provisions in shipping legislation of common law jurisdictions typically follow the corresponding provision in the United Kingdom Merchant Shipping Act 1894. The rationale for continuing to provide for this regime is questionable in this day and age, particularly in the context of open registries where ships hardly ever touch their port of registry, and where

¹⁷ *Ibid* at pp. 80-81.

the documentary procedure for change of flag is carried out, at least partly, by electronic communication. This matter has recently been debated within government policy circles in the United Kingdom. It has been decided that the provisional registration regime should, on balance, remain as it still serves some useful purpose. Other British registries, including those that are open, have followed suit. It has been the experience with one such registry, that the device of the provisional registration is more functional where a Consul is available and a routine for such registration has been well established. In countries such as Greece, where a significant amount of flag change activity takes place, and where Consuls are readily available, the provisional registration device appears to be quite popular.

Having gone through this debate one is then confronted with the question as to whether a mortgage can be registered against a provisionally registered ship. Thus far, the United Kingdom has not permitted such registration. Again, this is a matter which currently appears to be under consideration by the policy makers of that jurisdiction. It is notable that Gibraltar which is a British open registry provides for the registration of mortgages against provisionally registered ships. The Cayman Islands which is another such registry, has recently amended its legislation to allow for the same.

There are some practical reasons for supporting the stance taken by Gibraltar and the Cayman Islands. In ordinary commercial sales and purchases of ships, more often than not, mortgage financing is at the very centre of the transaction. It is highly unlikely that a commercial mortgage lender will part with his money unless his security is protected by registration. This is evidently always the case in civil law jurisdictions where a ship mortgage can only be created through registration. There is no concept of an equitable mortgage. It would seem therefore, that in civil law jurisdictions ships' mortgages must of necessity be registered regardless of whether or not the ship's registration is provisional or permanent. In the common law system, of course, an equitable mortgage can subsist against a ship if it is only provisionally registered. Such is the case under the law of the United Kingdom. However, if an aspiring open registry seeks enhanced mortgagee protection, which it should, it should seriously consider providing for mortgage registration in respect of a provisionally registered ship.

3.5 Priority of Mortgages

Under English law, mortgages rank third in priority after maritime liens and possessory liens and ahead of statutory rights *in rem*, otherwise known as statutory liens. It is evident from sections 79 to 90 of The Shipping Act, 1998 that the regime of the International Convention on Maritime Liens and Mortgages, 1993 has been adopted even though Jamaica is not a party to that convention. The convention regime, it is generally held, is a compromise between the English and American laws in terms of what claims have the status of maritime liens and is closely aligned to the continental position which is about midway between the two English and American extremes. On the question of priority ranking, the convention is not too different from the English regime. Notably, in both instances, mortgagees rank fairly low; lower than, for example, crews' wages, salvage claims, collision claims (all of which are maritime liens by definition). As well, mortgagees rank behind shipyards who hold possessory liens or rights of retention.

This order of priority ranking does not find favour with ship financiers. Along with other provisions protecting mortgagee interests which are now in the Shipping Act, 1998, consideration should be given to amending the maritime liens provisions of the Act to afford mortgagees a higher ranking. This it is expected, will be groundbreaking and will likely attract ship financing interests to Jamaica and boost the promotion of the "one stop shop" concept.

4. FISCAL SUCCESS VERSUS FLAG STATE RESPONSIBILITIES

4.1 General Observations

Without going into a review of the long and protracted evolution of the open registry system, suffice it to say that the system whether it is referred to as open registry or by some other aberration, is here to stay. This is undoubtedly one of the most topical issues in contemporary shipping. With the changing economic environment in world shipping the maritime aspirations of states which were hitherto considered non-maritime in the traditional sense are increasingly evident. The Secretary General of the IMO has recently stated that international shipping is now virtually in the hands of the developing world and that the process is irreversible¹⁸. Needless to say, this dramatic change in the very constitution of international shipping has largely been caused by the rise of the open registry system. On this premise a central question is whether it is necessary to compromise safety standards in order to realise the most alluring aspect of the open registry system, namely, the financial advantages. Perhaps the question ought to be characterised in a somewhat different way. Can the interested parties afford to compromise standards? This is more than a thought-provoking inquiry; it is provocative¹⁹.

The *raison d'être* for the closed registry system, at least in Great Britain, was to reserve British seaborne trade for the benefit of British shipowners. The underlying rationale today might be characterised in terms of the flag state's obligation and responsibility under international law to regulate its ships. This may be best effectuated where the shipowner is amenable to the laws of the flag state. Traditionally, this has been achieved by conferring nationality only on ships owned by nationals of that state. The closed registry system with its attendant strictures are viewed by many shipowners as being excessively onerous and an impediment to their economic objectives. The open registry alternative has thus gained immense popularity in recent times.

4.2 The Case Against Open Registry

Proponents of the open registry system, view ship registration as a service-oriented activity provided for a fee. This is in sharp contrast with the traditional view of ship registration; namely, the flag state's assertion of national sovereignty over its ships.

It is noteworthy that some open registries have adopted certain strictures such as age limits on vessels; requirement for surveys as a pre-condition for the issue of a permanent

¹⁸ Speech by William A. O'Neil, Secretary General of the IMO at the 1999 Seatrade Awards Ceremony reported in *Seatrade Review*, July/August 1999, p.4.

¹⁹ P.K. Mukherjee, "Fiscal Success versus Flag State Responsibility: the Open Registry Dilemma," paper presented at Association of Malta Shipowners Workshop on The Reputation and Competitiveness of the Malta Flag; Malta, 26 May 1994.

certificate of registry, and enforcement of compliance with international maritime safety standards. The principal criticism levelled against open registries is that they harbour substandard ships. This is borne out by statistical and empirical data on maritime casualties. It is well known, however, that such data do not always reflect the true picture.

The substandardness of a ship is not only characterised by its unsafe physical condition, but also by the want of skill and competence on the part of the officers and crew or by their unsafe, irresponsible and imprudent conduct. The lack of communication between officers and crew due to linguistic or other reasons is another factor at play, which is often attributed to the FOC practice of hiring cheap and inadequately trained labour.

On the one hand there are the allegations of substandard ships and exploitation of cheap labour; on the other hand there are the considerations of economic benefits of shipowners and the maritime aspirations of developing countries offering flags of convenience. The central question is should the economic considerations prevail untrammelled at the expense of maritime safety and an acceptable standard of labour conditions?

4.3 Compromising Standards

Much has been said about the need for uniform safety and other standards in international shipping. From an international public policy perspective, no one can deny or dispute that the highest standards obtainable should be imposed on ships to achieve this objective. Numerous international conventions and other instruments have been created under the auspices of the IMO, the ILO and UNCTAD. By and large, the majority of states with maritime interests have embraced these conventions; albeit the principal criticism levelled against the open registry states is that implementation and enforcement of the standards has been lacking. Rather than viewing the issue in philosophical terms, i.e., reiterating the undeniable lofty ideals, it is suggested that the issue be approached from a more pragmatic perspective. Hence the question- can open registry states afford to compromise standards?

Needless to say, the interests of various entities involved in the shipping business are intertwined in several ways. While there are sociological, political and other implications, it is apparent that the underlying interest common to all of these entities is economic gain in some form or another. It is sufficient to examine the question of benefits and detriments from the vantage points of the flag state and the shipowner.

An uninformed shipowner who simply wishes to increase his profits without due regard to other impacting factors, would attempt to seek out a flag state which imposes little or no impediments to his operations. In other words, he would attempt to operate his ship with unbridled freedom. Even if he succeeds in finding such a flag state, which he no doubt would; in worst case scenario he may not be able to obtain any mortgage financing for the acquisition of his ship. Even if he succeeds on that count, and is also able to find cheap, albeit inadequately trained crew, he may still not be able to obtain insurance cover for his ship or for third party liabilities. He might even find it difficult, if not possible to obtain cargo bookings.

In a somewhat better scenario, the shipowner may have successfully acquired a vessel, although it may be considered unseaworthy by any standards, and have it registered in a flag state which is reasonably relaxed in terms of enforcement of standards. The ship is not fully in compliance with all of the safety standards required under international law, but nevertheless, has been able to acquire cargo as well as insurance coverage. The officers and crew come from different linguistic backgrounds but they are affordable. The flag state has granted exemption certificates relating to manning, certification, safety equipment etc, on a virtually perpetual basis. No proper surveys have been conducted, but classification society surveyors have issued all kinds of certificates on behalf of the flag state. The society has also issued documentation to the effect that the vessel is seaworthy and has been maintained in class.

Under this scenario, the ship may be subjected to various pitfalls which have serious legal implications both in regulatory terms as well as from the point of view of civil liability. For example, the ship may be involved in a casualty such as a collision, grounding, or an oil spill. It may be detained under some port state control regime. It may be blacklisted by the ITF and boycotted by stevedores in a port. It may even be refused entry into a port, having appeared on some computerised list of substandard ships. All of these eventualities may spell financial disaster for the shipowner who initially may have thought that the first rule in doing profitable business in the shipping field, is to register your ship in a completely relaxed registry. The obvious moral of this hypothetical scenario is "short cuts in standards don't pay"²⁰.

It is enlightening to view this issue from the perspective of a flag state aspiring to increase its tonnage. In the first instance, such a flag state might lower its standards to attract more tonnage. But it may be faced with an exodus from its registry if the flag acquires a bad reputation. The ill repute of the flag may well be triggered by a major maritime disaster or a series of such incidents. This would obviously mean less revenues for the flag state. The question of competitiveness therefore does not necessarily rest on how relaxed the standards are of a flag state, as many would fallaciously believe. Reputation and competitiveness do not lie at opposite ends of the spectrum. To remain competitive reputation has to be maintained. This is true for both the shipowner and the flag state.

In summary it can be said that compromising of standards is not something which is necessary to achieve fiscal success, whether it is from the perspective of the shipowner or the flag state. Indeed, neither of these two entities can afford to compromise any maritime standards if it wishes to stay afloat as a viable, economic, going concern. The competitiveness of a flag depends to a significant extent on its standards, which in turn enhances or recedes its reputation, as the case may be.

5. INTERNATIONAL REGULATORY REGIME

5.1 Administrative Responsibilities Under Conventions

²⁰ *Ibid.* at p. 6.

It is instructive to recapitulate the definition of a flag state. It is that state whose nationality is held by a ship. In recent times there has been a tendency by the international maritime community, at least in traditional maritime quarters, to upstage the regime of port state control to the extent of virtually losing sight of the fact that maritime conventions are primarily flag state conventions. The pre-eminence of the flag state has existed since the dawn of maritime history and it has been preserved by Article 94 of UNCLOS to this day. Under Article 91 of that Convention, it is the prerogative of each state to fix the conditions for the grant of its nationality to ships. If open registry states have fixed conditions that permit non-nationals to own ships flying their flags, then they have acted within the scope of that prerogative. As we have seen, the requirement for genuine link between flag state and ship has been complied with in a manner suitable to the particular needs of each state.

It must be remembered, however, that hand in hand with rights and prerogatives goes duties and responsibilities. The flag state is obliged to extend to its ships certain privileges; at the same time it must exact certain obligations from its ships to meet its own obligations to the world at large under international conventions to which it is a party. In the present context, it is the most important responsibility of the flag state. The meeting of these obligations by a state translates into ensuring compliance by its ships through enforcement mechanisms which must include effective sanctions. It is frequently alleged that open registry administrations fail to do this. To reinforce the responsibilities of flag states under the various conventions, the IMO has, in recent years, set up the Flag State Implementation Sub-Committee of the Maritime Safety Committee. An aspiring flag state must not overlook these responsibilities, to say the least. Indeed, reputation of the flag is central to fiscal success, and a sound and responsible flag state administration is the core factor in developing that reputation.

There are basically three dimensions to an efficient flag state administration; namely, registration of ships and mortgages, the conduct of surveys and certification and the engagement and welfare of seafarers. In the case of Jamaica, the third dimension would include maritime training and education of seafarers. This is an area in which Jamaica has achieved a significant degree of maturity. In combination with the other factors, there is considerable potential for the development of a sound maritime administration.

Flag states must ensure that its ships comply with the international maritime standards and is obliged to enforce them. This is referred to as the enforcement jurisdiction of the flag state. As indicated earlier, compliance and enforcement go hand in hand. It is arguable that adherence to international standards as required under UNCLOS is a matter of customary international law; i.e., that the requirement applies regardless of whether a state is party to a relevant IMO convention. In the case of Jamaica, it is already a party to all major IMO conventions. As a flag state, therefore, Jamaica will be bound to exact compliance with these conventions from ships flying its flag, and will have to put into place an effective enforcement regime complete with sanctions.

Incidentally, the above matters have all, by and large, been addressed in the Jamaica Shipping Act, 1998.

5.2 Quality Assurance (QA)

In the case of a flag state, quality assurance can be achieved by adherence to internationally set standards such as ISO 9000. In order to obtain such certification, an organisation should enlist the help of professional services in this field. Such certification, if obtained, is known to be of immense benefit in terms of attracting business as it assures clients that the certificated company maintains a system that pledges the best practices in quality, avoids errors, and improves its performance.

Previously subsumed under the technical aspects of performance, *safety* is now seen as a quality criterion in its own right. To speak of quality without mentioning *safety*-consciousness is now unacceptable. This is strikingly evident in the quality assurance systems that have been put into place in the maritime sector.

5.3 International Safety Management (ISM) Code

The ISM Code represents the special application of the QA concept to a shipping organisation. The Code is incorporated by reference in Chapter IX of SOLAS and is thus made mandatory. The title of Chapter IX is "Management for the Safe Operation of Ships" and the rules relating thereto are contained in the Code. Regulation 1 contains definitions. The concept of a company is introduced in this regulation meaning the owner or manager or bareboat charterer of a ship who has assumed responsibilities for its operation. The Code is defined in Regulation 1 and is the text of resolution A.741 (18). Regulation 2 is the application clause of the chapter. It does not apply to government operated ships used for non-commercial purposes. It applies to passenger ships, high-speed craft, oil tankers, chemical tankers, gas carriers, bulk carriers and cargo high speed craft of 500 gross tonnage and above. All of these vessels became subject to this chapter on 1 July 1998. The chapter will apply to other cargo ships and mobile offshore drilling units (MODU) of 500 gross tonnage and above not later than 1 July 2002.

The Preamble to the ISM Code states that the purpose of the Code is to provide an international standard for the safe management and operation of ships and for pollution prevention. The Code is expressed in broad terms setting out general principles and objectives. The Preamble also recognises that the corner stone of good safety management is commitment from the top, and that commitment, competence, attitude and motivation of individuals at all levels determine the end result.

The objectives of the Code are to ensure safety at sea, prevention of human injury or loss of life and avoidance of damage to the marine environment and to property. The safety management objectives of the company and the SMS are set out in detail including the functional requirements for a SMS. The Code requires a company to establish a safety and environmental protection policy and to ensure that it is implemented and maintained at all levels both ashore as well as on board. If the ship is operated by an entity other than the owner the owner must report the full name and details of such entity to the Administration.

To ensure safe operation of each ship the company must designate a shore-based person to act as a link between the ship and the highest level of management ashore. The company must clearly define and document the master's responsibility with regard to, *inter alia*, implementation of the company's safety and environment protection policy, and review of the SMS including reporting its deficiencies to the management ashore. The company must ensure that the shipboard SMS contains a clear statement of the master's

authority. It should be established in the SMS that the master has overriding authority and responsibility for decision making with respect to safety and pollution prevention.

For aspiring flag states, the ISM Code along with STCW 95 and the regime of port state control represents a significant reinforcement of the regulation of ships and shipowners. The advent of the ISM Code in the international maritime regulatory regime is a landmark. Hitherto, conventions were directly aimed at flag states and ships. The ISM Code is the first attempt to regulate shipowners directly and to exact safety management responsibility from them. Of course, the responsibility for implementation and enforcement of the Code rests with each flag state Administration. It is therefore incumbent upon each such state to ensure that ships flying its flag and their companies comply with the ISM Code. This could be quite onerous and daunting for flag states in terms of overseeing so many ships and companies. Nevertheless it is a mandatory requirement under SOLAS and therefore must be done. As an aspiring flag state, Jamaica must pay special attention to the expertise and resources that will be necessary for the Administration to properly carry out its responsibilities. Serious consideration must be given to the training of some senior in house personnel for carrying out ISM audits even though the task may be delegated to classification societies.

5.4 Delegation to Classification Societies

In the heydays of the closed registries, delegation of statutory surveys to classification societies was virtually non-existent. The traditional maritime states each had their own cadre of qualified surveyors for carrying out statutory surveys. Even then, loadline surveys and tonnage measurement surveys were carried out by classification society surveyors. This was mainly because such surveys were done by naval architects and not many of them were available to Administrations. At the present time traditional maritime states, even though they have also moved towards increasing delegation, tend to reserve for themselves safety equipment surveys, and to some extent, surveys related to shipboard machinery. The Maritime and Coastguard Agency (MCA) of the United Kingdom is a prime example. The MCA also reserves to itself certain fire protection surveys.

Some Administrations appear to have a certain antipathy towards entrusting statutory surveys to classification societies. There are allegations of conflict of interest because classification societies are primarily engaged by shipowners to class their ships and are paid by them. When the societies carry out statutory surveys on behalf of Administrations, in theory, they wear a different hat, but sometimes it is alleged, with some justification, that the hats don't change as promptly as they should. Furthermore, in recent years, classification societies have been subjected to negligence actions even by their own shipowner clients. On the other hand, classification societies do have resident expertise, particularly in the naval architecture discipline, which most Administrations do not seem to have. This is sometimes reluctantly admitted by some Administrations. As a result, it is evident that the more technically difficult tasks are delegated to classification societies whereas the less difficult ones such as the safety equipment surveys are retained by the Administrations.

The IMO conventions explicitly recognise that numerous Administrations do not possess the technical expertise, human resources and wherewithal to discharge their flag state obligations. The conventions therefore permit Administrations to delegate these tasks to "recognised organisations". The conventions, however, make it clear that the ultimate responsibility for compliance with regard to flag states' obligations rests with each

Administration. As such, Administrations are required to oversee the delegated tasks and guarantee their performance in accordance with convention standards. It is therefore incumbent upon each flag state Administration to have at least that degree of resident expertise that is necessary to discharge the oversight function. Every aspiring flag state, therefore, must ensure that it has that expertise. This is an important factor which distinguishes a responsible and quality open registry flag state with one that is only capable of collecting and counting its tonnage tax revenues, and nothing more.

In making a decision on this point, a flag state needs to pay heed to its shipowners, who themselves are sometimes politicised or hold certain subjective views to the exclusion of others. In one instance, a rather powerful shipowner held the view that both BV and RINA were not up to the mark but ClassNK was, and attempted to lobby its flag state Administration to revise its class delegation arrangements accordingly, much to the chagrin of other shipowners of that flag. A flag state must recognise that a constituent shipowner may have ships under other flags and arrangements with classification societies other than those which the flag wishes to keep on its list. Since shipowners pay the classification societies for their services in connection with statutory surveys, there is a financial factor from the point of view of the shipowner which the flag state cannot afford to ignore. To maintain a competitive edge, usually flag states recognise all IACS members. The Maritime Authority of Jamaica should enter into suitable agreements with classification societies of its choice. Statutory authority for this is provided in section 247 (2) of The Shipping Act, 1998.

5.5 Safe Manning, STCW 95, Crew Supply and Maritime Labour

The provisions of STCW 95, to which Jamaica is a party have already been incorporated into draft regulations under the Shipping Act, 1998. Provisions relating to safe manning following the requirements of SOLAS, IMO Guidelines on Safe Manning and ILO Convention C180 of 1996 relating to safe manning have also been incorporated into these regulations. It is to be noted that pursuant to that convention, the fundamental principle is that a ship must be manned sufficiently, efficiently and safely²¹. In accordance with STCW 95 Jamaica has taken the necessary steps to enter the so-called white list and like many other states is awaiting IMO's decision in this regard.

On the one hand it is the hallmark of open registries to place no restrictions on the nationalities of crews serving on board their ships. This is a major factor in terms of attracting shipowners to the flag since it is well known that over 50 percent of a shipowner's operating costs are attributable to crew cost. Also by engaging crew from a developing country, as opposed to a western country, a shipowner's crewing costs could be reduced by as much as 56 percent²². The freedom to engage less expensive crews is therefore a major attraction from the point of view of a shipowner. On the other hand, unless ships employ white list crews, at least at the management and support levels, they are likely to be targeted by PSC and the flag state's reputation is likely to be potentially tarnished. This perceived dilemma may well be transformed into a significant advantage for Jamaica if a proper strategy is devised.

With an established reputation in the field of MET, Jamaica is well positioned to market itself as a crew supplying country. Following the cue of UNCCROS, Jamaica may by legislation, require that all Jamaican flag ships carry a certain percentage of Jamaican

²¹ Art. 111, para. 1.

²² *Supra*, footnote 7 at pp. 46-47.

crew. This will not be viewed as a constraint by shipowners if the wages of Jamaican crew are at a competitive level in comparison to other crew supplying countries such as the Philippines, India and Pakistan. If this strategy works, shipowners will have at their disposal JMI trained crews, hopefully white listed and at competitive wages. Jamaican crews will be afforded employment and another component of the concept of "one stop shop" will be established as a marketing device for the Jamaican registry.

Aside from consolidating the Jamaican crew supply aspect into the strategy for establishing a viable international registry, this aspect can be further enhanced and developed independently. Following the examples of the Philippines and India, Jamaica can enter into crew supply agreements with other major flag states of any persuasion. Once Jamaica makes the white list concerted efforts should be made to move towards this objective.

With regard to other matters concerning maritime labour law, Part VII of the Jamaica Shipping Act, 1998 is quite comprehensive and covers virtually all aspects of it. Many of the provisions of this Part reflect those of related IMO Conventions. Jamaica is a party to some ILO Conventions. As such, due attention must be paid to recent amendments, protocols or other revisions to these conventions. From the point of view of open registries, some of these conventions may be viewed as unattractive to potential shipowners, such as for example the conventions relating to hours of work, minimum wages, social insurance, etc.

The downside of being liberal on these matters is that flag state ships may be targeted by PSC. Another factor to be considered is that the ITF is likely to blacklist such ships if they do not comply with relevant ILO conventions.

5.6 Port State Control

There are those who are of the view that PSC should be abolished all together. Proponents of this view often express it out of frustration much of which is attributable to over-enthusiastic, ill-trained and inexperienced PSC inspectors who sometimes indulge in needless harassment. Some are non-flag states; others are declining flag states such who are bent on carrying out PSC "with a vengeance" to root out the substandard ships of international registries. The abolition of PSC may well work for flag states who are landlocked or geographically disadvantaged but a flag state that is also a significant port state and coastal state naturally has other vested interests which will prompt the retention of PSC. Needless to say, Jamaica is such a state. PSC today is a fact of life which needs to be put in its rightful place within the framework of the international maritime regime.

Some flag state Administrations spend a considerable amount of time dealing with PSC detentions imposed on their ships. In some instances the grounds for detention are trivial, or even unlawful and the situations which the Administration has to face from their shipowners can become proverbial nightmares. The solutions are to be found in proper flag state implementation of conventions and in sound overall management. Shipowners should be adequately warned of PSC consequences if compliance with conventions is lacking. Adequate oversight by the Administration is important. Shipowners should be informed that conventions provide for payment of compensation by a port state for unjustifiable and unlawful detentions or other actions.

The interests of flag states should be expressed and advocated in the proper forum, i.e. the meetings of the relevant regional PSC Memorandum of Understanding (MOU). This, of course, is of somewhat limited consequence. For example, the proper forum for Jamaica would be the meetings of the Caribbean PSC MOU. However, not all Jamaican flag ships will enter ports covered by this MOU. Finally, the flag state Administration should keep records of PSC actions faced by its ships and should attempt to build up a rapport with the authorities of ports where their ships are frequently detained or otherwise chastised. This can also be pursued through the regional PSC forum. Again, this can only be possible if the ports in question fall under the Caribbean MOU which is the only forum where Jamaica has a voice.

6. FLAGGING OPTIONS

It is a fundamental premise of the open registry philosophy that economic considerations are the driving force. The legal notions of nationality, flag and registration are, in a sense, manipulated to accommodate the economic interests of the flag states and their constituent shipowners. This is in sharp contrast to the traditional closed registry philosophy where the flag state assumes the exclusive role of regulator, and the shipowner who is regulated is compelled to operate within the bounds of the regulatory regime. What largely obtains in today's shipping environment is a typical open flag regime which presents itself as an accommodating yet responsible, quality registry. There are thus, varying degrees of openness which are at neither extremity of the spectrum.

A shipowner may by reason of national sentiments wish to flag his ship in his own country. If he could do so without sacrificing his financial interests, he would seek to flag in the secondary registry of his country if one were available. If his national sentiments are not of overwhelming significance, he might wish to flag with the secondary registry of another traditional maritime state where he would enjoy open registry benefits without the stigma of an FOC. If economic benefits are his foremost and predominant consideration, he would flag his ship with a responsible, quality international registry.

Although taxation would appear to be a major financial factor in the choice of flag, there are other financial considerations that attract shipowners to international registries. Open registries normally do not impose any income tax on the shipowner,

Another factor to be borne in mind is that a shipowner may be subject to the fiscal regime of his country of residence even if he is exempt from taxation in the flag state. This is perhaps of more relevance to individuals and less to corporate or other entities. The latter would usually take the necessary steps against such eventuality by appropriate corporate structuring of its shipowning concerns. Double taxation treaties coupled with appropriate tax and fiscal legislation can solve the problem.

International registries require an initial registration fee and thereafter an annual fee based on the ship's tonnage, usually referred to as tonnage tax. This is the principal source of income for the flag state. By keeping the rates down, an open registry state can be competitive and attract more tonnage which in turn enhances the state's revenue intake from ship registration fees, i.e., tonnage tax.

From the shipowner's perspective, a significant financial advantage is lower operating costs, most of which is attributable to the cost of crewing a vessel. Closed registry states typically require their ships to be crewed by flag state nationals. For shipowners of developing countries with closed registries, such as India and South Korea, this requirement is not so onerous because crewing costs are relatively low. Indeed, for this very reason, these are probably the closed registries that will survive the rapidly increasing worldwide transformation of registries to the international type. But in developed countries, crewing costs, if only nationals are employed, are high enough to drive owners and operators out of business. If a developed country shipowner were free to engage crew from a developing country, his crewing costs would, as indicated earlier, be as much as 56 percent lower. International registries mostly permit crewing by non-nationals, which is a major attraction for the shipowner from a financial point of view²³.

Among other factors, the strictures of a flag state pertaining to maritime safety including restrictions on age, size and class of ships, and adherence to international conventions are of utmost importance. At the risk of reiteration, it is worth pointing out that a shipowner may opt for a flag which is liberal with regards to safety standards, but it may be difficult or even impossible for him to obtain insurance on a vessel branded as substandard. He may face serious PSC impediments that in the end may result in financial detriment.

The ability to raise financing in the world market by way of mortgages or other securities is another important consideration in the choice of flag. Financial institutions are usually reluctant to associate themselves with regimes that have payment default records, especially where it involves hard currencies. They are more inclined to deal in jurisdictions where their proprietary interests are better protected.

Another important consideration is convenience. This has to do with the amount of bureaucratic and procedural formalities a shipowner is likely to encounter in a particular flag regime. International registries are naturally more convenient in this respect. Some registries provide a round the clock service taking cognisance of time zones around the world and registrations of ships as well as mortgages can be effected in less than twenty-four hours. Indeed this is advertised and serves as a major marketing tool. There is a bureaucratic and socio-administrative element to the crewing factor as well. In traditional maritime countries labour laws are tough and trade unions are powerful. That is not usually the case in open registry states.

Ownership laws are not uniform, as we have seen, even among open registry states. Many such states permit the registration of foreign-owned ships subject only to the presence and availability locally, of a representative who is competent to answer to claims. Others permit foreign beneficial ownership without restrictions provided the legal ownership is vested in a business entity established in the flag state and is thus subject to its laws.

Among political considerations, a shipowner may be concerned about the extent of flag state protection in times of war; eligibility in the cabotage trade, requirements for naval auxiliary service, and flag and cargo discrimination to which the ship may be subjected in the course of trading.

²³ *Ibid.*

7. SUMMARY AND CONCLUSIONS

Jamaica is adopting the concept of the one-stop shop which has been successfully pursued by Malta. Similar to the Maltese scenario, Jamaica has the potential to bring together multifarious maritime interests under one roof. Most open registry states pursue ship registration offshore company registration in tandem. Others combine ship registration with offshore banking as well. However, not all banking countries have pursued ship financing in the way Malta has done by making it attractive both for shipowners as well as mortgage lenders, i.e. the financial institutions. The added dimension to all of this is the crewing element. Indeed, Jamaica with its MET facilities and by far the most accomplished state in the Caribbean in this respect can pursue the crewing angle more vigorously in terms of promoting the one-stop shop. It is envisaged that the areas which will comprise this one-stop shop concept will include the following elements:

- Registration of commercial ships and pleasure craft.
- Availability of mortgage financing through development of offshore banking facilities.
- Provision of qualified crew at competitive wages and offering incentives for engaging Jamaican crew.
- Development of related services such as marine insurance brokerage.

The philosophy behind the above may be articulated by extending virtually all related facilities and services to the potential shipowner without giving him the opportunity to shop around. In other words, all of the shipowner's needs will be catered to all at once and made available at his doorstep. In order to achieve this objective, the following deserve consideration, some of which are already provided for the Shipping Act, 1998.

- Unrestricted ownership requirements.
- Provision for registration of ships under construction.
- Bareboat charter registration.
- Flexibility in company formations for ship ownership.
- Mortgage financing for ships under construction and ships provisionally registered.
- No restrictions on crew nationality.
- No restrictions on age of ships.
- No taxation of profits from ship operation or income tax of employees on board Jamaican ships.
- Streamlined and expeditious procedures for incorporation of companies and registration of ships and mortgages including round-the-clock service at the Registry.
- Recognition of classification societies who are members of IACS.
- Concession on tonnage tax if Jamaican trained crew are engaged.
- Relief from onerous formalities under companies law such as disclosure requirements.
- Freedom to enter into crew agreements without mandatory impediments relating to wages and other conditions.
- Priority ranking of mortgages higher than certain other claims.

To counter-balance the smoothness of attracting potential shipowners,

and particularly quality shipowners, certain checks and balances will have to be put into place to support the policy of promoting a quality and responsible registry. These would include the following:

- Development of in-house technical expertise within the Maritime Administration sufficient to oversee the work of the recognised classification societies.
- Development of legal, financial, and marketing expertise within the Maritime Administration.
- Obtaining ISO 9000 certification by the Maritime Administration.
- Carrying out ISM audits as required under the ISM Code.
- Organisation of the Maritime Administration through appropriate Divisions, namely, registration, surveys and certification, and seafarers.
- Direct overseeing of Jamaican MET by the Maritime Administration.
- Establishing of a shipowners association and appropriate consultations tariff, etc.
- Carrying out active marketing of the registry in strategic parts of the world.
- Establishment of a ship inspectorate service in due course.
- Establishing appropriate liaison with relevant PSC authorities.

To effect the above-mentioned recommendation, in some instances legislative action will be necessary; in other instances executive and administrative actions will suffice.

Various amendments are proposed in respect of the Shipping Act, 1998 as well as regards particular commercial, taxation and labour legislative provisions. Needless to say, care should be taken to maintain the registry at a high quality level. It is evident that compromising standards does not pay. The recent *Erika* incident and the dramatic turn in direction of the Belize registry are indicators of this fact. As a concluding statement, it is fair to say that Jamaica is well poised to enter into the arena of open registries and with the dedicated efforts of those involved in the initiative, which is already evident, the venture is quite likely to succeed. This expectation is of course based on the assumption that the momentum already gained will be continued.