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ABBREVIATIONS

UNCLOS -	The United Nations Law of the Sea Convention, 1982
UNCCORS -	The United Nations Convention on the Conditions for Registration of Ships, 1986
Draft bill -	The Preliminary Draft Registration of Ships Bill
Draft regulations -	The Registration of Ships Regulations to the draft bill

THE REGISTRATION OF SHIPS AND THE SOUTH AFRICAN SHIPS REGISTER - CURRENT AND PROPOSED (AND SOME RELATED ASPECTS)

INTRODUCTION

As part of the Department of Transport's review of maritime transport, a preliminary draft Registration of Ships Bill and Registration of Ships Regulations has been prepared and circulated for comment. This preliminary draft bill (referred to herein as "the draft bill", while its regulations are sometimes referred to separately herein as "the draft regulations") is primarily an attempt to "amend and restate the law relating to the registration of ship".[1]

Perhaps more accurately, the draft bill is the beginning of a process for the much-needed "update" of the current registration regime. This is at present governed by the Merchant Shipping Act, No. 57 of 1951, which is to great measure based upon the legislation and policies of the nineteenth century. Developments in the shipping industry (for example, the practice of "flagging-out" ships and the specific practice of re-flagging demise-chartered ships); advances in communication (making possible the creation of a central ships register instead of having registers in the various ports); and a changing political, economic and social climate (the birth of many countries, the increasing number of registers on offer to shipowners, the globalisation of trade, South Africa's new standing in the world, the move away from strict nationalistic shipping policies), have all created the need for a new registration regime.

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[1] From the preamble to the draft bill

The draft bill (which must be read together with its regulations) is accordingly not the colourless piece of legislation its name might suggest. While of necessity dealing with some mundane issues, it is fundamentally an expression of the government's merchant shipping policy. Ship registration is designed to regulate in a certain way a particular sphere of activity. Nor is the shipping industry a detached arm of the economy. It involves many land and sea concerns and, moreover, it exists in a supra-national context. Competing capital and labour interests, international obligations, national interests and the capacity to regulate the shipping industry must all be taken into account in the formulation of this policy.

The draft bill has now been replaced by the Ship Registration Bill. This Bill is due to be tabled in Parliament shortly. In some respects it follows the draft bill, while in other matters it is markedly different. While focusing principally on the draft bill, the Ship Registration Bill is also considered here, particularly where it differs from the draft bill. However, until regulations have been prepared to complement the provisions of the Ship Registration Bill it is not possible to obtain quite as clear a picture of the shipping regime proposed thereunder.

There are many different ship registration systems in operation worldwide. The choices available to the drafters of the new laws were fettered only by the policy which it is intended the South Africa shipping industry will now be following. The current registration laws in South Africa create a national registry, normally associated with the traditional maritime state. Both the draft bill and the Ship Registration Bill propose a compromise between such a registry and the registration system which is regarded as being at the other end of the registration scale: the flag of convenience registry. In this regard, South Africa is following the trend of the traditional maritime states of the past fifty years.

An overview of ship registration and a look at some of the dynamics at work in this area in order to explain and put this development in perspective is followed by a consideration of the public and private law aspects of the current registration laws in South Africa and the proposed new systems.

ORIGINS AND DEVELOPMENT

The registration of ships can be traced back to Roman times.[1] The practice later became common in the City States of mediaeval Italy.[2] In England, the registration of ships appears to have been first introduced by the Navigation Acts in the mid-1660s.[3] These Acts made the registration of British ships compulsory. Together with increased port duties for foreign vessels they were intended to challenge the naval supremacy of the Dutch who commanded the rich eastern trade routes. At the time the Dutch owned between fifteen and sixteen thousand merchant vessels to the few thousand British ships and Amsterdam had become the entrepôt of the world.[4]

England's protectionist shipping policy, which persisted until the mid-1800s, closed the coastal trade around Britain to foreign ships; forced the carriage of many goods from Europe to Britain into British vessels; confined the shipment of certain produce to British vessels - meaning those built in British shipyards and owned by English or colonial persons - and excluded foreign merchantmen from colonial ports. The English policy has been common to all empires, including the Dutch,[5] and it accounted in large part for the growth of the British empire. The effect of the Navigation Acts was that "no one else got a look in."[6] In vain, Grotius had a short while before tried to insist on the freedom of navigation and commerce as laws of nature and

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[1] *Ship Registration*, 2nd Ed, NP Ready, page 2

[2] *ibid*

[3] Abbott, 5th Ed, page 25 quoted in *Maclachlan on Merchant Shipping*, 7th ed, page 56; *Temperley's Merchant Shipping Acts*, 7th Ed, page 3

[4] *The Embarrassment of Riches - An interpretation of Dutch Culture in the Golden Age*, Simon Schama, 1987, pages 223-238; *Collier's Encyclopedia*, 1964, Vol. 15, at 702

[5] *Collier's Encyclopedia*, 1964, Vol 15, at 702. In fact, England's first attempt to ecourage and protect English shipping and seafarers had occurred through the navigation acts of 1381 and 1389. These acts had proved unworkable.

[6] *International Shipping:. An introduction to the Policies, Politics and Institutions of the Maritime World* (Lloyds of London Press Ltd, 1987), pages 9-10 quoted in *EC Shipping Law*, Vincent Powers, 1992, page 210-211

of nations. He had asked: "Can the vast boundless sea be the appendage of one country alone, and it not the greatest? Can any one have the right to prevent another from bartering with one another?"[7]

The periodic monopolisation of particular trades or trade-routes by the ships of a town or nation has occurred for thousands of years. Cretan pre-eminence in the Mediterranean persisted until about 1400 B.C., only to be succeeded by the Phoenicians and subsequently Carthage. Many centuries later the Venetians secured the spice trade for their ships and profited handsomely. In the 15th and 16th centuries Spain, to the west, and Portugal, to the east, monopolized the sea-routes. However, the basis of the British monopolisation of trades and trade-routes was the registration in ships' registers of certain ships as being "British". The favouring of British citizens and British ships using this method has caused at least one commentator[8] to observe that "Tudor England pioneered flag discrimination".[9] The practice quickly became widespread. Restrictionist policies similar to those of Britain resulted in comparable measures being promulgated in France, the Hansa-Towns and in the United States of America.[10]

Although the Navigation Acts passed during Cromwell's time were not the first English attempt to limit the effect on its island economy of foreign shipping, they were the beginning of two centuries of successful English mercantilist shipping policy.[11] It contributed to wars with the Dutch, but this policy ultimately helped make the British fleet the largest in the world. It had

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[7] *The Embarrassment of Riches*, supra, page 230, quoting from *Mare Liberum*, or "The Freedom of the Seas or the Right which belongs to the Dutch to take part in the East Indies Trade".

[8] *EC Shipping Law*, supra, page 210

[9] Being the practice of States to discriminate - on the basis of ship registration laws - against ships not carrying their own flag.

[10] *Wylock v Milford Investments (Pty) Ltd* 1962 (4) SA 298 (C) at 304H

[11] *Collier's Encyclopedia*, supra, 706-7, which mentions that as early as 1385 the English government "had sought to divert from Italian, Hanseatic, and Flemish shipping some of the profits derived from carrying away English exports."

direct benefits, political and economic, for Britain. By the end of the 19th Century Britain was the shipbuilder of the world. Today, London is still in many respects the nerve-centre of world shipping.

Over the years the purpose of registration in Britain changed. With the repeal of the tax on imported corn in 1846 Britain shook off the shackles of mercantilism and protectionism and began following a policy of freedom of trade.[12] By the time of the British Merchant Shipping Act 1894, the registration of a ship in terms of that Act served only the dual purpose of proof of title and the right of that ship to British nationality:[13]

> "When the policy which induced the Legislature of this country to restrict our commerce by sea chiefly to our own ships, the building and repair of these ships chiefly to our own workmen, and the manning and command of them chiefly to our native mariners, was abandoned, the purposes for which the register had been originally instituted then ceased to exist. But it had been converted meanwhile to another use, which has now become the recognised object of continuing it in an improved condition. The existing register is the appointed record of title to property in British ships, and, except for this, and for ascertaining the vessels that are entitled to use the British flag, serves no other purpose."

Ships' registers worldwide continue to fulfill these twin public and private law functions, but with one major difference. While registration in terms of the British Merchant Shipping Act 1894 meant that a ship was British, the converse did not necessarily apply. At that time, registration was not seen as the real or sole proof of nationality for merchant ship.[14] Thus a ship could still be British although not registered under the Act. Nationality depended upon where the ownership of the ship lay. Historically, ships had always been identified in this manner; a Spanish galleon was a Spanish ship because of its country of origin, who built it, who sailed it and who was going to reap the benefits from its voyages. The emphasis on ownership as establishing nationality explains the judgment in the early case of *The "Atjeh"*.[15]

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[12] *Elements of Economics*, SE Thomas, 10th ed, 430

[13] *Maclachlan on Merchant Shipping*, supra, page 56

[14] *Temperley's Merchant Shipping Acts*, supra, page 4

[15] *The Chartered Mercantile Bank of India, London, and China v The Netherlands India Steam Navigation Company, Limited* (1883) 10 QBD 521 at 535-6 *per* Brett, L.J.

A century later, the position has changed considerably:

> "It is absurd to suppose that the mere fact of carrying the Dutch flag makes her a Dutch ship. Pirates carried the flag of every nation, but they were hanged by every nation notwithstanding. To carry false papers was an ordinary mode of evading the laws of war, but nobody ever supposed that the mere fact of carrying a foreign neutral flag and having papers of a foreign neutral country would cause the ship to be considered as the ship of the nation whose flag and papers she carried. Unless a ship be employed under letters of marque of Government, which make her become a ship of the Government, and by which letters of marque the Government undertake a responsibility as government, the nationality of a ship depends upon her ownership and that alone. The owners of this ship are an English company, the owners of this ship are Englishmen, and it seems to me that the mere fact of her being registered in Holland for the purpose of carrying on a Dutch trade, which however is to be carried on for the benefit of the Englishmen, and them alone, does not prevent her being a British ship. It seems to me, therefore, that both these ships were British ships. But it is suggested that they are not British ships, because they are not registered as British ships pursuant to the provisions of the Merchant Shipping Acts. The Merchant Shipping Acts of course cannot be applicable except to English ships and English owners. The legislature would not be entitled to legislate with regard to a foreign ship. Therefore the question whether a ship is bound to be registered according to English law depends upon whether she is an English ship. If she belongs absolutely and entirely to English owners, she is an English ship before she is registered, and whether she is registered or not. It is true that she cannot obtain those advantages which are given to English ships by reason of the Merchant Shipping Acts in the Courts of this country, unless she is registered as such. But it has always been held, and it seems to me to be the law, that she cannot evade liability if she is a British ship by the mere fact of her owner omitting to register her as a British ship. It would be strange if it were otherwise, because in that event it would be for the advantage of British owners not to register their vessels. If it be true to say, for instance, that not to register a vessel prevents the owners from being liable for the acts of their own servants and captain, it would be for their advantage to omit to get their ship registered as a British ship. It seems to me that the nationality of a ship depends solely upon her ownership, and as to her liability it does not matter about her being registered. Therefore it seems to me on the question of fixing the defendants with liability for the negligence of the captain and crew of the *Atjeh*, who are admitted to be the servants of the defendants, that the defendants cannot escape liability by saying that their ship was not registered as a British ship, but that she was registered as a Dutch ship. She was nevertheless an English ship, and the defendants are liable according to English law."

Over the years since the *The "Atjeh"* nationality and the fact of registration on a particular State's register have become inextricably linked. Ownership is still to be distinguished from registration in determing a ship's nationality, however, registration and not ownership is now

generally the critical factor linking a ship to any particular country.[16] A ship, although crewed by Malaysians, skippered by a Greek and registered in the name of a company in Panama whose shares are all owned by an Englishman, is universally recognised as Panamanian.

International convention has followed international customary law in accepting that a ship acquires a particular nationality through registration on that State's ships' register.[17] Upon registration, the flag of the State becomes that of the ship. It is the symbol of the ship's nationality,[18] more properly proved by the ship's papers of registration.[19] The leading modern judgment on the law of the flag, *Lauritzen v Larsen* 345 U.S. 571, expresses it thus: "Nationality is evidenced to the world by the ship's papers and its flag."

Furthermore, registration, for most ships and in particular merchant ships, is not optional.[20] The realities of international commerce and navigation require that all ships possess a national

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[16]"Nothwithstanding the multiplicity of connecting factors, the view is increasingly gaining ground that the only universally applicable test for determining a vessel's nationality is the fact of her registration - or, in a limited range of cases, documentation not accompanied by registration - in a particular State" (*Ship Registration*, supra, page 5).

[17]Three international conventions deal, to a greater or lesser extent, with the registration of ships. They are the 1956 Geneva High Seas Convention, the 1982 UN Convention on the Law of the Sea ("UNCLOS") and the UN Convention on Conditions for Registration of Ships ("UNCCORS"). Article 91 UNCLOS which deals with the right of a ship to fly a State's flag, bears the heading "Nationality of Ships". There is, however, "no analogy between the nationality of ships and the concept of nationality as applied to individuals or corporations" (*United Nations Convention on the Law of the Sea, 1982 - A Commentary*, Vol. III, 106).

[18]Article 91(1) UNCLOS provides: "Ships have the nationality of the State whose flag they are entitled to fly." This principle is reiterated in article 4, paragraph 2, of UNCCORS.

[19]Article 91(2) UNCLOS requires every State to issue to ships to which it has granted the right to fly its flag documents to that effect. Article 5 UNCCORS requires that ships carry on board documents evidencing the right to fly a particular flag.

[20]International law recognises that some ships, because of their small size or purpose do not need to be registered.

character.[21] There is no place in international law of the sea for the "stateless" ship.[22] Without nationality, a ship cannot expect unhampered innocent passage through or into a State's territorial waters.[23] It cannot rely on the protection of any state; it is at the mercy of those states whose jurisdiction it enters.[24] Even on the high seas, which are *res communis omnium* and not subject to any municipal jurisdiction,[25] ships without nationality may be boarded by the warships of any state.[26] Accordingly, the freedom of navigation enjoyed by ships on the high seas is subject to the proviso that they must sail under the flag of a state. This is evidenced by the case of *The "Asya"*.[27]

When first sighted by a British destroyer on the high seas some 100 miles south-west of Jaffa, the motor vessel *Asya* was flying no flag, but later she hoisted a Turkish flag. Having made

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[21]Article 92, UNCLOS provides that "Ships shall sail under the flag of one State only". Commenting on the predecessor of this article (article 30 of the International Law Commission's 1956 draft articles), the ILC stressed the need for ships to fly one flag and come under the authority of one state: "The absence of any authority over ships sailing the high seas would lead to chaos. One of the essential adjuncts to the principle of the freedom of the seas is that a ship must fly the flag of a single State and that it is subject to the jurisdiction of that State" (quoted in *United Nations Convention on the Law of the Sea 1982 - A Commentary*, Vol. III, 123).

To prevent anarchy and to ensure that ships heed international customs regarding sea travel, Article 94 UNCLOS (previously article 5 of the High Seas Convention) seeks to place ships under the effective 'jurisdiction and control' of a flag state. Article 4, paragraph 3 of UNCCORS further entrenches this principle.

[22]*Naim Molvan, Owner of Motor Vessel 'Asya" v Attorney-General for Palestine* [1948] A.C. 351 (PC) at 369-70

[23]For example, section 63 of the South African Merchant Shipping Act, 1951, requires that the nationality of a ship be declared before it may proceed to sea.

[24] The nationality of a ship "is also a protection for other States for the redress of wrongs committed by those on board against their nationals" (*International Law of the Sea*, Colombos, paragraph 308).

[25]Article 2 of the High Seas Convention; article 87 UNCLOS

[26]Article 110(1)(d) UNCLOS

[27]*Naim Molvan, Owner of Motor Vessel "Asya" v Attorney-General for Palestine*, supra.

no reply on being asked her destination by signal, a boarding party was sent from the destroyer and on its arrival on the *Asya* the Turkish flag was hauled down and the Zionist flag raised. The *Asya* was escorted to the harbour of Haifa where it appeared that she had none of the usual ship's papers. She was ordered to be forfeited to the Government of Palestine for being (although under compulsion) within the territorial waters of Palestine in circumstances which contravened the territory's immigration laws. On appeal it was contended *inter alia* that under the shield of the doctrine of "the freedom of the open sea" the *Asya* was entitled, whatever her mission might have been, to sail the open sea off the coast of Palestine. The Privy Council held otherwise:

> "For the freedom of the open sea, whatever those words may connote, is a freedom of ships which fly, and are entitled to fly, the flag of a State which is within the comity of nations. The *Asya* did not satisfy these elementary conditions. No question of comity nor of any breach of international law can arise if there is no State under whose flag the vessel sails. Their Lordships would accept as a valid statement of the law the following passage from Oppenheim's International Law (6th ed.), vol. I., p. 546: 'In the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a State.' Having no usual ship's papers which would serve to identify her, flying the Turkish flag, to which there was no evidence she had a right, hauling it down on the arrival of a boarding party and later hoisting a flag which was not the flag of any State in being, the *Asya* could not claim the protection of any State nor could any State claim that any principle of international law was broken by her seizure."[28]

Hill[29] explains the need for nationality thus:

> "Ships are potentially the means by which their owners can incur liabilities to third parties - sometimes of catastrophic proportions. It is, therefore, logical that ships should be given a nationality so that their owners' obligations, duties, rights, liabilities, immunities, etc., can the more easily be regulated and recognized. In short, ships should and do fly a national flag."

International customary law requires that every state insist upon the registration of all sea-going ships which it or its nationals own. It is the duty of a flag state at international law to maintain

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[28]At 369-370

[29]*Maritime Law*, Hill, 3rd Ed, page 4

a register of ships flying its flag.[30] The register should contain the "names and particulars" of the ships.[31] The information which should be included in a register of ships is set out in some detail in UNCCORS.[32] It was said in *Wylock v Milford Investments (Pty) Ltd* 1962 (4) SA 298 (C) at 304C-D that:

> "The concept of public registries, established and controlled by Government authority, in which are recorded certain details relating to all ships in excess of a certain size which can be regarded as being subject to the authority of the State and in which it is compulsory to record all changes taking place from time to time in the ownership of such ships, is or ought to be well-known in this country - as indeed it is in every other civilised country the citizens of which have any maritime interests."

Because States offer benefits to and assume obligations for ships flying their flag, it is their right to set conditions for the grant of registration - and hence nationality - to ships.[33] In the *Case of the Muscat Dhows between Great Britain and France* the Permanent Court of Arbitration stated that, "Generally speaking it belongs to every sovereign to decide to whom it will accord the right to fly his flag and to prescribe the rules governing such grants."[34] This principle, which was afterwards recognised in article 5 of the High Seas Convention and article 91UNCLOS,[35] was endorsed in *Lauritzen v Larsen*:

> "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."

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[30]Article 94(2)(a) UNCLOS; article 11(1)UNCCORS

[31]Article 94 UNCLOS. Those ships which are excluded from generally accepted international regulations on account of their small size are not required to be registered.

[32]Article 11, paragraph 1

[33]*International Law of the Sea*, supra, paragraph 309.

[34]Decided in 1905, reported at Hague Court Reports 1916, page 93 (*Ship Registration*, supra, page 9).

[35]The relevant part of article 91 UNCLOS reads: "Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territority, and for the right to fly its flag."

The preconditions for registration which are laid down by a registering State constitute the essence of ship registration. In them is manifested the State's shipping policy. This policy will account for why a particular State might limit the registration of ships on its register to ships with certain minimum attributes or particular owners. For example, by adopting minimum operating requirements a State may wish to ensure that those ships for which its accepts responsibility are safe and suitable for the purposes to which they will be put. Or a State might wish to reserve its national flag solely for ships owned by it citizens. This might be a reflection of broader social or economic policies. For instance, although in the nineteenth century Britain - understandably in the light of its domination of the seas - had come to adopt a policy of complete freedom of trade, other countries adhered even more strictly to protectionism. To give effect to this policy those States had to identify quite specifically which ships were to benefit and which were to be excluded. Or as has occurred more recently, a number of States have entered the shipping market, not for reasons of national pride or for any of the usual economic reasons but solely for the financial benefit that comes from the act of registering ships. The preconditions for registration in the laws of these States have been moulded accordingly to allow almost anyone to register ships.

States of Registration

For more than two hundred years prior to World War II, a few nations[36] had monopolised the international shipping industry while dominating the world's affairs. Their shipping fleets, which had been intrumental in their political ascendency, were used to maintain trading relationships with far-flung territories. By carrying the trade of other territories and by cross-trading between third countries these nations prospered. At the same time, the political subordination of dependent territories precluded them from building up their own fleets.

After 1945 and with the independence of former territories, shipping enterprises grew up all over the world and non-maritime states sought to participate in sea-carriage. Since the power

[36]Such as the United Kingdom, United States, France, Germany Netherlands, and the Scandinavian countries.

to grant a ship the right to fly a national flag goes hand in hand with statehood,[37] the new nations gave expression to their aspirations by having ships fly their flags. In an effort to acquire shipping tonnage they often resorted to giving preferential treatment to ships flying their flags and some required that a proportion of their trade - sometimes more than 50% - be carried in ships of their nationality. Naturally, the traditional maritime states objected but, just as such favouritsm had assisted the established nations to attain maritime superiority in the past, so it now enabled some developing countries to substantially increase their merchant fleets. In the result, the traditional maritime states were unable to use their political influence to halt the development of national shipping registers in the emerging states. Furthermore, they watched while their registers lost ships to new countries or those offering international registries for the first time.

But it was not only the desire for prestige that prompted the new nations to build up their merchant navies. States benefit economically[38] and militarily[39] from having a strong fleet. Shipping provides foreign revenue[40] and employment.[41] Foreign currency is earned from port

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[37]Recognised in article 90, UNCLOS 1982, and article 4, paragraph 1 of the 1986 United Nations Convention on Conditions for Registration of Ships, which record that every state, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.

[38]Greece, with the largest fleet in the European Community, earned about $1.3 billion per annum from shipping in the first years of this decade (*EC Shipping Law*, supra, page 40).

[39]The difficulties experienced by the UK during the Falklands war, caused by the limited size of her fleet, is an example. During the world wars Britain's merchant marine was a major reason for its survival.

[40]Bermuda's minister of transport is quoted in *Fairplay* of 5 July 1990, at page 18, as saying: "We are in trouble. Our foreign exchange is down. We need an infusion. The tourist industry has been down the last couple of years. Our only real industries are tourism and international business. Shipping is an adjunct to international business. In the past we have not had to promote it. Shipowners have come here." Promising a more aggressive marketing campaign, he says: "Shipping is good for the economy."

Lloyd's List of Wednesday, 1 April 1992, in a report on registers contained on page 12 observes that "The international ship register market is a multi-million-dollar business, often seen as an integral part of the much larger market for off-shore banking, and as such has over the years attracted ambitious

dues, the ware-housing of goods, the provision of bunkers, legal fees, insurance premiums, wages and a host of services necessary to keep ships afloat and their cargo safe. Foreign currency can also be conserved by employing one's own fleet. Stevedores, ships' agents, chandlers, shipbuilders and seamen are dependant on the shipping industry. Ports become centres for other industries. Shipping is also an indispensable element in world trade and a State (or trading bloc such as the European Community) without a fleet is vulnerable to pressure from other trading powers.

Today most States offer assistance to shipowners in one form or another. To keep or increase their shipping industries they offer soft loans, subsidies[42] and generous depreciation allowances; they employ cargo reservation strategies and cabotage; they offer exchange rate guarantees, tax concessions and exemptions, indemnities against losses, preferential access to government contracts, and customs and port discounts.[43] Recently there have been a substantial number of new registers, all aimed at the same market;[44] and in vying for a greater share of a limited

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newcomers", such as the Bahamas, Cyprus, Malta and Vanuatu.

[41]In 1986 approximately 32 000 were employed in its merchant marine (0.9% of the total labour force) and over 6000 persons in shipbuilding (*EC Shipping Law*, supra, page 40).

[42]The British Navigation Act of 1651 provided for *inter alia* the giving of grants to British shipowners - *EC Shipping Law*, supra, page 367

[43]See generally, chapter 15, *EC Shipping Law*, supra.

[44]*Fairplay*, 25 May 1989, page 19, carries the following report: "There is no let-up in the stream of new registries setting out to lure shipowners. Luxembourg is gearing up, Spain and Portugal are making use of their offshore islands.... Each registry wants its share of a static pool of tonnage. Control of that tonnage still rests with traditional shipowners in a few main centres. So the registries have to tailor their products to that market, and scrabble for business. Shipowners are spoilt for choice. But in the process, ship registries are being spoilt by choice.... The characteristic of the last decade has been the emergence of the pure service-sector-driven registry. Open registers have been around a long time. But the likes of Liberia and Panama were started by shipowners looking for tax and labour freedom, not by financial entrepeneurs seeking the benefits a register can bring. A host of newcomers has been created, not to meet a need perceived by shipowners, but to satisfy a need felt by financial interest. These are not so much open registries as commercial registries. They have less interest in the ships, and

market they undercut competitors[45] or offer dubious incentives to less scrupulous shipowners, such as lax controls.[46]

Reduced operating costs (through subsidies, lower minimum wages, the non-observance and non-enforcement of international safety standards, etc.), permit the fleets of some nations to offer freight and passenger rates substantially less than those offered by other fleets; in effect, "dumping" their services on the markets of the other countries. This provokes affected governments to introduce their own anti-competitive measures. It is not only the developing countries which resort to anti-competitive State aids to their shipping industry. For example, the United States of America reserves its coastal trade for ships flying its flag. England abandoned this practice only after two hundred years and "against the violent protests of shipowners".[47]

The "Genuine Link"

Shipping is an international industry. It is peculiar therefore that so much of its regulation is left in the hands of national states, although there are growing signs of international standardisation. For example, various international conventions have been adopted regarding the employment of seafarers, or the minimum standards of merchant ships, or the carriage of

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the obligations that shipping brings, than in the benefits that shipping brings. The governments have been quiescent partners in a business of financial entrapment."

[45]The Cambodian register "openly draws attention to its claim to be up to three times cheaper than Panama.... Other low-cost flags have not stood idly by. Vanuatu slashed tonnage tax last year - already frozen since 1981 - by as much as 150%" - *Lloyd's List: Shipmanagement*, February 1998, page 16.

[46]The Mauritian register, relaunched in January 1991 and opened to international shipping has drawn criticism for it inability to enforce standards. A report in *Lloyd's List*, Wednesday 1 April, 1992, comments: "The register's critics did not attack it just because of the small number of international conventions it had ratified, but because there were serious doubts as to whether the authorities would employ the necessary resources to enforce them. At its launch press conferences in London and Piraeus, delegates were told that policing would be left to trust, rather than through enforcement of standards."

[47]*Collier's Encyclopedia*, supra, 707

nuclear materials by sea, or the liability of owners and operators of nuclear-powered ships. As regards the registration of ships, however, international conventions have proven difficult to formulate or apply. The High Seas Convention[48] was the first multilateral convention to govern the law of registration, flag and the nationality of ships.[49] Article 5 (which followed closely the phraseology of the International Court of Justice in the Nottebohm case),[50] and which is substantially repeated in article 91 UNCLOS, provided that, as the only pre-condition for registration, there "must exist a genuine link between the State and the ship".

A subsequent convention, the United Nations Convention on Conditions for Registration of Ships, 1986, ("UNCCORS") was an attempt at a more orderly, responsible expansion of international shipping, aimed at strengthening the genuine link between State and ships flying their flags, and at ensuring that the State of registration exercised effective control over all aspects relating to its ships.[51] However, this convention provided no further guidance on the "genuine link" principle.

Historical, political and economic factors, and the competing interests of States, shipowners and labour all play their part in making ship registration an area of conflict. Pre-eminently, the differing interpretations put on the "genuine link" requirement and attempts to enforce such a requirement reflect this.

The "genuine link" is a reaction to a recent phenomenon. It happened that at the same time that newly independent states sought to establish their own registers, ship owners were looking at ways of lowering their operating costs and maximising the use of their ships. In the place of the registers of traditional maritime countries, which were closed to non-nationals, registers began to appear which were open to shipowners who had little or no connection with the country offering registration. Moreover, these registers offered the shipowners benefits not

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[48]In 1958

[49]*Maritime Flag and International Law*, Master Memorial Lecture, 1977, Nagendra Singh, page 7

[50]ICJ Reports 1955, page 4 at page 23 where the concept of a "genuine connection" between an individual and a State is used.

[51]See the preamble to, and article 1 of, the Convention.

available to them on their own registers. While they began to prosper, the beneficial owners of much of the world's merchant fleet remained situated in the traditional maritime nations. It followed that the governments of such states had an interest in the "genuine link" requirement being strictly interpreted and implemented to discourage their shipowners from registering their ships on foreign registers.

Labour interests - as represented by the International Transport Workers Federation (ITF) - in an effort to protect the seafarers in traditional maritime states, have vigorously tried to enforce the genuine link requirement to prevent the registering of ships, which are beneficially owned in the traditional maritime states, on the new registers. The new registers invariably allowed the employment of foreigners at low rates.

Shipowners and Others

The purpose of ship registration as far as States are concerned does not necessarily coincide with the need of shipowners or mortgagees or seamen or shippers. For example, while seafearers might want minimum employment conditions, shipowners and shippers want to pay the lowest wages for the greatest profit margin. Thus, if a government sets minimum wages for ships on its register, shipowners might seek to crew their ships with seamen from other states. If the government requires shipowners to employ its nationals on board ships registered on its registry, shipowners might register their ships elsewhere.

The economic considerations which compel ship owners to flag out their ships onto foreign registers might manifest themselves in a number of ways: the direct savings in respect of taxes,[52] or low wages payable to crew;[53] or indirect savings to the extent that a ship which

[52]It is not necessarily traditional convenience registries which attract shipowners wanting to minimise their tax liability. This is apparent from a report in *Fairplay* of 8th January 1998 in which two major Finnish owners threatened to flag out their fleets, because of domestic taxation and because an income settlement had raised the cost of employing Finnish seafarers, onto the German or Netherlands registers. In both the latter countries, profits of shipowning companies which are held for future investment are exempt from corporate taxation and only a tonnage fee is payable. It is reported in the same article that the Finnish transport ministry is working on a bill that will

structurally or otherwise does not meet one state's standards will be permitted by another state to continue operating. The economic reason might have a political aspect: where a ship owner fears requisition of his vessel or where, as in South Africa's past,[54] the international standing of the state hampers free trade and travel.[55] Flagging-out occurs on a large scale: only about half of the ships owned by European Community owners are registered on their domestic registers.[56]

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allow shipowners using the Finnish flag the same tax advantages.

[53]The crew component of ship operating costs are in the region of 40% to 45% of the total cost (*South Africa - A Maritime Business Location*, Safmarine/Unicorn/Griffin, May 1995, page 12). The "chief motivation" of the International Transport Federation in its campaign against flags of convenience "has been to prevent loss of work opportunities for seafarers in the traditional maritime countries where spiralling wage costs have rendered the operation of ships increasingly uneconomic" (*Ship Registration*, supra, page 25).

[54]*South Africa - A Maritime Business Location*, supra, 8-9

[55]See, for example, the fate of the *Crna Gora* in *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A), which was refused entry to the port of Rotterdam because of its Yugoslavian connections. At the time economic sanctions had been imposed on Yugoslavia and, it would seem that as a result, the *Crna Gora* had recently been reflagged from Yugoslavian to Maltese registry. The fact that she was owned by a company recently registered in Malta, and the fact that 499 of the 500 shares in that company were owned by another company registered in Liberia, did not avail her. The controlling shareholders in the Liberian company could all be traced back to Yugoslavia.

The Singapore Registry of Ships reached a record of 20m gt in October 1997 from 15m gt in early 1996. The reason for this was put down to "political stability and good infrastructure" (*Farplay*, 22 January 1998, p 15).

A problem for the Cyprian register is that the ongoing dispute with Turkey means that Cyprian flag ships cannot visit Turkish ports (*Lloyd's List: Shipmanagement*, February 1998, page 16).

[56]*EC Shipping Law*, supra, 1992, page 170. In order to combat this state of affairs, the Euros Community ship register has been proposed. First introduced by the Commission to the Council in August 1989, the register was (as reported in an article by Michael Grey in *Lloyd's List*, Wednesday 1 April, 1992), "[c]onceived as one of the planks of the 'positive measures' designed to revitalise a European commercial shipping industry fast disappearing to cheaper flags.... The architects of the Euros concept in Brussels had three principal goals in mind. They hoped to perpetuate a reasonable size of European maritime

Types of Registers

The ship registers of the traditional maritime states have generally been limited to the ships belonging to their nationals. Frequently they require that such ships employ seafarers (at least to an extent) of their own country. At times they have limited access to the register to ships built in their own shipyards. Generally, these registers have been part of a design to maintain and increase the strength of the maritime nation. They are variously described as "closed" or "home" or "national" registries. They are to be contrasted with "open" registers which are non-national in character. Such registers have no requirement that a vessel be either beneficially owned or controlled by interests directly connected with the state of registration.[57] An open register provides a service - or convenience - for ship owners and is a source of revenue[58] for the country operating it.

The traditional[59] open registries are run by states which are not otherwise recognised as maritime states. They do not possess a fleet[60] or have a need for a large fleet and some are not

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presence, provide a formula which would help to remove cabotage restrictions which were being implemented by many EC member nations and also preserve a reasonable size of European maritime workforce, which had been halved in line with European tonnage during the past ten years."

[57]*Maritime Law*, supra, page 10

[58]*Shipping Law*, Chorley & Giles, 8th Ed, chapter 3.1.2. Convenience registries generally have a high charge for the "convenience" of registration. Registers which are truly national, such as South Africa's, have lower registration costs (*South Africa - A Maritime Business Location*, supra, 41-4).

[59]As opposed to more recent open registries which seek to combine a neutral register with strict controls, such as the Norwegian register.

[60]Substance must be distinguished from form. Although ships appear on a flag of convenience register, those ships only nominally bear that state's nationality. The ships seldom if ever enter the ports of the flag of convenience state, they do not contribute to the prosperity of the state except to the extent of registration costs, and the flag of convenience state is powerless to requisition such ships in times of war. It is the state of real control or ownership which may claim those ships during hostilities (*Shipping Law*, supra, chapter 2.2, page 21; *Maritime Law*, supra, page 11).

concerned with ensuring that ships are maintained to a certain standard.[61] Or if they do have such a concern, they are not able to give effect to it.[62] In order to attract custom, such registries have a minimum of registration requirements.[63] States often combine such a register with low levels of taxation.[64]

In terms of international customs and conventions the onus to take measures to regulate ships is borne principally by the flag state.[65] "Convenience" registries,[66] contrary to custom and

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[61]Article 5 UNCCORS, requires of each flag State that it has a competent and adequate national maritime administration. The reason herefore is stated in the preamble to the Convention as being to ensure that flag States exercise effectively their jurisdiction and control over ships flying their flag in accordance with the principle of the genuine link.

[62]For example, the register officials managing the Belize register "insist they are not trying to earn money at the cost of safety. They say their strict merchant shipping act and a commitment to quality is underlined by their signing many treaties drawn up by the International Maritime Organisation. But ultimately they admit the outside classification societies will have to take responsibility for ensuring standards are maintained. Belize has no operational surveyors of its own" (report in *Tradewinds*, June 19, 1992, page 9).

[63]For example, the Cambodian register, established in 1995, accepts ships of any age. As a result it has acquired tonnage from owners of older tonnage forced to quit other budget registers. The Cambodian register has "few restrictions of any kind" - *Lloyd's List: Shipmanagement*, February 1998, page 15.

[64]*Shipping Law*, supra, chapter 3.1.2

[65]See for example Articles 10 and 24 of the High Seas Convention; Articles 194(2) and 211(2) UNCLOS; Article 5 UNCCORS. As regards pollution from ships, the 'main feature of the current jurisdictional regime is that the flag state is the most important state when it comes to both enacting and enforcing standards' (*Oil Pollution from Ships*, Abecassis, paragraph 5-01).

[66]The designation "flag of convenience" is frequently used interchangeably with that of "open register" or "flag of necessity" (*Ship Registration*, supra, page 17). The characteristic of open registries is the "fact of foreign control, if not foreign ownership" (*ibid*). However, registers are sometimes difficult to categorise. In certain cases the International Transport Federation classifies ships on particular registers as flying a flag of convenience on a ship by ship basis. The only real consequences of flying a flag of convenience are those that the ITF visits on the ship so labelled. To that extent, the flag of convenience designation serves a purpose and

conventions and in particular Article 91 of the United Nations Convention on the Law of the Sea 1982, often ignore or exercise little or no control over the state of their ships or acts committed by ships under their flags or conditions on board such ships.[67]

A flag of convenience is an attractive alternative for a shipowner whose ship must be registered in order to freely sail the oceans of the world, but who is weighed down by regulations and high levels of taxation in his own country. The shipowner therefore swops statelessness (being unregistered) for neutrality (being registered on a non-national register to which he owes no allegiance and which makes few demands on him or his ship).[68] A shipowner needs a flag which will permit him to trade everywhere with the minimum of interference or cost.[69]

Although they are responsible for many of the safety infringements and maritime and ecological disasters,[70] it would be wrong to generalize regarding flags of convenience. Some are highly regarded.[71] It is also to be expected that flags of convenience would account for most shipping casualties: such flags - as defined by the International Transport Workers' Federation group

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a flag of convenience in any given case is what the ITF decides. The ITF "classifies as a flag of convenience any country which allows on its register ships which are beneficially owned and/or controlled by companies incorporated elsewhere" (*ibid*).

[67]Since the flag State (together with the State of the guilty individual) has penal jurisdiction in respect of matters of collision or any other incident of navigation on the high seas, a lack of will on its part to take penal or disciplinary proceedings ... (article 97 LOSC, 1982).

[68]"Irrespective of original nationality, shipowners and operators will locate themselves in their most favourable financial and fiscal environment, which may have no bearing on their trading pattern" - *South Africa - A Maritime Business Location*, supra, page 2.

[69]The modern day practice of using the flag of another country can be traced back to 1922 when American shipowners used the Panamanian flag to avoid the consequences of prohibition which extended to all ships flying the U.S. flag, in particular, cruise liners (*Collier's Encyclopedia*, supra, 718).

[70]*Ship Registration*, supra, pages 22-24

[71]*ibid*

of trade unions - "still fly over an absolute majority (52.5%) of global tonnage."[72] On the other hand, many national flags are "proven poor performers".[73] Sometimes shipowners have to weigh up the savings from flying a flag with a bad reputation against the threat of unwelcome attention from the port state control.[74]

Convenience registries and 'brass plate' companies readily co-exist; a fleet is allowed to be divided up into many such companies, each owning one ship.[75] Because the law generally treats each company in a corporate group as a separate entity the commercial reality differs from the legal reality. In this way the association between beneficially owned and controlled ships is obscured and one ship's liability for another's debts may be evaded. This is a major consideration for owners of more than one ship.

In addition to the traditional open registries and the traditional closed or "home" registries, "offshore registries" are situated in dependencies or colonies and are intended for the shipowners of a particular state. The Cayman Islands, for example, permit ships registered there to fly the Red Ensign (which gives such ships respectability), but do not have the strict manning requirements of a ship registered in the United Kingdom. Other such registries, which

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[72] *Lloyd's List: Shipmanagement*, February, 1998, page 15

[73] *Lloyd's List: Shipmanagement*, February 1998, page 15

[74] This is increasingly relevant with the implementation in July 1998 of the International Safety Management code (see: *Lloyd's List: Shipmanagement*, February 1998, page 15).
An example of re-flagging to escape port state control occurred after the tough provisions of the US Oil Pollution Act of 1990 were made known. This led to a "dramatic improvement in the fortunes of the Liberian register.... Many leading owners feared the legislation could lead to a crackdown on vessels flying flags with poor records, and this was no time to experiment.... Liberian officials felt that, in an era of greater environmental concern, the emphasis they placed on safety helped the register. They detected owners debating: 'If we do not get into a quality register, we will attract unnecessary attention from the coast guard, port state control and other authorities'" (*Lloyd's List*, Wednesday, 1 April, 1992, page 10).

[75] See, for example, *Hasselbacher Papier Import and Export v MV Stavroula* 1987 (1) SA 75 (C) at 77E *et seq*, where the applicants sought to establish links between two vessels for the purposes of the associated ship provision of section 3(6) of the Admiralty Jurisdiction Regulation Act.

may be regarded as second registries, are the Isle of Man (United Kingdom),[76] Bermuda (United Kingdom), Kerguelen (France) and the Netherlands Antilles (Netherlands).[77]

The Norwegian International Ship Register (NIS) was introduced in 1987 as a second register in response to the flagging out by Norwegian shipowners of Norwegian ships.[78] The only link which ships on the NIS are obliged to have with Norway is through an operational / technical or commercial manager who must be based in and is a citizen or resident of that country or is a company controlled to the extent of 60% by Norwegians. The advantage of the NIS, which unlike the traditional open registries requires adherence to the highest standards, is in its manning flexibility: only the master of a ship registered on the NIS must be Norwegian. The NIS has no major fiscal advantages over the national Norwegian register. Although initially successful,[79] the number of ships on the NIS dropped by about twenty percent between 1990 and 1994.[80]

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[76]The Manx shipping register is part of the British register and therefore ships registered in the Isle of Man are British ships. They do, however, come under the separate jurisdiction of the Isle of Man Marine Administration. As British vessels, Manx ships are entitled to fly the red ensign. *Fairplay*, 25 January 1990, reports the following: "The Isle of Man register has been in existence for 200 years. It is only in the last 3 years that it has been actively run as an alternative to the main national registers. The register offers low entry costs, financial sophistication and a good reputation. High standards of manning and certification are required, and an office manned by a responsible person must be opened on the island. At the end of 1989 the register had attracted 128 vessels of 3 400 000 dwt, predominantly British owned."

[77]*EC Shipping Law*, supra, 1992, page 166

[78]Other such registers are the Danish International Ship Register (DIS) and the German International Shipping Register (ISR). The latter has done less well than the NIS or DIS, "partly because it seems to have suffered from having less clearly defined aims and less generous tax benefits than either the NIS or DIS, and partly because it seems to have been accorded lower governmental priority than either of the other two registers" - *Lloyd's List*, Wednesday 1 April, 1992.

[79]As the NIS fleet increased in size, the conventional flag declined - *Fairplay*, 25 May 1989, page 25.

[80]*South Africa - A Maritime Business Location*, supra, 55-57. The NIS appears, however, to have recovered. According to *Lloyd's List: Shipmanagement*, February 1998, page 16, the NIS was the

THE LAW OF THE FLAG

The registration of a ship has consequences beyond the narrow concerns of the shipowner or State of registration. The law of the flag is in many respects supreme. Not only does the flag regulate a ship's relations with the world at large, operating as the ship's passport, but it also regulates the ship's internal relations. This is in accordance with the doctrine of flag state jurisdiction on the high seas.[81] As long as a ship is on the high seas she and her crew are subject primarily to the jurisdiction of the flag state,[82] whether a ship is regarded as a floating part of a state or as a 'moveable chattel'[83]

In the nineteenth century, and with the rise of nationalism, one looked to the flag of a ship to

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world's eighth largest flag in 1996.

[81]This tenet is enshrined in Article 6 of the High Seas Convention. See also Article 94 UNCLOS.

[82]Described as 'Perhaps the most venerable and universal rule of maritime law' in *Lauritzen v Larsen* [1953] 345 U.S. 571. Thus it does not matter that what is done on board a ship on the high seas is unlawful to other states, provided it is lawful according to the courts of the flag state. *Le Louis* (1817) 2 Dods 210, referred to in *Landmarks in the Law* by Lord Denning, Butterworths, 1984, at page 221, was a case where a French slaver, proceeding lawfully according to the laws of France, was boarded on the high seas and detained by an English vessel. It was held by Lord Stowell that although slavery was contrary to English laws, the slave ship had nevertheless been unlawfully impounded.

Article 92, UNCLOS 1982, provides that ships are subject to the exclusive jurisdiction of their flag states while on the high seas, "save in exceptional cases expressly provided for in international treaties or in this Convention". As regards concurrent jurisdiction between the coastal State and the flag State, see articles 27, 28, 42, 56, 73, 218, 219, 220 and 246 UNCLOS. As regards the possibility of a State other than the flag State exercising jurisdiction over a ship on the high seas, see article 99 read with article 110(1)(b), which deals with ships engaged in the slave trade, articles 105 and 107 (the seizure of pirate ships), article 109 (unauthorised broadcasting from the high seas), and article 111 (the right of hot pursuit).

[83]The question is debated in *International Law of the Sea*, supra, paragraphs 303 to 307

determine the relations of that ship in nearly all matters with the world.[84] The ship was considered an extension of the national territory. Whether today the flag State will have exclusive jurisdiction in respect of things done on board a ship on the high seas, or concurrent jurisdiction with the law of the State of persons affected by those things will depend, at least in part, on the circumstances.[85] The municipal laws of a State may expressly confer jurisdiction in certain instances, while in other cases specify that the law of the flag is to apply.[86] Principle and precedent may guide the courts, for example, in determing the proper law of a contract entered into by seamen employed on board a ship[87]. The marriage ceremony on board a ship while on the high seas would be governed by the *lex loci celebrationis*, namely the law of the flag. Altenatively, international conventions may stipulate that the law of the flag is to be followed.[88] Articles 27 and 28 of 1982 UNCLOS provide some guidance regarding the criminal and civil jurisdiction of coastal states in respect of foreign ships. However, in some circumstances it may be clear that the theory of the law of the flag is inappropriate.[89] In

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[84]Tetley in an article titled "The Law of the Flag, 'Flag Shopping', and Choice of Law", Tulane Maritime Law Journal [Vol. 17, 1993], p 139, quotes Lafleur as writing in 1898: "The only safe and practical rule which can be followed is to adopt the law of the ship's flag to govern in nearly all matters relating to a vessel, its captain and its crew."

[85]The law of the flag is generally accepted to govern matters of internal discipline and the administration of a ship. This is subject, however, to the peace and tranquility of the port state not having been affected.

[86]See for example sections 327 and 328 of the Merchant Shipping Act 57 of 1951.

[87]*Magat and Others v MV Houda Pearl* 1983 (3) 421 (N) at 426C-F, where the fact that "the ship was registered in Cyprus, was owned by a Cypriot company and sailed under the Cypriot flag" were factors taken into account by the Court in finding that the proper law of the contracts entered into by the Filipino seamen was the law of Cyprus.

[88]See, for example, art 3(4) of the International Convention Relating to Stowaways; art 15(2) of the International Convention on Maritime Salvage, 1989.

[89]For example, in the case of a necessaries man, pursuant to a contract concluded in Cape Town, supplying a vessel flying the flag of Vanuatu while she is berthed in Cape Town harbour. The proper law of the contract will apply. Or the case where two ships flying different flags, collide on the high seas. In such a case, the *lex fori* would probably apply.

conflict of laws situations the law of the flag is not invariably the applicable law. In modern times when many of the world's ships have no real connection with the country whose flags they are flying, the theory of the law of the flag seems incongruous. While not providing a ready or logical solution to conflicts of laws situations, the flag which a ship flies[90] will generally be at least one of the factors to be taken into consideration when deciding which is the appropriate law governing something done by or on or in connection with that ship.[91]

Although section 2(1) of the Admiralty Jurisdiction Regulation Act confers admiralty jurisdiction on the various Provincial and Local Divisions of the High Court in respect of any "maritime claim" irrespective of the place where it arose or the residence or domicile of the owner of the ship, the flag a ship flies could be a factor in a Court, in terms of section 7(1)(a) of the Act, declining to exercise its admiralty jurisdiction in respect of a specific cause. Section 7(1)(a), it has been held, gives a Court a discretion to decline to exercise jurisdiction on the ground of *forum non conveniens.*[92] In exercising this discretion the Court will look to "connecting factors" in deciding whether there is some other forum having competent

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[90]As opposed to country of registry in the case of a ship which is bareboat chartered and which flies the flag of a second country. In such a case, article 12 UNCCORS provides that the law the flag is the law of the country where the bareboat charter is registered, not where the ship has been registered.

[91]The law of the flag was regarded as one of seven criteria in *Lauritzen v Larsen*, supra. The judgment reads: "This Court has said that the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because it 'is deemed to be a part of the territory of that sovereignty [whose flag it flies], and not to lose that character when in navigable waters within the territorial limits of another sovereignty.' On this principle, we concede a territorial government involved only concurrent jurisdiction of offenses aboard our ships. Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flag-state, but apply the law of the flag on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her. It is significant to us here that the weight given to the ensign overbears most other connecting events in determining applicable law."

[92]*Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) at 939D

jurisdiction which is the appropriate forum.[93] In *Dias Compania Naviera SA v MV Al Kaziemah and Others* 1994 (1) SA 570 (D&CLD) the applicant sought to be declared to be the owner of the *MV Al Kaziemah.* Greek law, by virtue of the registration of the vessel in that country, was the proper law by which many, if not all, of the issues in the case had to be decided. In that case, however, the Court refused the invitation to decline to exercise the Court's admiralty jurisdiction. It held (at 577I-J) that "whilst there is a great deal of connection between the matter and Greece, the fact of the vessel's presence in the Port of Durban is of overriding importance."

The flag which a ship flies, on its own, would appear to be one of the more tenuous links to a foreign forum which might persuade a South African Court not to hear a matter on the basis of *forum non conveniens.* The location of the controlling interests behind a ship is a more important factor.[94] However, a ship's flag might be decisive in determining the proper law of a transaction involving the ship. In this sense, the flag which a ship flies could be important as regards the place where the dispute will eventually be adjudicated.

REGISTRATION IN SOUTH AFRICA

The British Merchant Shipping Act of 1854, which dealt in detail with English Maritime and Shipping Law, including the registration of British ships, was made law in the Cape Province and Natal.[95] From as early as 1855 there is reference in the statute law of the Cape Colony to

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[93] *The Spiliada* [1987] Vol. 1 Lloyds Law Rep 1 (H.L.) at 11; [1986] 3 All ER 843 (HL) at 856; *Du Pont v Agnew* [1987] Vol. 2 Lloyds Law Rep 585 (C.A.); *Great River Shipping Inc. v Sunnyface Marine Ltd* 1992 (4) SA 313 (C) at 317C-D

[94] The location of the shipowner as opposed to the flag of the ship were referred to in *MV Achillieus v Thai United Insurance Co Ltd and Others* 1992 (1) SA 324 (N) at 337B; *MV Spartan-Runner v Jotun-Henry Clark Ltd* 1991 (3) SA 803 (N) at 807F; *Yorigami Maritime Construction v Nissho-Iwal* 1977 (4) SA 682 (C) at 693D

[95] In terms of the Cape Act 8 of 1879, sec 1, English Shipping and Maritime Law was made applicable in the Cape Province (*R v McGrath and Others* 1949 (4) SA 207 (c) at 210).

"British ships registered at or being within the limits of this Colony".[96] The subsequent British Merchant Shipping Act, that of 1894, was expressly stated to extend to the British possessions. Part 1 of the Act, which dealt with British ships and their registration, applied to the dominions by virtue of section 91. However, section 735 provided that the legislature of any British possession could render the Act inapplicable in whole or in part relating to ships registered in that possession. This was subject first to the Queen confirming such legislation in Council.[97] The 1894 Act also had no application to the ships registered in a British possession in so far as the legislature of the possession had already excluded the provisions of the earlier British shipping Acts.[98]

Save for the concession to partial autonomy contained in section 735, the British Merchant Shipping Act 1894 - a bulky code of 748 sections and twenty-two schedules liberally supplemented by later legislation - applied in general to the Dominions.[99] There existed only limited scope for dominion legislation since the Legislatures of the colonies of the British Empire were subordinate to the British Parliament and legislation passed by them which conflicted with British law was invalid. The Colonial Laws Validity Act[100] which provided for the validity of certain colonial legislation did not do away with the doctrine of repugnancy. Even after South Africa became a Union in 1910 it remained a British dominion and legislation passed by its Parliament was invalid to the extent that it was inconsistent with an Act of the British Parliament which extended to the Union.[101] These restrictions on the dominions prior to 1931 to fly their maritime flag "indicated their somewhat inferior status in international

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[96]*Wylock v Milford Investments (Pty) Ltd*, supra, at 304 referring to Act 13 of 1855

[97]Section 735(1) 1894 (UK) MSA

[98]Sub-section 735(2) (UK) MSA, 1894. In terms of the Cape Act 8 of 1879, English shipping and maritime law was made applicable to the Cape Province, and in consequence the Merchant Shipping Act (UK) 1854 became law in the Cape Province.

[99]For the confusion the situation caused, see the article by Herbert Smith contained in Vol. XLIII SALJ (1926), page 170.

[100]28 & 29 Victo c 63, 1865

[101]*Harris & others v Minister of the Interior & another* 1952 (2) SA 428 (A) at 461F-G

law." [102]

Only after 11 December 1931, in terms of section 2 of the Statute of Westminster, were the dominion Parliaments free to enact laws inconsistent with British laws. In *R v McGrath and Others* 1949 (4) SA 207 (C), where the Court had been faced with the question whether seamen on a Canadian registered - but still regarded as a "British" - vessel were subject to the British Merchant Shipping Act 1894, the Court commented on the desirability of South Africa passing its own Shipping Act: "This case illustrates one of the difficulties created by the Statute of Westminster in relation to the Dominions in matters connected with Maritime and Merchant Shipping. Canada passed her Act in 1934, Australia did so soon after, New Zealand apparently has too; and I am informed (and I have indeed been shown a printed draft) that a draft Bill on this subject was prepared a considerable time ago. It is I think highly desirable, in view of the complicated constitutional problems involved, that our own Shipping Act should be placed on the Statute Book without undue delay."[103]

Shortly after *R v McGrath*, the South African did pass its own Shipping Act - the Merchant Shipping Act, Act No. 57 of 1951. In *Harris & others v Minister of the Interior & another* 1952 (2) SA 428 (A) the Court obverved (with reference to the Statute of Westminster): "Consequently the Union Parliament can now make a law repugnant to a British Act of Parliament in so far as that Act extends to the Union, e.g. the Union Parliament can, as it has actually done, repeal the British Merchant Shipping Act in so far as it extends to the Union."[104]

Although assented to on 27 June 1951, the South African Merchant Shipping Act of 1951 did not come into operation for almost a decade.[105] Until then, the MSA (UK), 1894, and Part I

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[102] *Maritime Flag and International Law*, supra, page 26

[103] at 215

[104] at 462. The origins of the Statute of Westminster were, coincidentally, a bill drafted at a conference in 1929 on the operation of Dominion Legislation and Merchant Shipping Legislation held in London and attended by representatives of the British government and the dominions.

[105] Although passed in 1951, the South African MSA was not brought into operation until 1 January 1960, save for secs. 68 to 72, inclusive, which were brought into operation on 1 November

in particular, remained applicable.[1] Even though replaced by Act 57 of 1951, many of the provisions of Part 1 of the 1894 Act, with amendments where necessary, were reproduced in Chapter II of the South African Act. The latter Act is closely modelled on the UK Act which it repealed.[2] Accordingly, the policy behind Part 1 of the UK MSA - the maintenance of registries for ships belonging to its citizens and serving as registries of title - became part of the policy of the South African Act.[3] In addition, however, South Africa inherited and abided by the theory of a "national" merchant fleet.

REGISTRATION PROCEDURE

Under the 1951 MSA the Minister[4] has declared certain ports to be ports of registry for the registration of ships in South Africa.[5] When a ship is required to be registered in terms of the MSA, application must be made by the owners to the proper officer[6] at any such port of

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[1] *Wylock v Milford Investments (Pty) Ltd*, supra, at 305D. For a similar reason, for more than two decades after becoming a Republic and until the passing of the Admiralty Jurisdiction Regulation Act 105 of 1983, South Africa's admiralty law continued to be governed by the Colonial Courts of Admiralty Act of 1890.

[2] *S v Garis* 1965 (1) SA 419 (E) at 421A

[3] As observed by the Court in *Wylock's* case (at 306H): "A cursory perusal of Act 57 of 1951 is sufficient to indicate that one of the main objects of this measure was the establishment and maintenance at ports in the Republic of public registries in which complete and up-to-date records would be kept of all ships of South African nationality falling within certain prescribed categories, as well as of their ownership and of certain other rights appertaining to them."

[4] Minister of Transport - section 2 MSA

[5] Section 4(c) MSA

[6] The proper officer is the officer designated by the Director General: Transport to be the proper officer at the place or in respect of the matter referred to in the Act. The definition in section 2 MSA further provides for certain persons to be regarded as the proper officer in the event of no such designation having been made.

registry within one month of the date on which the ship was acquired.[7] All ships registered by the proper officer are entered in a register.[8] The particulars to be entered are the ship's name, the port to which she belongs, her tonnage, her origin, and the names, addresses and occupations of her owners and their repective shares in her.[9]

Whereas, in terms of the current dispensation, the ports of registry each have their own register, the draft bill would establish one central register.[10] This accords with the development which took place in the United Kingdom in 1993.[11] The draft regulations[12] permit applicants to select a port listed in Annex 2 to the regulations as the ship's port of choice when applying for registration. The ship is then marked with that port of choice.[13] As in the United Kingdom, it is only in this sense that the traditional ports of registry have survived.

The draft bill envisages that the proposed register will be divided into at least two parts, distinguishing between fishing vessels and all other ships.[14] It provides for the further division of the register so as to cater for different classes or descriptions of ships.[15] The draft regulations stipulate that the proposed register is to comprise four parts: Part I for ships of 25 gross tons or more, other than fishing vessels; Part II for fishing vessels; Part III for small

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[7]Section 13(2) MSA. Applications for registration had to be made within one month of the coming into of operation of the MSA for those ships which then complied with the requirements to be registered.

[8]Section 15 MSA

[9]Section 21 MSA

[10]Section 3(1) of the draft bill

[11]Section 1 of the Merchant Shipping (Registration, etc.) Act 1993. That register is continued by section 1 of the 1995 (UK) MSA.

[12]Draft regulation 21 for all ships other than bareboat chartered ships and draft regulation 65 for the latter.

[13]Annex 3 of the draft regulations

[14]Section 3(4) of the draft bill

[15]Section 3(4) of the draft bill

vessels and Part IV for bareboat charter ships.[16] No ship may be registered on more than one part of the register at any one time.[17] In these respects the proposed South African register will mirror the current United Kingdom register.[18]

While providing for the establishment of the new register, the draft bill leaves the details of the registration procedure to the draft regulations. These are contained in Chapter V.[19] An application for registration is to be supported by a "declaration of eligibility", which must be in an approved form, setting out details of the ship's owners and containing a declaration of her "South African connection".[20] Where a ship has more than one owner but no representative person has been appointed (because the owners of the majority interest in the ship are resident in SA),[21] one of the owners who is resident in the Republic is to be nominated as the managing owner.[22]

The Ship Registration Bill will create the South African Ship Registration Office[23] and it also provides for the establishment of "the South African Ships Register, in which must be entered all matters required or permitted ... to be entered"[24]. The use of the singular "Ships Register" throughout the Bill and in the definitions section suggests that there will be established one central ships register. Although branch offices of the Ship Registration Office may also be established it does not appear that the present situation, with various ports of registry, will be maintained. While providing for the register to be divided into parts so as to distinguish

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[16]Draft regulation 3(1)

[17]Draft regulation 4

[18]Sections 8(1) and (5) MSA (UK) 1995; Parts I, II, III, and IV of the 1993 Registration Regulations.

[19]Article 6(1) UNCCORS insists upon sufficient information in the ship's register to identify her and her owners or bareboat charterer, but does not prescribe any particulars.

[20]Draft regulation 12(1)

[21]Draft regulation 6(2)

[22]Draft regulation 13(1)

[23]Section 7(1) of the Ship Registration Bill

[24]Section 33(1) of the Ship Registration Bill

between classes or descriptions of ships,[25] the Ship Registration Bill does not stipulate, as does the draft bill,[26] that there must be such divisions in respect of any type of ship.[27] The Ship Registration Bill also contains few details of the registration procedure which is to be followed. Presumably this will be left to the regulations to be promulgated in terms of section 56.

As with the current MSA[28] and the draft bill,[29] the Ship Registration Bill provides that the register will be available for public inspection.[30] This will enable members of the public to check on the ownership, mortgages against and the histories of ships. This is in accordance with article 6(3) UNCCORS.

SOUTH AFRICAN SHIPS

The provisions governing the registration of ships on the Republic's register are contained principally in sections 10 to 13 of the Merchant Shipping Act of 1951. Ships[31] of South African nationality[32] are those registered[33] in terms of the MSA or deemed to be so registered[34], or

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[25]Section 33(2) of the Ship Registration Bill

[26]Section 3(4) of the draft bill

[27]Article iv of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (1993) requires the parties thereto to "maintain a record of fishing vessels entitled to fly its flag and authorized to be used for fishing on the high seas, and shall take such measures as may be necessary to ensure that all such fishing vessels are entered in that record."

[28]Section 59 MSA

[29]Section 3(1) of the draft bill

[30]Section 34 of the Ship Registration Bill

[31] Ships are defined in sec 2 MSA as any vessel used for transportation or for any other purpose on or under the surface of the water.

[32]The term "South African ship" is used in the Act. The classes of ships listed in section 64 MSA are not stated as in fact having South African nationality. Nor are the ships falling within the classes listed stated to be the only ships having such nationality. They are merely recognised - for the purposes of the Act - as having South African nationality.

licensed[35] under the MSA, or those ships belonging to the South African Government.[36] "Small vessels"[37] which are not registered or licensed but are used solely for sport or recreation[38] and which are wholly owned by South African citizens, a majority of whom (in extent or number) are resident in South Africa, are also recognized as having South African nationality[39] and the provisions of the MSA apply equally to them.[40]

In terms of section 64 MSA, ships are "recognised"[41] as having South African nationality

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[33]Section 64(a) MSA

[34]Section 64(b)MSA provides that any ship which in terms of sections 14 or 30(2) is deemed to be registered under the Act shall be recognised as a ship of South African nationality. Section 14 provides that all ships registered at a port in the Republic at the coming into operation of the MSA are deemed to be registered in terms of the Act. In terms of sec 30(2), a provisional certificate issued in respect of a ship which, elsewhere than in the Republic, becomes the property of a person qualified to own a South African ship is deemed to be a certificate of registry until the expiry of six months from the date on which it was issued, or until the ship's arrival at a port of registry in the Republic, whichever is the earlier date, but thereafter it has no effect.

[35]Section 64(c) MSA. Section 68 MSA makes provision for the licensing of small vessels.

[36]Section 64(d) MSA

[37]Insofar as the MSA is concerned, a small vessel is any vessel of less than twenty-five gross tons and more than three metres in length.

[38]Sport or recreation is defined in section 2 MSA as any sporting or recreational activity carried on in, on or under the water, irrespective of whether that activity is of a competitive nature or whether prizes are involved, provided it is not carried on for commercial purposes.

[39]Section 64(e) read with section 68(3)(b) MSA

[40]Section 3(7) MSA

[41]Section 64 MSA lists five classes of ship which it says "shall be recognised as ships of South African nationality". The draft bill (in schedule III, paragraph 2) employs the identical phrase. Curiously, the MSA (UK) 1894 never defined "British ships".

because of their having been registered or licensed.[42] It is the act of registration or licensing which gives rise to such recognition, not any intrinsic connection which those ships have to this country. When a ship is not registered in terms of the MSA it is the deeming provision, which deems her to have been registered, which confers recognition of South African nationality. The MSA does not expressly deny South African nationality to ships[43] which might otherwise qualify as South African ships but which have not been registered or licensed or cannot be deemed to have been registered. The MSA simply does not provide for such ships to be regarded as South African ships. The draft bill adopts a similar approach of expressly recognising certain vessels as South African ships and leaving the question of whether other, unregistered, ships may be South African ships to international law.[44]

The Ship Registration Bill evidences a different approach to both the MSA 1951 and the draft bill on the question of nationality. Instead of merely "recognising" certain ships as South African ships, the Ship Registration Bill states unequivocally that the specified ships "are South African ships and have South African nationality".[45] The difference is more than semantic in the light of the Bill's allocation of South African nationality to ships which are not registered on any register but which possess what may be described as South African ownership or operational characteristics.[46] Although remaining a South African ship with South African

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[42] The only exception relates to small vessels used solely for sport or recreation.

[43]As opposed to small vessels used solely for sport or recreation - section 68(3)(b).

[44] At international law, ships have the nationality of the state whose flag they are "entitled" to fly (article 91(1) UNCLOS). But whether or not an unregistered ship is entitled to fly the South African flag begs the question.

[45]Section 3 of the Ship Registration Bill

[46]These are stated in section 16(a) and (b) of the Ship Registration Bill as being "South African-owned ships" and "small vessels, other than fishing vessels, that are wholly owned by South African residents or South African residents and South African nationals; or operated solely by South African residents or South African nationals or both such residents and such nationals".

nationality,[47] such an unregistered ship which departs from a port on an international voyage will not be "recognised" as a South African ship and will not be entitled to any "benefit, privilege, advantage or protection usually enjoyed by a registered ship".[48]

NATIONAL CHARACTER

Questions of nationality and the national flag are part of the public law aspects of a register.[49] These relate to the privileges granted and the obligations imposed by a State on ships which, in terms of international law, are regarded as having been allotted to it.

In terms of the MSA 1951, the owner or master of a South African ship[50] shall neither do nor allow anything to be done which has as a consequence the concealment of her South African national character.[51] This includes a prohibition on the carrying of papers or documents on board the ship with the intention of concealing her national character or allowing papers or documents to be carried for that purpose. Contravention of the prohibition against concealment of national character carries a fine, or imprisonment for a period not exceeding two years.[52] It can also lead to the forfeiture of the ship.[53]

The wording of section 67 MSA - which deals with the concealment of South African national character - is to an extent ambiguous. It is made an offence for the owner or master of a ship knowingly or wilfully to do anything or even carry papers on board "with intent that a non-South African national character be assumed for the ship". Does this mean that the owner who

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[47]This appears not only from the wording of sections 3 and 46(1) of the Ship Registration Bill, but also from the provisions of section 46(2) of the Bill in terms of which the unregistered ship remains liable for certain fees and sanctions.

[48]Section 46(1) of the Ship Registration Bill

[49]*Ship Registration*, supra, page 6

[50]Subsections 64(a)-(e) MSA

[51]Section 67, MSA

[52]Section 313(2), MSA. No maximum fine is stipulated.

[53]Section 334 MSA

allows documents to be carried on board his ship (for instance, an offer to sell the ship or share therein which is being taken to a prospective foreign buyer) with the intention that the ship acquire a foreign national character, is guilty of an offence? It is submitted not. The heading of section 67, "Concealment of South African national character", indicates that what is proscribed is the disguising of the real national character, not the acquisition in fact of a non-South African national character.[54] "Assumed" is used in the section in its secondary meaning of "to pretend to possess".[55] Furthermore, section 103 of the MSA (UK) 1854 on which section 67 is based, makes it clear that what is legislated against is the intention to deceive regarding the real national character of the ship.[56]

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[54]"... the headings of different portions of a statute may be referred to for the purpose of determining the sense of any doubtful expression in a section ranged under any particular heading", *Chotabhai v Union Government* 1911 AD 13 at 24, *Turffontein Estates v Mining Commissioner, Johannesburg* 1917 AD 419 at 431

[55]The Afrikaans (signed) text does not clear up the ambiguity; it uses the word "aanneem". However, the suggested interpretation is the more obvious one both in the context of the section itself and in the light of the immediately preceding sections. Even if the wording preceding the section cannot be taken into account because in reality it amounts to a marginal note (*Durban Corporation v Estate Whittaker* 1919 AD 195 at 201-2, *S v Liberty Shipping & Forwarding (Pty) Ltd & others* 1982 (4) SA 281 (D) at 285-6), the solution "is to select the narrower construction in preference to the wider one. When the Court cannot discover how far Parliament meant to go in devising a special scheme like that of s 300(1), when it finds Parliament's intention clear up to a point but open to doubt beyond such, it must construe the legislation conservatively, in my opinion, settling for that which seems certain and venturing no further" (*S v Liberty Shipping & Forwarding (Pty) Ltd & others*, supra, at 286F). When read with sec 313 MSA, sec 67 amounts to a penal provision. It must be given a meaning which least interferes with the liberty of the individual (*R v Sachs* 1953 (1) SA 392 (A) at 399). To give it a meaning which differs markedly from "conceal" and to increase the scope of the potential prohibition beyond a mere ruse or sham acquisition of foreign nationality would be contrary to accepted rules of interpretation.

[56]Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), "Sec. 103. The offences hereinafter mentioned shall be punishable as follows (that is to say): .... If the master or owner of any British ship does or permits to be done, any matter or thing, or carries or permits to be carried any papers or documents, with intent to conceal the British character of such ship from any person entitled by British law to inquire into the same, or to assume a foreign character, or with intent to deceive any such

Strategems to disguise the national character of ships are nothing new. They may, for instance, be part of an attempt to avoid trade embargoes, or obtain fishing quotas. In *The Annandale*[57] the following letter, dated 25 June 1874, which reveals some of the reasons why a ship-owner may wish to operate his ship under a false flag, was read out in court:

> "Sir, - I beg to inform you that I have made arrangements for registering British or other ships under another flag (allowing the employment of officers of any nationality) on cancelling their present register. The vessels will remain at the disposal of the parties interested.
>
> The cost of this arrangement and of procuring the foreign register will be £25 for each vessel, and for that amount you can be entirely freed from the interference of the Board of Trade, whether instigated by tradesmen seeking work, by discharged servants, by Mr Plimsoll and his friends, or by any officials who, seeing a ship is going to be repaired, think they ought to have the credit of reporting her. Should you wish to avail yourself of this opportunity of protecting your interests you can do so at once by communicating with me."

In that case, the ship had been struck off the register of British ships on the representation of her managing owner that she had been sold to foreigners and that she had subsequently been known to be sailing under the Belgian flag. However, the sale had been a sham and the purported purchaser had been an Englishman who had merely represented himself to be a Belgian in the bill of sale. The Court declared her condemned to be forfeited.[58] The fact that the ship had sailed as a Belgian vessel had not affected her true colours.

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person as lastly hereinbefore mentioned, such ship shall be forfeited to her Majesty, and the master, if he commits or is privy to the commission of the offence, shall be guilty of a misdemeanour...."

See also the judgment by Sir R. Phillimore in *The Sceptre*, infra, from which the interpretation of "assumed" can only mean "pretended to have": "The facts stated in the statement of claim being admitted by the defendant [that the ship had only purported to be a Belgian ship], I must pronounce in this case that the owner of the ship was intending to conceal the British character of the ship from the person entitled to inquire into it, and that the vessel assumed a foreign character, with intent to deceive the officer of customs, and it therefore liable to forfeiture ...."

[57] 37 Law Times 364, decided in 1877

[58] In terms of sec 103, sub-sec 2 of the Merchant Shipping Act, 1854 (17 & 18 Vict. ch. 104)

In *The Sceptre*,[59] the sole owner of the ship had represented to the collector of customs at Sunderland, where the ship had been registered, that she had been sold to a Belgian and was Belgian property. He had thereby procured the cancellation of her registration in Britain. He had done so to avoid the then recent legislation relating to unseaworthy ships. The ship had, however, never ceased to be his sole property and he had, after the closing of her British registry, worked her himself, and had received the freights and profits. The Court pronounced for her forfeiture.[60]

In both *The Annandale* and *The Sceptre* the ships had only masqueraded as non-British ships. The purported transfers of ownership had been fictitious: neither had in fact become a Belgian ship. However, if either ship had become a Belgian ship, even if the purpose had been to avoid taxes or seaworthy requirements, then it could not have been said that the ship had "concealed" a British character or had only "assumed" a foreign character. In that case, she would have acquired a Belgian character; nor would she have retained a British character.

As it is unlawful to conceal the national character of a South African ship, so too is it unlawful for a non-South African ship to assume the national character of the Republic.[61] Not only the owner or master, but no person on board a foreign ship may use or permit the national flag of the Republic for the purpose of making the ship appear to be a South African ship.[62] Any person who acts in contravention of this section is guilty of an offence.[63] The ship also becomes liable for forfeiture.[64]

According to section 65 MSA, all ships registered in the Republic have the national flag as

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[59]35 Law Times at 429, decided in 1876

[60]In terms of sec 103, sub-sec 2 of the Merchant Shipping Act, 1854 (17 & 18 Vict. ch. 104)

[61]Section 66 MSA

[62]*ibid*

[63]Section 313 MSA. On conviction a person is liable to a penalty not exceeding a fine (the maximum amount of which is not stipulated), or imprisonment for a period not exceeding two years.

[64]Section 334 MSA

their national colours.[65] No other national colours may be hoisted.[66] No mention is made of ships which are deemed to be registered under the Act, or licensed under the Act, or owned by the Government of the Republic but not registered in terms of the Act, or those small vessels used solely for sport or recreation. There seems no good reason why section 65(1) should not read: "The National Flag of the Republic is hereby declared to be the national colours for all ships of South African nationality." This is particularly so in the light of sub-section (2) which requires that ships of South African nationality hoist the national flag on the occasions mentioned therein.[67] s4(1)(2)

Section 65(3) MSA prohibits the hoisting of the national colours of any other country on board a South African ship. Nor may any colours or pennant usually worn by South African naval ships or resembling such colours or pennants by hoisted on board a South African ship. The master of the ship, and the owner if on board, may not permit the hoisting of any colours or pennant in contravention hereof.[68] s4(3)

Chapter IV of the draft bill - which comprises only a single section[69] - carries the heading "National Character and Flag". This chapter does not deal directly with the question of the national character and flag of South African ships, but incorporates by reference schedule 3 to the draft bill. Schedule 3 (as intimated in section 10 of the draft bill) substantially re-enacts the relevant provisions of the MSA 1951. The schedule stipulates that the flag which every South African ship is entitled to fly is the national flag of the Republic;[70] it is an offence to fly any

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[65]Section 65(1) MSA

[66]Section 65 MSA. This accords with article 6 of the High Seas Convention and article 92 UNCLOS.

[67]Failure to comply with sub-section 65(2) MSA is an offence, the penalty for which is a (unspecified) fine, or imprisonment for a period not exceeding six months.

[68]Contravention of sub-section 65(3) is an offence and the penalty may not exceed a (unspecified) fine, or imprisonment for a period not exceeding two years.

[69]Section 10

[70]Section 3(1) of schedule 3 to the draft bill

other distinctive colours on board such a ship;[71] the concealing of the national character of a South African ship can lead to forfeiture;[72] and the unlawful assumption of a South African national character for a non-South African ship can also lead to her forfeiture.[73]

The changes in the draft bill to the existing provisions in the 1951 MSA relating to national character and the flag are largely cosmetic. The drafters appear to have been influenced by the recent United Kingdom legislation on the topic. For example section 5 of schedule 3 repeats verbatim (except for terminological differences) section 3 of the MSA (UK) 1995.[74] It even bears the same heading. Sections 3(1) and (2) of schedule 3 follow sections 2(1) and (2) of the MSA (UK) 1995.

It is not clear why the drafters of the draft bill and regulations chose to separate the provisions relating to the national character of SA ships and their flag from the body of the bill itself. It does not produce a simplified piece of legislation but results in the need for constant cross-referencing. While there may exist better reasons for keeping the private law provisions for registered ships separate from the body of the bill - although those provisions could have been incorporated within a separate chapter - there is no logical explanation for the provisions of schedule 3 not to be reproduced in chapter IV itself. Section 2 of schedule 3, which sets out the classes of ships which will be recognised as SA ships, should certainly be situated more prominently. The corresponding section in the MSA (UK) 1995 forms section 1 of that Act.

The Ship Registration Bill has sensibly jettisoned the use of a schedule to deal with the national character and flag of South African ships. Chapter 2 of the Bill (sections 3 to 6) sets out the

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[71]Section 3(3) of schedule 3 to the draft bill

[72]Section 5(4) of schedule 3 to the draft bill

[73]Section 5(1) of schedule 3 to the draft bill

[74]In addition, subsection 3(6) of MSA (UK) 1995 has been omitted from section 5 of schedule 3 to the draft bill.

relevant provisions. The definition of "ship" is arguably wider than in the present MSA 1951,[75] or the draft bill,[76] and means "any type of vessel capable of navigation by water". It would appear to specifically include the wide variety of craft used in the off-shore industry. The second important difference relates to which ships have South African nationality. According to section 3(a) of the Ship Registration Bill, ships which are not registered in terms of the Bill or the law of any other State but which are entitled to be registered in South Africa are to be regarded as having South African nationality.[77] For the rest, chapter 2 of the Ship Registration Bill corresponds in general with the provisions in schedule 3 of the draft bill relating to the national character and flag of South African ships.

1951 MSA REGISTER

The current South African merchant shipping law couples the entitlement to register a ship with an obligation to register her in certain circumstances. All ships having South African - and only South African - owners (natural or juristic), which fulfill certain additional criteria as to local control or management, must be registered on the South African ships' register or licensed unless specially exempted.

In order to qualify for registration in terms of the MSA, the requirements of section 11 as to ownership must be met. This section stipulates that the whole[78] of the ship must be owned either by the Government of the Republic[79] or by South African citizens[80] and/or by citizens

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[75]"Ship" is defined in section 2(1) MSA 1951 as "any vessel used for transportation or any other purpose on or under the surface of the water". "Vessel" is defined in section 2(1) MSA 1951 as including "any ship, or any boat, small vessel or other description of vessel used or designed to be used in navigation".

[76]Section 1(1) of the draft bill defines "ship" as including "every description of vessel used in navigation not propelled by oars".

[77]Compare with section 64 MSA 1951 and section 2 of schedule 3 to the draft bill.

[78]That is, all the shares in the ship. As regards ownership of a ship, see below.

[79]Section 11(1) MSA

of a treaty country[81] and/or by bodies incorporated in accordance with the law of a treaty country and having their principal place of business in a treaty country.[82]

Apart from the Republic itself[83], there are no treaty countries. Thus the privilege to register ships in South Africa is reserved for South African citizens and for corporations incorporated in accordance with South African law and having their principal place of business in the Republic. It is legally impossible for a person who is not a South African citizen to have a ship registered in his name under the provisions of the South African MSA.[84]

Once the requirements of section 11 and one of the additional requirements of section 13 are met, there is an obligation on the owner of the ship to register her on the South African register. The additional requirements of section 13 are that a majority of the owners of the ship, either in number or extent of ownership, are persons resident in the Republic[85] or corporate bodies with their principal place of business within the Republic,[86] or the ship, as to her management and use, is principally controlled in the Republic.[87] Because there are no treaty

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[80]Section 11(1)(a) MSA

[81]Section 11(1)(b) MSA

[82]Section 11(1)(c) MSA

[83]Section 2 MSA defines 'treaty country' as the Republic and any other country (which is further defined) which is a party to any bilateral treaty or agreement entered into by the Republic in connection with any matter dealt with in any provision in the Act.

[84]*Wylock v Milford Investments (Pty) Ltd*, supra, at 312F-G

[85]Section 13(1)(b)(i) MSA

[86]Section 13(1)(b)(i) MSA

[87]Section 13(1)(b)(ii) MSA. Section 1 of the British 1894 MSA provided that "a ship shall not be deemed to be a British ship unless owned wholly by ... 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." In *The Pozeath* [1916] P 241, CA, a ship registered as a British ship and owned by a company registered as a British company was declared forfeit to the Crown when the evidence established that the affairs of the company at all material times had been directed from Hamburg.

countries, only corporate bodies established under and subject to South African law and having their principal place of business in South Africa qualify as owners of South African ships. Accordingly, the stipulation in section 13 that the majority of corporate bodies must have their principal place of business in the Republic is, as matters stand, quite unnecessary.

An exception to the general obligation to register is contained in sub-section 13(1)(b)(ii). A ship which otherwise would have to be registered on the South African registry is exempted from this obligation if the ship "is already registered in the Republic or elsewhere". It is clear, on a proper construction of the section as a whole, that the exception regarding ships already registered on foreign registers applies to all persons on whom the obligation to register would normally fall and it applies to qualified persons becoming whole owners of ships even after the coming into operation of the Act. Accordingly, even if the whole of a ship is purchased by a South African citizen living in the Republic, from where he controls the ship, that person has a choice whether or not to register the ship in the Republic if she had been registered on a foreign register at the time of purchase.

The general obligation to register a ship on the South African ships' registry once the requirements of secs 11 and 13 are fulfilled is subject to the further exceptions provided by sub-section 13(3).[88]

The effect of section 13 is that only - and all - South African owned ships which have a majority of their owners located in South Africa or are locally controlled ships, which are not already registered elsewhere, are to be registered under the MSA. A ship, previously unregistered on any register and which is entitled to be registered in the Republic escapes the obligation to be registered in South Africa only if a majority, either in number or extent, of her owners reside outside the Republic and if the principal control of the ship is also located outside the Republic.

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[88] In terms of section 13(3) MSA the Minister of Transport may in his discretion exempt the owners of certain classes of ships of less than one hundred gross tons, to be determined by him, or the owners of ships which are not self-propelled and which are used exclusively in a port, from the provisions of sec 13.

The South African registration requirements ensure that, for ships qualifying for registration, there is a very close link between the ship's ownership and the flag of registery. This is generally seen as being in accordance with the provisions of article 91 UNCLOS, which requires that there must be a "genuine link" between the ship and the State whose flag she flies. South Africa is a signatory to this convention which is in force. Of course, the South African registry requirements were formulated a considerable time before either the High Seas Convention 1958 (where the genuine link concept was first internationally accepted) or UNCLOS. They follow closely the prerequisites for registration in the British Merchant Shipping Act of 1894,[89] and historical reasons existed for the particular conditions for registration incorporated in that piece of legislation. The fact that the South African registry requirements, because they follow those formerly laid down by a maritime power, comply with the genuine link requirement at international law has nothing to do with design. It is rooted in the development of nationalism of an earlier century.

The current SA register was not designed to be competitive vis-a-vis other registers. It is an example of a national or "closed" register. There is no need for incentives (because of the obligation to register) to encourage SA shipowners use their own register. On the contrary, registration in SA brings with it high taxes, an obligation to use SA crews and costly safety regulations. Registration in SA does not carry with it the "inestimable benefits" to shipowners suggested by the learned Judge in *Wylock's* case.[90] The fact that a ship registered in the

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[89]Section 1 of the British Merchant Shipping Act of 1894 dealt with the qualification for owning a British ship. It provided:

> "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;
> (b) ...(repealed by the British Nationality Act 1948)
> (c) ...(repealed by the British Nationality Act 1948)
> (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".

[90]The particular benefits of registration on the South African Register were expanded upon by the Court in *Wylock v Milford Investments (Pty) Ltd* as follows:

> "To mention a few of the benefits flowing from registration, it seems obvious, in the first place, that it

Republic has the protection of the SA navy can offer limited comfort; that seamen can expect minimum employment conditions is generally not a concern of shipowners; other, more accommodating registers, can be trusted to establish proof of title and will satisfy financiers willing to advance money against a mortgage over the ship.

That the SA register satisfies the "genuine link" precondition for registration means little. This concept is not defined in any of the international conventions in which it is found. The only elaboration on what constitutes a "genuine link" between a ship and a State is to be found in the words beginning, "in particular ..." in article 5 of the High Seas Convention.[91] These

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should be easier to sell a share in the ship or to raise money on mortgage on it locally where it is a registered ship, than where the public cannot rely on the integrity of an official registry of title to ascertain what interests are already in existence in respect of the ship or to provide some guarantee of security - see sec. 61, in which the absolute right of the registered owner to dispose of a ship or share is recognised; and secs. 47 to 53, dealing with mortgages. Without registration the *Golden Flame* will not be recognised as a ship of South African nationality or be able to fly the National Flag - see secs. 64 and 65. To get some idea of the importance attached by our Parliament to these factors, see secs. 65(3), 66 and 67 and the heavy penalties prescribed for failure to observe their provisions (in each case a fine of £500 or 2 years' imprisonment or both, apart from liability to forfeiture in terms of sec. 334). If the *Golden Flame* is not recognised as a ship of South African nationality it will, of course, mean that she will not be entitled to the protection of the Naval or other Armed Services of the Republic. But it will mean also that the conditions of service of seamen on board her may be radically affected in other ways: they may not enjoy the security and comfor afforded by the stringent provisions of the Act in relation to the seaworthiness of South African ships and the competency of those placed in command of them and the accommodation to be allotted to the crew; and the law of the Republic will not apply aboard the ship, at any rate outside the territorial waters; the wage determinations applicable to persons employed on South African fishing ships would not apply to them; and they may not qualify for the Workmen's Compensation benefits provided by the laws of the Republic."

[91]The relevant sentence of article 5 of the 1958 Convention on the High Seas reads: "There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."

words, omitted from article 91 UNCLOS, are to be found with some elaboration in article 94 UNCLOS. They do not assist so much in determining what a genuine link is, as lay down what a registering country must undertake in respect of ships already on its register.[92] The minimum national element connecting States and ships flying their flags is left to the discretion of the individual States. The very imprecision of the genuine link requirement allows for some flexibility and renders it susceptible to a narrow interpretation. While it can be said that the South African register complies with the genuine link requirement, that requirement certainly does not demand the stringent conditions imposed by sections 11 and 13 MSA.[93]

An example of a traditional maritime nation's registry which may be said to comply with the genuine link requirement, while having some flexibility, is the current United Kingdom register. Previously, in terms of the 1894 MSA (as amended), a ship was not regarded as being a British ship unless wholly owned by British subjects or bodies corporate established in and having their principal place of business in one of Britain's dominions. Now, the "qualified persons" definition includes natural persons and corporate bodies established within the whole of the European Economic Area. Only a majority of such persons need to own a ship to qualify for registration, provided a British based representative is appointed in respect of that ship.[94]

SA REGISTER - SOME ASPECTS

Since section 11(1) was amended to make provision for citizens of "treaty countries" to be accorded the same privileges as South African citizens, no country has entered into a treaty with the Republic in respect of that section. Accordingly, sub-sections 11(1)(b) and (c) have proved superfluous *in toto*. Before its amendment to refer to "treaty countries", section 11(1) referrred to citizens of countries (other than South Africa) which were members of the commonwealth. The section was amended upon South Africa becoming a Republic and leaving the commonwealth. South Africa is once again a member of the commonwealth. Section 11(1)

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[92] *Ship Registration*, supra, 12

[93] If it does, then the "genuine link" requirement is a dead letter at international law. The host of open registries are testimony to that.

[94] Section 9(2) MSA (UK) 1995 read with Reg. 7 of the 1993 Registration Regulations.

has, however, not be amended to re-enact the previous dispensation. There would not appear to be any good reason to do so now. Although it would allow for some dilution of the strict nationality requirements, South Africa and South African interests no longer have a special connection with the Commonwealth. At the time section 11(1) was framed, ships predominantly owned by South African citizens could also have been partly owned by persons who were citizens of other Commonwealth countries and still be "British" ships in terms of Part 1 of MSA (UK) 1894. To legislate now to include Commonwealth citizens and corporations among the list of persons qualified to own South African ships could lead to previously disqualified ships moving to the South African register, but is unlikely to do so, at least to any great extent. If, however, there is a desire to increase the list of qualified persons in order to augment the size of the South African register there is no reason to limit such persons to citizens and corporations of the Commonwealth.

Bearing in mind that there are no treaty countries, section 11(1) requires one hundred per cent South African ownership as a prerequisite for registration. This requirement is stringent and absolute. It is legally impossible for a foreign person (natural or juristic) to have a ship registered in his name by reason of the provisions of section 11.[95] This of course disqualifies certain ships from qualifying for registration on the South African ship's register because of their partial foreign ownership content. To the extent, therefore, that registration on the South African register provides major benefits the object of reserving those benefits for South African citizens is achieved. However, this object can be defeated by the device of incorporating a company in South Africa and having that company own and operate the ship.

The MSA 1951 seeks to compel ships, which would generally be regarded as "South African ships" because of their ownership structure, to register on the South African ship's register. However, this obligation can be circumvented by simple means. A potential South African shipowner can arrange for a single share in the ship (1/64) to be owned by a foreign person or company. Automatically the ship will be excluded from the obligation to register, nor will it be recognised as a South African ship. Or, if the ship is already registered elsewhere, section 13(1)(b)(ii) provides a loophole. The South African buyer of a foreign ship may decide to leave the ship on the foreign register, provided that the foreign register does not require a genuine

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[95] *Wylock v Milford Investments (Pty) Ltd*, supra, at 312F

link between the ship and her owner. In fact, the wording of the exception in section 13(1)(b)(ii) does not prevent the South African buyer of a foreign ship registered on a foreign register from transferring her to another foreign register. In this way he may avoid any genuine link requirement of the ship's original registry by registering her on a convenience register.

WYLOCK v MILFORD

Does the fact that a foreign person cannot have a ship registered in his name on the South African ship's register mean that he cannot purchase a ship or a share in a ship which is already registered in South Africa? Under pain of forefeiture,[96] section 11(2) MSA provides that no foreigner "shall acquire, except by such transmission as is referred to in section forty-three, any interest in a ship registered in the Republic." Section 43 MSA deals with the passing of ownership of a South African ship or a share therein to an unqualified person "on marriage or death or otherwise".

"Transmit" is a wide term which would not usually exclude the passing of ownership by way of sale. However, in *Wylock v Milford Investments (Pty) Ltd*[97] the words "or otherwise" in section 43 MSA were interpreted restrictively by the application of the *noscitur a sociis* rule. The Court (at 315B-C) held that for the purpose of interpreting "transmission" in section 11(2) MSA, the words "or otherwise" in section 43 MSA "should be considered as comprehending only transmission by operation of law unconnected with any direct act of the party to whom the property is transmitted and not as including, for instance, transmission in pursuance of a contract of sale."

This interpretation is surely correct. If "transmission" in section 43 is to be equated with any act of alienation, such as a sale, then the exception in section 11(2) becomes superfluous. Such an interpretation would also render section 11(2) nugatory. The interpretation favoured in

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[96] Section 334 MSA provides that all ships, shares or interests in ships in connection with which an offence is committed under section 11(2) shall be liable to forfeiture.

[97] Reported in the SA law reports at 1962 (4) SA 298 (C). This is the only SA case which deals with the question of registration under the MSA 1951.

Wylock's case is also identical to that given to the term in the corresponding section[98] of the Merchant Shipping Act 1854 (17 & 18 Vict., c. 104) in the case of *Chasteauneuf v Capeyron*[99]. It is also consistent with the use of the word elsewhere in the Act.[100]

On the assumption, then, that "transmit" in section 43 does not include the passing of ownership by way of a sale, the clear meaning of section 11(2) prohibits the sale of a ship or a share therein to unqualified persons. The section would read, in effect, that no foreign person could "acquire, except by transmission on marriage, death or by operation of law unconnected with any direct act of the parties, any interest in a ship registered in the Republic". However, according to the decision in *Wylock v Milford Investments (Pty) Ltd*, this interpretation is in conflict with the scheme of the Act as a whole, was never intended by the legislature and is not correct. The Court in *Wylock* also relied on the apparent origin of section 11(2) in the British Merchant Shipping Act 1894 in concluding that section 11(2) does permit the passing of ownership of a South African ship to a foreign person pursuant to a contract of sale.

While acknowledging that section 11(2) was capable of bearing a contrary meaning (*viz.* that it does not permit the passing of ownership by way of a sale),[101] the Court in *Wylock's* case held that the sub-section does not prohibit the sale of a South African ship to someone other than the persons mentioned in sub-section 11(1) who qualify to own ships registered in the Republic.[102] The Court reasoned as follows:[103]

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[98]Section 58, subsequently section 27, Merchant Shipping Act 1894 (57 & 58 Vict., c. 60)

[99]7 App. Ca. 127. See *Stroud's Judicial Dictionary*, 4th Ed, page 2819. In *Montelindo Compania Naviera v Bank of Lisbon & South Africa Ltd* 1969 (2) SA 127 (W) Colman, J commented (at 131E) that "no doubt, it is a fair *prima facie* assumption that a word which appears in the English text of a South African statute bears the same meaning there as it would have in England. I would say, however ... that such an assumption is not necessarily or invariably a sound one. Under South African usage a word may acquire a meaning different from the one which it bears in England." See also: *Estate Wege v Strauss* 1932 AD 76 at 81

[100]Sections 42 and 53, MSA

[101]at 314-5

[102]at 316B-C

> "Doubts as to whether the Legislature could really have intended by sec. 11(2) to prohibit altogether sales of ships registered in the Republic to unqualified persons - under pain of heavy criminal penalties and liability to forfeiture - are aroused by a few provisions appearing later on in the Act; but it is only when one reaches secs. 54 and 55 ... that these doubts attain serious proportions. From these two sections it appears that any registered owner of a South African ship who wishes to sell her by a deed of sale to be executed outside the Republic is entitled to obtain from the proper officer at the port of registry of the ship a 'certificate of sale' (virtually a power of attorney complying with certain requirements and embodying in addition an official extract from the register of ships, containing details of entries affecting the particular ship in question) in pursuance of whch the ship may be freely sold to anyone (*sic*) whatsoever, whether or not qualified to be the owner of a South African ship. To me it seems inconceivable that if sec. 11(2) had indeed been intended to prohibit sales to unqualified persons there would not have been some proviso or reference in it to secs. 54 and 55 [which deal with sales executed outside the Republic], or at least some reference in the last-mentioned two sections to sec. 11(2) - yet one finds nothing of the kind.... In fact the only reasonable inference to be drawn from the presence of secs. 54 and 55 in the Act is that the Legislature proceeded throughout on the assumption that there would be no bar against sales to unqualified persons in any circumtances ...."

The Court concluded[104] that:

> "... there is no objection to the sale of a South African ship to an unqualified person and the tranfer of full rights of ownership by or in pursuance of such sale, but that what the Legislature wished to guard against was that a ship belonging to an unqualified person should appear on our register of ships and should thus be enabled to masquerade as a ship of South African nationality".

In *Wylock's* case the Court found that there was no legislative prohibition to the sale of a South African ship to a foreign person. The Court held that "the prohibition of the acquisition by an unqualified person of any interest 'in a ship registered in the [Union]' should be construed as referring only to the acquisition by such person of any interest 'in a ship *continuing thereafter to be registered in the Union*'."[105]

The question then arises whether, if a South African ship can be sold to an unqualified person, can part of such a ship be sold to an unqualified person? It would be anomolous if one were

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[103]at 315G-H

[104]at 316B-C

[105]at 316D, emphasis added.

able to sell the whole of a South African ship to a foreigner but not a share in it. Moreover, "any interest" in the phrase "any interest in a ship registered in the Republic" as it appears in section 11(2), if it encompasses the whole of a ship, must surely also include a part thereof. On the interpretation of section 11(2) favoured in the *Wylock* case, there seems to be no reason why an interest in a ship registered in the Republic should not be sold to an unqualified person, never mind that the sub-section appears to expressly prohibit such a transaction, provided only that the ship is subsequently de-registered.

However, if section 43 does not cater for sales - as it was held (correctly, it is submitted) in *Wylock's* case - then there is no provision in the Act for the situation where only a share in a South African ship vests in an unqualified person as a result of contract of sale. Apart from reading it into section 11(2) itself, there is no requirement in the Act that upon the sale of a share in a South African ship to an unqualified person that ship loses her South African nationality or her registry must be closed or the ship must be sold or is liable to forfeiture.[106] If section 43 does not apply to sales, there is no provision in the MSA to give effect to the interpretation of section 11(2) favoured in *Wylock*, namely, that after a share in a South African ship has been sold to an unqualified person, the ship cannot thereafter continue to be registered in the Republic.

The judgment in *Wylock v Milford Investments (Pty) Ltd* highlights, without necessarily resolving satisfactorily, some of the contradictions within the MSA. Foremost among these is the fact that the plain, obvious and ordinary meaning of section 11(2) prohibits sales of South African ships to foreigners.[107] *Prima facie*, the intention of the legislature is clear and the "cardinal rule of construction of a statute is to endeavour to arrive at the intention of the law-giver from the language employed in the enactment."[108] But the intention of the legislature is

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[106]Section 29 MSA seems to govern the situation where the whole of a ship, and not a share, is transferred to a person not qualified to own a South African ship. Sub-sections 55(a) and 55(j) MSA also refer only to the sale of the whole of a ship.

[107] Both Counsel - but not the Court - in *Wylock's* case accepted this as being the correct meaning of section 11(2).

[108]*Bhyat v Commissioner for Immigration* 1932 AD 125 at 129. See also *Venter v R* 1907 TS 910 at 913: "In construing the statute the object is, of course, to ascertain the intention

blurred by subsequent provisions: upon the sale of the whole of a South African ship to an unqualified person the registry of that ship in the register at her port of registry is closed.[109] The unqualified purchaser is required to report the fact of the sale to the relevant officer designated by the Director-General.[110] Also, in section 29 mention is made of a ship "ceasing to be a South African ship by reason of transfer to a person not qualified to own a South African ship or for any other cause". To this extent the MSA foresees that sales of South African ships to unqualified persons will occur.

Furthermore, in terms of section 61 "the registered owner of a ship or share therein shall have the right absolutely to dispose of the ship or share." The only exception to this right are those cases where there are unsatisfied mortgages or existing mortgages. Although it was not there referred to, the conclusion reached in *Wylock's* case regarding the interprestation of section 11(2) is accordingly supported by the provisions of section 61.

But are these apparent internal inconsistencies such as to permit a departure from the clear, unambiguous language of the Act? Theron, AJ, certainly thought so; he found himself "quite unable to accept that it was the intention of the Legislature to render a ship which had been dealt with in the manner in which the *Golden Flame* was, subject to forfeiture."[111] The approach, in cases of contradiction and absurdity, has been stated by Innes, CJ to be as follows:

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which the legislature meant to express from the language which it employed. By far the most important rule to guide courts in arriving at that intention is to take the language of the instrument ... as a whole, and, when the words are clear and unambiguous, to place upon them their grammatical construction, and to give them their ordinary effect" *per* Innes, CJ.

[109]Sections 55(j) to (j) *ter*, MSA. This is subject to the provisions of secs 29(1) and (3) in the case of the transfer of a ship which is subject to any unsatisfied mortgage or existing certificate of mortgage entered therein in respect of which the written consent contemplated in section 29(1)(b) has not been given.

[110]Section 55(j) MSA

[111]at 313E

> "the fact, however, that a particular contruction of a statute would have the effect of crippling its operation, or would result in inconvenience or absurdity, is not in itself a sufficient reason for refusing to give effect to such construction if it follows inevitably from the language used. But if such language can be fairly and properly read so as to lead to a conclusion which is not inconvenient, inept, or absurd, then that reading is the one which a court should adopt, even though it may not at first sight appear to be the obvious one."[112]

If the plain meaning of section 11(2) is given effect to, and if the sale of a South African ship to an unqualified person renders her liable to forfeiture, this can also be said to fit into the structure and purpose of the Act. For instance, section 61 can be interpreted to permit the registered owner of a ship or share therein to have the right absolutely to dispose of the ship or share, provided that this is not done in conflict with any of the other provisions of the Act. Section 55, which deals with the sale of the whole of a South African ship by means of a certificate of sale, can be regarded as an exception to the general prohibition contained in section 11(2). Section 29(1)(a), far from making allowance for the transfer of an interest in a South African ship to an unqualified person, may be regarded as merely declaratory of the fact that a South African ship transferred to an unqualified person ceases to be a South African ship. It could hardly be considered to be otherwise if section 11(2) is to be given its obvious interpretation. Section 54, which was relied on in *Wylock* as evidence of an intention on the legislature's part to provide special facilities for ship-owners desirous of seeking, as purchasers, unqualified persons outside the country, could just as well be considered to be providing such facilities for qualified persons in treaty countries (in the event of any country becoming such).

Furthermore, if sub-section 11(2) is interpreted to read that no unqualified person "shall acquire, except by such transmission as is referred to in section *forty-three*, any interest in a ship continuing thereafter to be registered in the Republic", one is doing violence to the plain

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[112] *New Rietfontein Gold Mines Ltd v Misnum* 1912 AD 629 at 634. It must be remembered that, "as has often been remarked by eminent judges, 'it is dangerous to speculate as to the intention of the legislature, and what seems an absurdity to one man does not seem absurd to another'. The absurdity must be utterly glaring, and the intention of the legislature must be clear, and not a mere matter of surmise or probability", *Shenker v The Master & another* 1936 AD 136 at 143. See also: *Stellenbosch Farmers' Winery Ltd v Distillers Corp (SA) Ltd* 1962 (1) SA 458 (A)

meaning of the section. Such an interpretation also fails to have regard to the specific exception provided for by section 43. Clearly, sub-section 11(2) is to be read so that section 43 provides an exception thereto. But section 43 does not provide for an unqualified person to have an interest in a ship which thereafter remains registered in the Republic.[113]

Moreover, section 71 of the United Kingdom MSA of 1894 where the Court in *Wylock* found support for its interpretation of section 11(2) differs markedly from latter section. Section 71 of the UK MSA provides:

> "If an unqualified person acquires as owner, otherwise than by such transmission as hereinbefore provided for, any interest, either legal or beneficial, in a ship using a British flag and assuming the British character, that interest shall be subject to forfeiture under this Act."

It is clear that section 71 of the British Merchant Shipping Act 1894 did not prevent an unqualified person from obtaining any interest in a ship "registered" in Britain. All it did was provide a sanction in the case where a ship pretended to be of British character when she was in part or whole owned by unqualified persons who had acquired such interest otherwise than by transmission. In other words, it prohibited a ship pretending to be British when she was no longer British because an interest in her had been sold to an unqualified person; it did not prohibit the sale of an interest in a British ship to an unqualified person, as section 11(2) of the South African MSA appears to do.

Alternatively, if the words "or otherwise" in section 43 are interpreted to include transmission by sale, a foreigner could acquire an interest in a South African ship without the need to re-interpret section 11(2) in the manner done in *Wylock's* case. It would also mean that the owner of a South African ship would be able to have the registry of the ship closed by "transmitting" one share therein to an unqualified person. The unqualified person could then apply in terms

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[113]The only exception to the rule that a ship may not remain on the South African register after sale to an unqualified person is to be found in section 55(j)*ter*, which deals with the case where the ship remains subject to an unsatisfied mortgage.

of section 43 for an order directing that the ship be sold.[114]

Whichever approach to section 11(2) is favoured, whether the section is to be interpreted as permitting the sale of only the whole of a South African ship to unqualified persons, providing that such ship is thereafter removed from the South African ship's register; or as permitting the sale of all or any shares in a South African ship to an unqualified person, subject to the same condition of de-registration; or as prohibiting unconditionally the sale of any South African ship or share therein to an unqualified person, such interpretation is not obviously correct and free from refutation.This should be remedied. The MSA ought to provide a coherent expression of shipping and, in particular, ship registration policy.

THE DRAFT BILL'S REGISTER

The draft bill changes the face of the South African ships' register. It removes the obligation to register contained in section 13 MSA and relaxes the strict nationality pre-condition. Registration under the regime created by the draft bill is an act of choice, not of compulsion. This will not, however, lead to large numbers of unregistered ships. International customary law and conventions require that ocean-going vessels possess nationality. The ports of most States, including South Africa, also require such vessels to have a registration certificate. Since nationality is a comcomitant of registration ships will still seek registration, whether on the South African or another State's register.

Section 4 of the draft bill contains the registration provisions for ships or, rather, it creates the framework for registration. It does not prescribe the conditions for registration; in particular, it does not indicate which persons are qualified to own South African ships or the extent to which ships must be owned by such qualified persons before the ship may be entered on the South African ship's register. The essence of the registration requirements is contained in the draft regulations. Accordingly, section 4 does not contain the new merchant shipping policy; that is left for the draft regulations to flesh out.

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[114]An interested party could apply to the relevant court to prohibit such a transfer - see section 45 MSA.

This is similar to the approach adopted in the MSA (UK) 1995, but does not accord with the accepted relationship between Parliamentary and subordinate legislation. Generally, regulations are the tools providing the practical and technical expression to the pricipal legislation. They can be easily promulgated and amended as the need arises. Acts of Parliament must follow a more laboured process before being passed by a body of elected representatives. Fundamental matters of principle are expected to be handled in this latter manner.[115] Additionally, although legislation passed by Parliament may now be checked against the constitution, regulations are also more likely to be challenged in, and set aside by, a Court. Being subordinate legislation, they may be attacked for being *ultra vires*, vague or unreasonable.[116] Consequently, as basic Government policy, the requirements for registration which are currently to be found in the draft regulations ought to have been contained in the draft bill. Embodiment in a statute would also lend to such requirements the appearance of permanence.

The change in registration policy reflected in the draft bill and regulations is similar to that which occurred in the United Kingdom in 1989 when the Merchant Shipping Act 1988 modified the provisions of the 1894 Merchant Shipping Act by substituting the statutory obligation to register with preconditions for the entitlement to register. Under the regime to be introduced by the draft bill and regulations a ship will be recognised as a South African ship if it is registered in accordance with the provisions of the draft bill.[117] Section 4 of the draft

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[115]The Transport and General Workers Union, "Comment and Submission on the Preliminary Draft Registration of Ships Bill and Registration of Ships Regulations", 3 May 1996, page 7, observe that, while recognising the need for greater flexibility to bring about amendments to legislation, as regards the "enabling legislation" approach adopted in the draft bill, "it is absolutely essential that issues of principle are not sacrificed in the interests of expediency". The Union states that it is important "that issues of principle remain clearly within the terrain of the elected legislature, and not left to a consultative process between the Executive and stakeholders alone."

[116]The main reason for the difference in the way courts approach subordinate legislation and legislation emanating from Parliament is that the latter is enacted by elected representatives, the former are made by an executive body - Rabie, 1987 (50) THRHR 199.

[117]Section 2(a) of Schedule 3 to the draft bill.

bill, which is apparently modelled on section 9(1) of the MSA (UK) 1995,[118] sets the entitlement to register. A ship is so entitled if:

(a) she is owned, to the prescribed extent, by persons qualified to own South African ships; and

(b) such other conditions are satisfied as may be prescribed to secure that, taken in conjuction with the requisite ownership, only ships having a South African connection are registered.

The draft bill gives no indication as to what will suffice as "a South African connection", save that to some extent, a ship will have to be owned by a "qualified person". In the draft regulations "qualified persons" are defined as South African citizens and corporate bodies incorporated in the Republic and having their principal place of business in the Republic.[119] Shorn of its "treaty country" appendage, these are the same qualified persons who are referred to in section 11 of the MSA 1951. As the proposed ship's register is to be divided into parts, section 4 of the draft bill permits different requirements to satisfy the "South African connection" in respect of each part. This has in fact occurred in the draft regulations and fishing vessels have to satisfy more stringent conditions for registration.

Draft regulation 6(1) provides that a ship (other than a fishing vessel)[120] is entitled to be registered if a majority interest in the ship, that is, 33 of the 64 shares,[121] is owned by one or more qualified persons. This is subject to the proviso[122] that either the person or persons owning a majority interest in the ship[123] is or are resident in the Republic or, if not so resident, a representative person has been appointed in respect of the ship. The representative person

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[118]Which itself follows section 2(1) of the MSA(Reg. etc) (UK) 1993

[119]Draft regulation 5(1)

[120]As to which see the discussion on fishing vessels *infra*.

[121]See the discussion on the ownership of ships *infra*.

[122]Draft regulation 6(2)

[123]Who need not be the qualified person(s) owning the majority interest in the ship.

may be either an individual resident in the Republic or a corporate body incorporated in the Republic and having its principal place of business in the Republic.[124] Once these conditions have been complied with, a ship is (subject to subsection 4(2)(a) of the draft bill)[125] entitled to be registered if an application for registration is duly made.[126] It follows that a South African "connection" will be established if more than 50% of the ship (other than a fishing vessel) is owned by qualified persons and certain residential or representative conditions are met.

This waters-down considerably the present ownership requirement for ships on the SA register. It does not, however, surrender the status of the register to that of a flag of convenience. The proposed registration regime would be roughly in line with that which prevailed under the subsequent British Merchant Shipping Acts of 1988 and 1993 and which continues to prevail under the 1995 Act. It is generally accepted that the provisions of these Acts satisfy the "genuine link" requirement of international law.[127] Apart from a "genuine link", UNCCORS requires a registering State to comply with either article 8, which relates to the ownership of ships, or article 9(1) to (3), relating to the manning of ships. However, neither article specifies levels of participation by nationals of the flag State either insofar as the ownership in, or the manning of, ships is concerned. Article 8(2) merely repeats the injunction of article 94(1) UNCLOS that the laws and regulations relating to the ownership of ships flying its flag "should be sufficient to permit the flag State to exercise effectively its jurisdiction and control over ships flying its flag." The proposed South African ship's register will certainly require a high level of national ownership in ships on its register and the residence or representative person requirement will ensure that the State has someone to whom it may direct its demands. The draft regulations also comply with article 10(1) UNCCORS which requires that the State of registration "shall ensure that the shipowning company or a subsidiary shipowning company is established and/or has its principal place of buisiness within its territory in accordance with

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[124]Draft regulation 8(2)

[125]Which allows the registrar to refuse to register a ship if, having regard to any relevant requirements of the Shipping Acts or the interests of the Republic or international merchant shipping, he considers it inappropriate to do so.

[126]Section 4(1) of the draft bill

[127]*Current Law - Statutes Annotated*, Sweet and Maxwell, 1993, vol. 1, page 22-6; 1995, vol. 2, page 21-9

its law and regulations."

In the circumstances, the proposed register would appear to comply with the relevant international conventions. Nevertheless, the easing of the registration requirements in the draft bill has prompted the Transport and General Worker's Union (a South African affiliate to the ITF) to comment that "we note certain tendencies within the draft legislation which brings us dangerously close to being rendered an FOC."[128] The Union is of the view that "only vessels beneficially owned in the Republic [should] be permitted to register."[129]

This highlights the sensitivities - political and commercial - affected by the nature of the connection between a ship and a State. It reflects the same debate which occurred in England prior to the recent UK Merchant Shipping Acts. There the Labour opposition had unsuccessfully sought an "economic connection" as a pre-condition for registration.[130] Clearly, what the Transport and General Worker's Union is concerned about are companies which are incorporated in South Africa simply for the purpose of owning a ship on the South African register while the beneficial owner is to be found elsewhere. There is nothing to prevent this in terms of the draft bill, or for that matter under the present MSA 1951. All that is required is that the company's "principal place of business" be in the Republic. This is an imprecise description, but the alternative is to establish criteria such as whether the company pays tax in SA or whether the company's day-to-day management decisions are made in SA, or to require that the company's share holders, or a majority thereof, be persons qualified to own SA ships. The latter method would be a means of giving effect to the requirement that the beneficial interests in the company should be owned (wholly or substantially) by South African citizens. The UK sought a formula which would not deter foreign investors. It has remained with the "principal place of business" requirement - "A state which enquires too much into the beneficial ownership of corporations themselves registered in that state will not succeed in encouraging

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[128] *Comment and Submission on the Preliminary Draft Registration of Ships Bill and Registration of Ships Regulations*, Transport and General Workers Union, 3 May 1996, page 6

[129] *ibid*, page 8

[130] *Current Law - Statutes Annotated*, 1995, vol. 2, page 21-30

such companies to register ships under its flag."[131]

At present, the draft bill and regulations give effect to South Africa's obligations at international law[132] to ensure a "genuine link" between such ships and the Republic. However, these requirements, since they occur in the regulations, can be amended without Parliament's approval. Moreover, specifying in the draft bill that only ships having "a South African connection" are to be registered is no more than a gesture to the requirement of a "genuine link". The notion of a South African "connection" is so vague that it would be extremely difficult, if possible at all, for future regulations which amend the registration requirements to be evaluated against it. In this respect it approximates the genuine link requirement; neither has an obvious meaning in international or municipal law. Nor does the draft bill attempt a definition or set out what the conditions which would satisfy the requirements of a SA "connection". The concept appears to have been taken over from UK legislation. The identical phrase is used in the same context in the MSA (UK) 1995.[133] Previously, in the MSA (UK) 1988, the requirement for the registration of fishing vessels was stated to be, in language no more exact, "a genuine and substantial connection with the United Kingdom".[134]

The provisions of draft regulation 5(1) read with draft regulation 6(1) make is clear that, as regards the ownership requirement, South African ships need be owned only by a majority of qualified persons. It follows that unqualified persons, provided they are in the minority, may also own shares in a South African ship. Draft regulation 5(2) which specifically spells that out would seem in consequence to be unnecessary.

The proposed regime, in so far as it allows the nationality of a ship to be determined by the majority owners of that ship, is eminently more fair. Under the present MSA 1951, as was the position under the MSA (UK) 1894, a minority shareholder could dictate the eligibility of the vessel to be registered in the Republic. By disposing of his share to a foreigner he could cause

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[131] *ibid*

[132] See sections 231-3 of the Constitution of the Republic of South Africa, Act 108 of 1996.

[133] Section 9(2)(b)

[134] Section 14(3)(b)

the ship's registration to be closed. The "advantages of clarity" of this system led to it being retained in the Merchant Shipping Bill (UK) of 1988. However, in the House of Lords the provision that a ship be wholly owned by qualified persons was amended to permit the registration of a ship as British if a majority interest in the ship was owned by a qualified person who was resident.[135] The subsequent UK Acts of 1993 and 1995 endorsed the position that an unqualified person can be a minority owner of a UK registered ship.

The idea that a ship on the SA register must have a South African "connection" is maintained throughout the draft bill and this is the only real benefit of the term - as a shorthand for the ownership and residence registration requirements set out in the draft regulations. Upon the sale of a SA ship or a share therein, or upon the transmission of a SA ship or share therein other than by way of sale, the transferee or transmittee, as the case may be, may be registered as the owner of the ship or share if an application is so made and if the ship retains a South African connection.[136] In the event of the ship ceasing to have such a connection because of the *transmission* of the ship or a share therein to an unqualified person, that person must apply to Court for the sale of the property so transmitted, failing which it becomes liable for forfeiture.[137] This provision resembles section 43 MSA. There is no comparable provision in the draft bill to cover the case of the *sale* of a ship or share therein and the ship ceases to have a South African connection. Clearly that person cannot be registered as the owner of the ship or share he has purchased, but the draft bill does not in so many words demand that the ship be de-registered. Only in a rather roundabout way do a number of provisions in the draft bill and regulations seek to obtain this objective.

Since a ship's register is not conclusive proof of title it not for that reason necessary for the new owner of a ship or share therein to inform the registrar of any such change in ownership. In other words, an unqualified person who purchased an SA registered ship could keep her on the SA register if he was not obliged to disclose her purchase; and the discrepancy between the facts as contained in the register and the actual state of affairs would not affect his ownership.

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[135] *Current Law - Statutes Annotated*, 1995, Vol. 2, page 21-32

[136] Sections 3 and 4 of Schedule 2 to the draft bill

[137] Section 5 of schedule 2 to the draft bill

However, in terms of the draft bill the owner of a ship must notify the registrar[138] within 30 days of any change in the SA connection of that ship. Failure to do so is an offence.[139] The draft regulations place an obligation on the owner of a ship similar to that contained in draft section 5(3) to notify the registrar of any change affecting the eligibility of a ship to be registered on the SA register.[140] They also oblige the person selling the ship or share (or executor in the case of transmission) to notify the registrar thereof and to surrender the certificate of registry.[141] The registrar thereupon cancels the certificate of registry and "freezes"[142] the register pending an application for the registration of the transfer or transmission by the new owner or owners of the ship or share.[143] If no application is forthcoming, the registrar "may" cancel the registration of the ship.[144] If, on application, the registrar is not satisfied that the ship is entitled to be registered, he "shall" serve a notice on the owner of the ship and the ship's registration "shall" terminate 14 days after such service.[145]

These provisions in the draft regulations apply equally to transfers and transmissions of ownership in ships or shares in ships.[146] Accordingly, the need for section 5 of schedule 2 to the draft bill (relating to the forfeiture of SA ships which, because of the transmission of a share or the whole of a ship, no longer possess a SA connection) is doubtful. Its inclusion in the draft bill is probably related to its presence (in a slightly different form) in the 1951 MSA.

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[138]Who is the Chief Director, Chief Directorate: Shipping of the Department of Transport, in his or her capacity as registrar or as respects his or her functions being discharged by another authority or person, that authority or person - section 1(1) of the draft bill. The registrar in terms of the draft bill approximates to the "proper person" in terms of the MSA 1951.

[139]Section 5(3) of the draft bill

[140]Draft regulation 39(1)

[141]Draft regulation 40(1)(a)

[142]Defined in the draft regulations as preventing any entry, including the deletion of an entry, being made in the register.

[143]Draft regulation 40(1)(b)

[144]Draft regulation 40(2)(b) and (c)

[145]Draft regulation 38(1)

[146]See draft regulations 36, 37, 38, 39, 40(1) and 40(3)

The problem created by the wording of section 11(2) and the various conflicting provisions of the 1951 MSA regarding the sale of a ship or a share in a ship on the South African register to a foreign person does not arise in regard to the draft bill and regulations. It is clearly permissible under the proposed legislation to sell the whole or part of a South African ship to an unqualified person. The only aspect which requires clarification is whether, on unqualified persons becoming the majority owners of a South African registered ship, the registration of such a ship must be closed. From the open wording of section 4(2)(a) of the draft bill, de-registration would not seem to be an automatic consequence. Draft regulations 39 and 40 appear to give the registrar a discretion to permit the continued registration of a ship in those circumstances. In particular, draft regulation 46(1)(b) provides that the registrar "may" terminate a ship's registration on the ship no longer being entitled to be registered. However, it is clear from draft section 4(1)(b) and draft regulation 38 that a SA "connection", as specified by the regulations, is a pre-condition for continued registration of the SA register.

The Transport and General Workers Union[147] notes "with some concern" that the provisions of section 13 MSA have been omitted from the draft bill. The Union comments that in their view, "any person who meets the entitlement criteria for ownership within the Republic, *should be required under law to register such vessel in the Republic.* To allow owners/operators the choice is to open the door for South African owners to decide whether or not they will meet their obligations as residents of the Republic." This attitude has no regard for the acknowledged facts, which have been quoted by the Union itself.[148] For the past few decades, South African shipowners have managed to circumvent the obligation to register on the South African register. The same had occurred under the British 1894 MSA, although section 2 thereof had obliged every British ship to be registered. Neither Act presented a problem to shipowners wishing to register abroad, as they could sell one share in the ship to a person not qualified to own the ship under those Acts and the ship's registration would then have been closed. If the draft bill were to impose an obligation to register there would be nothing to prevent shipowners doing the same in the future.

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[147] *Comment and Submission on the Preliminary Draft Registration of Ships Bill and Registration of Ships Regulations*, supra, page 7

[148] *ibid*, page 5

To oblige South African shipowners to register their ships in the Republic, if that obligation leads to South African shipowners being less competitive, could well have the long term consequence that the number of South African shipowners will dwindle and more of South Africa's exports will be carried on foreign-flagged ships. On the other hand, if the South African register and its attendant fiscal benefits become attractive enough and the crewing requirements not unduly onerous, there will be no need to oblige South African shipowners to register their ships on the local register; they will seek such registration. Making registration voluntary should not be seen as encouraging South African shipowners to flag-out their vessels - if they want to do so the obligation to register will not prevent them. Rather, the option to register might encourage foreign shipowners, by incorporating a company in the Republic, to flag their ships on the proposed South African register.

THE SHIP REGISTRATION BILL'S REGISTER

The Ship Registration Bill maintains the concept of voluntary registration advanced in the draft bill. Like the draft bill, the Ship Registration Bill also distinguishes between fishing vessels and other ships regarding their registration requirements.[149] However, the Ship Registration Bill abandons the "South African connection" requirement of the draft bill as a pre-condition for registration and also reverts to accepted practice in setting out the requirements for registration in the Bill itself. The matter is not left to regulations as is the case with the draft bill. Most importantly, the Ship Registration Bill differs from the draft bill in its requirements for the entitlement to register a ship on the South African register and in its distinguishing between registration requirements for small vessels[150] and other ships. On balance, these conditions for registration as set out in the Ship Registration Bill are less onerous than those in the draft bill.

In terms of section 16 of the Ship Registration Bill the only ships (other than fishing vessels, small vessels and bareboat chartered ships) which are entitled to be registered on the South African register are "South African-owned ships". These are defined as ships either *wholly*

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[149]Section 1(4) read with section 16 of the Ship Registration Bill.

[150]Defined in section 1(xxxvi) of the Ship Registration Bill as "a vessel of less then (sic) 25 gross tons and of more than three metres in length".

owned by one or more South African *nationals*; or owned by three or more persons as joint owners of the ship, where the *majority* of those persons are South African *nationals*; or owned by two or more persons as owners in common, where the *majority* of the shares in the ship are owned by South African *nationals*.[151] In the absence of the residence requirement of the draft regulations, this would be similar to the position under the draft bill and regulations if South African nationals were to be defined in the Ship Registration Bill as either "South African citizens" or "corporate bodies incorporated in the Republic and having their principal place of business in the Republic".[152] However, the Ship Registration Bill does not require that corporate bodies must have their *principal* place of business in the Republic. It is sufficient if they have "a place of business" in the Republic.[153] This suggests that not only may the shareholders be foreigners, but that the control of the company's business may be exercised from outside the Republic. While not quite permitting a "brass plate" company to be a South African national, the test that has been set is not high. It will be sufficient for the company to do some limited business in South Africa. On the other hand, the test stipulated in the draft bill, viz. that the company must have its principal place of business in the Republic, would require the effective control of the company to be exercised within the Republic. It would not allow the incorporation of a company as a "mere colourable cloak for the evasion of the provisions" of the draft bill.[154]

The Ship Registration Bill does not prescribe, as the draft regulations do,[155] that the person(s) owning the majority interest in the vessel must be resident in the Republic, failing which a "representative person" be appointed. In other cases the draft regulations required that a

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[151]Section 1(4)(b) of the Ship Registration Bill. Section 1(5) sets out how to establish whether a majority interest is owned by South African nationals in the case of a ship which is owned by more than one person.

[152]Section 5(1) of the draft bill

[153]Section 1(xxxviii) of the Ship Registration Bill

[154]See discussion in *Temperley's Merchant Shipping Acts*, supra, page 5

[155]Draft regulation 6(2)

managing owner be appointed.[156] But this does not make the registration requirements under the Ship Registration Bill lighter. The Bill requires that a "registered agent" be entered in the register in respect of every registered ship.[157] The registered agent will be the operator or one of the operators of a small vessel operated solely by South African residents and/or nationals; the charterer or one of the charterers of a ship on bareboat charter to South African nationals; and either the ship's agent or managing owner or one of her managing owners in the case of other ships. The registered agent of a ship under the Ship Registration Bill will fulfil the same function as a representative person or managing owner under the draft bill.[158]

The Ship Registration Bill's registration requirements differ from the draft bill in a further respect: it makes provision for a trust to be regarded as a South African national for the purposes of owning a South African ship. This is also an innovation as regards the present MSA and reflects the growing use of trusts in business. Since a trust is a *sui generis* institution, which lacks juristic personality, the Ship Registration Bill has had to evolve certain guidelines for determining whether a particular trust will qualify as a South African "national". These guidelines take into account both the trustees and the beneficiaries of the trust. The Bill requires that the majority of trustees having the controlling power at any given time must be South African citizens or bodies corporate incorporated in terms of a law of the Repulic with a place of business in the Republic *and* that a majority of the beneficial interests must be held by South African citizens or bodies corporate incorporated in terms of a law of the Repulic with a place of business in the Republic.[159]

Although the Ship Registration Bill clearly follows a voluntary system of registration, there is one respect in which the Bill might be considered as obliging a shipowner to register his vessel on the South African register. This relates to the prohibition on ships which are unregistered,[160]

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[156]Draft regulation 13

[157]Section 40 of the Ship Registration Bill

[158]Draft regulations 9 and 13(3) and section 40(5) of the Ship Registration Bill.

[159]Section 1(xxxviii)(c) of the Ship Registration Bill

[160]Sections 44 and 45 of the Ship Registration Bill

but which fulfil the criteria for being "South African ships", from leaving any South African port on an international voyage or from leaving any foreign port where there is a "proper officer"[161]. However, this does not so much compel the particular ship to register on the South African register as enforce South Africa's international obligations to register and exercise control over ocean-going ships flying its flag.[162] The ship would otherwise be entitled to fly the South African flag and would therefore not be a "stateless" ship,[163] but would have no documents to prove its nationality[164] and would be free of any flag-State controls.[165]

The Ship Registration Bill also provides for a "provisional registration certificate" to be issued to a ship which becomes entitled to be registered while at sea[166] or at a foreign port[167] or at a South African port[168] if the ship is to depart to a place outside the Republic. The provisional certificate is to be regarded as a registration certificate until the ship arrives at or returns to a South African port or until the expiry of six months, whichever occurs first.[169] The six month period may be extended.[170] Similar provisions are contained in Chapter VI of the draft regulations to the draft bill and section 30 MSA 1951. The Ship Registration Bill also provides

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[161]A proper officer may issue a provisional registration certificate to a ship while she is at a foreign port if she becomes entitled to be registered - section 26 of the Ship Registration Bill.

[162]Article 94 UNCLOS

[163]Ships have the nationality of the State whose flag they are entitled to fly - article 91(1) UNCLOS.

[164]Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect - article 91(2) UNCLOS.

[165]As to the registering State's obligations at international law, see article 94 UNCLOS and articles 5(3) and 6 UNCCORS.

[166]Sections 26(1)(b) and 27(1) of the Ship Registration Bill

[167]Sections 26(1)(a) and (b) and 27(1) of the Ship Registration Bill

[168]Section 27(2) of the Ship Registration Bill

[169]Sections 26(2) and 27 (3) of the Ship Registration Bill

[170]Sections 26(4) and 27 (4) of the Ship Registration Bill

for a temporary pass in lieu of a certificate of registry.[171] The current MSA 1951 has such a provision[172] although the draft bill does not.

The draft bill - in the draft regulations thereto - introduced the concept of a finite five year registration period for all vessels.[173] This follows the development in the United Kingdom.[174] The Ship Registration Bill does not itself specify any period for which a ship's registration will remain valid, however, section 56(2)(f) provides for regulations to be promulgated regarding "the period for which the registration of a ship is to remain effective without renewal".

THE INCENTIVE TO REGISTER

A shipowner who is entitled to register his ship under the draft bill will have the choice whether to register her on the South African register or to register her abroad. And in making this choice the shipowner will want the best returns for the major investment his ship represents. Patriotic sentiments are unlikely to cloud his mind. As the shipowners themselves say:[175] "Irrespective of original nationality, shipowners and operators will locate themselves in their most favourable financial and fiscal environment". In such a marginal business it is necessary to minimise operating costs, particularly tax liabilities. At least one learned UK law lord is on record in support of this approach when he stated: "no commercial man in his senses is going to carry out commercial transactions except on the footing of paying the smallest amount of tax involved".[176]

Without obligatory registration as a method of maintaining the register, registration in terms of the draft bill will have to afford definite benefits to the shipowner if the register which it

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[171]Section 29 of the Ship Registration Bill

[172]Section 31 MSA

[173]Draft regulation 29

[174]Regulation 39 of the 1993 Registration Regulations

[175]*South Africa - A Maritime Business Location*, Safmarine/ Unicorn/Griffin, May 1995, page 2

[176]*per* Lord Upjohn in *IRC v Brebner* 43 TC 705

proposes is to flourish. After decades in operation, the South African "closed" register has a handful of ships on it, although many more ships are beneficially owned by South African companies.[177] It is unlikely in the light of the administrative and economic complexities that many of these ships will return to the South African register. The probable market for the proposed register will be future acquisitions by South African interests.

The size of the current South African register compares unfavourably with those of many other countries. For instance, the "open" Belize register, after it had been in existence for only 12 months, had 94 vessels totalling nearly 50 000 gross tons.[178] Dubbed - by itself - the "friendly register" this register is modelled on its neighbour Panama's. It was created with the specific intention of bringing in foreign exchange to the small Central American nation[179] and is just one of the many new registers in the highly competitive business[180] of ship registration all competing for the finite pool of tonnage. However, the proposed South African register will not, in so far as the registration requirements are concerned, put South Africa into the league of flag of convenience registries. If South Africa had wanted to create such a register there would have been no need for any residential pre-condition for registration or to require that the principal place of business of a company must be in the Republic. It may be assumed, then, that it is not intended that the proposed register should operate as a flag of convenience register. Accordingly, the benefit of the proposed register to South Africa will have to come in some way other than registration fees.

The answer of the Transport and General Workers Union is to limit the registration of South African ships to those which are beneficially owned in South Africa and to prohibit the registration of South African owned ships on foreign registers. The Union, while following the

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[177]Fifteen ships above 500 gt were registered on the South African register in 1995 out of a total number of South African beneficially owned ships of 68(*South Africa - A Maritme Business Location*, supra, page 8).

[178]*Tradewinds*, June 19, 1992, page 9

[179]*ibid*

[180]*Lloyd's List*, Wednesday, 1 April 1992, attributed the rivalry among ship registers primarily to the recession of the 1980s and the desire by shipowners to reduce their tax liabilities.

line of the ITF,[181] does so apparently without realising the conflict of interest between the Union's own South African members and the membership of the ITF generally, and the particular concern of the ITF to protect the jobs of seafarers in the traditional maritime countries. Should more ships be registered locally, that could be the beginning of additional employment for local seamen. Of course, the profits from the shipping of goods to, from, and around South Africa will not all remain in South Africa if some of the ships are beneficially owned elsewhere, but that is more or less the position as it pertains today. To make the most of a national register one would have to close coastal trade to all but South African registered ships, require that a high percentage of SA exports be carried in SA ships and even limit registration to ships built in South African shipyards. Other countries have followed such policies to establish their shipping industries. Simply to limit registration to ships beneficially owned in the Republic will not ensure that South African trade is carried in South African bottoms.

However, South Africa has never practised shipping protectionism,[182] and it is extremely unlikely that it has the capacity to sustain such a policy. With the industrial capital on the highveld the coastal trade is not such as would warrant closing it to non-South African ships. A protectionist policy would make transport less efficient and more costly and, as it would increase the cost of the goods transported, it would have an adverse effect on foreign trade. It would also provoke unwanted reactions from foreign governments and harm the liner trade. Some other countries, such as Greece, Italy, Portugal and Spain have historically had cabotage restrictions.[183] But while this safeguards jobs and business, the protected environment has almost invariably led to higher freight and passenger rates and inefficiency.[184]

In any event, the new register will not be a national register linked to a protectionist policy. Nor, apparently, will it be a flag of convenience based on the income from registration fees

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[181]The ITF's policy is to require beneficial ownership in the country of registration.

[182]*Maritime Transport Policy Working Group, Report to Plenary No. 2*, February 1996, page 8

[183]*EC Shipping Law*, Vincent Powers, 1992, page 211

[184]*ibid*, page 213

and generating a related service sector. The likelihood is that, as regards large vessels but not including fishing vessels, it will remain a fairly small register, predominantly for South African beneficially-owned ships. This does not mean that attempts should not be made to increase the size of the register. The larger it becomes, the more the benefits, direct and indirect for South Africa as a whole. For instance, the flag often determines the nationality of the crew. Accordingly without resorting to outright protectionist policies, South Africa would not be out of place in offering inducements to register or by making it more affordable to do so. In France, Germany, Italy and Greece the governments offer grants towards the acquisition of ships.[185] France requires two-thirds of hydrocarbon and two-fifths of coal imports to be carried in French ships. The Netherlands has sought to reduce the cost of employing Dutch nationals on ships by providing relief on personal taxation.[186] These and other possible benefits, particularly in the light of the present tax and manning implications of registration in South Africa, will have to be explored in the South African context.

The further challenge will be, apart from attracting vessels onto the register, to create a register of high standards. This is the gist of the "Memorandum on the Objects of the Ship Registration Bill",[187] which states that the Bill is predicated on the need for a genuine link between the Republic and its ships and the provision of a professional and client-focused ship registration service. The apparent intention is for ships on the South African register to comply with international standards. This will give a greater competitiveness to ships on registers which do not require or enforce such standards. However, by adopting and enforcing proper port controls, thereby ensuring that ships trading with South Africa comply with international standards, South African shipowners can to some extent be protected against sub-standard vessels operating at lower cost on foreign registries. Importantly, such steps will also further the causes of maritime safety and the preservation of the environment. Instead of focusing on the need for ships on the South African register to be beneficially owned in South Africa and by so doing looking after the interests of seafarer in developed countries, it might have been expected that the trade union representing South African seafarers would have concentrated on

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[185] *ibid*, pages 38-44

[186] *ibid*, 1992, page 45

[187] Page 80 of the Ship Registration Bill

this other issue, namely the safety at sea on South African ships.

THE MAINTENANCE OF STANDARDS

In terms of the draft bill, an application to register a ship may be refused, or her registration terminated, by the registrar if, having regard to any relevant requirements of the Shipping Acts[188] or to the interests of the Republic,[189] he or she considers it inappropriate for the ship to remain registered.[190] Draft regulation 26(3) gives some content to the registrar's discretion under this section. It provides for the registrar's refusal to register a ship on account of her condition or equipment in so far as it is relevant to her safety or to any risk of pollution or to the safety, health and welfare of persons employed or engaged in any capacity on board the ship. Draft regulation 46(1)(d) allows the registrar to terminate a ship's registry on similar grounds to those set out in draft regulation 26(3). Since the Republic gives its flag and nationality to such ships and assumes responsibility for them,[191] it is appropriate that it should have a choice as to whether or not to register any particular ship notwithstanding that they are

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[188]Which includes the provisions of the draft bill, see draft section 1(1).

[189]Draft section 2(a)(ii)

[190]Draft section 2(a)(i)

[191]Article 217 UNCLOS obliges States to ensure compliance by vessels flying their flag with international rules and standards and with laws and regulations adopted in accordance with UNCLOS for the protection of the marine environment from pollution. See also article 94(3) UNCLOS which obliges the flag state to take such measures for ships flying its flag as are necessary to ensure safety at sea with regard 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; the use of signals, the maintenance of communications and the prevention of collisions. The ILO has adopted a number of instruments which deal with manning, labour conditions and the training of crews and there are a number of other international conventions regulating different aspects of the matters addressed in article 94(3). *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, Vol. III, pages 147-8. See also article 5 UNCCORS.

otherwise entitled to be registered.[192] However, section 4(2)(b) ought to set out in some detail precisely what interests of the Republic or of international merchant shipping would render it inappropriate for a ship to appear on the South African registry. At the moment it is left to the Minister to make regulations concerning "the refusal, suspension and termination of registration in specified circumstances".[193] No regulations have been made which would permit the registrar to refuse to register or terminate a ship's registration on the grounds of either the interests of the Republic or international merchant shipping, besides those contained in draft regulations 26(3) and 46(1)(d). It is not clear what the interests of the Republic or international merchant shipping might be, besides ensuring compliance by the ship with the relevant requirements of the Shipping Acts.[194] In this regard, draft section 4(4) makes it clear that the relevant requirements of the Shipping Acts are those relating to the condition of ships or their equipment so far as relevant to their safety or any risk of pollution, and the safety, health and welfare of persons employed or engaged on board. This is precisely what draft regulations 26(3) and 46(1)(d) cover. The need for both the aforementioned draft regulations in addition to section 4(4) is, in the circumstances, doubtful.

The Ship Registration Bill does away with the confusion created by sections 4(2) and 4(4) of the draft bill and draft regulations 26(3) and 46(1)(d). Section 18(1)(a) of the Ship Registration Bill re-enacts the substance of all those provisions.

As appears from the provisions of sections 4(2)(a) and 4(4) of the draft bill, and regulations 26(3) and 46(1)(d) of the draft regulations (and section 18(1)(a) of the Ship Registration Bill), standards of safety and seaworthiness are to be met by ships wishing to be registered on, and

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[192]The Transport and General Workers Union in their "Comment and Submission on the Preliminary Draft Registration of Ships Bill and Registration of Ships Regulations", 3 May 1996, page 8, make the point that the importance of the relevant Shipping Acts should compel the registrar to refuse an application for registration where an owner or charterer does not meet the relevant requirement.

[193]Section 11(2)(k) of the draft bill

[194]The "Shipping Acts" are defined as meaning the Merchant Shipping Act, the Prevention and Combating of Pollution of the Sea by Oil Act, Act 6 of 1981, the International Convention for the Prevention of Pollution from Ships Act, Act 2 of 1986 and the draft bill itself.

adhered to by ships already on, the proposed South African ship's register. The intention is to ensure flag state control over South African registered ships. On their own, however, these provisions will be insufficient to distinguish the South African register from some of the flags of convenience registers. States offering flags of convenience can be signatories to international safety conventions and they can have minimum operating requirements. What distinguishes flags of convenience from the traditional maritime registry is that historically under the former, state control has often been insignificant and international standards of safety and seaworthiness have not been enforced. The Mauritian register, for instance, cannot enforce the small number of international conventions it has ratified, but expressly leaves the matter of standards "to trust".[195] To avoid such a situation the draft bill (and, indeed, the present system) has to be backed up by adequate administrative machinery, able to conduct regular and thorough surveys of South African ships and those ships seeking registration on the South African register.[196]

DUAL REGISTRATION

Section 4(3) of the draft bill, which has been taken almost verbatim from section 9(5) of MSA (UK) 1995, aims at ensuring that no dual registration takes place in contravention of article 91 UNCLOS. If a ship becomes registered in South African when it is already registered under the law of a foreign state, the owner of the ship is to take all reasonable steps to secure the termination of the ship's registration in the foreign state. This is contrary to article 11(4) UNCCORS which lays down that *before* entering a ship in its register of ships a State should assure itself that the previous registration, if any, is deleted. The requirement that "reasonable steps" be taken was introduced by section 9 MSA (UK) 1988 to accommodate the practical problems which occur when a ship is transferred from one register to another. It is not always possible to secure deregistration prior to entry onto the new register because of delays in

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[195] *Lloyd's List*, Wednesday, 1 April, 1992

[196] Article 5 UNCCORS (1986) requires each flag State to have a competent and adequate national maritime administration, subject to its jurisdiction and control. This obligation would extend as much to Liberia, whose registry operates out of New York, as to South Africa with its under-staffed and under-funded public administration.

communications with foreign administrations.[1] Section 19(2)(b) of the Ship Registration Bill, which is headed "Prohibition on dual registration", makes allowance for this situation.[2]

OWNERSHIP

The original purpose of the registers to which the South African register owes its heritage was to establish which ships would be entitled to the privileges of the British flag. This was a matter regarding the interests of the nation at large and concerned the public law function of the register. The second purpose of registration which the British Merchant Shipping Acts reveal is one "similar to that which gave rise to the Acts for the registration of titles to land, the object being to determine what should be a proper evidence of title in those who deal with the property in question."[3] Ships' registers continue to fulfil the principal private law function of protecting the title of the registered owner(s) of a ship or share therein.[4] They have also proved useful to persons wishing to establish whether particular ships share a common ownership, and to other persons wanting to disguise their association with a ship.

The law to be applied by a South African court when deciding questions of ownership of or in a ship, is, subject to local statutes, English law.[5] In terms of sec 4 of the 1840 and sec 8 of the 1861 Admiralty Court Acts, a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act of 1890 had jurisdiction in respect of matters of ownership. Accordingly, in terms of sec 6 AJRA, English law as it was at 1 November 1983 is the South

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[1] *Current Law - Statutes Annotated*, 1995, vol. 2, page 21-33

[2] It provides that an application for the registration of a ship which has at any time been registered in terms of the law of another state must be accompanied by evidence to establish that steps have been taken or are proposed to terminate registration in terms of the law of such other state.

[3] *Liverpool Borough Bank v Turner* (1860) 29 L.J.Ch. at page 830

[4] *Ship Registration*, supra, page 7

[5] This was not adverted to in *The Tao Men v Deguildre* 1996 (1) SA 559 (C), although it is arguable that the proper law of the contract was in any event South African law. See, in particular, at 563H *et seq*.

African admiralty law governing the ownership of ships.[6]

English admiralty law has for many years regarded a ship as being divided into 64 parts or shares.[7] This came to be reflected in the British legislation on the subject.[8] That a ship is divided into shares has since received recognition in domestic legislation. The MSA 1951 makes allowance for the co-ownership of ships through the ownership of separate shares in a ship. It defines an owner as any person to whom a ship or a share in a ship belongs.[9] It provides for the listing in the South African ships' register of the number of shares in a ship held by each owner in the case of multiple owners.[10] The Act, however, does not expressly limit the number of shares which may comprise a ship. The definition in the MSA also makes no provision for joint owners of a single share.

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[6]Section 6 AJRA regulates, by reference, the law to be applied to maritime matters. *Great River Shipping Inc v Sunnyface Marine Ltd* 1994 (1) SA 65 (C), particularly at 68I-69A

[7]Hill, Maritime Law, page 2. "Since very early days, a ship has been notionally divided into 64 parts. Nobody really knows the reason, except possibly the obvious and practical one that dealings in and transfers of ships are simplified."

[8]Section 5 of the 1894 English MSA provided:"(i) The property in a ship shall be divided into sixty-four shares; (ii) ... not more than sixty-four individuals shall be entitled to be registered at the same time as owners of any one ship ... (iii) A person shall not be entitled to be registered as owner of a fractional part of a share in a ship; but any number of persons not exceeding five may be registered as joint owners of a ship or of any share or shares therein; (iv) Joint owners shall be considered as constituting one person only as regards the persons entitled to be registered, and shall not be entitled to dispose in severalty of any interest in a ship, or in any share therein in respect of which they are registered ...." The principle that a ship is divided into 64 shares remains current under British law - see British Merchant Shipping (Registration of Ships) Regulations 1993, reg. 2(5).

[9]Section 2(1) MSA

[10]Section 21(d) MSA. Section 1 AJRA defines a "maritime claim" *inter alia* as "any claim for, arising out of or relating to (a) the ownership of a ship or a share in a ship".

The draft bill, while making allowance for the ownership of shares in a ship,[11] does not specify the number of shares which will make up the entire ownership in a ship. Sub-section 11(2)(d) does, however, provide for regulations to be made regarding "the shares in the property in, and the number or owners (including joint owners) of, a ship permitted for the purposes of registration". Until changed by any such regulations, the concept that a ship is divided into 64 shares would, therefore, continue to apply in South African admiralty law by virtue of its reception from English admiralty law.[12] Although the only argument in favour of 64 shares is an historical one,[13] in terms of draft regulation 3(5) the existing position is entrenched. Draft regulation 3(5) provides that the property in a ship shall be divided into 64 shares and not more than 64 persons shall be entitled to be registered at the same time as owners of any one ship, although any number of persons not exceeding 5 may be registered as joint owners of any share therein.[14] These provisions are substantially re-enacted in section 15(1)(a) of the Ship Registration Bill which also makes specific allowance for the registration of body corporates and trusts as owners of ships or shares.

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[11]The definition of owner in the draft bill, in relation to a ship or a share in a ship, means the person owning the ship, or share as the case may be, whether or not registered as owner.

[12]Van Niekerk, without reference to authority, assumes that in South African Admiralty law a ship is, for purposes of ownership, regarded as consisting of sixty-four shares. (*The ownership, registration, licensing, transfer and transmission of South African ships*, MB 1985, page 74.)
Also without referring to any authority, the Safmarine, Griffin and Unicorn report, *South Africa - A Maritime Business Location*, supra, assumes that the 64 shares constitute 100% ownership of a ship (page 43).

[13]There is no reason why a ship should not be regarded as divided into, for instance, 100 shares as is the case in some countries.

[14]The Transport and General Workers Union, in their "Comment and Submission on the Preliminary Draft Registration of Ships Bill and Registration of Ships Regulations", 3 May 1996, page 9, raise the question of the possible anachronism of limiting ownership in a ship to 64 shares: "Whilst we are not fully advised as to why the specific numbers of shares, and the possible number of joint owners are as proposed, we do raise the possibility that the specific provisions may act as a barrier to possible future Employee Share Ownership Programme arrangements, particularly in those operations employing more than 64 x 5 persons."

A ships register provides prima facie proof of ownership.[15] It is not conclusive.[16] A Court will not allow itself to be misled by documents but, where necessary, will resort to evidence to find the truth. Accordingly, a Court will look behind the register to the real character of a transaction which on the face of it may appear to be an absolute transfer, if the parties thereto intended it as a sham.[17] Where the alleged transfer of a vessel is a sham or facade, a Court will hold that the original owners have retained the beneficial ownership in the vessel.[18] If transfer of an interest in a ship has occurred pursuant to an act of fraud or for any other cause and has been registered, a Court has jurisdiction, by virtue of its inherent jurisdiction, to rectify the

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[15] *Haley v The Comox* (1920) 20 Exch CR 86; [1920] 3 WWR 325 (CAN); *Duffus & Lawson v Mackay* (1857) 29 LTOS 67 (SCOT), referred to in *The Digest, Annotated British, Commonwealth and European Cases*, Vol. 42, page 106.

[16] *Robillard v The St Roch & Charland* (1921) 21 Exch CR 132; 62 DLR 145 (CAN) referred to in *The Digest, Annotated British, Commonwealth and European Cases*, Vol. 42, page 106; *The "Tao Men" v Degueldre* 1996 (1) SA 559 (C) at 565D. Section 3(5) of the draft bill provides for any document purporting to be a copy of any information contained in any entry in the register and to be certified as a true copy by the registrar shall be "sufficient proof" of the facts stated therein. Section 54(1) of the Ship Registration Bill reverts to the term "*prima facie* evidence".

[17] *Glatzer and Warrick Shipping Ltd v Bradston Ltd & Tekem Sea Abyss Ltd (The "Ocean Enterprise")* [1997] Vol. 1 Lloyd's rep. 449 (Q.B.) at 485, col. 1. The Court held that there had been no intention to create bona fide legal relations in regard to the alleged sale of the vessel and that it was plain that the whole transaction was anything but a bona fide transaction. It involved one individual covering his tracks by a series of sham sales and registration transactions, the purpose being to enable him to make off with the vessel to use it for his own purposes.

[18] *The "Tjaskemolen"* [1997] Vol. 2 Lloyd's rep. 465 (Q.B.) at 469, col. 2. The facts showed that the memorandum of agreement in terms of which the vessel was purportedly sold was a sham or facade; it was not a genuine commercial transaction. It had been intended by those who controlled both the "seller" and "purchaser" companies that there should be a transfer from the ownership of the "seller" company so that the vessel could not be arrested or executed upon by the plaintiff. The intention of the persons controlling both the "purchaser" and "seller" companies and other companies within the group had been to enter into the memorandum of agreement so that the vessel could be traded in the name of another company within the group. It had never been intended that the "purchaser" company should pay a full purchase price.

register by ordering the entry of the void transfer to be expunged.[19] The Ship Registration Bill specifically confers on the High Court jurisdiction, on the application of any interested party, to rectify any error or omission from the register.[20]

In the case of *The "Akademik Fydorov": Government of the Russian Federation and Another v Marine Expeditions Inc* 1996 (4) SA 422 (C) - an application for the release of the *Akademik Fydorov* from her arrest in terms of section 5(3) of the AJRA 105 of 1983 as security for the respondent's claim for damages in respect of the *Akademik Shuleykin* - it was accepted that the Arctic and Antarctic Research Institue (AASRI) was registered in the shipping register in the port of St Petersburg as the owner of both the *Akademik Fyodorov* and the *Akademik Shuleykin.* The Lloyds Register, however, recorded that the two vessels were owned by "The Government of the Republic of Russia (Hydrometeorological Service)". The Cape Court (Rose-Innes, J.) held that it was not bound by the facts stated in either register (at 436G-437B):

> "Proof of the registration at the head office of the Russian Maritime Register of Shipping in St Petersburg, and in the register kept by the office of the Port Captain of the Port of St Petersburg, is acceptable evidence of the ownership of a vessel as stated in the register. So, too, the Lloyds Register affords acceptable evidence of the ownership of a vessel as stated in the register. Such evidence of registration is not conclusive proof of ownership. Ownership of a vessel, in South African law, may be proved by evidence of its construction by the owner, or its construction for the owner and delivery to the owner by the shipyard, or by evidence of the acquisition of the ship by purchase and delivery to the owner. There are other modes of acquisition of ownership of a ship as well to which it is not necessary to refer in this case. See *Osaka Mercantile Steamship Co Ltd v South African Railways & Harbours* 1938 AD 146; *Mills v Reck and Others* 1988 (3) SA 92 (C) and *Reck v Mills en 'n Ander* 1990 (1) SA 751 (A) at 759. Registration of the ship is not necessary for the vesting of ownership. such evidence of the history and mode of acquisition of ownership of a vessel may

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[19] *Brond v Broomhall* [1906] 1 KB 571; 75 LJKB 548, referred to in *The Digest, Annotated British, Commonwealth and European Cases*, Vol. 42, page 106.

[20] Section 37 of the Ship Registration Bill

prove that the ownership of a vessel reflected in a register of shipping is erroneous and should be amended. Unless such error is demonstrated, the evidence of the registration of a ship in a recognised register of shipping may be accepted as proof of ownership. To these considerations it should be added that ownership of a foreign vessel may very well be a matter of proof by reference to the law of the country of its flag, in this case Russian law, whatever the registration of the vessel in Russia or elsewhere may indicate as to its ownership."

The fact that the St Petersburg Registry reflected AASRI as the owner of the vessels did not mean that the Government of the Republic of Russia was not their owner. States do not necessarily conduct their affairs in their own names, but more often than not act through various departments and organs. Depending upon the legal status and capacity of AASRI and whether it was an executive organ of the Government or whether it was an independent entity distinct from the Government capable of owning property apart from the Government, the registration of the vessels in the St Petersburg Registry may have indicated no more than that they belonged to the Russian Government. In that case the St Petersburg and Lloyds registers would not have been contradictory.

The Court had regard both to the history of the building and acquisition the *Akademik Fyodorov* and to the legal position in Russia in concluding that the respondent had failed to prove on a balance of probabilities that AASRI was the owner of the two vessels and a separate entity distinct from the Russian Government. Although the two vessels were, on the applicant's own version, associated ships (both being owned by the Russian Government), the *Akademik Fyodorov* was immune from the process for arrest by virtue of the provisions of the Foreign States Immunities Act 87 of 1981.[21]

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[21]Compare the case of *The "Nazym Khikmet"* [1996] Vol. 2 Lloyd's rep 362 (C.A.) which involved an arrest on the sistership provisions of the Supreme Court Act (UK) of 1981. The Court held that it was clear beyond argument that the defendant was at no time what English law would recognise as the legal owner of the arrested ship; legal ownership was a matter of title and title to the vessel at all times belonged to the State; it was also clear that the State did not own the vessel as legal owner for the benefit of the defendant; it would be more apt to regard the defendant as exploiting the vessel for the ultimate benefit of the public.

CORPORATE OWNERSHIP

A corporate body established under and subject to the law of the Republic (or any other treaty country) and which has its principal place of business in the Republic (or any other treaty country) qualifies in terms of section 11 MSA to own a ship registered under the Act. It is not a requirement that the persons holding shares in such a company must themselves qualify to own a South African ship. In accordance with the company laws of South Africa, the company is deemed to have a juristic personality separate from its members.[22]

A company incorporated in a foreign country will be a company of that foreign country, no matter that it has a South African character. Even the acquisition of enemy character does not deprive a company of its national character.[23] Accordingly, in order to avoid having to register a ship on the South African ships' register, a qualified person can register a company in a foreign country and have the company own the ship. The company is a foreign company even though it is controlled from South Africa. If a company is registered in South Africa, then it has South African nationality and to sell a share in the ship to it will not avoid the South African registration requirements.

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[22] *Morrison v Standard Building Society* 1932 AD 229 at 238, *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 550, *Francis George Hill Family Trust v SA Reserve Bank* 1992 (3) SA 91 (A) at 97, *The Shipping Corp of India Ltd v Evdomon Corp* 1994 (1) SA 550 (A)

[23] In *Kuenigl v Donnersmarck* [1955] All ER 46 (QB) McNair J stated that: "Enemy character is not substituted for the original character, but is something added to it. An English company which has acquired enemy character continues to owe its very existence to English law (under which it was incorporated).... I think it is also clear that, in so far as nationality can by analogy be applied to a juristic person, its nationality is determined in an inalienable manner by the laws of the country from which it derives its personality (see *Janson v Driefontein Consolidated Mines, Ltd* (9) [1902] A.C. at p 505 per LORD LINDLEY; *Gasque v Inland Revenue Comrs.* (7); 9 HALSBURY'S LAWS (3rd Edn.) 19, para. 30). In my judgment, it would be contrary to principle and to public policy as embodied in the trading with the enemy law to hold that a company incorporated under the laws of this country and registered here, and so having both an English domicil and British nationality, can cease to be in the eye of English law an English company subject to English law by reason of the fact of enemy control."

On the other hand, foreign persons wishing to register a ship on the South African register can, by the simple expedient of incorporating a company in South African and by transferring the ship to that company, confer on her the entitlement to South African registry and nationality.[24] The nationality of the shareholders in the company does not disqualify the ship from such right.[25] Nor would it matter that the ship is controlled from outside South Africa,[26] provided it could be said that the "principal place of business" of the company is in the Republic.[27] In terms of the Ship Registration Bill it is no longer a pre-requisite that the company owning the ship have its main office in the Republic. It will suffice if the body corporate owning the ship was established in terms of a law of the Republic and has "a place of business" within the Republic.[28] It follows that any benefits that South African citizens are entitled to on the registration of their ships can be enjoyed by foreigners and their ships through the use of a corporate personality.

CORPORATE VEIL

Because of the capital required to acquire them and the liabilities which their owners can incur through them, ships are invariably owned by corporations. On occasion, however, the fact that a ship is owned by a corporation and flies a particular flag may be ignored altogether. This occurs in the so-called "lifting of the veil" cases. The Court will then look through the facade of foreign registration and incorporation to the real interests behind the vessel. The practice of lifting the veil occurs only in limited instances as Corbett, C.J. emphasised in *The Shipping*

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[24]The only additional requirement is that the company have its principal place of business in the Republic, as to which see *The World Harmony* [1965] 1 Lloyd's Rep. 244 at 251.

[25]Section 11(1)(c) MSA

[26]Sub-sections 13(1)(b)(i) and (ii) are in the alternative.

[27]Section 11(1)(c) MSA; draft regulation 5(1)(b). The "principal place of business" of a company is "in each case a question of fact which generally falls to be determined by an inquiry into the *locality of the control* of the business of the company" (*Temperley's Merchant Shipping Acts*, supra, page 5). See *The Polzeath* [1916] P. 241 (C.A.), *The World Harmony* [1965] 1 Lloyd's Rep. 244 at page 251.

[28]See the definition of "South African national" in section 1(xxxviii) of the Ship Registration Bill.

Corporation of India Ltd v Evdomon Corporation and Another 1994 (1) SA 550 (A).

In that case, the *MV Vallabhbhai Patel* had been attached in order to found or confirm the jurisdiction of the Cape Provincial Division of the High Court of South Africa in an action to be instituted against the Government of India for freight due to the first respondent. The appellant, a private company registered under the Indian Companies Act, in whose name the vessel was registered, opposed the attachment. Although the Government of India was the actual or beneficial owner of the appellant's entire issued share capital, the appellant argued that it and not the Government of India was the owner of the vessel. Applying the principle expressed in *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 that a registered company is a legal *persona* distinct from the members who compose it, Corbett CJ held that the property of the appellant could not be regarded as the property of the Government of India for the purpose of attachment to found or confirm jurisdiction.[29]

In giving effect to the associated ship[30] provisions in the Admiralty Jurisdiction Regulation Act a Court will not be restrained by the corporate veil. To give effect to the principle would

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[29]The Chief Justice stated (at 566C-F): "It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify 'piercing' or 'lifting' the corporate veil. And in this regard it should not make any difference whether the shares be held by a holding company or by a Government. I do not find it necessary to consider, or attempt to define, the circumstances under which the Court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs. In this connection the words 'device', 'strategem', 'cloak' and 'sham' have been used".

[30]The concept of an associated ship was a development of the notion of 'sister-ship liability' which was introduced in England during 1956 - a sister-ship being a vessel fully owned by the owner of the 'guilty' ship, ie the ship responsible for the damages claime - see: *Euromarine International of Mauren v The Ship Berg* 1986 (2) SA 700 (A) at 711J-712A

frustrate the purpose of the Act.[31] A Court will use the entries in the ships' registers as the starting point in its search for the real or beneficial owners of the ships in question. Nor is it necessary to prove that the company or companies registered as the ships' owners are part of a sham or that they were incorporated as part of a fraud. The step of incorporating several entities to split up the legal ownership of ships and to hide such ownership from the beneficial ownership of the same ships is not new,[32] but is a quite legitimate use of the advantages of corporate personality.[33] It can be accomplished in a number of ways. For example, as observed in *Zygos Corporation v Salen Rederierna AB* 1985 (2) SA 486 (C) at 489C-D, "control over a company can be exercised without a majority shareholding where voting rights are not commensurate with shareholding, or where 'pyramiding' takes place." Yet, in each case, it is "a factual question whether the necessary ownership or control is present in order to bring the two ships within the terms of s 3(6) read with s 3(7) of the Act."

An inroad into the protection afforded by corporate personality is to be found in section 8 of the draft bill. In this regard it follows section 62(2) of the present MSA which was based on section 58(3) of the MSA (UK) 1894. Beneficial owners of a ship registered on the SA register

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[31]*Zygos Corporation v Salen Rederierna AB* 1985 (2) SA 486 (C) at 488I. In *EE Sharp & Sons Ltd v MV Nefeli* 1984 (3) SA 325 (C) the Court, in dealing with an application for the attachment of an associated ship, expressed itself as follows (at 326H): "These vessels are company-owned; each is owned by a different company; all other things being equal, this is precisely the situation which [section 7 AJRA] is intended to cater for, namely a series of 'one ship' companies, all controlled by the same interests, but previously because of their separate legal personalities immune from attachment in respect of debts incurred in respect of a sister ship."

[32]According to Shaw, *Admiralty Jurisdiction and Practice in South Africa*, at 35-6, the 1952 Arrest Convention which gave a claimant the right to arrest any one ship belonging to the defendant had the result that "many shipowners took the step of registering so-called 'one ship' companies which had, among other advantages, the advantage that their vessels would not be subject to arrest for claims against ships owned, not by the same company, but by what can perhaps loosely be called sister companies, in which the shares were either immediately or ultimately controlled by the same person as owned the shares in the company owning the ship in question."

[33]For example, the benefit of limiting the liability of the 'real' owner of a ship

are not immune from some of their public law liabilities merely because they operate the ship behind the guise of a juristic person. Section 8 of the draft bill, which appears to have been modelled on section 16(3) of the MSA (UK) 1995, makes any person (other than a mortgagee) who is beneficially interested in a ship or share therein (no matter that another person is registered as the owner of that ship or share) liable together with the registered owner for "any pecuniary penalties imposed by or under the Shipping Acts or any other law on the owners of registered ships".[34] Section 62(2) MSA currently makes such a person "subject to all pecuniary penalties imposed by this or any other Act on the owners or shares thein". At present, in terms of the Marine Pollution (Control and Civil Liability) Act No. 6 of 1981, the liability of an owner does not extend to the beneficial owner of a ship if that ship is registered.[35] The other "Shipping Act", the Marine Pollution (Prevention of Pollution from Ships) Act No. 2 of 1986, does not itself prescribe penalties but provides for regulations to do so.[36]

Section 8 of the draft bill is re-enacted as section 32 in the Ship Registration Bill. The definition of "beneficial interest" in section 1(iii) of the latter Bill means that mortgagees are still excluded from the ambit of the section. Section 32 vests the South African Maritime Safety Authority with the power to institute civil proceedings for the enforcement of any penalty imposed in terms of the Shipping Acts or any other law on the owners of registered ships. In addition, the "Shipping Acts" have been expanded to include the Marine Traffic Act No. 2 of 1981 and the Marine Pollution (Intervention) Act No. 64 of 1987. It is clear that it is not every offence but only those of which "owners" may be guilty which persons beneficially interested

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[34]This is not quite the obligation created by article 10(3) UNCCORS which requires that a State of registration must ensure that the person or persons accountable for the management and operation of a ship flying its flag are in a position to meet the financial obligations that may arise from the operation of such a ship.

[35]Section 9 of the Act deals with the liability of an owner who is defined in section 1 as follows: "in relation to a tanker or ship, means the person or persons registered as the owner of such ship or tanker or, in the absence of registration, the person or persons to whom such ship or tanker belongs, but in relation to a ship or tanker belonging to a State which is operated by a person registered as the ship's or tanker's operator, 'owner' means the person so registered".

[36]Section 3(1)

in a ship may be held liable. For example, section 4 of Act 2 of 1981 establishes an offence which only the "master" of a ship may contravene. An owner, whether beneficial or not, will not be liable for the penalty incurred by a master in terms of that section by virtue of the provisions of section 32 of the Ship Registration Bill.

The ITF, in a way akin to the lifting of the veil by a Court, will not allow itself to be misled by the entry as to ownership appearing in a ship's register. The ITF looks beyond the registered owner of a ship in determining whether or not she flies a flag of convenience. The ITF looks to where the beneficial ownership in the ship lies.[1]

SMALL VESSELS

The register of ships established under Part 1 of the British Merchant Shipping Act of 1894 only applied to ships of a minimum size. The smaller vessels were exempted from registration.[2] Because Part IV of the 1894 Act, which dealt with fishing vessels, did not apply in South Africa, the situation of small vessels was not at first regulated in this country. It appears that, until Parliament enacted the Railways and Harbours Regulation, Control, and Management Act, 1916 (Act 22 of 1916), there were no provisions in South African law for any form of registration for ships below the size prescribed in Part 1 MSA, 1894.[3] The position is now regulated by Act 57 of 1951. Section 2 defines a small vessel as being a vessel of less than twenty-five gross tons and of more than three metres in length.[4]

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[1]In its *Comment and Submissions on the Preliminary Draft Registration of Ships Bill and Registration of Ships Regulations*, the Transport and General Workers Union, states (at page 4) that in "simple terms", a flag of convenience is one "[w]here the beneficial ownership of a vessel is found to lie elsewhere than in the country of the flag the vessel is flying".

[2]Section 3 MSA (UK) 1894. These were vessels not exceeding 15 tons engaged in river and coastwise navigation or fishing and certain ships not exceeding 30 tons employed in fishing or coastwise trading along the east coast of Canada.

[3]*Wylock v Milford Investments (Pty) Ltd*, supra, at 305D-F

[4]"Small" ships, for the purpose of the Merchant Shipping Acts (UK) since 1983 are ships of less than 24 metres in length. The Small Ships Register was introduced in the United Kingdom for the first time in that year. The reason for the apparently

The situation at present is that a small vessel, not registered in any registry as a ship, and operating at or from a port in or from anywhere else on the coast of the Republic, must be licensed in terms of the MSA if she is owned either by the Government of the Republic or entirely by South African citizens or corporations if a majority[5] of such owners are resident in the Republic or are bodies corporate having their principle place of business in the Republic.[6] Alternatively, if the small vessel is wholly owned by South African citizens or corporations, a majority[7] of whom are not resident in the Republic or do not have their principle place of business in the Republic, but if the vessel is, as to her management and use, principally controlled in the Republic, then she must be licensed.[8] Only if used solely for sport or recreation, is a small vessel which otherwise qualifies to be licensed exempt from the obligation of licensing.[9] A small vessel which is not registered in terms of the South African or a foreign shipping Act and which is not licensed in terms of the MSA may not be used in South African waters.[10]

In terms of section 13(3) MSA, the Minister may exempt the owners of any class of ship of less than 100 gross tons, or the owners of ships which are not self-propelled and which are used exclusively in a port, from the obligation to apply for the registration of such ships. If the Minister has exercised his discretion in terms of this subsection, then the ship must be licensed

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arbitrary size chosen in the UK seems to be the International Convention on Tonnage Measurement of Ships 1969 which came into force on July 18, 1982. That Convention only required tonnage measurements of vessels of 24 metres and more.

[5]Either in number or extent

[6]Section 68(3)(ii)(aa) MSA

[7]Either in number or extent

[8]Section 68(3)(ii)(bb) MSA

[9]sec 68(3)(b)

[10]Section 68(1) MSA which requires that a small vessel have a licence before it is used. The phrase used in this section is "in the Republic", which would include the territorial waters. Section 72 specifically prohibits the use of a vessel which ought to have been licensed in terms of section 68 but which has not been.

before she may be used in the Republic.[11] The benefit of licensing as opposed to registering in terms of the MSA is the relatively simplified procedure. All that is required is that application must be made in the prescribed form and the owner or master must produce a local general safety certificate and, where applicable, a local safety exemption certificate.[12] This appears to have been part of the motivation behind the introduction of provisions of the registration of small ships in the United Kingdom.[13] Like the register for small vessels established under the MSA (UK) 1988,[14] the licensing of small vessels in terms of the MSA 1951 could not be described as a "title" register. It is not intended to provide any proof of title and nor does it allow for mortgages to be registered.

A licence remains valid for one year and may be subject to conditions.[15] Its renewal must be applied for before the expiry of the period for which it was issued or renewed.[16]

The draft bill, while not itself distinguishing between small vessels and other ships,[17] provides that the South African ship's register may be divided into parts to distinguish between "classes or descriptions of ships"[18], and envisages that regulations may be made to cater for such differences.[19] The definition of "small vessel" in the draft regulations differs from the corresponding definition in the 1951 MSA only in so far as the former excludes fishing vessels

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[11]Section 68(1)(b) MSA

[12]Section 68(2). This compares favourably with the pre-requisites for registration. As to which, see sections 16 (survey and measurement), 19 (marking), 20 (evidence on first registry).

[13]At one stage, over 80% of teh vessels on the UK register were pleasure craft and these did not need the full registration procedure (*Current Law - Statutes Annotated*, 1995, vol. 2, page 21-25).

[14]*Current Law - Statutes Annotated*, 1995, Vol. 2, page 21-36

[15]Section 70 MSA

[16]Section 69 MSA

[17]Unlike the 1951 MSA there is no definition of small ships and they are not referred to anywhere in the draft bill.

[18]Section 3(4) of the draft bill

[19]Sub-section 11(3)(a) of the draft bill

from its purview.[20] Draft regulation 3, which deals with the proposed South African ship's register, provides for four separate parts, Part III of which is intended for small vessels. A vessel registered as a small vessel on the new register may not also be registered on another part of the register as, for example, a fishing vessel.[21]

The draft bill, read together with the draft regulations, continues to draw the distinction already drawn in the 1951 MSA between small vessels and other ships. The major differences between the current regime and the draft bill and its regulations in respect of small vessels are that, under the latter, small vessels are to be distinguished from fishing vessels; there is no difference between the entitlement of small vessels and other ships to register; and no small vessels need be specifically exempted from registration for any reason, for example, on account of their use solely for sport or recreation.

That there is no provision in the draft bill for the exemption of any ships from registration is in accordance with its framework. Since the draft bill does not require the registration of any ships there is no need, as there is in the existing MSA, to exempt any classes of vessels from registration. However, since no ships, not even small vessels, are obliged to register in terms of the draft bill, the prospect is that without legislation requiring particular classes of ships to be registered, many ships operating in South African waters but not engaged in international voyages will remain unregistered. For example, small yachts, windsurfers and canoes are "ships" for the purposes of the draft bill,[22] but it would be absurd to expect them all to be registered on the ship's register. On the other hand, it might be expected that certain other classes of small vessels should be registered. The 1951 MSA draws the distinction between small vessels used solely for sport and recreation and other small vessels. It appears that legislation will be required to supplement the draft bill in order to regulate this aspect.

The fact that small vessels operating in South African waters will not be registered would be

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[20]The definition in the draft regulations reads: "any vessel, other than a fishing vessel, of less than 25 gross tons [and] of three metres or more in length".

[21]Draft regulation 4

[22]*Vide* the definition of "ships" in the draft bill, which is all encompassing.

some justification for the provisions of section 2(d) of Schedule 3 to the draft bill.[23] The situation would seem to be the same under the British Merchant Shipping Act 1988. The position there - "although this is not entirely clear"[24] - seems to be that small vessels (less than 24 metres in length), qualify in their own right to be British ships, "providing they are not fishing vessels, are not registered under the Merchant Shipping Act 1983 and are *wholly* owned by qualified persons."[25]

The draft bill, while providing that any registration of a ship made under the MSA 1951 shall be deemed to be a registration duly made under the draft bill, has no similar provision for small ships which have been licensed under the MSA 1951. This is not necessarily an oversight having regard to section 2(d) of Schecule 3 to the draft bill. However, since small vessels are entitled to be registered and since the draft regulations provide for a separate part of the register for such vessels, it could have been expected.

The absence of a deeming provision in respect of small vessels licensed under the present MSA is an indication that the register is intended principally for ocean-going ships. By the nature of their voyages these ships are generally more than 25 gross tons. This in not incompatible with article 94 UNCLOS which requires very State to maintain a register of ships of flying its flag, "except those which are excluded from generally accepted international regulations on account of their small size".[26] At the moment there are no international regulations governing national shipping registers, although it is considered likely that such regulations might be established.[27]

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[23]It provides that any ship, other than a fishing vessel, of less than 25 gross tons which is not registered under this Act or under the law of any foreign state the whole of which is owned by persons all of whom are qualified to own South African ships shall be recognised as a ship of South African nationality.

[24]*Maritime Law*, supra, page 6

[25]*ibid*

[26]Article 94(2)(a) UNCLOS

[27]*United Nations Convention on the Law of the Sea, 1982 - A Commentary*, Vol. III, page 145

Article 94 UNCLOS provides for the possibility of excluding small vessels[28] from national registers "to avoid imposing onerous requirements on small local vessels or pleasure boats which, because of their small size, would not normally be used outside coastal waters."[29]

The Ship Registration Bill differs from the draft bill and the MSA in that it provides for small vessels[30] to be registered if they have certain ownership or *operational* characteristics. The Bill also introduces the concept of "South African residents" for small vessels. The intention appears to be to limit the registration of small vessels to those which are locally controlled and operating around the coast of the Republic. In terms of the Ship Registration Bill, small vessels are entitled to be registered if they are either wholly owned by South African residents or both South African residents and South African nationals; or if they are operated solely by South African residents or South African nationals or both.[31] The "resident" requirement is less stringent than the "national" requirement as regards natural persons. A "resident" does not have to be a citizen of the Republic but, unlike a "national", must have either a permanent place of abode in the Republic[32] or must be domiciled in the Republic.[33] The qualification requirements for a "resident" juristic person are at the same time more and less strict than those for a "national". The former must have its *principal* place of business in the Republic, but unlike the latter need not have been incorporated in the Republic.[34] A resident may also be a trust if the

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[28]Which are not defined otherwise than as regards their exclusion from generally accepted international regulations.

[29]*United Nations Convention on the Law of the Sea, 1982 - A Commentary*, Vol. III, page 146

[30]Defined in section 1(xxxvi) in the same manner as in the draft regulations and the MSA 1951 as a vessel of less than 25 gross tons and of more than three metres in length.

[31]Section 16(b) of the Ship Registration Bill

[32]Section 1(xl)(a) of the Ship Registration Bill

[33]Section 1(xl)(b) of the Ship Registration Bill. A distinction is drawn between permanent place of abode and domicile and the person who has a permanent place of abode outside the Republic cannot rely on the domicile requirement to qualify as a SA resident.

[34]Section 1(xl)(c) of the Ship Registration Bill

majority of that trust's trustees and beneficiaries are South African residents.[35]

If unregistered, a small vessel which is entitled to be registered will nevertheless be a South African ship and have South African nationality.[36] However, in order to operate from a port in or from anywhere else on the coast of the Republic, a small vessel will have to be licensed.[37] This would cater for the apparent lack of control which would result if the draft bill and regulations were implemented in its present form.[38] The new section 68 MSA, which Schedule 2 to the Ship Registration Bill will introduce, seems to suggests that the licence which an unregistered small vessel must possess is a licence in respect of the owner or master of the vessel. The intention, however, was surely that the vessel and not its owner or master must be licensed.

MORTGAGING OF SMALL VESSELS

Although it appears from the wording of section 47(1) MSA that a mortgage comes into existence on the mere completion of the prescribed form[39] and although there is no obligation to register a mortgage which has been so created, the efficacy of such a mortgage is dependant on the subsequent recording thereof on the relevant ship's register.[40] Because small vessels (i.e. those of less than twenty-five gross tons) are required to be licensed under the MSA, it is the view of the Department of Transport that such vessels cannot be registered on the ships' register and, accordingly, cannot have mortgages registered against them.

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[35]Section 1(xl)(d) of the Ship Registration Bill

[36]Section 3 of the Ship Registration Bill

[37]See paragraph 7 of Schedule 2 to the Ship Registration Bill which provides for the substitution of section 68 MSA with a new section.

[38]Section 72 MSA 1951 will continue in force if the Ship Registration Bill is implemented - see section 60 of the Bill.

[39]This is accepted as being the case under the British Merchant Shipping Act, 1894, which is similarly worded. In English law there is no requirement to register a mortgage. Failure to do so does not render the mortgage void (*Maritime Law*, Hill, 27).

[40]Sections 49, 50, 51 and 52, MSA

According to the Department of Transport, the MSA only makes provision for the recording of mortgages against ships which have been registered. This is no doubt correct. There can be no registration of a mortgage in terms of the MSA in respect of a ship which is unregistered. However, section 11 MSA (which deals with the registration of ships) makes no distinction between small and large vessels. It refers simply to "ships" and a ship is defined in the Act as "any vessel used for transportation or any other purpose on or under the surface of the water".[41] Section 11 MSA does not expresssly or by necessary implication prohibit the registration of small vessels. On the contrary, the plain meaning of the section would be to include of small vessels. Only the obligation to register a ship (section 13, MSA) is reserved for ships of twenty-five or more gross tons. Nor is the plain meaning of section 11 disturbed by the provisions of any other section in the Act. Section 68 MSA, which prescribes the requirements for the licensing of small vessels, specifically refers to small vessels which are registered as ships in the Republic or elsewhere as being exempted from the licensing requirement. Section 68 therefore anticipates that small vessels are able to be registered on the South African ship's register. According to the Department's interpretation of the Act, section 68(1)(a)(ii) MSA is, at least to the extent that it refers to small vessels which are registered as ships in the Republic, without any meaning. There is no reason to suppose that the legislature inserted these words by mistake and it is a "cardinal rule" of the interpretation of statutes[42] that every word, phrase and sentence (not added by mistake) has a meaning to which the courts must give effect.[43]

The MSA clearly provides for the registration of small vessels and, secondarily, in the event of their not being registered, for their licensing. It follows that the possibility of a mortgage

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[41]Section 2, MSA

[42]per Ogilvie Thompson JA in *Secretary for Inland Revenue Somers Vine* 1968 (2) sa 138 (AD) at 156

[43]As Kotze JA said in *Attorney-General, Transvaal v Additional Magistrate, Johannesburg* 1924 AD 421 at 436, "to hold certain words occurring in a section of an Act of Parliament as insensible, and as having been inserted through inadvertence or error, is only permissible as a last resort". The learned Judge quoted Cockburn CJ who said in *Q v Bishop of Oxford* 4 QBD 261 that "a statute should be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant".

being registered in respect of a small vessel does - notionally - exist. However, until a Court issues a declarator or an order directing the Department of Transport to register a mortgage over a small vessel, the true position on a proper construction of the Act is cold comfort to persons wishing to raise finance on small vessels.

The law relating to mortgages in respect of South African ships is, insofar as it is not regulated by statute, English law as at November 1983.[44] English law recognises "equitable mortgages" in respect of unregistered ships. The question thus arises whether such mortgages can find a place in South African admiralty law, particularly in regard to the hitherto unregistrable small vessels.[45]

The answer as to the existence of equitable mortgages in South African admiralty law is to be found in the wording of section 47 MSA. That section deals with how a ship or a share therein is to be mortgaged. It requires that every mortgage of a ship or share be in the prescribed form. Although section 47 obliges the proper officer at the ship's port of registry to record the mortgage in the register, the section does not require registration of the deed of mortgage to be effective. The wording of section 47(1) suggests that registration is not necessary to create an effective mortgage. The fact that the MSA refers only to registered mortgages and the consequences of such registration does not mean that mortgages which are in the prescribed form but are not registered have no legal effect. The MSA is simply specifying the legal effect

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[44]Admiralty Court Acts of 1840 and 1861 of the United Kingdom, sections 3 and 11 respectively, read with section 6 of the Admiralty Regulation Jurisdiction Act, 105 of 1983

[45]*Maritime Law*, supra, page 26, describes equitable mortgages as any mortgage relating to ships or shares other than the statutory legal mortgages: "Simply put, an equitable mortgage is that which a mortgagee has if he has merely received an *equitable* interest. it could be described as a mortgage created otherwise than by deed. If an equitable mortgage is effected on a registered ship, or shares therein, the big disadvantage is that it cannot be taken into account when deciding the priorities in relation to other legal (and properly registered) mortgages of that same ship or share(s). Typical circumstances where equitable mortgages can and do exist are: (1) on an unregistered British ship or a share in such; (2) on foreign vessels; and (3) on unfinished vessels. As unfinished vessels cannot be registered, so also no mortgage on them is capable of being registered."

of registered mortgages. Since English law has at all material times recognised equitable mortgages there is no reason why, in the light of section 6 of the Admiralty Jurisdiction Regulation Act, they should not exist in South African admiralty law. The relevant South African legislation relating to mortgages is modelled on the British Acts and in English law there has been no conflict between the existence of both registered and unregistered equitable mortgages.[46] What can be said with more conviction is that in order to come into existence an equitable mortgage in respect of a South African ship will have to be in the prescribed form. In other words, a mortgage in the prescribed form, but not yet registered is probably effective as an equitable mortgage.

A major advantage of a small vessel being permitted to register as a ship, as proposed in the draft bill and in the Ship Registration Bill, will be that she will be able to have mortgages registered against her. Section 8(1) of Schedule II to the draft bill provides for a "registered ship or share in such a ship" to be mortgaged an the approved form. The Ship Registration Bill also provides for the mortgaging of registered ships. However, it is possible that small vessels may yet be excluded from the privilege of being the subject of a mortgage. Section 11(3)(d) of the draft bill allows for regulations to be made which will "make provision for the registration of any class or description of ships to be such as to exclude the application of the private law provisions for registered ships and, if they do, may regulate the transfer, transmission or *mortgaging* of ships of the class or description so excluded".[47] Section 56(3)(c) of the Ship Registration Bill has a similar provision. The exclusion of the private law provisions from that part of the register reserved for small vessels appears to have in fact occurred in the United Kingdom.[48]

FISHING BOATS

Both section 13 MSA (ships) and section 68 MSA (small vessels) require a vessel which complies with the requirements for registration or licensing to be registered or licensed "in

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[46] *The Angel Bell* [1979] 2 Lloyd's rep 491

[47] Emphasis added

[48] *Current Law - Statutes Annotated*, 1995, Vol. 2, page 21-36

terms of this Act". However, at the time the draft bill was published, the licensing of fishing boats *for the purpose of fishing* was regulated not by the MSA, but by the Sea Fishery Act, No. 12 of 1988.

In terms of section 7(2) of the the Sea Fisheries Act 58 of 1973 the Director of Sea Fisheries was obliged to grant an application for the registration of a boat for a particular fishing harbour if he was satisfied that the applicant was the owner of the boat in question and that the boat was registered or licensed in terms of the MSA. The Sea Fishery Act, No. 12 of 1988, which repealed the Sea Fisheries Act of 1973, did not refer to the MSA and the registration or licensing of vessels thereunder. The system of licensing in terms of the Sea Fishery Act of 1988 was distinct from and not dependent upon the system of registration and licensing under the MSA. Licensing in terms of the Sea Fishery Act was the fundamental control mechanism in limiting fishing efforts in South African waters.[49] It had no bearing on the private and public law functions of registration in terms of the MSA. Similarly, the MSA never has been the vehicle for regulating the exploitation of South Africa's living marine resources.

The Sea Fishery Act of 1988 provided that no person may use any vessel as a fishing boat or factory unless it had been licensed in terms of section 30 of the Act or unless a permit had been issued in terms of section 52. Any person who desired to use any vessel as a fishing boat or factory had to apply in the prescribed manner to the director-general: Environment Affairs for the issue of a licence.[50] A licence was issued subject to, *inter alia*, the allocation, to a fishing boat, of a registration number. The licensing of fishing boats and factories was dealt with in regulations 3 and 4 of the regulations promulgated in terms of the Sea Fishery Act, 1988.[51]

Section 1 of the Sea Fishery Act defined a "fishing boat" as any vessel which is used by a fisherman for catching fish or which is used for the transport or processing of fish caught by a fisherman. A "fisherman" was defined as a person who catches or attempts to catch fish on

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[49]See Fuggle and Rabie, *Environmental Management in South Africa*, chapter 14, particularly paragraph 14.5.2.3

[50]Sec 30(2) of Act 12 of 1988

[51]RG No. 4967 of 23 October 1992

a full-time or part-time basis, whether such fish is found in the sea or in or on the sea-shore, with the purpose of selling or attempting to sell or otherwise disposing or attempting to dispose of such fish at a consideration, including a person assisting therewith. The definition of "factory" included a fishing boat in or on which fish which is caught off such boat is only gutted, salted or chilled for the preservation thereof. "Fish" meant every species of sea animal, whether vertebrate or invertebrate, including the spawn or larvae of such sea animal, excluding any seal or seabird. Accordingly, the definition of "fish" included whales and the definition of "fishing boat" included whaling boat.

In terms of the MSA, a fishing boat is any ship engaged in sea fishing for financial gain or reward, but does not include any sealing boat or whaling boat.[52]

In the draft bill provision is made for a separate part of the ship's register to be allocated to fishing vessels.[53] The draft regulations give effect to the requirement that the register distinguish such vessels from other ships - Part II of the proposed register is to be set aside for fishing vessels.[54] This is at first glance a sensible distinction, particularly bearing in mind that different registration requirements could be - and in fact are - imposed as regards the registration of fishing vessels. Again, this is understandable; the marine resources of South Africa's exlusive economic zone belong to the Republic and the draft bill would seek to reserve them for South Africans. However, this is the beginning of the blurring of the distinction between registration for the purpose of establishing the right to a flag and as proof of title, on the one hand, and registration for the purpose of fishing on the other. It was in terms of the Sea Fishery Act that South Africa's fishing policy was manifested. Registration could at most be a tool in the implementation of that policy. Yet, in the draft bill and regulations, the function between registration as a fishing vessel and registration for the purpose of carrying out fishing becomes indistinct.

At present, in terms of the MSA 1951, only ships wholly owned by South Africans and/or

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[52]Section 2 MSA

[53]Section 3(4)

[54]Regulation 3 of the draft regulations

South African companies are entitled to be registered in the Republic.[55] The effect of draft regulation 5(2), read with draft regulation 6(1)[56], would be to perpetuate this state of affairs in respect of fishing vessels.[57] Draft regulation 5(1) defines persons qualified to own South African ships in the same way as the 1951 MSA, namely as South African citizens and corporate bodies incorporated in the Republic and having their principal place of business in the Republic. Draft regulation 5(2), which provides that under certain circumstances unqualified persons may become owners of South African ships, specifically excludes fishing vessels from its ambit. Accordingly, any ship, other than a fishing vessel, is entitled to be registered as a South African ship if a majority interest in the ship is owned by qualified persons. In terms of the draft regulations, however, a fishing vessel must be *wholly* owned by qualified persons before it may be registered.[58] The only exception is in respect of fishing vessels of less than 25 gross tons which are not propelled by an engine.[59] Such fishing vessels, in order to qualify for registration, need only a majority of qualified persons as owners.[60] Draft regulations 6(3) and 6(4) set additional residency and management requirements which are applicable to all fishing vessels. This is presumably to ensure that companies are not incorporated in the Republic for the sole purpose of owning a fishing vessel which can then be registered on the new register. The MSA (UK) 1988 went further in requiring that, where a fishing vessel is owned by a company or companies, a certain percentage of its shares (taken as a whole), and of each class of its shares, is legally and beneficially owned by one or more qualified persons

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[55]Section 11(1) MSA

[56]As currently worded. It must be borne in mind that the draft regulations are subject to change by Executive decree.

[57]Only fishing vessels (unless specifically exempted) are required to be wholly owned by qualified persons.

[58]Draft regulation 6(1)

[59]Draft regulation 2

[60]Draft regulation 6(1) read with draft regulation 2. The reason behind this relaxation of the strict registration requirements for small fishing vessels is not clear. No doubt the fishing vessels at which it is directed are those owned by the fishing communities around the country. Was the intention of the drafters of the draft bill and regulations to make it easier for members of such communities to register their fishing boats?

or companies before that vessel is eligible to be registered.[61] This approach in the UK was dictated by the practice of "quota hopping" - the re-registration of fishing vessels under the British flag in order to take advantage of British fishing quotas allocated under the Common Fishing Policy of the European Community.[62] It is not a problem experienced in the Republic, but it appears that the draft bill draws its inspiration in large measure from the recent UK merchant shipping legislation.

Section 4(2)(b) of the draft bill makes provision for the registration of a fishing vessel notwithstanding that it is not fully owned by qualified persons, "if the vessel otherwise has a South African connection".[63] The exception provided for in draft section 4(2)(b), although differently worded and although the authority to dispense with the requirements for registration is given to another person, is also contained in draft regulation 7.[64]

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[61]Section 14(2)(b) MSA (UK) 1988

[62]*Current Law - Statutes Annotated*, 1995, Vol. 2, page 21-30

[63] Draft section 4(2)(b) provides that the Chief Director, Chief Directorate: Shipping of the Department of Transport may, "if regulations so provide, register a fishing vessel notwithstanding that the requirement of subsection (1)(a) is not satisfied in relation to a particular owner of a share in the vessel if the vessel otherwise has a South African connection." Draft section 4(1)(a) provides that a ship is entitled to be registered if it is owned, to the prescribed extent, by persons qualified to own South African ships".

[64]Draft regulation 7 reads:
"Where, in respect of any fishing vessel, the Director-General is satisfied that-
(a) the vessel would be entitled to be registered but for the fact that any particular individual, or as the case may be each of a number of particular individuals, is not qualified to be an owner of a South African ship under regulation 5(1); and
(b) it would be appropriate to dispense with that requirement in the case of that individual or those individuals, in view of the length of time he or she has or they have resided in the Republic and have been involved in the fishing industry of the Republic,
the Director-General may determine that that requirement should be so dispensed with; and if he or she does so, the vessel shall, so long as paragraph (a) applies to it and any such determination remains in force, be treated for the purposes of registration on Part II of the register as being entitled to be registered as a South African ship."

The real purpose behind the registration of fishing vessels as such on the ship's register is blurred when regard is had to section 6 the draft bill and draft regulations 6(4) and 7. Subection 6(1) provides for offences relating to certain unregistered[65] fishing vessels which fish "for financial gain or reward". Unregistered fishing vessels which are either entitled to be registered under the draft bill or are wholly owned by persons qualified to be owners of South African ships which engage in such activity also become liable for forfeiture.[66] By prohibiting fishing by unregistered fishing vessels, draft sub-section 6(1) seems to suggest that, once registered on the ship's register, fishing vessels are otherwise free to engage in fishing. This interpretation is strengthened by the provisions of draft sub-section 6(2) which states that sub-section 6(1) shall not apply to fishing vessels of such classes or descriptions or in such circumstances as may be prescribed. Clearly the draft bill and regulations are intended to form part of the regulatory framework affecting fishing in South African waters. However, they cannot do so on their own in their present form. Nor was it the intention of the drafters of the draft bill and regulations that the legal dispensation so created will replace the Sea Fishery Act of 1988. Rather, an inter-relationship between the two will be established. This appears from draft regulations 46(1)(e) and (f).[67] As it stands, however, the draft bill and regulations encroached upon the domain of - then in force - Sea Fishery Act, which[68] had its own policy for regulating the exploitation of marine resources, based of the issuing of quotas. A split administrative regime was being created. The consequence of the current lack of harmony between the relevant legislation could have been that a person to whom a quota had been issued would have been unable to use it because his fishing vessel could not be registered as a South

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[65] Either under the draft bill or under the law of a foreign state.

[66] Section 6(1) of the draft bill

[67] They provide that the registrar may terminate a ship's registration when a registered fishing vessel which has been licensed to fish under the Sea Fishery Act ceases to be so licensed for a continuous period of six months or more; or when a fishing vessel which requires a licence to fish under the Sea Fishery Act, but at the time of registration did not have such a licence and has not acquired such a licence within six months of the issue of its certificate of registry.

[68] Apart from the managerial aspects of the Sea Fishery Act, in which fisheries management principles are incorporated, the Act also has criminal aspects by which it seeks to enforce control of fishing.

African vessel, being part-owned by a foreigner.

The conflict between the draft bill and the Sea Fishery Act extended to the terminology employed by each. In terms of the draft bill, a "fishing vessel" means any vessel used (or, in the context of an application for registration) intended to be used for or in connection with catching fish or other living resources of the sea for financial gain or reward, excluding a vessel for the time being used (or intended to be used) wholly for the purpose of conveying persons wishing to fish for pleasure. This definition is more extensive than that of "fishing boat" in the MSA, which does not include sealing or whaling boats. For the purposes of the definition in the draft bill, seals and whales must be regarded as "living resources of the sea".[69] The definition of "fishing vessel" in the draft bill is also not co-extensive with that of "fishing boat" in the Sea Fishery Act of 1988, which did not include sealing boats, but which did include whaling boats.[70] Not all fishing vessels, as defined in the draft bill, will qualify as ships in so far as they are propelled by oars.[71] The Sea Fishery Act had no such limitation.[72]

Furthermore, in the Sea Fishery Act, a vessel used solely for the purposes of transporting or processing fish caught by a fisherman was included in the definition of "fishing boat". In the draft bill, a "fishing vessel" is a vessel used "for or in connection with" the "catching" of fish. This would not necessarily include a vessel used for the transporting or processing of fish.

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[69]The draft bill, while referring to "fish or other living resources of the sea", contains no definition of "sea". Presumably it would follow either that contained in the Sea-Shore Act, No. 21 of 1935 or in the Sea Fishery Act. The latter's definition of "sea" has recently been amended to include the water and beds of tidal rivers and tidal lagoons and in this respect no longer conflicts with the Sea-Shore Act, No. 21 of 1935.

[70]See the definition of "fish" in the Sea Fishery Act No. 12 of 1988

[71]See definitions of "fishing vessel" and "ship" in section 1(1) of the draft bill

[72]The Sea Fishery Act, section 1, defines "fishing boat" as any vessel which is used by a fisherman for catching fish or which is used for the transport or processing of fish caught by a fisherman.

As regards the technical aspects of the draft bill, the wording of section 6 (relating to fishing vessels) is cumbersome. It provides that an offence is committed if an unregistered fishing vessel which is entitled to be registered on the South African register "fishes for financial gain or reward". By its very definition, however, a fishing vessel is any vessel used for or in connection with the catching of fish for financial gain or reward. Furthermore, section 6(1)(a)(ii) which refers to fishing vessels "wholly owned by persons qualified to be owners of South African ships", would appear to be unnecesary in the light of section 4 of the draft bill.[73] A ship which is owned to the "prescribed extent by persons qualified to own South African ships" is always entitled to be registered.[74] The "prescribed extent" obviously cannot be more than "wholly owned" and might well be less.

Section 6 applies to things done outside, as well as within, the Republic[75] and, accordingly, would apply within South Africa's exclusive economic zone.

Unlike the draft bill, it appears that the Ship Registration Bill will in all respects leave the regulation of fishing to the Marine Living Resources Act, No. 18 of 1998 ("the MLRA"). The provisions of the Ship Registration Bill govern fishing vessels only to the extent that they govern the private and public law aspects of ship registration generally. Furthermore, the Ship Registration Bill avoids the problems faced by the draft bill by providing that a fishing vessel is to be defined in the same way as in the MLRA.[76] And, instead of setting out the conditions which entitle fishing vessels to be registered, the Ship Registration Bill also leaves that to the MLRA. The Ship Registration Bill provides only that a fishing vessel that is owned, or owned and controlled, as provided in the definition of local fishing vessel in section 1 of the MLRA,

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[73]Section 6(1) provides that if a fishing vessel which (a) is either (i) entitled to be registered or (ii) wholly owned by persons qualified to be owners of South African ships, but (b) is registered neither under this Act in that part of the register relating to fishing vessels nor under the law of a foreign state, fishes for financial gain or reward then the vessel shall be liable to forfeiture and the skipper, the owner and any charterer of the vessel shall each be guilty of an offence.

[74]Section 4(1)(a) of the draft bill

[75]Section 6(3) of draft bill

[76]Section 1(x) of the Ship Registration Bill

is a South African-owned ship.[77]

NEWBUILDINGS

A "ship", as defined in section 2 of the MSA 1951, is any vessel used for any purpose on or under the surface of the water. A "vessel", as defined in section 2 MSA, is a ship or boat or other description of vessel used or designed to be used in navigation. Notwithstanding the apparent ambiguity in the phrase "designed to be used", it is clear that only finished constructions qualify as ships or vessels for the purposes of the MSA. And only such completed ships or vessels may be registered. This interpretation is supported by a textual approach, having regard, in particular, to section 10 MSA on newbuildings.

Written particulars of every vessel which when completed will be required to be registered or licensed in terms of the MSA must be furnished by the person who intends to build a vessel which when completed will be required to be registered or licensed in terms of the MSA.[78] The purpose of this notification is to afford the Department of Transport an opportunity to appoint its own surveyor or an internationally acceptable Classification Society surveyor to monitor the vessel's construction and to ensure her compliance with the current Safety Construction Regulations and the International Safety of Life at Sea (SOLAS) requirements.[79] This section does not affect the future operation of newbuildings by giving South African built ships advantages over foreign built ships since there is no limitation to foreign built ships operating

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[77]Section 1(xli) of the Ship Registration Bill. The MLRA defines a "local fishing vessel" as "any fishing vessel registered in the Republic which is -
(a) wholly owned and controlled by one or more South African persons;
(b) wholly owned by the State;
(c) wholly owned and controlled by any body corporate, society or other association of persons incorporated or established under the laws of the Republic and in which the majority of the shares and the voting rights are held and controlled by South African persons; or
(d) wholly owned by a body corporate designated as an authorised body corporate by the Minister".

[78]Section 10 MSA

[79]*South Africa - A Maritime Business Location*, supra, 44

in South African waters or in conveying South African cargo.[80]

There is no requirement in the draft bill for notification regarding newbuildings. There is not even provision for voluntary notification of the particulars of newbuildings. This is a shortcoming. It would be beneficial to have a separate part of the register for ships under construction. For example, it could subsequently assist in ascertaining or proving the ownership of the vessel to have regard to her newbuilding registry[81]. This matter has been partially remedied in the Ship Registration Bill, which provides for notification in respect of a newbuilding.[82]

Since it is apparent from the draft bill that registrable mortgages are limited to ships which have already been registered,[83] and since on a proper interpretation of "ship" in the definition section of the draft bill,[84] registration is limited to completed ships only,[85] it follows that mortgages cannot be registered over ships while they are still under construction. The position appears to be the same under the Ship Registration Bill.[86] In particular, "priority notices" - an innovation introduced by the draft bill and regulations to cater for the situation where an

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[80]This is in accordance with the modern position. In the past, some countries sought to develop their shipbuilding industry by limiting registration to locally built ships. Until World War I the USA register was closed to foreign-built ships, even those owned by Americans. However, the war meant that there were too few locally-built ships and, after the American policy had been reversed, many foreign-built ships were quickly placed under the American flag.

[81]In *The "Akademik Fyodorov: Govt of the Russian Federation v Marine Expeditions Inc* 1996 (4) SA 422 (C) the history of the relevant vessels, including at whose behest their construction took place, was very important in determining their eventual ownership.

[82]Paragraph 4 of Schedule 2 to the Ship Registration Bill provides for an amended section 10 MSA.

[83]Section 8(1)

[84]Section 1(1)

[85]This is the same as the position under the current MSA and the British Merchant Shipping Act 1894.

[86]Section 9 of Schedule 1 to the Ship Registration Bill

intending mortgagee wishes to establish the priority of his mortgage - do not apply to ships under construction.[1] Accordingly, the person financing the construction of a ship must rely on some other form of security than a mortgage. The laws of many countries now make provision for mortgages on ships under construction, and provision is further made for the transfer of the mortgage to the ordinary ship's register upon completion of construction.[2] South African law should follow suite. Shipbuilding is an expensive business and persons should not be discouraged from providing assistance by the absence of suitable security. Article 1 read with article 5 of the Convention Relating to Registration of Rights in Respect of Vessels Under Construction, 1967, requires the contracting parties to establish a separate register for such ships where mortgages can be entered.

BAREBOAT CHARTER REGISTRATION

The draft bill contains new provisions, not foreshadowed in the current MSA, relating to ships which may be registered on the proposed South African shipping register notwithstanding that they are not owned by anyone qualified to own a South African ship. In terms of the draft bill a ship may be registered on the South African register if she has been demise-chartered by persons qualified to own South African ships. These are the "bareboat charter" provisions contained in the draft bill. The precise details of the demise-charter will be left to the contracting parties,[3] provided the effect of the contract establishes a bareboat charter.

In a bareboat charter the charterer hires the vessel and assumes possession and control of her. The master and crew are generally recruited by the charterer and are answerable to the charterer, not the ship owner. The charterer is hiring not the use of the vessel for a specific period or a voyage, he is hiring the vessel herself. The contract is in the nature of a lease. The charterer stands in the place of the ship owner for the duration of the charter. In the draft bill a bareboat charter is defined as "the hiring of a ship for a stipulated period on terms which

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[1]Draft regulation 56(3) could conceivably have applied if priority notices were not limited to "ships" which, in terms of the definition in the draft bill, does not seem to include a ship under construction.

[2]*Shipping Law*, supra, para 6.7.2

[3]In accordance with article 12(5) UNCCORS

give the charterer possession and control of the ship, including the right to appoint the master and crew".[4] This approximates to the definition in article 2, UNCCORS.[5]

Chapter III of the draft bill makes provision for ships, registered elsewhere, to be registered as South African ships for so long as they have been bareboat chartered-in by persons "qualified to own South African ships".[6] Part IV of the proposed register is to be set aside for bareboat chartered ships.[7] However, one wonders why, if the draft bill prescribes that a separate part of the register is to be maintained for fishing vessels, a similar stipulation does not exist for bareboat chartered ships. Bareboat registration, which is also known as parallel registration,[8] is an innovation in so far as South African shipping law is concerned. Bareboat registration distinguishes between the state of registration, which could be any other state (the Underlying Flag Registry), and the flag state, which will be South Africa (the Charter Registry). It follows developments world-wide which began after the Second World War when Germany, as part of its post-war reconstruction, permitted vessels that had been forfeited to the allies or taken as prize, to be repatriated by means of 'chartering in'.[9] Many countries now have bareboat charter registries.[10] The practice is recognised in Articles 11 and 12 of the United Nations Convention on Conditions for Registration of Ships, 1986,[11] and the 1993

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[4]Sec 10 of Draft bill

[5]Where a bareboat charter is defined as "a contract for the lease of a ship, for a stipulated period of time, by virtue of which the lessee has complete possession and control of the ship, including the right to appoint the master and crew of the ship, for the duration of the lease".

[6]Section 9(1) of draft bill

[7]Draft regulation 3(1)(d)

[8]*South Africa - A Maritime Business Location*, supra, 58

[9]*ibid*

[10]See, for example, the British Merchant Shipping (Registration of Ships) Regulations 1993. The Philippines, Germany, The Isle of Man, Australia, France, Italy, Panama, Poland, St Vincent and the Grenadines, Spain, Liberia, Cyprus, and others, also have bareboat charter registries.

[11]The 1986 Convention on Conditions for Registration of Ships even draws a distinction between the "flag state", which is defined as the state "whose flag a ship flies and is entitled

United Nations International Convention on Maritime Liens and Mortgages.

Bareboat charter registration can serve a number of purposes. States which do not have the financial resources for the purchase of ships benefit from being able to flag ships which have been chartered-in. Apart from the prestige involved in having a large fleet, the chartering-in state is able to stipulate manning requirements, thereby ensuring work for its citizens both on board the ships as seamen and ashore in supply and repair facilities.[12] It adds to the development of skills, the learning of technology and the earning of foreign exchange.[13] By the same procedure, charterers are able to build up a fleet without capital expenditure. On the other hand, shipowners who do not wish to pay the minimum wages laid down by their own - usually developed - countries can flag out their ships to countries were crewing costs are low.[14] Since the ships would be regarded as ships of the state with the low-wage economy they could, to the extent of the manning requirement, avoid being labelled as ships on a convenience register. Moreover, while reducing operating costs by making use of a charter registry, the shipowner can enjoy the "stability, status and security" of an underlying flag registry; such guarantee may well be necessary to satisfy the ship's financiers.[15] Other reasons for ship owners flagging out their ships is "to take advantage of subsidies or cargo reservations in favour of national carriers in the flag State",[16] or it may be part of the shipowner's tax minimisation efforts.[17]

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to fly" and the "state of registration", which is the state "in whose register of ships as ship has been entered". However, this distinction is not employed in the articles dealing with bareboat charter registration.

[12] *Ship Registration*, supra, page 33

[13] *ibid*

[14] *ibid*

[15] *South Africa - A Maritime Business Location*, supra, 58-9 where it is put as follows: "Because of a desire to secure access to capital markets, insurance and to display security, a shipowner may seek to own his assets in a commercially acceptable and secure jurisdiction, but to operate and manage the same vessel under a more economic, efficient and flexible flag."

[16] *Ship Registration*, supra, page 34

[17] *Tax Havens and Their Uses*, Caroline Doggart, The Economist Intelligence Unit Ltd (EIU Special Report No. 105), page 39. The strategems employed by shipowners are many, and take advantage

In terms of the draft bill only ships of more than 25 gross tons qualify to be registered as bareboat charter ships.[18] The conditions for registration of such ships differ in one major respect from those governing the ordinary registration of ships by their owners as provided for in Chapter I of the draft bill.[19] In terms of section 9(1)(b) of the draft bill it is clear that only ships chartered to a person who is qualified to own South African ships may be registered as a South African ship. There is no provision for the position where a majority of persons bareboat chartering a vessel are qualified persons.

In addition, by virtue of section 9(5) of the draft bill, the provisions of draft section 4(4) are not to apply to chartered-in ships. Draft section 4(4) expands upon the phrase "relevant requirements of the Shipping Acts" which is employed in section 4(2) of the draft bill and its inapplicability to ships being chartered-in suggests that the registrar cannot have regard to those requirements to refuse to register a chartered-in ship or terminate the registry of such a ship. Yet, section 4(2) of the draft bill, which does apply to chartered ships, grants the registrar the power to refuse to register a ship or terminate the registration of a ship having regard to any

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of ship registration developments, including bareboat charter registration:

> "Once the ship is built the avoidance opportunities become even more bewildering. To begin with, the management company has the choice of operating the ship on its own account, leasing it or bareboat chartering it. The various operations may be carried out through several companies belonging to the same group, but situated in different countries with tax regimes favourable in each particular operation. Leasing, for example, offers all sorts of interesting tax possibilities, such as getting a full depreciation allowance for both the lessor (who under UK law, for example, retains ownership) and the lessee (who under, say, Netherlands law, gains economic ownership and can claim his own depreciation). Finally, any profits derived from shipping operations can either be routed through a tax haven with no taxes, or through a company in a high-tax country with a good double taxation treaty network."

[18]Section 9(1) of the draft bill and draft regulation 60(1)

[19] Sections 9(1),(2) and (3) of the draft bill and regulation 60(1) of the draft regulations. The position regarding fishing vessels is a little confused, but the intention appears to be to regard such vessels in the same way, whether registration is sought by an owner or charterer. See, in this regard, draft regulation 62.

relevant requirements of the Shipping Acts, if regulations so provide. And draft regulation 68(4) expressly provides for the registrar to refuse to register a chartered ship "if, taking into account any requirements of the Shipping Acts relating to the condition of the ship or its equipment so far as relevant to its safety or to any risk of pollution or to the safety, health and welfare of persons employed or engaged in any capacity on board the ship, he or she considers that it would be inappropriate for the ship to be registered." Draft regulation 73(1)(d), which deals with the closure of a chartered ship's registration by the registrar is in similar terms. Both coincide with the terms of section 4(4) of the draft bill. Accordingly it does not in fact appear that ships chartered-in onto the South African register will have any less stringent criteria to meet. The reason for excluding section 4(4) from applying to chartered ships is unclear; such exclusion serves no purpose.

There is another apparent difference between the registration requirements for chartered-in ships and those owned by qualified persons under the draft bill. A ship bareboat chartered to a person qualified to own South African ships is only entitled to be registered if such "modifications" to the conditions as may be prescribed for ordinary registration in terms of section 4(1)(b) of the draft bill have been satisfied.[20] These modifications are to be satisfied by both the charterer as well as the ship.[21] The requisite modifications will substitute[22] any requirement to be satisfied by shipowners with "a corresponding requirement to be satisfied" by the charterers of ships seeking registration. The difference is semantic. It is not intended to lead to different conditions for registration being applied to charterers and owners. The obligations to be met by charterers and owners will be the same, even when chartered in ships are exempted from paricular requirements of the Shipping Acts.[23] Ships do not require more or less of a South African connection depending on whether registration is pursuant to

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[20]Sections 9(1)(c) and 9(2) read with section 4(1)(b) of the draft bill

[21]Section 9(1)(c) of the draft bill

[22]The "requisite modifications" are not additional conditions for registration, but will simply substitute references in section 4(1)(b) to "owner" with "charterer".

[23]Draft section 9(8). Any such steps taken by the Minister "shall not have the effect of relaxing the relevant requirements of the Shipping Act contemplated in section 4(2) in their application to a [chartered-in] ship" - draft section 9(9).

ownership or chartering-in. And since South Africa is in both instances conferring its nationality on, and the right to fly its flag to, the ships concerned there would be no logical basis for any discrimination.

Throughout the charter period (being the period during which the ship is chartered on bareboat charter terms) the chartered-in ship will be in law a South African ship[24] and will be entitled (and obliged) to fly the South African flag.[25] She will have all the privileges and liabilities of a ship of South African nationality.[26] She will be entitled to South African naval protection and South African nationality will determine the application of rules of war in times of hostilities. South African public law will apply to her, although the Minister of Transport may exempt her from any law or may determine that any law will apply with such modifications as has been specified by notice in the Government Gazette.[27] South African laws will govern the running of the ship, the crewing and discipline on board, safety requirements and the powers of enforcement.[28] As the flag state South Africa will have to ensure that all bareboat chartered-in ships are subject to its full jurisdiction and control.[29]

Only South African private law provisions for registered ships will not apply to chartered-in ships. Section 9(7) of the draft bill provides that:

> "any matters or questions corresponding to those for which the private law provisions for registered ships make provision shall be determined by reference to the law of the state of original registration."

Accordingly, questions of ownership and mortgage, being private law matters, are dealt with

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[24]Draft section 9(6)(a)

[25]Sec 9(6)(a) of Draft Bill

[26]In accordance with article 12(4) UNCCORS - "A State should ensure that a ship bareboat chartered-in and flying its flag ... will be subject to its full jurisdiction and control."

[27]Draft section 9(8)

[28]Draft section 9(6), 9(8) and 9(9)

[29]Art 12(3) UNCCORS

in terms of the law not of the charter registry, but that of the underlying flag registry. This is notwithstanding the fact that for the duration of the bareboat charter the charterer stands in the place of the owner (sometimes being referred to as the disponent owner) and that for the purposes of the 1986 registration convention the charterer is considered the owner.[30] The provisions of section 9(7) are aimed at resolving any conflict between the two legal systems applying to a ship which has been flagged out. This conforms with the desires of the financial community to have such matters as the enforcement of their security determined by the law in terms of which such security was created.[31] It is also in accordance with article 16 of the UN Convention on Maritime Liens and Mortgages.

When a chartered ship is registered on the charter registry, but encumbrances are registered on the underlying flag registry, there is a danger that third parties dealing with the chartered ship will be unaware of such charges. This is even more so if the ship is registered under a different name on the charter register, as may happen.[32] The draft regulations, as presently framed, do not require the charterer to produce evidence of any mortgages or other encumbrances registered against the vessel when applying for bareboat charter registration. Although it would appear to be a matter more for the state of underlying flag registry to decide whether it will require information regarding mortgages to be endorsed on the charter register before it will permit the flagging out of its ships, it is a matter that could also have been dealt with in the draft bill and regulations. Instead, the drafters of the draft bill appear to have adopted the view that charges against a ship on her register of original title can be determined once that registry is known to the intending mortgagee, Knowledge of the underlying flag

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[30]Article 12(3) UNCCORS specifically provides, however, that the Convention "does not have the effect of providing for any ownership rights in the chartered ship other than those stipulated in the particular bareboat charter contract."

[31]*Ship Registration*, supra, pages 34-5; 39-42. In an article in *Lloyd's list* of Wednesday, 1 April 1992, a financial management consultant is reported to consider "bare-boat and charter-back deals as providing imaginative and secure insurance against political upheaval. The arrangement between the Philippines and Panama effectively means that the banks are confident they can enforce their mortgage if necessary under Panamanian jurisdiction, while the ship operator can employ cheap Filipino labour."

[32]*Ship Registration*, supra, page 39

register is facilitated by the obligation on the charterer, on an application for registration, to provide the certificate of registry of the underlying flag register[33]. In addition, the "country of original registration" has to be stipulated in the charter register.[34] This complies with the chartering-in register's international obligations.[35]

The South African nationality of a chartered-in ship ceases automatically on the termination of the charter period.[36] The ship assumes her previous nationality. No formalities are required.

The provisions of the Geneva Convention on the High Seas 1958, UNCLOS, and UNCCORS which stipulate that ships shall sail under the flag of one State only are not necessarily in conflict with bareboat charter registration. These conventions do not prohibit dual registration of ships but they deny to ships the right to have more than one nationality and more than one flag. Thus, Article 6 of the 1958 Geneva Convention on the High Seas provides that: "A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State and may be assimilated to a ship without nationality."[37] The point of bareboat charter registration, however,

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[33]Draft regulation 63(3)(c)

[34]Annex 4, paragraph 7(e) to the draft regulations

[35]See the UN International Convention on Maritime Liens and Mortgages (1993) which requires "cross-reference entries between the register of the State of registration of the vessel and the records of the State whose flag she is temporarily permitted to fly. The entries will, however, be limited to specifying the flag State in the first case and the State of registration in the second case. There is no requirement that mortgages and other charges registered in the State of registration be entered in the records of the flag State, although the Convention does require that the holders of all registered mortgages and charges consent to the flagging-out" (*Ship Registration*, supra, page 41).

[36]Section 9(4) of Draft bill. This accords with article 12(1) UNCCORS, *viz.* that the right to fly the flag of the chartering-in State may be granted by that State only for the period of the charter. The provisions of draft regulation 69(1)(b) are in conflict with draft section 9(4). The former provides for the termination of the registration of a bareboat charter ship at the end of a period of five years if that occurs before the expiry of the charter period.

[37]Article 92(2) UNCLOS is identical. Article 4(4) UNCCORS provides: "Ships shall sail under the flag of one State only."

is that the ship will fly only one flag: that of the state of the person chartering her in. In order to comply with the Geneva Convention of 1958, UNCLOS and UNCCORS, the ship must necessarily lose her previous nationality and acquire that of the "flagging in" state. As long as the ship is under bareboat charter she must be allowed to fly the flag only of the charterer.

Accordingly, bareboat charter registration can be achieved only where the "chartering out" and "chartering in" registries permit the vessel to fly the flag of the latter state. Complementary legislation in the states involved is necessary so that on the chartering out of a ship her initial registration and her right to fly the flag of that registery is cancelled or suspended (at least as regards the matter of nationality), only reviving at the end of the charter period.[38] To this extent the South African bareboat charter provisions will inevitably be dependant on the laws of the country of the ship owner.

The legislation not only of the flagging out state, but also that of the flagging in state should ensure that the ship will not retain its original nationality.[39] In this respect the South African draft bill is lacking. Section 9(5) requires the registrar only to "notify the authority responsible for the registration of ships in the state of original registration of the registration of the ship and of any suspension or termination thereof".[40] The bill should require evidence of the suspension or cancellation of the foreign registration (insofar as a ship's right to fly the foreign flag is concerned) or proof that the foreign registration will be suspended or cancelled.[41] Otherwise it could happen that a ship flying the South African flag, because it is also entitled to fly the flag of another state, will be "assimilated to a ship without nationality".

Although providing for flagging in, the draft bill makes no provision for the flagging out of

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[38] *Ship Registration*, supra, page 37

[39] Article 11(5) UNCCORS

[40] Draft section 9(5); draft regulation 72. Article 12(5) UNCCORS requires that the State where the bareboat chartered-in ship is registered shall ensure that the former flag State is notified of the deletion of the registration of the bareboat chartered ship.

[41] Article 11(5) UNCCORS refers to the "production of evidence, indicating suspension of previous registration".

ships on the South African register.[42] This is understandable having regard to the purpose of the bill, namely to development the South African maritime transport industry. However, it will probably have the effect of forcing South African shipowners to register their ships for all purposes on foreign registers. In that case there is little likelihood that the ships might one day return to the South African register. If ships on the South African register are allowed to be chartered-out this would afford their owners some flexibility. It would allow a ship owned in South Africa to be registered temporarily in a foreign country as a cost-saving measure. It would also ensure that ships would revert to being South African ships at the end of the charter period. It could, however, lead to the lowering of safety and other standards on board the ship chartered-out from South Africa if the new flag of registry does not require or enforce adequate standards.

The Transport and General Workers Union, while recognising that in the interest of trade and seasonal needs it may be necessary for operators to charter-in vessels on occasion, warns that the chartering-in of vessels:

> "... should not become a back-door route to an effective Flag of Convenience, nor should it release the owners of any chartered vessels from their obligations to flag and employment law in the nation of beneficial ownership. Similarly, such should not release the beneficial owner from employing flag-state nationals. No matter how one approaches the issue, the bareboat chartering provisions of the draft legislation, in terms of the beneficial ownership definition, falls foul of the FoC definition."[43]

The Union concludes that "the legislation should not permit the registration of vessels on charter unless such vessel is beneficially-owned in the Republic." However, in so far as the Union labels only the bareboat charter registry provisions of the draft bill a flag of convenience registry it is not being consistent. The requirements for registration on the South African register in terms of the draft bill are more stringent if the ship is chartered-in than if she is

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[42]Nor do the British Merchant Shipping (Registration of Ships) Regulations 1993

[43]*Comment and Submission on the Preliminary Draft Registration of Ships Bill and Registration of Ships Regulations*, supra, page 9

owned by qualified persons. In the latter case, only a majority of owners need be qualified persons. If the bareboat charter provisions fall foul of the flag of convenience definition, then so too should the provisons relating to the registration of ships owned by qualified persons.

The Ship Registration Bill also contains provisions for the bareboat chartering-in of ships. Section 16(c) entitles ships on bareboat charter[44] to South African nationals[45] to be registered. However, the Bill prohibits such a ship from being registered in South Africa unless the owner of the ship and the competent authority in the underlying flag registry consent thereto.[46] The Bill does not limit the size of the vessels which may be chartered-in. The application of the private law provisions for registered ships have been excluded from chartered-in ships.[47] Any matter or question regarding such provisions in respect of chartered-in ships is to be determined by reference to the underlying flag registry.[48]

MORTGAGES

The Shipping industry is capital intensive and the costs of operating ships are high. Mortgage bonds have traditionally[49] provided shipowners with the means for obtaining advances for the building, purchasing and operating their ships, while affording the financiers some security for the monies so advanced.[50] Both ships and shares in them ships may be mortgaged.[51]

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[44]Defined in substantially the same way as in the draft bill

[45]As defined in section 1(xxxviii) of the Ship Registration Bill

[46]Section 19(2)(d) of the Ship Registration Bill

[47]Section 31(9) of the Ship Registration Bill

[48]*ibid*

[49]And certainly since bottomry and respondentia have now become obsolete.

[50]*South African - A Maritime Business Location*, supra, page 61; *Shipping Law*, Robert Grime, 2nd Ed, page 68

[51]Section 47(1) MSA. The draft bill has a similar provision in section 8(1) of Schedule II thereto.

Prior to the coming into operation of the 1951 South Afican Merchant Shipping Act, ships' mortgages were registered in the Deeds Office as notarial bonds. After the commencement of that Act, such bonds over South African ships or shares in South African ships ceased to confer upon the mortgagee any preference as against other creditors.[52] Currently, if a shipowner wishes to put up his ship as security for a loan or other debt, a deed of mortgage has to be concluded and, to enjoy priority over other such bonds, the mortgage must be recorded against the ship's name in the ship's register at her port of registry.[53] The draft bill re-enacts the substance of section 46 MSA.[54] Accordingly, once the proposed legislation is in place, the only way in which a South African ship or share will be able to be mortgaged will be in compliance with the provisions of the draft bill, in particular Schedule II thereto, and the draft regulations.[55]

Section 47(1) of the MSA presupposes that the mere completion of "the prescribed form" will give rise to a mortgage over a ship or share therein. This section follows the wording of section 31(1) of the British Merchant Shipping Act 1894. It is not incumbent upon a mortgagee to have a mortgage registered, but the effectiveness of the mortgage against third parties is dependant on its having been recorded in the ship's register.[56] Although created by execution of the prescribed form, a mortgage bond which is not registered might be valid as an equitable

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[52]Mortgagees were afforded sixty days after commencement of the Act to take the requisite steps to have the mortgage recorded in the register at the ship's port of registry: Sec 46(2) MSA.

[53]Sections 47 and 49 MSA

[54]Section 7(1) of the draft bill and section 31(1) of the Ship Registration Bill

[55]Subject, of course, to the survival of equitable mortgages.

[56]In *South Africa - A Maritime Business Location*, supra, page 62, this is considered to have "the potential to create problems with regard to efficacy and notice in respect of third parties." The draft bill (in section 9(1) of schedule II) would cure that problem by placing an obligation on the mortgagor to disclose to the mortgagee in writing the existence of any maritime lien, prior mortgage or other liability in respect of the ship to be mortgaged. The wording of draft section 9(1) is probably wide enough to cover even unregistered mortgages.

mortgage, but it will not give priority over subsequent, registered mortgages.[57] Priority depends upon the time of registration of the mortgage, not the time when the deed of mortgage is executed.[58] As with the MSA, the priority of mortgages under the draft bill will be determined by the order in time in which they are registered.[59] It is clear from the design of the draft bill and regulations that only South African ships will be able to have mortgages registered against them under that legislation.[60]

Whereas in terms of section 47(1) MSA the instrument creating the mortgage is required to be "in the prescribed form", regulation 54 of the draft regulations refers to "an approved form". Although the latter would appear to be a less categoric requirement and to afford the registrar some discretion that is in fact not the case. Section 8 of Schedule 2 to the draft bill requires the instrument creating the mortgage to be in a specific form: "a form approved under regulations". This is no different to the requirement that the instrument be in the prescribed form, except that there is now a possibility that there will be more than one prescribed form. The British Merchant Shipping Act, 1894, required that a ship's mortgage had to be in one of two forms - the first to secure the "Principal Sum and Interest" and the second for "Account Current".[61] The same is possible in terms of the draft bill and regulations.[62]

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[57]Registration of a mortgage operates as notice to the world of the mortgagee's interest. See also the discussion on equitable mortgages in respect of the mortgaging of small vessels.

[58]Section 49 MSA

[59]Section 10(1) of Schedule II to the draft bill. The registrar, on registering a mortgage in terms of the draft bill must endorse on it the date and time it was registered.

[60]Section 47(1) MSA expressly limited the registration of a mortgage to a South African ship or share therein. The draft bill and regulations refer to a "registered" ship only. However, it is clear that the mortgage is intended to be recorded by the registrar on the ship's register, as defined in section 3 of the draft bill. This register is intended to be a register for South African ships.

[61]*Shipping Law*, supra, page 60

[62]That appears to be the position in any event under the MSA 1951. According to *South Africa - A Maritime Business Location*, supra, 62, a South African ship or share therein can be mortgaged as security for either a principal loan or a current account.
In an article titled 'More Crucial Issues for Banks' in

Under the present MSA, an exception to the rule that priority depends upon registration of the mortgage exists where a mortgage is to be entered into outside the Republic. In such a case, particulars of the proposed mortgage may be entered into the ship's register and a certificate of mortgage issued in accordance with those particulars. Upon the recording of the mortgage on the certificate of mortgage, and without any further registration, that mortgage acquires priority over all other mortgages which were registered after the issue of the certificate.[63] The draft bill and regulations contain much more extensive provisions regarding the effective date of proposed mortgages which are concluded and registered only at some time in the future. However, there is no provision for the issuing of a certificate of mortgage in the draft bill. This is a drawback since a certificate of mortgage provides a useful function. In effect it allows the ship's register to be taken to wherever the mortgagee may be and it permits the mortgagee to scrutinise the register without having to engage in a costly and time-consuming search. Because the certificate of mortgage mirrors the ship's register the mortgagee is able to satisfy himself as to existing encumbrances before agreeing to advance finance to the ship's owner.

In terms of section 54 MSA it is the mortgagor who applies for a certificate of mortgage. In terms of the draft regulations, an intending mortgagee under a proposed mortgage may notify the registrar of the interest which it is intended he or she should have under the proposed mortgage. The registrar records the necessary information in the register, which then becomes the time from when the mortgage (if subsequently executed) is effective as against other

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Lloyd's List of 1 April 1992, it is stated that "banks appear to be relaxed about the flag of registry, with the exception of new registers which may yet need to convince banks of the adequacy of their legal framework should it be necessary to take on owners who default on loans." In the same article, a finacial management consultant is quoted as saying "All you need is a flag of registry where you can be sure you can arrest the ship, and that when you wave the mortgage in front of the judge he will recognise the enforceability of that mortgage.... It is not that there is even anything wrong with the flag and its administration, but it is an issue of having confidence in the legal provisions surrounding it."

From the experience of the Liberian and Panamanian upheavals at the beginning of the decade, it appears that financiers are not unduly concerned about political instability in flag states undermining their ship mortgage rights (*ibid*).

[63]Sections 54 and 56 MSA

mortgages.[64] This places the obligation on the mortgagee and would involve him in finding and inspecting the ship's register whereas it is the mortgagor who is seeking the financial assistance of the mortgagee.

A particular innovation under the draft bill would allow for an intending mortgagee to have the interest, which it is intended he will have under a proposed mortgage, recorded in the particular ship's register.[65] This notice[66] by an intending mortgagee is known as a "priority notice".[67] If subsequently registered, the mortgage will have priority over all mortgages registered after such notice was given.[68] Allowance is also made in the draft regulations for the situation where the ship which is proposed to be mortgaged is unregistered. If the ship, in respect of which the intending mortgagee has given a priority notice, is subsequently registered then it will be registered subject to that interest or mortgage if already executed.[69] Priority in respect of such a mortgage is also determined by the time when the priority notice was given.[70]

Whereas section 29(1)(b) of the MSA required the written consent of all the mortgagees where a ship was subject to an unsatisfied mortgage or existing certificate of mortgage before such ship or share therein could be transferred to any other person, the draft bill and regulations contain no comparable provision protecting the rights of mortgagees. Section 7(4) of the draft bill provides only that where registration of a ship has terminated, such termination shall not affect any entry made in the register so far as relating to any undischarged registered mortgage

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[64]Draft regulation 56

[65]Draft regulation 56(1)

[66]Which must be in an approved form - draft regulation 57(8). Draft regulation 57(2) sets out some of the information which the notice must contain.

[67]So called in section 10(2) of schedule II to the draft bill and in the heading of draft regulation 56.

[68]Draft regulation 56(5)

[69]Draft regulation 56(3)

[70]Draft regulation 56(5)

of that ship or of any share therein.[71] Since the real substance of a mortgage is usually contained in a collateral agreement it is open to the mortgagee to otherwise protect his interests in the case of a proposed transfer of the ship or share therein.[72] In fact, section 2(2) of Schedule 2 to the draft bill would permit an agreement between an owner and mortgagee prohibiting the former from disposing of his ship or share therein without the mortgagee's consent. However, such an agreement would be cold comfort to a mortgagee who subsequently discovers that the ship has already been sold.

On the insolvency of the mortgagor, a mortgagee continues to enjoy the right of preference given to him by a registered mortgage over a South African ship or share of such ship.[73] Section 51 (1) MSA is modelled in part on section 56 of the British MSA of 1894 and even retains some of the original wording of the latter Act. Section 51(1) provides that not only the insolvency of the mortgagor, but also any act of insolvency committed by the mortgagor has no effect on the mortgagee's right of preference. As regards the latter clause, it is difficult to conceive of situations where an act of insolvency would affect the rights of a mortgagee.

The right of preference enjoyed by a mortgagor of a ship or share therein on the sequestration of the estate of the mortgagor is limited at South African law. According to section 49 MSA prior mortgagees only enjoy preference over subsequent mortgagees. This right of preference does not extend over other creditors of the mortgagor. Therefore, on the sequestration of the mortgagor's estate the ship is not primarily reserved for the payment of the mortgagees of that ship.

A mortgage over a ship or a share therein is, in ordinary language, a "special mortgage": the

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[71]Subsection 7(4) does not apply in the case where the registrar is satisfied that every person appearing on the register to be interested as mortgagee under the mortgage in question has consented to the entry ceasing to have effect.

[72]*Shipping Law*, supra, pages 60-61; *Maritime Law*, supra, page 39

[73]Section 51(1) MSA

property secured is specifically indicated.[74] However, in terms of the Insolvency Act No. 24 of 1936, a mortgage over a ship or share does not constitute a special mortgage. The Insolvency Act defines a special mortgage as a mortgage bond hypothecating any immovable property or a notarial mortgage bond hypothecating specially described movable property in terms of section one of the Notarial Bonds (Natal) Act, 1932 but excludes any other mortgage bond hypothecating movable property. For all purposes, including those of the Insolvency Act, a ship is movable, not immovable, property. The fact that a ship's mortgage is not a special mortgage for the purposes of the Insolvency Act means that the mortgagee of a ship is not a secured creditor on the insolvency of the mortgagor. According to the Insolvency Act only a creditor who has a preferent right over property of the insolvent estate "by virtue of any special mortgage, landlord's legal hypothec, pledge or right of retention" is a secured creditor[75]. The value of being a secured creditor is that such a creditor has a right of preference from the proceeds of that security. It is not in the interests of ship financing that the statutory mortgage which financiers are obliged to employ if they desire any priority over other mortgagees, does not afford them real security on the insolvency of the shipowner. The draft bill proposes to remedy the situation. It provides that if a registered ship, or a share in such a ship, vests in a trustee on insolvency or forms part of the assets to be administered by a liquidator or a judicial manager of the registered owner of that ship or share, any registered mortgage of that ship or share shall be deemed to be a special mortgage for the purposes of the Insolvency Act, and shall rank and be dealt with as if it were a mortgage bond hypothecating immovable property.[76]

An important issue which the draft bill fails to address is the ranking of ships' mortgages in terms of the Admiralty Jurisdiction Regulation Act. Section 11(1) AJRA, provides that if a ship is sold in execution or constitutes a fund as contemplated in section 3(11), the relevant maritime claims are to be paid in the specified order. Mortgages are to rank, among themselves, according to the law of the flag of the ship.[77] However, in relation to other claims, in particular the claims of necessaries men, mortgages rank "very low down the scale when compared to

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[74] *Wille's Mortgage and Pledge*, Scott and Scott, page 8; *The Law of insolvency in South Africa*, Mars, paragraph 19.4

[75] Section 2

[76] Section 12 of Schedule II to the draft bill

[77] Section 11(5)(d)

other potential creditors and as such is a cause of grave concern to financiers the world over."[78] The ranking of mortgages in terms of section 11 AJRA is not in keeping with the ranking orders of other major shipping nations nor the 1967 and 1993 Conventions. Although it may be expected that the local service industry would oppose such a move,[79] South Africa ought to move into line with the major shipping nations.[80] The appropriate amendment would certainly make the South African register more attractive to shipowners in so far as they would be looked upon more favourably by those who, by the advancing of monies, make the operating of ships possible.

In section 31(1) the Ship Registration Bill prohibits the registering, in a deeds registry, of a mortgage over a ship registered or deemed to be registered or regarded as registered under the Bill.[81] Although this does not appear to be as wide as section 46(1) MSA, which prohibits the registering of a bond in the deeds registry in respect of a "South African ship or a share in a South African ship", the effect of the two sections is the same. The purpose is, no doubt, to ensure that all mortgages in respect of any such ship will be found in a single place.

In the Ship Registration Bill the provisions relating to mortgages are contained in schedule 1 thereto. Unlike the draft bill and the MSA 1951, the Ship Registration Bill provides for the creation of a mortgage "by the registration" of the mortgage instrument, which must be in the prescribed form.[82] This will do away with possible "equitable mortgages". Priority among

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[78] *South Africa - A Maritime Business Location*, supra, 62

[79] Since suppliers of goods and services to a vessel have higher ranking claims than mortgages their opposition is to be expected. A consequence of their relative high ranking has also meant that "South Africa has become known as an arrest friendly jurisdiction for most creditors other than mortgage banks, who traditionally have the largest claim" (*South Africa - A Maritime Business Location*, supra, page 63).

[80] For example, Australia, the Isle of Man, United Kingdom and the EEC in general.

[81] Section 31(1), read with the definition of "registered" in section 1(xxvi) of the Ship Registration Act. Section 31(1) is subject to section 31(2), which deals with bonds registered in the deeds registry at the time of coming into force of the Bill.

[82] Section 9(2) of Schedule 1 to the Ship Registration Bill

mortgagees - as with the draft bill and the MSA 1951 - will be in accordance with the order of registration.[1] An innovatory provision in the Ship Registration Bill requires the written consent of all existing mortgagees under all prior mortgages before the registration of the mortgage of the ship or share in question.[2]

Like the draft bill, the Ship Registration Bill provides for a mortgage of a registered ship or a share in a registered ship will be deemed to be a special mortgage as defined in section 2 of the Insolvency Act and will rank and be dealt with as if it were a mortgage bond hypothecating immovable property.[3] However, the Ship Registration Bill specifically provides that such a mortgage will include registered mortgages executed and valid in accordance with the law of the state in which the ship is registered, even if the ship is registered in another state. Accordingly, a foreign mortgage will provide the mortgagee with security on the insolvency of the mortgagor in South Africa.

CONCLUSION

Shipping has always been dependant for its existence on the world's commerce. The prosperity of particular nations has not itself been linked to having a national fleet of vessels. Some have been content to let the ships of others carry their goods. But a national fleet has historically been highly profitable for the fleet-owning state.

South Africa, although surrounded on three sides by the ocean, has never been a maritime nation. It has a limited shipping industry and few ships flying its flag. This is notwithstanding the fact that a considerable number of ships are beneficially owned in South Africa. The failure to address the causes which led to the flagging-out of such ships will mean that South Africa will never become a martime country. Even traditionally maritime nations have been badly affected by the flight of their shipowners to foreign flags. The effect of this phenomenon on the European Community was highlighted at the Centenary Conference of the Comité Maritime

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[1]Section 10 of Schedule 1 to the Ship Registration Bill

[2]Section 9(4) of Schedule 1 to the Ship Registration Bill

[3]Section 31(5) of the Ship Registration Bill

International:

> "Flagging out is a process with further reaching consequences than initially thought. It starts with simple tax evasion, soon followed by gradual replacement of EC seafarers by cheap labour. Finally it may happen in certain cases that the complete shipping management is delocated to places outside the EC. The end result is a serious erosion of maritime know how in the Community and loss of employment at all levels."[4]

Shipowners choose their registries principally on the basis of financial considerations. Judged by this yardstick, the current South African ships register must be viewed as a failure. Legislative constraints to compel the registration of South African ships onto their own register have also failed. Far from engendering a shipping culture, the registration laws (coupled of course with the more important factors such as South Africa's past and the absence of fiscal inducements) have had the same effect as in many traditional maritime states, that is, of driving home-owned ships onto foreign registers. It is probably too late to expect such ships to be re-flagged in South Africa. However, it might be hoped that new acquisitions by South African shipowners, if the benefits are real, could be registered locally. In this regard, very little can be done by the registration laws themselves, save for making possible the registration of ships in given circumstances and for providing the necessary safeguards to satisfy those who have a financial interest in such ships.

The need for a re-appraisal of all matters relating to shipping can be seen from the example of the United Kingdom. It was once the leading shipping nation. However, the past forty years has seen a steady decline in the number of ships registered under its flag. At the beginning of this decade the registered tonnage had dropped to less than a third of that reistered in the late 1950's and one-fifth of that registered during the boom years in the mid-1970s. This has been put down to two factors: "the structural changes in shipping worldwide" and "the lack of government subsidies but presence of high labour costs and standards in the UK".[5] The lack of competitiveness of the long-established registers is readily evident from the figures: the

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[4]Taken from the speech of Mr Willem De Ruiter, Head of Unit in the Maritime Directorate of the European Commission at the Centenary Conference of the Comité Maritime International, 9 June 1997, contained in CMI yearbook for 1997 at page 154

[5]*EC Shipping Law*, Vincent Powers, 1992, pages 48-9

tonnage sailing under the flags of European Community member states decreased from 32% in 1970 to 14% in 1995.[6]

Over the last fifteen years the United Kingdom, in addition to and as part of other steps to encourage shipowners to register there, has revamped its registration laws.[7] In this respect, South Africa is seemingly intent on following the UK. And, just as the current South African ships register is based on the British 1894 MSA, so the registers proposed in the preliminary draft bill and the Ship Registration Bill draw heavily on the recent UK legislation. Perhaps too heavily, on occasion. In some cases they even follow the structure of those Acts. This has resulted in the increased use of delegated legislation in the proposed registration regimes. While assisting the Department of Transport to keep the register up to date by avoiding the delays normally experienced with obtaining parliamentary approval for amendments, this could mean that issues which should have been dealt with in primary legislation have been left to regulations.

This is particularly true of the preliminary draft bill. The brevity of the draft bill, because of the unavoidable cross-referencing with the schedules and the draft regulations, contributes to its inaccessibility. At times there is also duplication in the draft regulations of matters covered in the draft bill. The draft regulations, apart from those essential matters of principle which should as a matter of course be contained in the draft bill, also deal with other matters which could be - as is the case in the present MSA - contained in the principal legislation. There is also no reason why the schedules cannot form part of the draft bill, instead of being annexures thereto.

Much of these difficulties appear to have been attended to in the Ship Registration Bill. In particular, the pre-conditions for the entitlement to register a ship in South Africa are contained in the Bill itself.

Both the preliminary draft bill and the Ship Registration Bill (if implemented) would introduce

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[6]From the speech of Willem De Ruiter, CMI yearbook, 1997, page 154.

[7]*Current Law - Statutes Annotated*, 1995, Vol. 2, page 21-25

some important and long needed changes to the South African ships register. The most fundamental change is the dilution of the strong national-connection condition for registration. The draft bill (or, rather, its regulations) settles on a necessarily arbitrary citizenship/residence/representative mix in giving effect to the notion of a "South African connection". The Ship Registration Bill, while abandoning the term retains essentially the same requirement for registration, namely a majority of South African interest in the ship. This is widely seen as conforming to the "genuine link" condition. The intention, no doubt, is to avoid the flag of convenience stigma and to appease labour interests.

In this regard, one can ask why a country needs to try to impose the rather nebulous concept of a "genuine link" if it does not offer the other advantages which make flags of convenience so popular. It is unlikely to attract many ships at all. Certainly none which do not have some sort of a "connection" with South Africa. And of what real interest is it in any event to South Africa if a ship uses its flag as a convenience? South Africa does not have a policy of protectionism and does not offer special dispensations to its ships which would make it want to reserve its flag for ships owned by its nationals. Moreover, the ship is paying for the convenience of the flag and, provided South Africa has stringent enough safety standards, and provided it can also enforce them, the risk of embarrassment to the Republic is small. On the other hand, if South Africa cannot enforce its safety regulations, then it does not matter that it remains even a very small national register. At present South Africa does not have an age limitation for ships on its register. This puts it in a bracket with the registers of Cambodia and Vanuatu. Whether or not the South African register insists on a genuine link as a requirement to register, it could still be put on port state control lists of targeted registers. The larger the register becomes, the more difficult is will be to maintain standards. An inability to monitor its ships would likent the South African register to those of Mauritius or Belize. As the Transport and General Workers Union warns:

> "In the absence of appropriate mechanisms to regulate the vessels on the register, the ability of government to ensure a high-quality register will come to nought."[8]

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[8] *Comment and Submission on the Preliminary Draft Registration of Ships Bill and Registration of Ships Regulations*, supra, page 5.

These are some of the considerations to be taken into account in formulating a comprehensive shipping policy. The end result on the important issue of entitlement to register strikes a balance between opening up the register to anyone and retaining the privilege for South Africans.

In addition to the new pre-conditions for registration, both the draft bill and the Ship Registration Bill allow for foreign bareboat chartered ships to be registered in the name of the South African charterer. In this they are following the lead of other - not all convenience - registers. Both the draft bill and the Ship Registration Bill also expressly allow for the registration (as opposed only to the licensing) of small vessels. This removes the Department of Transport-imposed prohibition on the mortgaging of such vessels. They also provide for the mortgage of a ship or share to be secured on the insolvency of the mortgagor. Both these steps will remove obstacles to the financing of ships.

In addition, both the draft bill and the Ship Registration Bill provide for a central register of South African registered ships. They both provide for the register to be divided into different classes or types of ships and they both provide for a representative to be appointed in respect of such ships.

These are all new provisions. They go a long way to making the proposed South African ships register an improved one. They will not on their own create a competitive register or a maritime culture or develop the shipping industry in South Africa. But they are a first step towards that goal.

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