

MALTA'S SHIP REGISTRATION POTENTIAL LAW AS MEANS TO AN END

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Preamble

This paper is intended to explain how law can serve as a means to an end and a successful one at that. Apart from presenting the reader with a cursory view of the law regulating ship registration in Malta, the authors have also strived to illustrate how the law assisted in making the Maltese merchant fleet a force to be reckoned with. The paper has been written with the purpose of presenting an overview of this success. Indeed, the focus of this paper is to illustrate this success by demonstrating the intimate nexus between the law and its practical application within a commercial environment, which sees legal professionals working in tandem with their clients and the relevant industry.

1. Introduction

It is fair to say that owing to its strategically placed geographic position and its natural harbours, Malta has always found itself at the heart of the Mediterranean's commercial activity. Providing a point of convergence for trade between the European and African continents, Malta has developed a strong maritime tradition which has seen it evolve into an international centre for the maritime and shipping industries. Indeed, Malta's maritime legacy continues up till this very day, with the island boasting a reputation as one of the world's most reliable and effective centres for maritime services.¹

Today, not only does Malta host a number of international institutions, inclusive of the International Maritime Law Institute, the International Ocean Institute and the Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea, but it also continues to strive to consolidate its position as one of the leading players in the highly competitive environment of the global shipping industry. For this reason Malta attempts to offer a holistic complement of diversified international maritime services including ship registration services, bunkering, ship repair, cargo operations, transshipment and yachting. Indeed, Malta has also managed to 'reinforce its position as a cruise port'.²

In a world where there are an increasing number of available flags for ship registration,³ however, Malta has also sought to become one of the globe's largest ship registries.⁴

The importance of the right of shipowners to register their ships and fly the flag of the State where the ship is registered should not be underestimated. First and foremost, it is a fundamental corollary to the freedom of ships to roam the high seas. This is because ship registration allows for the regulation of vessels 'via' the laws of the flag State when the vessel is on the high seas and, thus, prevents lawlessness and anarchy. Secondly, ship registration vests the vessel with the national character of the flag State to which it belongs. Indeed, it is often

¹ Transport Malta, 'Ship Registration' <<http://www.transport.gov.mt/ship-registration>> accessed 19 August 2013

² Andrew Spurrier, 'Malta Feature' (2013) Fairplay 19

³ Jotham Scerri-Diacono, 'A Guide to Ship Registration in Malta' (2013) Lawyer Monthly 83

⁴ --, 'Malta Flag now Europe's Top Shipping Register and Endorsed as a Low Risk Flag' (2012) Hellenic Shipping Worldwide

the registration of a vessel within the registry of a particular State which allows for the creation of a genuine link between the vessel and the State; thus vesting the vessel with national character.⁵

Where vessels are registered largely depends on the rules and regulations which a particular State decides to impose upon vessels as requisites for registration. In fact, the conditions for the entry of vessels into a States' register could ultimately be viewed as the pre-conditions for the attribution of such State's nationality to such vessel, the hoisting of its flag and the issue of documents attesting its nationality.⁶

Registration of vessels also serves a number of both public and private law functions inclusive of publicity, the right to engage in certain activities within the territorial waters of the flag state, the protection of the title of the registered owner and the protection of title and preservation of any ranking of priorities between persons holding securities over the ship.⁷

Following the birth of the Malta Flag with the enactment of the Merchant Shipping Act in 1973,⁸ Malta began a process which today sees it sitting in a position which belies its size. This is because Malta now boasts the largest maritime registry in the European Union and has established itself as a leading flag administration State.⁹

There is no doubt, that this success has been achieved as a result of Malta's deep rooted traditions with the ocean, hands on expertise and a solid set of values. There is equally little doubt, however, that this success is also largely owed to Malta's enactment of a robust regulatory structure, one which has laid strong legislative foundations on the basis of which Malta's success in the sector has been built. In a nutshell, Malta has managed to bring together – thanks to its laws – many of the factors which attract the industry.

Indeed, when it comes to shipowners searching the global playing field for potential flags, there are a number of choices which are available. Shipowners may, for example, wish to make use of a flag with which they have national or economic ties, as was the case for the so-called traditional registries. In the alternative, however, one may choose to register one's vessel within an open or international register.

Incidentally, it should be noted that whilst open registries were traditionally perceived as sub-standard flags of convenience, the wealth of international conventions which are in force and adhered to by such registers today means that the validity of such perception is now questionable.¹⁰ Indeed, it is traditionally open registries which have been those associated with some of the worst and most notorious maritime disasters, the *Torrey Canyon* 1967, the *Exxon Valdez* 1989 and the *Sea Empress* 1996 being some of the most noteworthy. This being said, commentators today are of the view that 'much of the criticism of against international registers on safety grounds is unjustified'. In fact, various factors, such as the fact that most vessels registered in such registries are owned and operated by some of the world's largest multinational undertakings, mean that this is one traditional prejudice which is no longer 'based in objective analysis'.¹¹

Either way, the point is that there will be a number of factors which will undoubtedly play no small part in influencing a shipowner's choice of flag. These include economic factors, operating costs, political factors and miscellaneous factors inclusive of technical expertise and the ability to repair anywhere in the world without being bound to national shipyards.¹² Similarly, shipowners will be on the lookout as to which vessels are eligible for registration within a particular register, whether there are any requirements as to ownership, what manning and certification requirements are in force as well as whether the flag is plagued with labour troubles or enjoys Government stability. Additionally, however, a shipowner will also want to look out for a flag which is both accessible and enjoys a good reputation.¹³

It is precisely sensitivity to the aforementioned factors and its ability to take them on board, both legislatively as well as practically, that has placed Malta on the world map when it comes to the maritime and shipping industries.

Other than this, however, one must also bear in mind that Malta's membership with the European Union and its placement on the Paris Memorandum of Understanding White List also means that it benefits from all associated advantages¹⁴ – such as the reduced frequency with which Maltese vessels are subjected to port state

⁵ Richard Coles and Edward Watt, *Ship Registration: Law and Practice* (2nd edn., Informa 2009) 1

⁶ *Ibid* 2

⁷ *Ibid* 7-9

⁸ Merchant Shipping Act, Chapter 234 of the Laws of Malta

⁹ Transport Malta, 'Vision and Mission'

<<http://www.transport.gov.mt/ship-registration/merchant-shipping/vision-and-mission>> accessed 19 August 2013

¹⁰ 'Open registers are nowadays considered to be an important feature of modern shipping. The concept of opening up the national register to allow and make it feasible for ships owned by foreign nationals to fly a particular flag is a widely accepted practice in the world's drive to internationalise commodity markets, including shipping which has become a global industry in all respects'; Combined Maritime Services Group, 'Ship Registration: Benchmarking Costs and Comparing Selected Factors Governing Choice of Flag' (October 2013) 5

¹¹ Coles and Watt (n 5) 28 *et seq*

¹² *Ibid* 61

¹³ *Ibid* 61-66

¹⁴ Phax Services Co. Ltd. Shipping & Corporate, 'Phax Services Company Limited'

<http://www.phax.com.mt/index.pl/information_on_the_malta_flag> accessed 16 November 2013

inspections.¹⁵ Malta has also bolstered its regulatory framework by ratifying and adopting, transposing or incorporating within its legislative corpus all major international maritime conventions.¹⁶

2. Robust, User Friendly Legislation

The enactment of the proper legislative instruments has been fundamental to making of Malta a hub of maritime services and ship registration. Malta has looked towards the Common law legislative legacy,¹⁷ itself the result of strong maritime traditions and likewise towards the various regional and international conventions, in order to be able to draft into our statute book the proper tools for this success. The policy decision taken by Malta to adhere to all major maritime conventions ensures that it remains an attractive flag to the international maritime industry.

In seeking to enact the appropriate legislative framework it was understood by the Maltese legislator that legislation had to be mindful of the realistic needs of the industry. In a hyper competitive sector, where millions of monies are transacted across the globe on a daily basis and where multiple factors continuously come into play to create a very dynamic and fluid environment, it was evident that legislation had to be user-friendly, cater for the commercial need of the industry and provide a tool which helps, rather than hinders, the stake holders. The aim, therefore, was for legislation to provide clear, simple and swift procedures and regulations, and not to create unnecessary obstacles or burdensome bureaucracy.

It is for this reason that local procedures for the registration of a vessel, for example, are relatively straightforward.¹⁸ It is precisely because Malta wished to attract vessels to the jurisdiction and with them all the economic activity that inevitably follows, that our law was drafted so as to prescribe flexible procedures. The same could be said for the deletion of a vessel from the registry¹⁹ or the discharge of a mortgage.²⁰ Such procedures should, and do, not operate as a barrier to entry, but rather as an additional advantage offered by the Maltese flag.

Every State has ultimate discretion in prescribing the conditions for registration, with the validity of any such registration being solely within the remit of such State.²¹ For this reason, Malta, like every other flag State, has determined which categories of vessels it will accept to register. This is fundamental due to the fact that the determination of a vessel as an internationally 'registrable' asset has crucial legal consequences. These include the determination of the applicable preemptory or prescriptive periods, whether the object is subject to arrestment for the securing of a claim, the imposition of international safety requirements and the limitation of liability in respect of things such as the causing of damage to property or pollution.²²

On a practical level, the flexibility of procedure adopted by Malta when it came to prescribing the legislative conditions and standards for registration has permeated throughout the corpus of applicable laws. It is in evidence, for example, in the fact that the law enables ownership of a vessel to be proven, by means of a declaration, in the process of its being registered in Malta. This is a feature which saves both time and costs. Similarly one is not initially required, upon registration, to submit evidence that the vessel has been taken off any registry where it might have been previously registered. Of course, such allowances are only provisional

¹⁵ Scerri-Diacono (n 3)

¹⁶ These include the International Regulations for Preventing Collisions at Sea 1972, the International Convention on Civil Liability for Oil Pollution Damage 1992, the Convention on Limitation of Liability for Maritime Claims 1996, the International Convention for the Prevention of Pollution From Ships 1978, the International Convention for the Safety of Life at Sea 1974, the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924, Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 and, recently, the Maritime Labour Convention 2006; European Community Shipowners' Association, *Annual Report 2008-2009* <http://www.ecsa.eu/images/files/downloads_annualreports/Rapport%202008-2009.pdf> accessed 14 October 2013

¹⁷ Alan E Branch, *Elements of Shipping* (8th edn., Routledge 2007) 162; Vernon Valentine Palmer Ed., *Mixed Jurisdictions Worldwide* (2nd edn, Cambridge) see Chapter 9 dealing with 'Malta' at page 528 by Ando, Aquilina, Scerri-Diacono and Zammit where it is explained further that in the maritime field, the Common Law influence, specifically English Law, came soon after Malta's involvement with Britain. There was pressure made by the British on Malta to adopt English-based legislation: this insistence was made because the British felt that it was advisable for Malta, as one of the main ports of call of the British Empire to follow English Law and practice in maritime matters.¹⁷ As for the rest, pressures to have the law changed came from within the country following political decisions taken to upgrade Malta's laws in order to generate or encourage business activity. This very often translates into pressure on legal drafters to adopt models that are attractive to the players (particularly the financiers) in the industry to which those models apply in order to ensure success. See also J M Ganado, *Malta: A Microcosm of International Influences*, Studies in Legal Systems, Mixed and Mixing (Kluwer Law International, 1996)

¹⁸ Merchant Shipping Act, Chapter 234 of the Laws of Malta, article 3 *et seq.* (Part I)

¹⁹ Referred to in the law as the *closure* of the register of a ship, *vide* article 28 of the Merchant Shipping Act, which specifically goes out of its way to spell out that a vessel cannot be deleted unless any registered mortgagees consent thereto. *Cf.* Council Regulation of 1991 concerning *The Transfer of Ships from One Register to Another Within the Community – Council Regulation (EEC) No 613/91 of 4 March 1991*

²⁰ Merchant Shipping Act, article 46; *Vide* Scerri-Diacono (n 3)

²¹ *Lauritzen v Larsen* US Supreme Court 345 US 571 (1953)

²² Coles and Watt (n 5)

and more concrete evidence will be required at a later stage. Indeed, both a Bill of Sale and a Deletion Certificate²³ from the previous registry will subsequently need to be produced to the Registrar. Nonetheless, this approach enables individuals to register their vessel within the Maltese registry without having to wait for the relevant paperwork and bureaucratic procedures.²⁴ One can understand this advantage better when one remembers that the shipping and maritime industries are industries which operate almost exclusively on an international dimension, and hence such transactions often involve several entities and administrative bodies from different States.

Another clearly useful legal mechanism that Maltese law offers shipbuilders or owners of vessels is the possibility to register various forms of ‘vessels’, from super yachts to barges, or even vessels still under construction.²⁵ The latter refers to vessels that are still in the process of being constructed or equipped. The registration of ships under construction offers a number of advantages to shipowners and operators,²⁶ including the suspension of various legal requirements ordinarily relating to registration, until such time the construction is completed or delivery of the vessel made.²⁷

Indeed, the possibility of registering vessels under construction is a seriously underutilised mechanism and something practitioners should take up and promote with their clients. This observation is particularly pertinent locally in light of the fact that not all open registries provide for such a possibility.

The flexibility of procedures and the industry sensitive approach which has been taken by the legislator when it comes to regulating the sector may also be seen in the fact that there are no specific regulations delineating the nationality of the master, officers and crew members serving on Maltese vessels.²⁸

This being said, one should not confuse the legislative intent to provide for a comfortable legislative environment with the somewhat less scrupulous approach characteristic of less reputable flags of convenience. The Maltese legislation in force today, in fact, means that the Maltese flag is recognized and respected as a serious flag having regard for a wide variety of regulations ranging from technical management and seafarer’s rights to matters concerning the environment and maritime pollution.²⁹ Even if one looks towards the necessary requirements for the operation of a vessel one notes that this depends on, *a priori*, conformity of the vessel with all relative manning, safety and pollution prevention standards and certification.³⁰ Indeed,

flag authorities have, necessarily to strike a balance between the requirements of the international conventions and the exigencies of the market. The overriding consideration remains safety of life at sea.³¹

The success of the balance which has been struck between serious regulation and an industry friendly approach has also been helped by the delegation of authority by the Administration to a network of consuls and classification societies, both of which are in a position to offer owners of vessels an integrated system of cross border services.³² Indeed, a ship may only operate under a Maltese flag if it carries all the requisite certificates as prescribed at law, commonly referred to as the ship ‘trading certificates’ or ‘ship’s papers’.³³ Such certificates, inclusive of survey, tonnage and convention certificates, may be issued on behalf of the Administration by recognized organizations such as the American Bureau of Shipping, Lloyd’s Register of Shipping, the Registro Italiano Navale and the China Classification Society, amongst others.

²³ Or an equivalent document

²⁴ Merchant Shipping Act, article 10 *et seq.*

²⁵ Transport Malta, ‘Ships under Construction’

<<http://www.transport.gov.mt/ship-registration/ship-registration/ships-under-construction>> accessed 11 September 2013; See also article 2 of the Merchant Shipping Act

²⁶ For example, the requirement to declare the ownership of the vessel at the time of registration as per article 3 of the Merchant Shipping Act.

²⁷ Transport Malta (n 25)

²⁸ Transport Malta, ‘Ship Registration’ <<http://www.transport.gov.mt/ship-registration/ship-registration>> accessed 11 September 2013. Amongst other Conventions Malta ratified the Maritime Labour Convention and most Annexes to MARPOL. With regard to the EU position, the freedom of movement was acknowledged by the European Court of Justice in the case *Commission of the EC v French Republic* (Case 167/73). The EU Guidelines of State Aid to Maritime Transport encourage member states to have their nationals recruited as seafarers on their vessels whenever possible (section 2 of the said *Guidelines*) albeit there is no legislation at EU prohibiting the employment as crew of non-EU seafarers. Had it been any different the EU fleet would be fraction of what it is today. Meanwhile the EU and Malta have ratified the Maritime Labour Convention consolidating and at times upgrading the various pieces of legislation including various EU Directives concerning seafarers’ working conditions.

²⁹ European Community Shipowners’ Association (n 15); Malta partakes of the various EU and International Conventions concerning pollution prevention.

³⁰ Scerri-Diacono (n 3)

³¹ Combined Maritime Services (n 10)

³² Jotham Scerri-Diacono, ‘Malta Flag Determined to Retain its International Status as a Quality Flag of Confidence’ (*Corporate Live Wire*) <www.corporativewire.com>

³³ Merchant Shipping Act, article 13

Moreover, when considering the factors which have contributed to the status quo one must also keep in mind that the relative small size of the country means that interested parties are in a position to communicate directly with decision and policy makers.³⁴

3. The Malta Register of Ships: Attractions

Although Malta's relationship with the vessel stretches far back to the time when pre-historic men first travelled to and from the island *via* a set of uneven logs loosely strung together, the Maltese shipping register was only formally established some forty years ago.

This being said in this short span of time Malta has capitalized on the number of factors which have contributed to the current success enjoyed by our tiny island in this sector. The number of high-end vessels which are seeking to be registered within the Maltese register is constantly on the increase. It is important to stress, however, that Malta's approach towards its shipping register is one where the quality of the registered vessels is prioritised over their quantity. It is in part for this reason that younger ships often benefit from reduced registration fees and tonnage tax.³⁵ In fact, as a rule, trading ships of over twenty-five years and over are not normally registered.³⁶ Ships between twenty and twenty-five years old, on the other hand, 'must pass an inspection by a flag State inspector prior to being provisionally registered'.³⁷

Some of the advantages and features of the Maltese shipping register include the fact that vessels may be registered in the name of legally incorporated bodies irrespective of the latter's nationality.³⁸ This is very much unlike a number of flag states which have traditionally placed restrictions on the ownership of vessels to persons who are either national, domiciled or legally incorporated of or in the flag state. Indeed, the traditional maritime nations such as the United Kingdom, France and the Netherlands have all sought to place limitations on the ownership of vessels which are eligible for registration. This was often done in order to attempt to guarantee a closer link between the vessel and the flag state. In this regard one may refer to the UK Navigation Acts as enacted in the seventeenth and eighteenth centuries, as well as the French equivalent.³⁹

However, the absence of nationality restrictions is not the only advantage offered by the Maltese Flag. In fact, the Maltese flag's long maritime tradition, the lack of legal or administrative restrictions on the nationality of master, officers and crew,⁴⁰ the industry friendly approach – with services available on a twenty four hour basis seven days a week, Malta's repute and active participation in related international fora as well as a vast spectrum of primary and supportive services.⁴¹

This said, there are various other features which make the Maltese shipping register attractive to the industry. Ship owners and operators recognize that a Maltese vessel will not be subject to trading restrictions, that they enjoy preferential treatment in certain ports,⁴² that registry requirements are recognized and known to the main international shipyards and classification societies and that there are various tax exemptions⁴³ which help to conserve hard earned profits. When these advantages are coupled with reasonable registration and incorporation costs and time frames the Maltese flag is bound to thrive.⁴⁴

4. Procedure for Registration

Additionally, the procedure for the registration of vessels in Malta is a relatively user-friendly process which aims at a swift transaction whilst securing a safe vessel.⁴⁵ The application for the registration of a vessel must be made by the ship owner or an authorized representative and must be accompanied by proof that such person, be it physical or moral, qualifies to own a Maltese vessel. The procedure also entails submission of various certifications, such as a copy of the vessel's International Tonnage Certificate, compliance certificates, company statutory certificates, Minimum Safe Manning Certificates, as well as the making of a declaration of

³⁴ Jotham Scerri-Diacono and Karl Grech Orr, 'The Malta Flag: A 40-Year Success Story' (2011) Mondaq Business Briefing

³⁵ Ibid

³⁶ Guidelines for the Ascertainment of Seaworthiness of Vessels being Registered as Maltese Ships, Merchant Shipping Directorate (Merchant Shipping Notice No. 90, 2011)

³⁷ Coles and Watt (n 5)

³⁸ Merchant Shipping Act, article 84Z. The liberalisation trend can trace its roots at EU level to the decision of C-256/89 *Commission v U.K.* [1991] where the Court held that a member state cannot impose nationality prerequisites that link vessels to England for it to grant a ship the right to fly its flag, as opposed to allowing any EU nationals.

³⁹ Coles and Watt (n 5)

⁴⁰ Merchant Shipping Act, article 89 *et seq.*

⁴¹ Transport Malta (n 9)

⁴² Branch (n 16) 165

⁴³ Discussed below under 'The Tonnage Tax Regime'

⁴⁴ Transport Malta, 'Malta: A Guide to Ship Registration' <<http://www.transport.gov.mt/admin/uploads/media-library/files/Reg%20Note%20-%20Merchant%202013.pdf>> accessed 19 August 2013

⁴⁵ The paramount importance given to safety considerations has already been discussed above.

ownership before the Registrar.⁴⁶ Evidence of seaworthiness is also necessary⁴⁷ and is a direct result of the Malta shipping register's desire to ensure that it only boasts safe vessels within its ranks.⁴⁸

The procedure for the registration of a vessel largely consists in a provisional registration stage, wherein a set number of documents and certificates must be submitted and a subsequent stage when the owner must submit all prescribed documentation and certification within the time limits set at law. Once this is done, a permanent Certificate of Registry is issued. Such Certificate evidences both the ownership and nationality of the ship.⁴⁹ The Certificate of Registry also indicates Valletta as the home port of every vessel registered under the Merchant Shipping Act.⁵⁰ This certificate, however, is subject to renewal on a yearly basis upon payment of the annual registration fee.⁵¹

It is notable that when registering a vessel there is also the opportunity to re-christen it and register it under a different name. Indeed, this may be done immediately upon the application for the provisional registration of the ship.

When it comes to matters of ownership and eligibility for registration, the Merchant Shipping Act provides, under article 4, that a vessel must be owned by one of the prescribed qualified persons. These primarily include citizens of Malta and bodies corporate established under and subject to the laws of Malta having their principal place of business in Malta. Alternatively, 'a ship owner may opt for international ownership of a Malta-flagged vessel' through the appointment, in writing, of a Resident Agent who is habitually resident in Malta.⁵²

Registration of vessels⁵³ is a serious matter for any nation tantamount to an act of state, given that once a vessel is registered under a particular flag, such as that of Malta, the flag State enters into an international obligation to ensure compliance of its vessels with all international rules and standards. The Flag State is under a legal duty to ensure that the ships that fly its flag carry all trading certificates. The Flag State is also obliged to inspect its vessels for compliance and conformity.⁵⁴

5. Bareboat Charter Registration

Having considered the basics of ordinary registration, of particular note is that Maltese law also allows for bareboat charter registration of foreign vessels as well as for the bareboat charter registration of Maltese vessels under a foreign flag. Bareboat charter registration is, in brief, a system in virtue of which a vessel which is registered under one flag is allowed to fly the flag of another State for a determinate period of time.⁵⁵

Indeed, the bareboat charter is often described as arising where a charterer is tasked with providing cargo and crew whilst the shipowner merely the vessel in such way that it is the charterer who takes full responsibility for the operation of the vessel and related expenses.⁵⁶

Bareboat charter generally involves relationships where the legal owner [of the vessel] gives the charterer sufficient of the rights of possession and control which enable the transaction to be regarded as letting – a lease or demise in real property terms.⁵⁷

Such charter agreements are transacted for a number of reasons, varying from savings on crew costs to taking advantage of any subsidies or cargo reservations which may be prevalent within a particular flag state at a particular point in time.⁵⁸

When it comes to bareboat charter registration in Malta the principle is to have both registries acting abreast of each other in a compatible fashion. In practice this means that matters relating to title over the ship, mortgages and the like are governed by the normal register whilst matters relating to the operation of the vessel are subject to the jurisdiction of the bareboat charter registry.⁵⁹

⁴⁶ Merchant Shipping Act, article 11

⁴⁷ Ibid, article 12

⁴⁸ Transport Malta (n 44)

⁴⁹ Coles and Watt (n 5)

⁵⁰ Merchant Shipping Act, article 5

⁵¹ Ibid, article 19

⁵² Coles and Watt (n 5)

⁵³ As with aircraft

⁵⁴ Ibid, 11

⁵⁵ Merchant Shipping Act, article 84A

⁵⁶ [Branch \(n 16\) 310: 'the charterer is responsible for providing the cargo and crew, whilst the shipowner merely provides the vessel. In consequence, the charterer appoints the crew, thus taking over full responsibility for the operation of the vessel, and pays all expenses incurred.'](#)

⁵⁷ *The Giuseppe di Vittorio* [1998] 1 Lloyd's Rep. 136 at 156

⁵⁸ Coles and Watt (n 5)

⁵⁹ Transport Malta, 'Bareboat Charter Registration'

Vessels which are registered as bareboat charter vessels in Malta are considered to have equivalent rights and obligations as vessels which are registered within the normal register. Moreover, whilst registration of such bareboat charter vessels may be extended, the initial registration period is never in excess of two years.⁶⁰

Whilst the procedure for the registration of bareboat charter vessels is similar to that for the registration of ordinary registrations, there are some differences. These include the application for registration by the charterer as opposed to the owner and the making of a declaration of bareboat charter accompanied by the charter agreement.⁶¹ Registration fees and annual tonnage tax, however, apply just like in the case of the ordinary registry.⁶²

6. Yacht Registration

Another category of vessels which may be registered within the Maltese registry is that relating to commercial yachts. These are yachts which are used for commercial purposes but which do not carry cargo and do not carry more than twelve passengers.⁶³

In this regard, one may see the provisions of the *Merchant Shipping (Certification of Commercial Yachts and Commercial Cruising Vessels) Regulations*,⁶⁴ which provide that all yachts must operate with full compliance to 'the Safety and Load Line Conventions, or with the regulations applicable in the place where the ship is operating, or with the Code of Practice'.⁶⁵

Indeed, Commercial yachts flying the Malta Flag are regulated under the relatively recently launched *Commercial Yacht Code*.⁶⁶ This Code is intended to regulate yachts carrying up to twelve passengers and being yachts not exceeding a gross tonnage of three thousand. The Code caters for and regulates exclusively this particular category of vessels. In doing this, the Code takes into consideration the particular design, operation and safety requirements of such yachts whilst at the same time having regard for the international regulatory framework.

When it comes to this category of registration therefore, Malta is very 'well placed to welcome many more yachts and superyachts'.⁶⁷ If we manage to invest our resources in top of the range facilities, communications and connections and if we continue to involve all stakeholders in the industry, Malta will undoubtedly continue to increase its international presence in the superyacht community.

One cannot fail to mention, however, that this area of law is highly volatile and currently very much in the limelight on account of the notorious abuses which have been highlighted in various cases, foremost amongst which is the *Bacino* case.⁶⁸

Apart from commercial yachts, however, Maltese law also permits the registration of pleasure yachts. In fact, the attractive tax treatment applicable to pleasure yachts, has meant that a number of yacht owners have decided to register their yachts in Malta.⁶⁹ Indeed,

in this respect Malta offers a very interesting VAT leasing structure through which VAT is paid on the perceived use of the yacht in EU territorial waters. This presents owners with substantial benefits and offers them the opportunity of obtaining a VAT paid certificate at the end of the structure.⁷⁰

<<http://www.transport.gov.mt/ship-registration/ship-registration/bareboat-charter-registration>> accessed 1 October 2013

⁶⁰ Merchant Shipping Act, article 84G

⁶¹ Merchant Shipping Act, article 84C

⁶² Transport Malta (n 44)

⁶³ Commercial Yacht Code 2010, 7

⁶⁴ Merchant Shipping (Certification of Commercial Yachts and Commercial Cruising Vessels) Regulations Subsidiary Legislation 234.45

⁶⁵ Ibid, Regulation 3

⁶⁶ The so-called 'Commercial Yacht Code' is the 'Code of Practice' referred to in the previous paragraph; Transport Malta, 'Commercial Yacht Code' <http://www.transport.gov.mt/admin/uploads/medialibrary/files/2_Commercial%20Yacht%20Code%202010.pdf> accessed 1 October 2013

⁶⁷ Edward Zammit Lewis, 'Government Committed to Superyacht Industry' *The Sunday Times* (Malta, 22 September 2012)

⁶⁸ The *Bacino* case, properly referred to as *Etat du Grand-Duché de Luxembourg, Administration de l'enregistrement et des domaines v Pierre Feltsen, Bacino Charter Company SA (C-116/10)* was a case relating to a request for preliminary ruling made by the Luxembourg Cour de Cassation to the European Court of Justice. The case highlighted some of the widespread abuse prevailing in the commercial yacht industry. In this instance it was held that, contrary to the practice which had been adopted, where the lessee of a yacht uses it for private purposes, such lessee must pay VAT on the service to the owner who makes use of the yacht, for commercial purposes, on the high seas. In other words the ECJ confirmed that VAT must be paid when a private charterer charters a yacht for his own private use. This was not the practice which had been adopted by the individuals concerned in the case.

⁶⁹ The attractive tax treatment relates to VAT and may be found provided for in the Guidelines Regarding Vat Treatment of Yacht Leasing <http://www.vat.gov.mt/en/VAT-Information/Guidelines-to-certain-VAT-procedures/Documents/yacht_leasing_vat_guidelines.pdf> accessed 29 November 2013

⁷⁰ Anne Fenech, 'Two Years On – Legal Developments', *The Malta Business Weekly* (Malta, 5 May 2011)

7. The Shipping Company

Modern maritime practice and commercial custom often sees vessels owned by purposely incorporated companies.⁷¹ This is done for obvious reasons ranging from the protection offered by the corporate veil to the selection for incorporation in a jurisdiction which offers significant fiscal and corporate benefits. Maltese law offers shipowners a variety of corporate vehicles, from limited liability companies to trusts or foundations, which may be used to own and/or operate a vessel.⁷²

Special legislation intended to cater specifically for shipping vehicle was introduced by means of special Regulations in 2004.⁷³ These Regulations allow for the setting up of a 'Shipping Organisation'; an entity which is based on the traditional concepts found in the Companies Act⁷⁴ but which operates 'with simplified and less onerous requirements'.⁷⁵ Moreover, there are no nationality requirements as to shareholders and directors.

The laws regulating the winding up of companies have also been purposely crafted when it comes to Maltese shipping companies. Under the latter regulations,⁷⁶ for example, a Court may order the winding up of a company which owns a Maltese vessel on such company becoming insolvent.⁷⁷ This being said, our law provides that if the vessel is the sole asset of the company and such vessel is subject to a registered mortgage or other maritime claim, with any outstanding sums due under the mortgage or claim exceeding the value of the ship, the Court shall not order the winding up of the company owning the vessel until it is satisfied that there are excess funds deriving to the company in Malta in relation to which the winding up order may be ordered.⁷⁸ This of course means that the Court may only proceed with the procedure for winding up after the handing down of any judgements in relation to any mortgage or maritime claim against the relative vessel. Moreover, it is only if there are surplus funds following the payment of the mortgage or maritime claim that any other debts are satisfied in the ordinary course of winding up.⁷⁹

8. The Legal Regime Regulating Tonnage Tax

There can be little doubt in any one's mind that when it comes to identifying a potential flag administration within which to register one's vessel or one's fleet, fiscal considerations come to play no small part. This is something which has, of course, been widely recognised: even within the European Union.⁸⁰

In fact, the EU Competition Commissioner Joaquin Almunia has stated that

The European Union needs a maritime sector that is competitive at international level and hence allows, for that purpose, favourable taxation based on tonnage to prevent companies from relocating.⁸¹

Indeed, 'the 1997 EU Guidelines identify fiscal costs (corporate taxation and wage related liabilities in respect of seafarers) as being the critical factor affecting the competitiveness of flag states'.⁸² For this reason various measures have been taken in order to attract a greater fleet into the EU. Foremost amongst these measures has been the ability of Member States to do away with the traditional methods of taxation and introduce a system where the tax paid is dependant on the tonnage of a vessel or fleet belonging to a particular shipowner, that is, tonnage tax.

The success of this approach, adopted in some form or other by Greece, the Netherlands, Norway, Germany, the UK, Finland, Spain and Ireland amongst others, has meant that the EU consolidated earlier

⁷¹ Commonly referred to as SPVs or 'Special Purpose Vehicles'

⁷² Merchant Shipping Act, article 84Z; Of course, natural persons may also own vessels in their own name.

⁷³ Merchant Shipping (Shipping Organisations – Private Companies) Regulations, Subsidiary Legislation 234.42

⁷⁴ Companies Act, Chapter 386 of the Laws of Malta

⁷⁵ Coles and Watt (n 5)

⁷⁶ Merchant Shipping (Shipping Organisations – Private Companies) Regulations

⁷⁷ Ibid, regulation 99(2)

⁷⁸ Ibid, regulation 101(2)

⁷⁹ Louis Cassar Pullicino, 'Bankruptcy of Shipowners and the implications on ship arrest under Maltese Law' (10th Member's Meeting of Shiparrested.com, Marrakesh, 16 May 2013)

⁸⁰ As early as 1996 the Commission recognised that the competitive difference between Community and non Community ships depends primarily on fiscal costs such as corporate taxation and wage related liabilities in respect of sea farers *cf.* the Commission's Communication dated March 1996 entitled *Towards A New Maritime Strategy*.

⁸¹ These comments, made by Commissioner Almunia within the context of an EU state aid probe on Spain's tax-lease shipbuilding system in 2011, were amongst some of his first public comments in relation to the maritime tonnage tax regime.

⁸² Coles and Watt (n 5)

measures by introducing the *2004 Guidelines on State Aid to Maritime Transport*.⁸³ The latter has permitted for the payment of lower social security contributions and income tax for EU seafarers on board EU registered vessels.⁸⁴

With this in mind, therefore, it should come as no surprise that Maltese tax legislation⁸⁵ has also contributed to the growth enjoyed by the Maltese flag. This is because cargo and passenger ships trading internationally freely benefit from the tonnage tax regime.⁸⁶ This regime is based on the EU's Community Guidelines referred to above and dictates that all ships falling within the scope of this regime will be liable to pay a tonnage tax whilst being eligible for exemptions from other tax regimes – such as income tax.⁸⁷

Legal Notice 83 of 2010 extended the tonnage tax regime to Maltese companies (and other legal persons) that own ships that are not registered in Malta.⁸⁸ Maltese Law and the Guidelines on which our law is based do *not* extend the tonnage tax regime to shipping activities that do not consist of carriage of cargo or passengers internationally. This will effectively mean that fishing vessels, oil rigs or non-commercial leisure yachts are not eligible for the tonnage tax benefits under the existing legislation.

The thorny question here is whether special, 'service' ships, such as cable layers, qualify under the tonnage tax regime. The European Commission's decision in the Danish case⁸⁹ is interesting because in that case the Commission accepted the argument that in practice there is *no difference between 'service' and 'transport' activities, all being commercial shipping activities*, thereby making service ships (e.g. cable-layers) eligible for state aid under the Guidelines.⁹⁰

The Maltese position is currently being reviewed by the European Commission⁹¹ and the outcome is eagerly awaited by the shipping Community in Europe given that the Commission's findings will have a rebounding effect on the sector in the whole of the EU.⁹²

9. Mortgages

Of note is also the fact that the Merchant Shipping Act presents to financiers the required comfort when it comes to financing undertakings wishing to operate within the Maltese maritime and shipping industries. This comfort is achieved 'via' the security offered by the registration of a mortgage. Indeed the Act is effective in ensuring that the mortgage security over a vessel is well protected and can be enforced efficiently and effectively in case of default on loans.

One remembers that article 37A of the Merchant Shipping Act provides;

Ships and other vessels constitute a particular class of moveables whereby they form separate and distinct assets within the estate of their owners for the security of actions and claims to which the vessel is subject. In case of bankruptcy of the owner of a ship, all actions and claims, to which the ship may be subject, shall have preference, on the said ship, over all other debts of the estate.

⁸³ *Official Journal of the European Communities*, 4.1.97 (97/C 2/02)

⁸⁴ Coles and Watt (n 5)

⁸⁵ *Vide* Legal Notice 224 of 2004 as amended by Legal Notice 83 of 2010 (S.L. 234.43) - the Merchant Shipping (Taxation and Other Matters Relating to Shipping Organisations) Regulations

⁸⁶ Not all vessels registered in Malta are subject to the same tax regimes. On the contrary, the applicable tax regime is dependent on the type of vessel in question and its trade.

⁸⁷ Andrew J Zammit, 'Ship Registration and Finance in Malta' (*CSB Advocates*, 18 September 2008) <<http://www.csb-advocates.com/malta-law-articles/ship-registration-and-finance-malta>> accessed 19 August 2013

⁸⁸ Legal Notice 38 of 2010 creates two categories of non Maltese ships, namely community ships in relation to which the tonnage tax is simply extended to all companies that own or operate vessels that are flagged in an EU or EEA Member State, and to extra community ships where the tonnage tax regime is to apply only where certain eligibility criteria are met.

⁸⁹ Commission decision of 13 January 2009 on State aid C 22/07 (ex. N. 43/07) as regards the extension to dredging and cable-laying activities of the regime exempting maritime transport companies from the payment of income tax and social contributions of seafarers in Denmark.

⁹⁰ The tonnage tax regimes and aspects thereof have been the subject of much controversy and debate. The European Commission has had numerous occasions to scrutinise the tonnage tax regimes adopted by members states, not least that adopted by Malta. A decision on the Maltese tonnage tax regime is expected at time of writing. Amongst decisions taken by the Commission in the past. See for example the *Commission Decision of 18 December 2009, on State aid C 34/07 (ex N 93/06) related to the introduction of a tonnage tax scheme in favour of international maritime transport in Poland*.

⁹¹ EUR-Lex, *Information and Notices* <<http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2012:289:SOM:EN:HTML>> accessed 18 February 2014

⁹² Comprehensive overview of the position can be found in the article posted on the following site; Justin Stares (ed.), 'Tonnage Tax Review' (*Maritime Watch*, 6 November 2013)

<<http://www.maritimewatch.eu/articles/1>> accessed 18 February 2014

The mortgage as regulated by Maltese law has proven time and again to be a very effective tool in the hands of banks and other financiers. The Courts have had no hesitation in applying the full brunt of the law against defaulting mortgagors.⁹³ Whilst the mortgage security was imported from the Common Law and likewise, does not find a precise definition under our law,⁹⁴ it may be described as a strong security which supports the performance of an obligation – whether ‘*di fare*’ or ‘*di dare*’. Mortgages may even be used to secure future obligations!⁹⁵

Our law, at article 47 of the Merchant Shipping Act, states that if a mortgage is to have effect against third parties it must be registered in accordance with the provisions of the same Act. Such registration also enables the prioritisation of the mortgagor’s rights from the date and time of registration.⁹⁶ Of course, this means that where there is more than one mortgage on a ship the principle of ‘*prior in tempore potior in iure*’ is to apply.⁹⁷

The reason why this relatively alien security concept has been so effective in furthering the shipping and maritime industries is because it grants creditors a number of powers and remedies which they may make use of in case of default. Amongst the remedies available to the mortgagee, article 42 of the Act provides that in the case of default the mortgagee may take back possession of the vessel, sell it, and do anything required for the preservation of the status and validity of the ship’s registration.⁹⁸ When one couples these advantages with the fact that a registered mortgage is considered an executive title at Maltese law,⁹⁹ one understands the importance of this imported security instrument.

The bottom line is that financiers, are happy to grant finance to their ship-owning clients when their vessels are registered in Malta. This is because financiers are perfectly aware of Malta’s creditor friendly legislation and the effective remedies available to them as a matter of Maltese law. Were Malta not to benefit from such financier confidence (as sourced and secured by our legislation), the shipping and maritime industries would not be what they are today.

10. Legal and Professional Services

The growth of the Maltese merchant shipping register has, however, not only meant profits for the direct stakeholders alone, but also for a host of peripheral and supporting industries or sectors which have managed to capitalize on the boom.¹⁰⁰ The legal profession is no exception.

With a register which continues to attract quality vessels, the need for legal expertise in the maritime sector led to the proliferation of a host of legal professionals specializing in the maritime and shipping fields. The reality today is that Malta boasts a number of reputable advocates, law firms and other professionals whose practice has grown around this sector, whether supporting owners seeking registration of vessels, banks seeking financial advice or creditors seeking remedies against ships in debt.

The network of legal expertise is not only capable of offering the necessary services to register vessels and incorporate the companies owning such vessels in such a way as to contribute to the success of the sector and the economy, but is also fundamental in carrying out the necessary ongoing maintenance ensuring that the vessels’ status remains in order and in conformity with the legal requirements of Maltese law. By renewing registrations, making amendments to the register, acting as mandatories for the shipowners in all local matters as well as providing a host of follow up services, the legal profession is guaranteed a continuous work load from the sector.

11. Ship Management

This being said, we must not satisfy ourselves with the success of the professional services outlined above and which have grown and evolved abreast of the shipping and maritime industries. The work which has

⁹³ In this regard one may see Joint Stock Company ‘Rietmu Banka’ vs Il-Bastiment M.V. Blankenese, Civil Court First Hall, 22 August 2013 per Mr Justice Mark Chetcuti, as well as Joanne Baldacchino nomine vs Il-Bastiment MY Louis and the Girls, Civil Court First Hall, 17 April 2013 per Mr Justice Mark Chetcuti

⁹⁴ Tonio Feneh, ‘Ships as Security for Debts, Mortgages and Maritime Privileges’ (*Għaqda Studenti tal-Liġi Notes*) <<http://www.ghsl.org/~levigzur/upload/pages/Ship%20Finance%20Presentation.pdf>> accessed 16 November 2013

⁹⁵ Merchant Shipping Act, article 38(5)

⁹⁶ Ibid, article 39 and article 41

⁹⁷ Ibid

⁹⁸ Ibid, article 42

⁹⁹ Ibid, article 42(2)

¹⁰⁰ Scerri-Diacono and Grech Orr (n 30)

been put in so far will be lost if we are unable to continue to develop the services which we offer. In such a competitive environment, with States struggling for the top positions when it comes to ship registration and flag administration, we must be able to offer incentives and advantages which rival, if not better, those offered by other flags. The setting up of an accredited and internationally recognised maritime academy, for example, is only one of the innumerable steps which can be taken to continue to consolidate Malta's position in the international maritime and shipping theatre.¹⁰¹

The idea now is to extend the sector to more technical aspects of the industry, such as technical management and crewing.¹⁰² In fact, it is true to say that 'the time is ripe for ship management activities to become the next growth area for this industry'.¹⁰³

Ship management is an activity which relates to technical and/or crew management as well as other forms of services (inclusive of services ranging from maintenance engineering to contract negotiations and inventory control). As Branch puts it,

the basic aim of the ship management service is to provide the owner, for a management fee, with vessels attaining quality service standards at a reasonable competitive cost.¹⁰⁴

Indeed, 'ship management companies are now becoming more common'¹⁰⁵ as they provide 'the ideal method for ensuring that the daily operation and maintenance of the vessels are correctly superintended rather than indulging in the expense of setting up their own operations department'.¹⁰⁶ In light of this, therefore, it is submitted that Malta place itself in a position to exploit and make full use of this increasingly emergent market. Ultimately,

our country's legal and fiscal framework relating to ship management activities already provides an attractive proposition for such activities, bringing Malta on a level playing field with other traditional European ship management jurisdictions.¹⁰⁷

12. Conclusion

Natural and human resources, history, expertise, skills and values have all played their part in turning our small archipelago into an epicentre for maritime excellence and a point of convergence for the shipping industry. As this article demonstrates, however, there can be little debate on the fact that having a sound legislative framework has also been fundamental.

Our laws, supplemented, guided and influenced by international and regional frameworks, policies and legislative instruments, are the tools with which Malta has been able to carve for itself a strong reputation which punches far above its weight. Moreover;

Government pledges to continue creating a favourable environment to attract foreign ship managers to conduct their operation from within a Maltese company structure while complying with international and EU standards and regulations to ensure the provision of services of the highest quality for clients.¹⁰⁸

In conclusion, however, it is the legislative foundations which we built and maintain that enable us to enjoy international recognition as a quality flag and to offer a top class product whilst remaining economically attractive. Together with an excellently run Flag Administration,¹⁰⁹ it is our laws, our Acts and our Regulations which have attracted the shipping and maritime industries, it is they which enable these industries to function profitably in our jurisdiction and it is they that continue to enable us to adapt to an ever fluid international scenario rapt with untiring competitors.¹¹⁰

¹⁰¹ Zammit Lewis (n 67)

¹⁰² In this regard one may see Legal Notice 83 of 2010, Merchant Shipping (Taxation and Other Matters relating to Shipping Organisations) (Amendment) Regulations.

¹⁰³ Edward Zammit Lewis, 'Opportunities for Ship Management' *The Sunday Times* (Malta, 1 December 2013)

¹⁰⁴ Branch (n 16) 295

¹⁰⁵ *Ibid.*, 294

¹⁰⁶ *Ibid.*, 295

¹⁰⁷ Zammit Lewis (n 103)

¹⁰⁸ *Ibid.*

¹⁰⁹ It is the Merchant Shipping Directorate that hosts within it the Registry of Ships.

¹¹⁰ Scerri-Diacono and Grech Orr (n 30)