

World Maritime University

The Maritime Commons: Digital Repository of the World Maritime University

World Maritime University Dissertations

Dissertations

2012

Discordant regimes : the interplay between mortgage and bareboat charter registration

Ryan Acosta Federo
World Maritime University

Follow this and additional works at: https://commons.wmu.se/all_dissertations



Part of the [Corporate Finance Commons](#)

This Dissertation is brought to you courtesy of Maritime Commons. Open Access items may be downloaded for non-commercial, fair use academic purposes. No items may be hosted on another server or web site without express written permission from the World Maritime University. For more information, please contact library@wmu.se.

WORLD MARITIME UNIVERSITY

Malmö, Sweden

**DISCORDANT REGIMES:
THE INTERPLAY BETWEEN MORTGAGE AND
BAREBOAT CHARTER REGISTRATION**

By

RYAN ACOSTA FEDERO

Philippines

A dissertation submitted to the World Maritime University in partial
fulfillment of the requirements for the award of the degree of

MASTER OF SCIENCE

In

MARITIME AFFAIRS

(MARITIME LAW AND POLICY)

2012

DECLARATION

I certify that all the materials in this dissertation that are not my own work have been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

(Signature): _____

(Date): _____

Supervised by: **Assoc. Prof. Maximo Q. Mejia Jr.**
World Maritime University

Assessor: **Prof. Proshanto Mukherjee**
Institution/organization: **World Maritime University**

Co-assessor: **Mr. Jonathan Pace**
Institution/organization: **Regional Marine Pollution**
Emergency Response Center
For the Mediterranean Sea (REMPEC)

ACKNOWLEDGMENTS

This dissertation is for my mother, Ms. Jocelyn S. Acosta, for providing all her unconditional support for my pursuit of this Masters degree despite of my often times stubbornness and seemingly spendthrift lifestyle and to my loving brother, Arch. Jeffrey A. Federo, for his extreme patience and understanding to my importunate attitude in everything. Without them, this degree will not materialize successfully and in style.

With full respect and utmost gratitude to my supervisor, Dr. Maximo Q. Mejia Jr., for his absolute assistance and liberating insights in the preparation and completion of this paper.

For Prof. Proshanto K. Mukherjee for his indelible brilliance and guidance both in the classroom and as an inspiration to many.

For Ms. Anne Pazaver for editing this paper.

For Ms. Jo Ann Salamanca, not only my senior buddy but an amazing friend, and Mr. Virvic Erese for making my life bearable the first months of my stay in Malmo – thank you for the unconditional hand in gathering data for this paper.

My heart will forever be grateful to the following persons who have become a part of my life and will remain as such:

Cdr. Weniell Azcuna, Cdr. Inocencio Rosario Jr., Cdr. Joselito B. Quintas Jr. and Eng. Marc Anthony Pascua – my family in Malmo, we have finally made it and I am proud of us all.

Tita Dolores, Tito Kjell and Tita Bitte, Tita Linda Crebello and Diana, Maria – my adoptive Swedish families.

The Wolfpack – Mr. Darion CM Lake, Mr. Anatolios Kazimirov, Mr. Spyridon Kipouros, Mr. Osanabi Nwangi, Mr. Ahmed Hussein and Capt. Waldemar Wichmann – my new brothers.

Ms. Doan Thu Nga, my WMU best mate – for taking care of me when I got sick, for cooking when I got too lazy and of course my hairstylist.

My friends especially to Philippa, Samira, Min, Anna, Nadiya, Eduardo and Alfredo.

Kimberle Ann, Charlene, Menzie Ann, Jom and Dannah, Wilbert and Amie, Christia, Ayis, Rica and Ella, Laida – for making me sane.

Lastly, this is a toast to my family back in the Philippines. My not-so-little anymore sister Reyna Marie, Dad, Lolo and Tito Dennis.

ABSTRACT

Title of Dissertation: **Discordant Regimes: the interplay between ship mortgage and bareboat charter registration**

Degree: **Master of Science**

This dissertation discusses the implications of mortgage on bareboat charter registration with respect to the parties involved, hence, the Mortgagor, the Mortgagee, the Charterer and the Flag state. There are no certain international laws establishing the treatment of the rights of the parties to a defaulted mortgage on a bareboat charter registration. This paper provides an analysis of the current international conventions available for reference and of the application of laws by different jurisdictions on how such issues have been tackled.

This paper provides an update on the current status of bareboat charter registration in the Philippines having its international registry primarily geared towards bareboat charter registration. This paper digs into current laws on other well-established bareboat charter registration programs such as those in Antigua and Barbuda and United Kingdom. In addition, this paper examines the laws of Zanzibar, a newly opened registry, which is considering bareboat charter registration.

Actual data from Antigua and Barbuda and the Philippine maritime administrations are gathered for analysis as these data draw a clear picture of the current status of the impact of bareboat registration vis-à-vis the general ship registration regime in these states.

Numerous books and articles are used to elucidate relevant legal principles and concepts. International conventions are scrutinized to determine the appropriate laws applicable to the subject. The maritime legislation of certain states is compared for

analysis of the viability of the subject matter to those states. Finally, a selection of case law is examined to substantiate the dissertation's conclusions.

Keywords: Bareboat Charter, Registration, Mortgage, Default, Maritime Claims

TABLE OF CONTENTS

Declaration	ii
Acknowledgement	iii
Abstract	v
Table of Contents	vii
List of Abbreviations	xi
1 Introduction	1
1.1 Background of the study	1
1.2 Objective of the study	2
1.3 Scope and limitation	3
1.4 Relevance of the study	3
1.5 Structure of the dissertation	4
2 Bareboat Charter Registration	5
2.1 Definition	5
2.1.1 Vessel registration	5
2.1.2 Bareboat charter	10
2.1.3 Bareboat charter registration	11
2.2 Parties to bareboat charter registration	13
2.2.1 Shipowner	13
2.2.2 Bareboat charterer	16
2.2.3 Flagging-out state	18
2.2.4 Flagging-in state	18
2.3 International regime governing bareboat charter registration	19
2.4 Private law on bareboat charter	21

2.5	Bareboat charter registration in various states	22
2.5.1	The Philippines	22
2.5.2	Antigua and Barbuda	26
2.5.3	United Kingdom	27
2.5.4	Zanzibar	28
2.6	Advantages/Disadvantages	29
2.6.1	Advantages	30
2.6.2	Disadvantages	32
3	Mortgage	34
3.1	Definition	34
3.2	Parties to mortgage	39
3.2.1	Mortgagor	39
3.2.2	Mortgagee	41
3.3	International law on mortgage	44
3.4	Private law on mortgage	45
4	Mortgage on Bareboat Charter Registration	47
4.1	Effect of mortgage on bareboat charter registration	47
4.1.1	On the mortgagor	47
4.1.2	On the mortgagee	48
4.1.3	On the charterer	49
4.1.4	On the flag states	50
4.2	Implications of defaulted mortgage on bareboat charter registration	51
4.2.1	Responsibilities of mortgagor	51
4.2.2	Rights of mortgagee	52
4.2.3	Rights of charterer	53
4.2.4	Role of flag states	54
4.3	Jurisdiction	55
4.4	Remedy	57

4.4.1	Demand for repayment	58
4.4.2	Possession	58
4.4.3	Action <i>in rem</i> and action <i>in personam</i>	59
4.4.4	Arrest ship	60
4.4.5	Freezing injunction	61
4.4.6	Sale of the vessel	61
4.5	Hierarchy of maritime claims	63
4.5.1	The Philippines	64
4.5.2	Antigua and Barbuda	64
4.5.3	United Kingdom	65
4.5.4	Zanzibar	65
4.5.5	Canada	66
4.5.6	United States	66
4.5.7	International Convention on Maritime Liens and Mortgages 1993	67
5	Analysis	68
5.1	Divergent experiences in bareboat charter registration in flag states	68
5.1.1	Philippines	68
5.1.2	Antigua and Barbuda	71
5.1.3	Zanzibar	72
5.1.4	Effectiveness of bareboat charter registration	73
5.2	Existing conventions: a question of sufficiency	74
5.2.1	United Nations Convention on Conditions for Registration of Ships 1986	74
5.2.2	International Convention on Maritime Liens and Mortgages 1993	76
5.2.3	Conventions on current realities	77
5.3	Question on conflict of laws	78

6	Conclusion	80
	References	83
	List of Cases	86
	Annexes	
A	Excerpt of United Nations Convention on Conditions for Registration of Ships 1986	88
B	Excerpt of International Convention on Maritime Liens and Mortgages 1993	90
C	BIMCO BARECON 2001	95
D	Philippines Presidential Decree No. 760	97
E	Philippines Presidential Decree No. 866	99
F	Philippines Presidential Decree No. 1711	101
G	Philippines Executive Order No. 438	103
H	Philippines Executive Order No. 667	105
I	Philippines Republic Act No. 7471	106
J	Excerpt of UNCTAD Review of Maritime Transport	108
K	Excerpt of Antigua and Barbuda Maritime Transport Act 2006	109
L	Excerpt of United Kingdom Maritime Shipping Act 1995	113
M	Excerpt of Zanzibar Maritime Transport Act 2006	116
N	Philippines – MARINA Marine Circular No. 182	120

LIST OF ABBREVIATIONS

AB MSA	-	Antigua and Barbuda Merchant Shipping Act
ADOMS	-	Antigua and Barbuda Department of Marine Services and Merchant Shipping
BARECON 2001	-	Bareboat Charter Contract 2001
BIMCO	-	Baltic and International Maritime Council
CMI	-	Comite Maritime International
COR	-	Certificate of Registry
EO	-	Executive Order
FOC	-	Flag of convenience
GRT	-	Gross Tonnage
ITF	-	International Transport Workers' Federation
MARINA	-	Maritime Industry Authority
MOU	-	Memorandum of Understanding
MTA	-	Maritime Transport Act
OSO	-	Overseas Office
PD	-	Presidential Decree
P&I	-	Protection and Indemnity Insurance
RA	-	Republic Act
SIRB	-	Seafarer's identification and record book
TOR	-	Transcript of Registry
TZIRS	-	Tanzania Zanzibar International Register of Shipping
TZRS	-	Tanzania Zanzibar Register of Shipping
UK	-	United Kingdom
UK MSA	-	United Kingdom Merchant Shipping Act
UNCCROS 86	-	United Nations Convention on Conditions for Registration of Ships, 1986
UNCLOS 82	-	United Nations Convention on Law of the Sea, 1982
UNCTAD	-	United Nations Conference on Trade and Development
US	-	United States

CHAPTER 1

INTRODUCTION

1.1 Background of the Study

As the seaborne trade has steadily increased over the past decade, ships have been built continuously to meet demand for vessels. Cargo owners have difficulty financing the high capital outlay in building vessels. These cargo owners resort to chartering vessels that are currently available in the market. One of the available options in chartering is bareboat chartering.

Bareboat chartering passes the operational expenses to the charterer. The charterer assumes control over the vessel as to the operations, maintenance and crewing. For the benefit of the charterer, the charterer has the option to register the bareboat charter to another flag state to take advantage of the laws of the flagging-in state accepting the registration of the bareboat charter regarding operations of the vessel. However, once the vessel has been flagged-out, the proprietary rights for the vessel remain with the original registry of the vessel.

The process of bareboat chartering seems to be a simple undertaking until certain issues arise and one of those is mortgage on the vessel.

Shipowners maximize the use of their available resources. Shipowners do not restrict themselves and rely on the hire from bareboat charter of their vessels and may expand their fleet by acquiring new vessels for hire or venturing into other

businesses. An option of available financing is through mortgage of their existing assets, herein the vessel chartered.

Mortgage on a ship is typically registered to the state where the ship is registered. This mortgage remains in force regardless that the vessel has been flagged-out to another state; thus, all the rights of the mortgagee continue to exist with the ship. The concept of bareboat charter registration acknowledges these implications. Only the public responsibilities of the vessel such as the flag it flies, and technical, safety and pollution prevention issues are transferred to the flagging-in state for jurisdiction purposes while the private or proprietary interest issues of the vessel stay in the original flag state or the flagging-out state.

The conflict arises when the mortgagor, herein the owner of the vessel, defaults on his mortgage of the vessel. The mortgagee may enforce his rights against the vessel. The charter party contract may still be binding and existing; hence, the complication has begun.

1.2 Objective of the Study

Default on an existing mortgage on a chartered vessel is probable. The legal implications of such default entail further conflicts of interpretation and application of laws.

There is no international regime specifically for bareboat charter registration. The laws vary from one jurisdiction to another. Bareboat charter registration is a public law matter but the legal interpretation and application rely on the actual maritime acts of the flag state. On the other hand, mortgage is a private law concept that relies on the national law of the state in which it is enforceable. This paper compares the treatment of both bareboat charter registration and mortgage on various jurisdictions to arrive at a general idea of how these two are being tackled by examining the

current international regime and the national laws of various states. This is pertinent in determining whether the current conventions are sufficient to govern the regime.

The aim of this dissertation is geared towards the identification of the effects of mortgage on bareboat charter registration by detailing such effects on the parties of the bareboat charter registration namely – the mortgagor, the mortgagee, the charterer and the flag states involved.

In addition, this dissertation aims to provide a clear understanding of the legal implications of a defaulted mortgage particularly the remedies available to the parties involved, the jurisdiction that such case may be covered and the laws that may be applied. This is essential to maritime states such as Antigua and Barbuda and the Philippines that have significant numbers of bareboat registrations in their fleets. A concrete solution to prospective conflict related to the issue may help in addressing the matter accordingly.

1.3 Scope and Limitation

This dissertation will focus primarily on the national laws of various jurisdictions such as Antigua and Barbuda, the Philippines, United Kingdom and Zanzibar for comparison and analysis. Data of bareboat charter registration from Antigua and Barbuda and the Philippines will be provided as these maritime states have a significant percentage of bareboat charter registrations in their fleets. This paper will concentrate only on existing vessels and will not include ships under construction.

1.4 Relevance of the Study

This dissertation is particularly important to the parties to the bareboat charter and the mortgagee of the vessel as this study provides some insights on the legal implications for a probable mortgage default on the vessel. The study gives

protection to the parties involved to be able to plan and execute actions without further jeopardizing their claims and the rights of other parties involved, hence, minimizing confusion and misinterpretation of the laws applicable as such.

This study is also relevant to flag states that seek to promote their flag and expand their fleet with the use of bareboat charter registration. This regime entitles flag states to acquire tonnage from vessels registered to other states as if they were their own vessels. The flagging-in states will be able to impose taxes on tonnage; consequently, helping the income of the states concerned.

1.5 Structure of the dissertation

Chapter 1 is a general introduction providing the background of the study and the relevance of the paper to the industry.

Chapter 2 describes the context of bareboat charter registration by providing its definition, composition, parties, laws, advantages and disadvantages. This chapter discusses the underlying principles and national regimes with regard to the vessel's nationality and the registration hereto.

Chapter 3 describes the context of mortgage by providing its definition, rights and obligations of the parties and the laws governing it.

Chapter 4 provides the effect of mortgage on bareboat charter registration by enumerating its implications to the parties and analyzing the legal effects of a defaulted mortgage. This chapter discusses the issues with regard to jurisdiction, the remedies available for the parties and the hierarchy of maritime claims.

Chapter 5 discusses the author's view on the current international conventions governing ship mortgages and bareboat charter registration. This chapter provides

recommendations that have been drawn from the analyses of the various international conventions, national legislation of certain states and case law.

Chapter 6 is the conclusion and summarizes the ideas derived from the study.

CHAPTER 2

BAREBOAT CHARTER REGISTRATION

2.1 Definition

2.1.1 Vessel Registration

Registration versus Nationality

The terms, nationality and registration, are often mistakenly interchanged. Nationality refers to the character embodied in a personality. Vessels are deemed to possess a separate legal personality from their owners, hence, vessels are vested themselves with their own nationality.¹

Nationality refers to the link between the vessel and the state that has jurisdiction over said vessel, is responsible for it, and has the right to protect it under international law.² Vessels need to be subjected to a jurisdiction that governs that vessel especially when they are in the high seas. Given the fact that a vessel is a self-sustained and self-contained floating object at sea, the people living and working within it are obliged to follow certain laws and be dependent on laws of a certain state to keep order within it. This nationality vested in a vessel also protects it against

¹ Pamborides, G.P., *International Shipping Law: Legislation and Enforcement*, Kluwer Law International, The Hague, 1999/Ant. N. Sakkoulas Publishers, Athens, 1999, p. 1.

² Odeke, A. *Evolution and development of ship registration*, *Il Diritto Marittimo*, 1997, p. 637. See also, Odeke, A. *Bareboat Charter (Ship) Registration*, Kluwer Law International, The Hague, 1998, p. 13.

any possible threats from individuals or other states that might have interest in the vessel.³

Registration is the legal procedure for conferring nationality on a vessel.⁴ Registration literally means putting the matter into public record;⁵ hence, evidencing the nationality of a vessel by virtue of a document. However, not all vessels are entitled to registration. Registration is governed by specific criteria set by a state for the eligibility of a vessel to be registered within that state's records. This condition does not prejudice the nationality of the vessel and its entitlement to a flag of that state as long as it meets the criteria to fall under the jurisdiction of a state through the issuance of a license⁶ or a deemed nationality through the nationality of the owner.⁷

A vessel with a license issued by a certain state means that the vessel is deemed to possess the nationality of that state and is under its jurisdiction. For example in the United Kingdom, vessels under twenty four (24) meters in length cannot be registered. The ineligibility of the vessel to be registered does not prohibit the vessel from being a British vessel and flying the UK flag. The issuance of a license to the vessel constitutes effective jurisdiction of the state to that particular vessel.

³ Pamborides, *International Shipping Law: Legislation and Enforcement*, loc. cit. See also Ready, N., *Ship Registration Third Edition*, LLP Reference Publishing, 1998, p. 1.

⁴ Mukherjee, P.K., *Flagging Options: Legal and Other Considerations*, Mariner, Jan/Mar 1993, p. 32.

⁵ Ready, N., *Ship Registration Third Edition*, op. cit., p. 2.

⁶ Odeke, A., *Evolution and development of ship registration*, op. cit., p. 633. See also, Odeke, A., *Bareboat Charter (Ship) Registration*, op. cit., 12.

⁷ Gold, E., et.al., *Essentials of Canadian Law: Maritime Law*, Irwin Law, Toronto, 2003, p. 176-177. See also Coles, R. and Watt, E., *Ship Registration: Law and Practice Second Edition*, Informa, London, 2009, p. 3.

Registration versus Documentation

While registration is the conferring of nationality on the vessel, documentation refers to the evidencing of entitlement of a ship owner to fly the national flag of a state.⁸ Evidencing, hereto, is the production of an actual document or paper to prove the right to fly the flag of a state. Without proper documentation, there is no way to prove the vessel's nationality and the vessel's registration to a certain state. There are two types of documentation:⁹ the certificate of registry and the transcript of registry.

The certificate of registry (COR) is the proof of ownership and nationality of the vessel.¹⁰ This document shows the particulars of the vessel, the registered owners (or the bareboat charterer in case of a bareboat charter registration), the flag under which the vessel has been registered and the date when the vessel was registered, hence, entitled to fly the flag of the state. The COR is the internationally accepted document that serves as evidence of nationality and registration of a vessel. On the other hand, the transcript of registry (TOR) is a publicly accessible document that provides the details of the vessel, the owners of the vessel (and the bareboat charterer where it is applicable), the flag of the vessel and the encumbrances attached to the vessel. The TOR is a public document that provides the list of registered liens and encumbrances, which is necessary especially in determining the ranking of mortgages.

Genuine Link

The United Nations Convention on the Law of the Sea 1982 (UNCLOS 82) Article 91(1) specifies that, "there must exist a genuine link between the State and the

⁸ Coles, R. and Watt, E., *Ship Registration: Law and Practice Second Edition*, op. cit., p. 5. See also Ready, N., *Ship Registration Third Edition*, op. cit., p. 4. See also UNCLOS 82 Article 91(2) which states that "Every state shall issue to ships to which it has granted the right to fly its flag documents to that effect."

⁹ Ibid.

¹⁰ Ibid.

ship.”¹¹ There is neither a clear definition of genuine link nor criteria to determine the genuine link principle. The *Nottebohm* case¹² paved the way on the assessment of the genuine link to be applied to the vessel’s eligibility for nationality. The case has presented that the link between Mr. Nottebohm and Germany is stronger than his link to Liechtenstein such that in spite of the fact that all of his businesses had been centered in Guatemala for 34 years, the Guatemala government had the right to treat him as a German alien rather than a Liechtenstein national. Vessels are subjected to this amorphous genuine link requirement in the grant of their nationality.

Registration used to be a nationalistic approach where the nationals of a certain country flew the flag of their own country. As trade has continuously evolved internationally, shipowners have begun to conceal their identities for protection either for political or economic reasons. Shipowners have been restricted from trade because of the flag their vessels fly. This scenario has resulted in the emergence of open registries enabling the shipowners to register their vessels in other states and earn the right to fly the flags of those states.

Maritime states that have developed so-called open registries have argued that the genuine link requirement is not jeopardized by the practice of allowing foreign owners to acquire nationality and eligibility to fly their flags. The key concept to be considered is the effective jurisdiction and control over the vessel.¹³ Having said that, effective jurisdiction and control over the vessel is accomplished through control of various aspects such as administrative, technical, economic and social matters. Administrative refers to matters such as the laws applicable to the vessel regarding registration and protection of the vessel. Technical refers to those statutory requirements regarding the condition of the vessel through its hull and machinery,

¹¹ The so-called “genuine link” requirement.

¹² *Liechtenstein v. Guatemala*, ICJ Reports [1955] 4.

¹³ Convention on the High Seas 58 Article 5 states that “There must exist a genuine link between the state and the ship; in particular, the state must effectively exercise jurisdiction and control in administrative, technical and social matters over ships flying its flag.” See also UNCCROS 86 Article 1.

safety and pollution prevention. Economic refers to matters such as the tax laws the vessel is subjected to and certain rights to engage in activities on the territorial waters of a state. Social refers to matters such as the welfare of the crew on board the vessel.

2.1.2 Bareboat Charter

The practice in conventional shipping is the owners themselves operate their own vessels. However, shipping has developed from the traditional practice of the owner operating his vessel to the practice of the owner leasing out his vessel to let another individual operate the vessel. The operator takes over the vessel and pays the owner the hire amount. This system is what we now call bareboat chartering.

Bareboat charter is also called a demise charter or a net charter.¹⁴ Under a bareboat charter, the vessel is leased by the owner to an operator (the charterer) within a specified time wherein the charterer takes possession and complete control of the vessel, provides the master and the crew and is deemed to be treated by law as its legal owner.¹⁵ In effect, a bareboat charter is a lease of the hull, machinery and equipment of a ship.¹⁶ During this lease (hire), the owners will hand over the vessel to the charterer bare of any crew on board; hence, the charterer takes over the vessel as if he is the *de facto*¹⁷ owner or the owner *pro hac vice*.¹⁸ The key element to a bareboat charter is the possession and complete control of the charterer over the vessel.

¹⁴ Tetley, W., *International Maritime and Admiralty Law*, International Shipping Publications, Quebec, 2002, p. 125.

¹⁵ Schoenbaum, T., *Admiralty and Maritime Law Fifth Edition Volume 2*, West, St. Paul, 2011, p. 3. See also Davis, M., *Bareboat Charters*, LLP Professional Publishing, London, 2000, p.1. See also Boyd, S., et. al., *Scrutton on Charter Parties and Bills of Lading 21st Edition*, Sweet and Maxwell Limited, London, 2008, p. 55. See also definition of bareboat charter on UNCCROS 86 Article 2.

¹⁶ Gold, et. al., *Essentials of Canadian Law: Maritime Law*, op. cit. p. 380.

¹⁷ Davis M., *Bareboat Charters*, loc. cit.

¹⁸ Tetley W., *International Maritime and Admiralty Law*, loc. cit. As defined by the US Supreme Court on *Leary v. United States*, 81 US (14 Wall) 607, 20 L.Ed. 756 (1872).

During operations, the master and crew of the vessel answer to the charterer since they are hired and paid by the charterer and, hence, are the employees of the charterer. In addition, the charterer will be responsible for equipping the vessel with provisions and supplies. The charterer will also be responsible for the insurance and the maintenance of the vessel during the charter period. The registered owner of the vessel remains only to collect the hire payments as per the contractual agreement made between the charter parties.

However, there are instances in which the owner may have paid the insurance and maintenance of the vessel. He may have appointed the crew of the vessel but the vessel may be deemed to be under a bareboat charter if the charterer pays the crew and the crew answers to the charterer. The possession and control is considered to be under the charterer.¹⁹

2.1.3 Bareboat Charter Registration

Bareboat Charter Registration is a legal arrangement whereby the nationality of a bareboat charterer, as an owner *pro hac vice*, is vested in a vessel as evidenced by flying the flag of the state during a specified time period.²⁰ This formal documentation is a temporary change of nationality of the vessel for the charterer to maximize his benefits in utilizing his preferred state where the laws of such state may reduce his operating costs and allow commercial and fiscal benefits.²¹ The original flag registration is also called the flagging-out or bareboat-out state and the charterer's flag of choice is also called the flagging-in or bareboat-in state.

¹⁹ *Baumwoll v. Furness* [1893] A.C. 8. See also *Outtrim v. British Columbia* [1948] 3 D.L.R. 273 (B.C.C.A.).

²⁰ Definition by Dr. Frank Wiswall as cited in International Chamber of Commerce (ICC), *Bareboat Charter Registration: Legal Issues and commercial benefits*, A report of the Symposium 1987. See also Odeke A., *Bareboat Charter (Ship) Registration*, p. 27.

²¹ Tetley W., *International Maritime and Admiralty Law*, op. cit., p. 160-161.

During the bareboat charter registration period, the registration of the flagging-out state is temporarily suspended or cancelled²² to pave way for the registration of the flagging-in state. This temporary suspension or cancellation avoids dual nationality of a vessel as dual nationality can potentially render the vessel without nationality.²³

In a bareboat charter registration, the public law functions of the state are transferred to the flagging-in state. These public law functions, *inter alia*, are the vessel's right to fly the state's national flag, the vessel being subjected to the jurisdiction of the state of the flag it carries, the right of the vessel to diplomatic protection and consular assistance of the flagging-in state, rights to engage in activities within the territorial waters of the state (e.g. cabotage) and use of goodwill with regard to the flag state's reputation to the public.²⁴ The use of the public law functions of a flag state entails benefits that will be discussed later in subsection 2.6.1 of this Chapter.

On the other hand, the private law functions of the state under bareboat charter registration remain with the flagging-out state. This private law function consists, *inter alia*, of the protection of the title of the registered owner and the protection of title and preservation of priorities in the ranking of persons and entities holding interests in the vessels, such as mortgages.²⁵

However, certain flagging-in states require also re-recording of the registrable liens on the vessel prior to acceptance of bareboat charter registration.²⁶ There is no legal

²² Some states do not allow temporary suspension of registration of the flagging-out state; instead, the registration in the flagging-out state is cancelled temporarily. Australia, for example, is one of those states requiring the cancellation of the primary registration before accepting the bareboat registration. See also Ready, N., *Ship Registration Third Edition*, op. cit., p. 39.

²³ UNCLOS 82 Article 92(2) states that "A ship 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." See also Convention on the High Seas 58 Article 6. See also UNCCROS 86 Article 4(4).

²⁴ Coles, R and Watt E., *Ship Registration Law and Practice Second Edition*, op. cit., p. 7-8.

²⁵ *Ibid*, p. 9.

²⁶ Mukherjee, P.K., *Flagging Options: Legal and Other Considerations*, op. cit., p. 36.

conflict as to jurisdiction of the registered liens on the vessel as the original jurisdiction still applies in cases where such liens are to be enforced.

2.2 Parties to Bareboat Charter Registration

There are four parties to a bareboat charter registration namely: the shipowner, the bareboat charterer, the flagging-out state and the flagging-in state.

2.2.1 Shipowner

The shipowner is the registered owner of the vessel. Shipowner is defined as any natural or juridical person recorded on the register of ships of the state of registration as an owner of a ship.²⁷

Ownership

Ownership is defined as a collection of the rights to use and enjoy property including the right to transmit those rights to others. Having ownership grants complete dominion over the property with regard to possession, enjoyment, control and disposal.²⁸ There are two types of ownership: absolute and qualified. Absolute ownership means there is a single person holding title over the property. Qualified ownership, on the other hand, means there are two or more persons holding title over the property. In absolute ownership, the benefits such as income are earned and liabilities, hereto, are borne by a single individual. In qualified ownership, however, the benefits are earned and liabilities are borne by the owners jointly.

²⁷ Definition of shipowner under UNCCROS 86 Article 2.

²⁸ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, Informa, London, 2001, p. 5.

Legal ownership versus beneficial ownership

The distinction between legal ownership and beneficial ownership should be established in understanding the concept of ownership primarily for the reason that legal ownership can be registered while beneficial ownership cannot be registered.

Legal ownership is acquired through operation of law by a will, an order of a court, gift or pursuant to contract.²⁹ The most common acquisitions of such ownership are through contract such as a shipbuilding contract or a contract of sale.

Beneficial ownership occurs upon owning shares in a vessel either directly or indirectly through a trust.³⁰ This means that there should be a beneficial interest, through an express trust, of the person to the property to be considered as beneficial owner. A trustor is the beneficial owner of a vessel registered under the name of a trustee. A mortgagee, however, is not considered as a beneficial owner as he does not possess beneficial interest in the vessel but instead he possesses only a proprietary interest in the vessel.

Beneficial ownership does not apply to shareholders of vessels. In theory, such shareholders have equitable interest on the property but courts will not pierce the corporate veil to prove beneficial ownership unless for cases of fraud.³¹

Rights and obligations of shipowner

The inherent right of the shipowner is the retention of a legal title to the vessel. Despite the vessel's possession and control being transferred to the charterer, the title to the property is protected as the registered owner of the vessel. The shipowner's

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid, p. 7. See also *The Maritime Trader* [1981] 2 Lloyd's Rep 153. See also *The Aventicum* [1978] 1 Lloyd's Rep 184. See also *The Saudi Prince* [1982] 2 Lloyd's Rep 255.

main interest is to receive hire as per the charter agreement and to satisfy himself that the vessel is properly maintained through his right of inspection.³² The shipowner has the right to withdraw the vessel from the contractual obligations should the charterer fail to pay the agreed hire, fail to insure the vessel or fail to repair and maintain the vessel³³ except for ordinary wear and tear.³⁴

The shipowner has the right to inspect the vessel during the course of the charter period to satisfy himself that his vessel is properly maintained provided that such inspection shall not disrupt the ordinary course of business of the charterer. At the same time, the shipowner also has the right for the return of his vessel at the end of the charter period³⁵ and has the right to inspect the vessel to verify its condition with the understanding that the vessel is in good order.

The primary obligation of the shipowner is to deliver the vessel in an agreed condition and allow the charterer complete control over the vessel during the entire charter period.³⁶ The vessel must be seaworthy and of the specified class and type at the time of delivery for its intended purpose.³⁷ This seaworthiness is in every aspect including the hull, machinery and the appurtenances on board the vessel. Seaworthiness covers also the proper documentation of the vessel.³⁸

The shipowner is not liable for any bills of lading issued by the master of his vessel during the charter contract and any other goods and services provided on his vessel during the same period. As soon as the delivery has been made, all the costs, liabilities and expenses attributable to the operations of the vessel are transferred

³² Davis, M., *Bareboat Charters*, op. cit., p. 5.

³³ Ibid.

³⁴ Schoenbaum, T., *Admiralty and Maritime Law Fifth Edition*, op. cit. p. 9.

³⁵ Odeke A., *Bareboat Charter (Ship) Registration*, op. cit., p. 44.

³⁶ Davis, M., *Bareboat Charters*, op. cit. p. 8.

³⁷ Schoenbaum, T., *Admiralty and Maritime Law Fifth Edition*, loc. cit. See also Boyd S., et. al., *Scrutton on Charter Parties and Bills of Lading 21st Edition*, op. cit. p. 58. See also Ibid., p. 16.

³⁸ Odeke A., *Bareboat Charter (Ship) Registration*, op. cit., p. 89. See also Tetley W., *International Maritime and Admiralty Law*, op. cit., p. 162-163. See also Davis, M., *Bareboat Charters*, op. cit. p. 22.

immediately to the charterer. The shipowner is discharged of his obligations and expressed or implied warranties once he delivers the vessel and the vessel has been taken over by the charterer.

2.2.2 Bareboat charterer

The bareboat charterer is a person who takes a vessel under a lease agreement within a specified time wherein he takes possession and complete control to operate the vessel and to be treated by law as its legal owner.³⁹ The charterer is deemed to be the *de facto* owner or the owner *pro hac vice* during the charter period wherein he hires and employs the master and the crew of the vessel who will be reporting to him as his servants.

Rights and obligations of the bareboat charterer

The bareboat charterer has the primary right to claim damages against breach of contract⁴⁰ since the bareboat charter is a contractual agreement. This breach of contract may arise from delivery of an unseaworthy vessel or a vessel that has not met the criteria or conditions of the charter as intended. An unseaworthy vessel may arise *inter alia* from defective hull and machinery, non-working appurtenances or invalid certificates. A vessel not meeting the criteria or conditions of the purpose of the charter arises from delivery of a different vessel than what has been agreed upon or in case of delivery of the same vessel, the necessary equipment on board the vessel is incomplete. The charterer in such cases has the right to reject the vessel and claim against the shipowner for breach of contract.

³⁹ Schoenbaum, T., *Admiralty and Maritime Law Fifth Edition Volume 2*, op. cit. p. 3. See also Davis, M., *Bareboat Charters*, op. cit., p.1. See also Boyd, S., et. al., *Scrutton on Charter Parties and Bills of Lading 21st Edition*, op. cit., p. 55. See also definition of bareboat charter on UNCCROS 86 Article 2.

⁴⁰ Davis, M., *Bareboat Charters*, op. cit., p. 12.

The bareboat charterer's main obligation is to pay the hire amount as agreed on a timely and regular basis as per the contract.⁴¹ His failure to pay the required hire amount at a specific time may result in the withdrawal of the shipowner without prejudice of any claim against the shipowner.⁴² Consequently, if the charterer makes a late payment, it does not extinguish the fact that the late payment has occurred and the shipowner can no longer exercise his right of withdrawal unless he has waived his claim or has been estopped of his claim.⁴³ However, the charterer may still make the late payment without the vessel being withdrawn within seven (7) days subject to interest.⁴⁴

The charterer, as the owner *pro hac vice*, is responsible for the performance of all agreements made with third parties as to the operations of the vessel.⁴⁵ His obligation is to perform according to contracts made during operations such as payment of the crew, provisions, necessaries, supplies and the bills of lading issued by the master.

The charterer is obligated to maintain the working condition of the vessel being the person in full possession and complete control of the vessel.⁴⁶ He will bear the costs and expenses of repair and maintenance whenever necessary within a reasonable time. Such maintenance includes drydocking⁴⁷ of the vessel when it is due and within the charter period. Upon expiry of the charter agreement, he will turn over the vessel in the proper condition and well maintained with the exception of ordinary wear and tear.

⁴¹ Ibid., p. 54. See also Schoenbaum, T., *Admiralty and Maritime Law Fifth Edition Volume 2*, op. cit. p. 9.

⁴² Ibid., p. 55. See also *Tankexpress A/S v. Compagnie Financiere Belge des Petroles SA* [1948] 82 L1 L Rep43.

⁴³ Ibid., p. 58-60.

⁴⁴ BARECON 2001 Clause 11(g).

⁴⁵ Schoenbaum, T., *Admiralty and Maritime Law Fifth Edition Volume 2*, op. cit. p. 10.

⁴⁶ Ibid., p. 9. See also Odeke A., *Bareboat Charter (Ship) Registration*, op. cit. p. 92. See also Tetley, W., *International Maritime and Admiralty Law*, op. cit., p. 165.

⁴⁷ Davis, M., *Bareboat Charters*, op. cit. 47.

The charterer is responsible to insure the vessel with regard to marine, war, P&I and pollution.⁴⁸ And for pollution damage insurance, he is required to arrange an appropriate financial security to indemnify the owners and himself in case pollution occurs.⁴⁹

2.2.3 Flagging-out state

The flagging-out state is the bareboat-out state or the underlying/primary registry, whereas it is the registry and the flag to which the vessel reverts upon termination of the bareboat charter.⁵⁰

The flagging-out state governs matters of legal title and mortgages of the vessel.⁵¹ The private law domain of the state remains with the flagging-out registry as the legal title remains under the name of the registered owner on the primary registry and registered mortgages are protected. In a case where there is a default of mortgage, the laws of this original registry state will be applied.

2.2.4 Flagging-in state

The flagging-in state is the bareboat-in state or the bareboat charter registry⁵² whereas the charterer avails for the operations of the vessel. It is the responsibility of the flagging-in state to ensure that the bareboat chartered-in vessel is under its full jurisdiction and control.⁵³ It is also the responsibility of the bareboat-in state to

⁴⁸ Odeke A., *Bareboat Charter (Ship) Registration*, op. cit., p. 96. See also Tetley, W., *International Maritime and Admiralty Law*, op. cit., p. 166.

⁴⁹ Davis, M., *Bareboat Charters*, op. cit. 45.

⁵⁰ Definition by Dr. Frank Wiswall as cited in International Chamber of Commerce (ICC), *Bareboat Charter Registration: Legal Issues and commercial benefits*, A report of the Symposium 1987.

⁵¹ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 20. See also Ready, N., *Ship Registration Third Edition*, op. cit., p. 42.

⁵² Definition by Dr. Ehlermann as cited in International Chamber of Commerce (ICC), *Bareboat Charter Registration: Legal Issues and commercial benefits*, A report of the Symposium 1987

⁵³ UNCCROS 86 Article 12(4).

ensure that the right to fly the flag of the primary state is suspended by means of a document indicating the grant of permission to the bareboat-in state to allow such vessel to fly the new flag, at the same time, indicating any registered encumbrances to the vessel.⁵⁴

The laws of the flagging-in state govern the operation of the ship on matters relating to, inter alia: safety equipment and construction, loadlines and manning.⁵⁵ The bareboat charter registry takes over the public domain functions of the state with regard to the flag the vessel carries, technical and safety aspects, and pollution prevention.

It is the responsibility of the flagging-in state, as well, to notify the flagging-out state of the deletion of the registration of the bareboat chartered vessel from its registry⁵⁶ as the termination of the registration from the flagging-out state automatically gives effect to the original registration.

2.3 International Regime governing Bareboat Charter Registration

While the Convention on the High Seas 1958 and the United Nations Convention on Law of the Sea (UNCLOS 82) codified the customary international law for the practice of registration of vessels in various maritime nations, neither convention contains provisions on bareboat charters. Instead, these two conventions have identified only the general criteria as to whether bareboat charter registration possesses dual nationality or falls under open registry.⁵⁷

Bareboat charter registration does not possess dual nationality as the nationality of the vessel remains with the original registry or the flagging-out state. The

⁵⁴ UNCCROS 86 Article 11(5).

⁵⁵ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, loc. cit.

⁵⁶ UNCCROS 86 Article 12(5).

⁵⁷ Odeke A., *Bareboat Charter (Ship) Registration*, op. cit., p. 129.

registration on the original registry is either suspended or cancelled temporarily for the vessel to be registered to the flagging-in state. It does not fall as an open registry because the nationality of the vessel has not been transferred. Not all the laws of the state apply to the vessel because only the public law domain is vested in the flagging-in state and the private law domain remains in the flagging-out state.

In fact, there are no international conventions at the present time dealing exclusively with bareboat charter registration. However, there are two conventions that contain specific provisions for bareboat charter registration: the United Nations Convention on Conditions for Registration of Ships 1986 and the International Convention on Maritime Liens and Mortgages 1993.

United Nations Convention on Conditions for Registration of Ships 1986

The United Nations Convention on Conditions for Registration of Ships 1986 (UNCCROS 86) stipulates that prior to acceptance of the flagging-in state of a bareboat charter, it is the responsibility of the state to assure itself that the right to fly the flag of the primary state is suspended as evidenced by a document and indicating any registered encumbrances to the vessel.⁵⁸ This is the first condition giving effect to bareboat charter registration as it satisfies the notion that there is no dual registry that exists. In addition, the convention has clearly indicated the intention of protecting the rights of holders of encumbrances to the vessel such as the mortgagee by requiring the original registry to provide a record of these encumbrances.

UNCCROS 86 provides the conditions for bareboat charter registration in its context under Article 12.⁵⁹ It is clearly stated that a state is allowed to accept registration of

⁵⁸ UNCCROS 86 Article 11(5) states that: "In the case of a ship bareboat chartered-in a State should assure itself that right to fly the flag of the former flag State is suspended. Such registration shall be effected on production of evidence, indicating suspension of previous registration as regards the nationality of the ship under the former flag State and indicating particulars of any registered encumbrances."

⁵⁹ See excerpt of UNCCROS 86 in Annex A.

bareboat chartered vessels to fly its flag within the period of the charter provided that the flagging-in state has full jurisdiction and control over the vessel and the flagging-out state shall be notified of the termination of the bareboat charter registration.

International Convention on Maritime Liens and Mortgages 1993

The International Convention on Maritime Liens and Mortgages 1993 acknowledges the existence of bareboat charter registration through Article 16 of the convention appropriately titled, “Temporary change of flag.”⁶⁰ The convention distinguishes the state of registration from the flag of the vessel. This distinction is particularly important in determining which state’s law is applicable. The state of registration, herein, is the original registry or the flagging-out state where the applicable laws with regard to liens and mortgages apply while the flag of the vessel is the flagging-in state that granted the vessel the right to fly its flag.

2.4 Private Law on Bareboat Charter

The underlying concept in a bareboat charter is the lease of a vessel. A vessel is a chattel; hence, it is under the law of personal property specifically when it relates to ownership.⁶¹ The person who has possession and superior possessory right has the apparent title to the property through an operation of law.⁶² Such acquisition of a vessel is commonly done by contract either by a contract of shipbuilding or contract of sale, which is evidenced by a bill of sale that needs to be registered to perfect the title and not by possession alone.⁶³ As soon as ownership is established, the next step is the test as to whether there is a lease agreement between the owner and the charterer.

⁶⁰ See excerpt of Maritime Liens and Mortgages Convention 93 on Annex B.

⁶¹ Meeson, N., *Ship and Aircraft Mortgages*, Lloyd’s of London Press Ltd., 1989, p. 8.

⁶² Goode, R., *Commercial Law Second Edition*, Penguin, London, 1995, p. 36. See also Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 5.

⁶³ Ibid., p. 6. See also *Hooper v. Gumm* [1867] L.R. 2 Ch. App. 282.

A lease agreement is governed by law of contract. Law of contract under English law refers to three factors as to offer and acceptance, intention to create legal relations and consideration.⁶⁴ The vital factor in contracts is the question of existence of a contract between parties through the perfection of the contract. Bareboat charter, in practice, is usually formed through a standard form⁶⁵ or a written contract. However, a bareboat charter contract can be perfected without a written document by means of an oral or verbal agreement⁶⁶ provided that the three factors of a contract are present and the owners have vested sufficient rights of possession and control over the vessel to be considered as lease.⁶⁷ When there is a meeting of the minds, the contract of lease, herein the bareboat charter agreement, is binding which will then be formalized by a written instrument.

These two doctrines in private law are the essential elements in a bareboat charter. Other private maritime laws are supplementary such as; inter alia, mortgage, marine insurance, bill of lading, towage, salvage, civil liabilities for pollution damage and arrest laws.

2.5 Bareboat Registration in various flag states

2.5.1 The Philippines

Policy on bareboat registration

Presidential Decree No. 760⁶⁸ is the core the Philippine legislation for the bareboat chartering program of the country. It allows the temporary registration of foreign-

⁶⁴ Davis, M., *Bareboat Charters*, op. cit., p. 7.

⁶⁵ BIMCO BARECON 2001 is the standard form for bareboat charter contracts. See sample on Annex C.

⁶⁶ See *William Cory & Son Limited v. Dorman Long & Co. Limited*, [1936] 41 Com Cas 224. See also *The Guiseppe Di Vittorio* [1998] 1 Lloyd's Rep 136.

⁶⁷ Davis, M., *Bareboat Charters*, op. cit., p. 8. See also Goldrein, I. and Turner, P., *Ship Sale and Purchase* Fourth Edition, Informa, London, 2003, p. 57.

⁶⁸ See Annex D.

owned vessels under time charter or lease to Philippine nationals for use in coastal trade. Initially, it was applicable only for time charter and leases of more than five years⁶⁹ but this precondition has deterred shipowners and charterers from availing of the incentives of the decree; hence, the restriction to time charters has been removed and the minimum lease period is reduced to one year.⁷⁰

P.D. 760 was exclusively for trades within the coast of the country and was in effect until 1990. The Philippine government subsequently declared a policy for expansion and modernization of the country's overseas fleet to increase foreign exchange earnings and maritime employment. The government recognized this need for expanding the legal framework; thus, the government extended the trading limits to overseas shipping projects including registration of specialized vessels at the same time extending the effectivity of the decree until 1999.⁷¹ In 1997, the effectivity of the decree was further extended until 2009⁷² and eventually, in 2007, this time constraint was lifted, making such leases effective indefinitely.⁷³

The Philippines has fervently promoted the expansion of its maritime fleet. It has continued to consider the needs of overseas shipping by enacting laws and policies to cater to such needs. These laws and policies provide incentives to shipowners who are availing of registration in the Philippines such as *inter alia*, exemptions from import duties and taxes, exemption from income taxes, privilege to conduct business within the waters of the archipelago and employment of local seafarers.⁷⁴

⁶⁹ P.D. 760 Section 1.

⁷⁰ P.D. 866. See Annex E.

⁷¹ P.D. No. 1711. See Annex F.

⁷² E.O. No. 438. See Annex G.

⁷³ E.O. No. 667. See Annex H.

⁷⁴ R.A. No. 7471. See Annex I.

Statistics

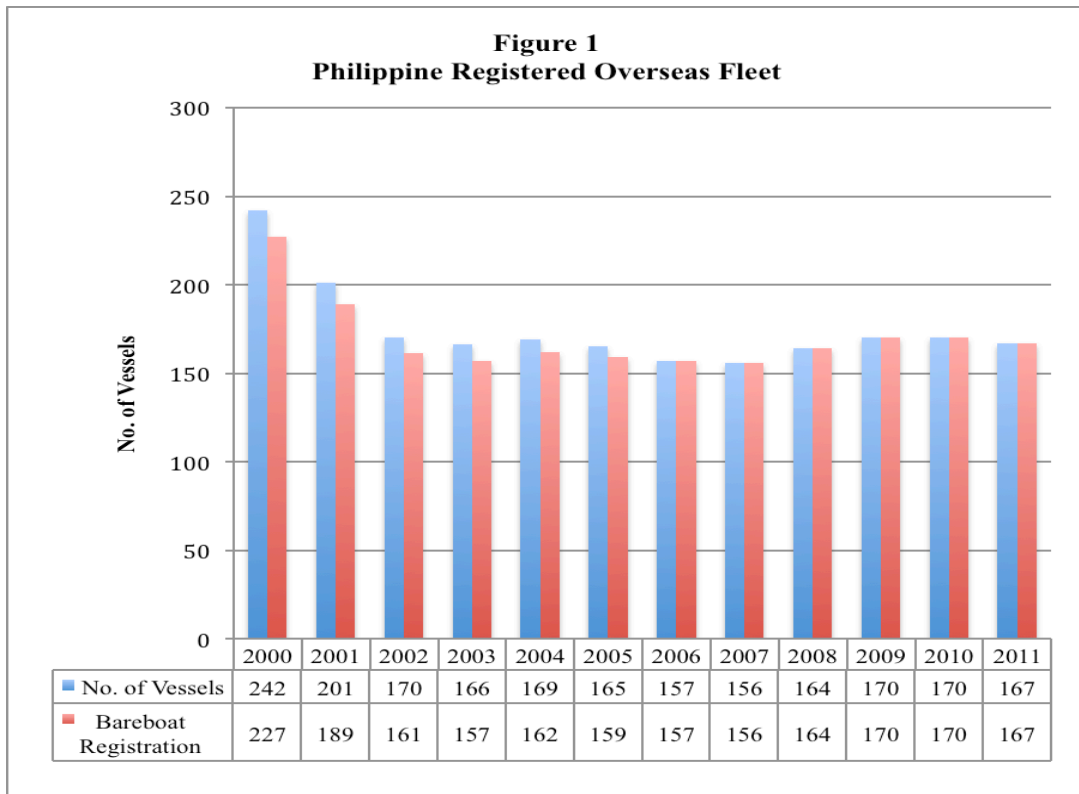
The Philippine total fleet belongs within the top thirty maritime nations with respect to deadweight tonnage. As of 2011, the total deadweight is roughly seven (7) million tons with the total number of vessels registered at 1,946.⁷⁵

The Philippine fleet is one of the pioneers in bareboat charter registration. Since its inception in the 70's, the number of vessels has constantly increased. The Philippines has two registers: the national register and the overseas register. The national register consists of those vessels wholly owned by Philippine nationals or corporations domiciled in the Philippines and controlled by Philippine citizens.

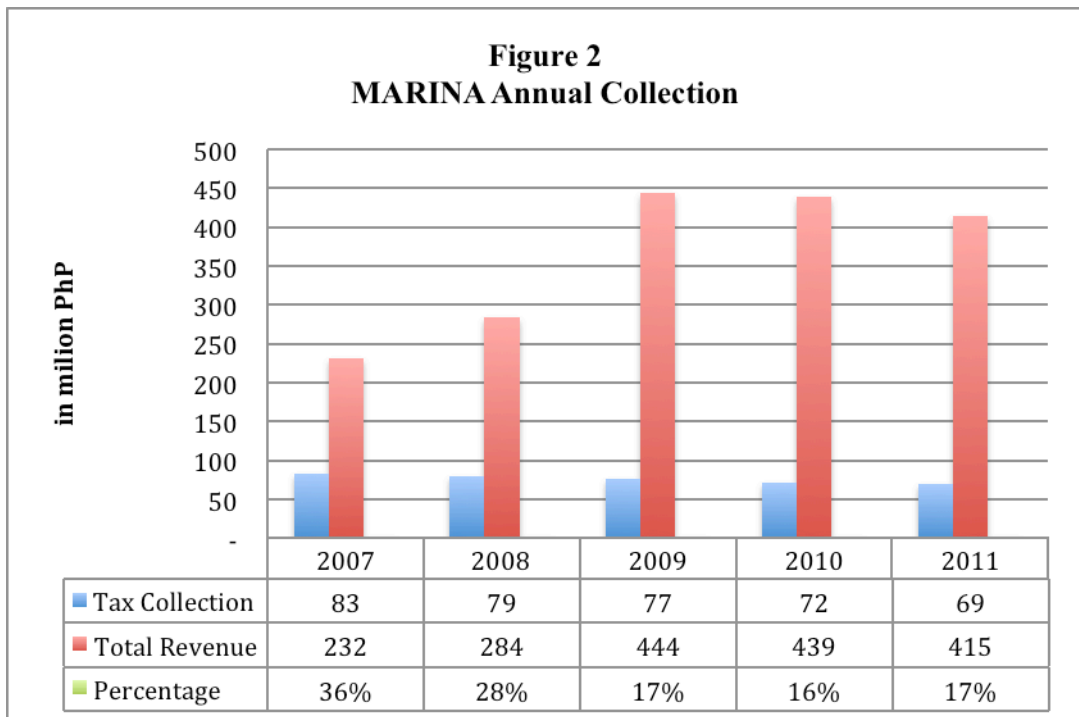
The overseas register is composed in the majority by bareboat-in chartered vessels. The number of vessels in the overseas register reached over 400 vessels during its peak. However in 1988, the ITF treated Philippine bareboat chartered-in vessels as under flag of convenience.⁷⁶ Since then, this number has gradually decreased. Figure 1 shows the number to be steady up to the end of 2011.

⁷⁵ UNCTAD, *Review of Maritime Transport*, 2011, p. 47. See Annex J.

⁷⁶ ITF Seafarers Bulletin No. 3, 1988.



Source: MARINA-OSO



Source: MARINA-OSO

The tax collection in Figure 2 represents the income from bareboat charter registration. The total amount remains in a constant range since there have been no significant changes in the number of bareboat charter vessels registered. The significant increase in the total revenue of MARINA is attributed to revenues from recent approval of lay-up vessels from 2009, increase in seafarer's identification and record book (SIRB) fees and increase in other income.⁷⁷

2.5.2 Antigua and Barbuda

Policy on bareboat registration

The legislation governing bareboat registration of Antigua and Barbuda is the Merchant Shipping Act, 2006. The Act has granted permission to register bareboat chartered vessel and to bareboat out vessels under its registry. A foreign-registered vessel may be registered provided that it meets certain conditions: if the laws of the foreign-registry allow doing so⁷⁸ and the duly certified documentation has been submitted.⁷⁹ The documents needed for registration are the copy of the charter agreement, the written consent of the shipowner, the written consent of the maritime authorities of the foreign registry and the written consent of the mortgagees.

Statistics

Antigua and Barbuda ranks within the top twenty maritime nations with respect to deadweight tonnage. As of 2011, the total deadweight is close to fourteen (14) million tons with the total number of vessels registered at 1,293.⁸⁰

⁷⁷ MARINA, Annual Report 2009. SIRB fees have increased from PhP550 to PhP800 for regular processing and PhP770 to PhP1,500 for expedite processing with no significant change in the number of applications from 2008 to 2009.

⁷⁸ AB MSA 2006 Part III, Chapter 2 Section 28(a). See excerpt on Annex K.

⁷⁹ AB MSA 2006 Part III, Chapter 2 Section 28(b). See excerpt on Annex K.

⁸⁰ UNCTAD, *Review of Maritime Transport*, 2011, p. 47. See Annex J.

The percentage of bareboat-chartered vessels in its registry is relatively high at about 79%. As of 31 December 2011, the total number of vessels under bareboat charter in the registry is 1,096 out of the total number of 1,392 vessels.⁸¹ This means that the number of bareboat charter registrations is significant in its fleet. The primary owners of these vessels are from Germany, which accounts for more than 90% of the total deadweight.⁸²

2.5.3 United Kingdom

Policy on bareboat registration

The Merchant Shipping Act 1995 is the principal legislation that allows bareboat charter registration in the United Kingdom. This Act repealed the 1993 Act that initially permitted bareboat-chartered ships to be registered under the flag. Section 17 of the Act states that vessels registered in a foreign country, chartered by a person qualified to own a British flag and qualified to be registered as per registration rules and requirements are allowed to be registered in the British flag under bareboat charter registration.⁸³ The bareboat charter registration remains in force until the end of the charter period or for five years whichever is lower unless the registration is terminated under the registration regulations or when the registrar considers that it would be inappropriate for the ship to remain registered.

It is the responsibility of the owner to terminate the registration from the original registry once bareboat charter registration has been established in the UK register.⁸⁴ The registrar, however, has the responsibility to inform the underlying registry of the vessel's registration under the British flag, the expiry of the bareboat registration of

⁸¹ Data from ADOMS.

⁸² UNCTAD, *Review of Maritime Transport*, 2011 p. 49.

⁸³ UK MSA 1995 Section 17(1). See excerpt on Annex L.

⁸⁴ UK MSA 1995 Section 9(5). See excerpt on Annex L.

the vessel and the closure of the registration of the vessel.⁸⁵ This avoids the vessel having two concurrent registrations and also serves as a protection of the ship's mortgage.

It should also be noted that the United Kingdom does not allow bareboat charter out of vessels. There are no regulations in the existing legislation that permit this practice.

Statistics

The United Kingdom is the 17th largest maritime nation with respect to deadweight tonnage. As of 2011, the total deadweight is approximately seventeen (17) million tons with the total number of vessels registered at 1,683.⁸⁶

2.5.5 Zanzibar

Policy on bareboat registration

The Zanzibar registry is one of the newest registries in the market. The registry opened in 2006 to promote the maritime industry in Zanzibar, provide registration of ships, safety and security of shipping and the protection of the marine environment and other matters related thereto. The Maritime Transport Act 2006 (Act No. 5 of 2006)⁸⁷ is the governing legislation for registration in Zanzibar. Vessels registered under Zanzibar have the right to fly the flag of the United Republic of Tanzania. There are two registers for Zanzibar vessels: the Tanzania Zanzibar International Register of Shipping (TZIRS) and the Tanzania Zanzibar Register of Shipping (TZRS). TZIRS is for ocean going ships or vessels engaged internationally while TZRS is for coastal ships or vessels engaged in domestic waters of Tanzania.

⁸⁵ UK MSA 1993 Regulation 86. See excerpt on Annex L.

⁸⁶ UNCTAD, *Review of Maritime Transport*, 2011, p. 47. See Annex J.

⁸⁷ Zanzibar MTA 2006. See excerpt on Annex M.

Bareboat charter registration is permitted under the Act but it is restricted to vessels chartered to nationals of Tanzania.⁸⁸

Statistics

By the end of 2011, the Zanzibar fleet had grown to 250 registered vessels with total GRT of just above one (1) million tons.⁸⁹ There are no bareboat chartered vessels because of the restriction stipulated in the Maritime Transport Act that only chartered vessels to Tanzanian nationals are eligible for registration.

2.6 Advantages/Disadvantages of bareboat charter registration

Shipowners have control in choosing the flag appropriate for their needs. There are various factors determining the choice of flag that are related primarily to economic reasons. Shipowners tend to look for a flag that will enable them to maximize profits by reducing operating costs. The most evident reason is taxation. Income tax in numerous flag states is relatively high in comparison to tonnage tax imposed by open registries. Shipowners are able to save a huge amount of money by availing of this escape. Moreover, there are other considerations in choosing a flag such as manning requirements, labor costs, reputation of the flag and financial and insurance services.

Such choice of flag follows with bareboat charter registration. What separates flag states are the services and the incentives they offer to the charterers to cater according to their needs.

⁸⁸ Zanzibar MTA 2006 Section 9(1)(b).

⁸⁹ Data from TZIRS.

2.6.1 Advantages

Bareboat charter registration primarily benefits the charterer. The charterer has the option to change the flag of the vessel to suit his needs. The advantages of bareboat charter registration fall into two categories: economic benefits and the reputation of the flag.

Economic benefits

Taxation is the primary economic benefit of bareboat charter registration. Charterers may opt to look for flags where their income will be exempt from taxation. Numerous flag states particularly the open registries impose only registration fees and tonnage tax on the vessels registered with them. For the charterers, such savings are significant in maximizing their profits. There are also flag states that have tax treaties with each other. For example, Italy has arrangements with other states for vessels under their flags entering Italian ports to be subjected only to an annual fee instead of paying tax each time they call at any port of Italy.⁹⁰

Minimization of operating costs is another essential advantage of bareboat registration. The charterers are able to scout in the market for the most appropriate flag that offers the most advantageous regime with regard to operating costs. Labor costs rank first in this consideration. Vessels flying some states' flags such as the United States, Netherlands, Norway and Denmark among others have policies setting relatively high crew salaries in contrast to labor supplying countries such as the Philippines, India, Poland and Sri Lanka.⁹¹ Ship operators are able to acquire crew from labor supplying countries with the same qualifications and experience for lesser costs. This means more savings for the operators. This also creates employment opportunities for the labor supplying countries. Not to mention, the availability of

⁹⁰ Tanzania has such tax treaty with Italy based on tonnage enabling a free movement of vessels to any port of Italy.

⁹¹ Coles, R and Watt E., *Ship Registration Law and Practice Second Edition*, op. cit., p. 59.

services and the costs hereto for the vessel with regard to repairs, oil and bunkering, air and telecommunication links and the general transport network creates an advantage for certain states such as the case of Bahamas, Bermuda and the Cayman Islands.⁹²

Another consideration in electing bareboat charter registration is the ability of charterers to participate in cabotage⁹³ and domestic trade. Archipelagic countries such as the Philippines and Indonesia require vessels participating in cabotage trade to be registered under the flag of the state. The most efficient way of availing of this option is through bareboat charter registration. The bareboat-chartered vessel enjoys all the benefits and privileges of a locally registered vessel. Azerbaijan and Kazakhstan, by law, require foreign-owned vessels that wish to operate in their domestic waters to be bareboat chartered in.

For the flagging-in state, the most evident advantage of bareboat charter registration is the expansion of its fleet. The tonnage under its fleet can be significantly increased which represents higher income for the state through the tonnage tax imposed on the vessels or in the case of the Philippines, tax is collected on the bareboat charter registration itself.⁹⁴

Reputation of the flag

A vital advantage to bareboat charter registration is the reputation of the flag in the market. Certain flag states have a good track record that gives them longevity. Panama and Liberia have demonstrated that they have knowledge and experience in ship registration, which enables them to stay on top of the list of the maritime

⁹² Odeke A., *Bareboat Charter (Ship) Registration*, op. cit., p. 62.

⁹³ Ibid., p. 73.

⁹⁴ See Figure 2 for tax collection on vessels bareboat-chartered in the Philippines.

registries.⁹⁵ For bareboat registry nations such as the Philippines, Antigua and Barbuda, United Kingdom and including Panama also, their reputation in the market is highly regarded as they all belong to white lists of various MOUs. Being on MOU white lists represents the flag's commitment to ensure that conventions applicable to their vessels with regard to safety, pollution and crew welfare are complied with; hence, they have lesser chances of being targeted as priorities by port states for inspection unlike those belonging to the grey and black lists. This is beneficial to charterers for uninterrupted operations of their business.

Another factor with regard to flag reputation is access to financial and insurance services. Numerous financial institutions and insurance companies give priority to certain states because of their performance as to the technical requirements of the vessels that fly their flag. Also, the proximity of these institutions to the offices of the registry of the flag adds to the package. Take for example Cayman Islands and the United Kingdom wherein banking institutions have direct relationships with the flag states because of easy access to information such as details of ship owners and mortgagees. Numerous banks and P&I Clubs have offices in the capitals of these states, making it even easier for exchange of necessary information. Notwithstanding, the offshore company register is also within the same area, which completes the multi-tier composition of the ship registration parties.

2.6.2 Disadvantages

The prevailing disadvantage of bareboat charter registration is the question of the genuine link requirement with regard to registration of vessels.⁹⁶ Consequently, bareboat charter registration is considered by some entities as flag of convenience. The ITF has clearly advocated this by pointing out the Philippine practice of bareboat

⁹⁵ Odeke A., *Bareboat Charter (Ship) Registration*, op. cit., p. 63. See also UNCTAD, *Review of Maritime Transport*, 2011, p. 47.

⁹⁶ Odeke A., *Bareboat Charter (Ship) Registration*, op. cit., p. 63

charter registration as flag of convenience.⁹⁷ The ITF defined FOC as a registry that allows ownership and control of vessels to foreign-individuals⁹⁸ wherein the genuine link requirement is detached. Bareboat charter registration nations argue this just like open registries by stating that effective control and jurisdiction over the vessels are intact regardless of the vessel's foreign ownership and control.

Another disadvantage of bareboat charter registration deals with confusion concerning the treatment of mortgages. Mortgagees may feel comfortable in granting financing to shipowners because of the laws of the original registry but as the vessel is bareboat chartered out, the mortgagee may feel insecure with the mortgage because of the issue of compatibility of laws between the flagging-out and flagging-in states.⁹⁹ This issue is highly pertinent when it comes to ranking of claims against the vessel. Different jurisdictions follow different rules in priority of ranking of maritime claims. Some jurisdictions may put preferred mortgage ahead of certain maritime claims while the same preferred mortgage might rank below the same maritime claims in another jurisdiction. Not all jurisdictions are compatible particularly civil and common law practicing countries.

Furthermore, there are also concerns in bareboat charter registration about insurance policies relating to hull and mortgagee interests since standard policies stipulate that the insurance will automatically terminate as soon as there is a change of ownership, transfer of management or bareboat charter of the vessel.¹⁰⁰ Normally, the lender binds the owner by virtue of the contract but in bareboat charter registration, it is difficult to bind the charterers as well since there is no condition on the standard insurance policy to do so.

⁹⁷ ITF *Seafarers Bulletin No. 3*, 1988.

⁹⁸ Coles, R and Watt E., *Ship Registration Law and Practice Second Edition*, op. cit., p. 46.

⁹⁹ Odeke A., *Bareboat Charter (Ship) Registration*, op. cit., p. 78-79. See also International Chamber of Commerce (ICC), *Bareboat Charter Registration: Legal Issues and commercial benefits*, A report of the Symposium 1987, p. 35.

¹⁰⁰ Emphasis by Mr. Herman M.J. Peeren as cited in International Chamber of Commerce (ICC), *Bareboat Charter Registration: Legal Issues and commercial benefits*, A report of the Symposium 1987, p. 37. See also Odeke A., *Bareboat Charter (Ship) Registration*, op. cit., p. 80.

CHAPTER 3

MORTGAGE

3.1 Definition

Mortgage is a form of security created by or under a contract that confers an interest in the property subject to it and that is annulled upon the performance of some agreed obligation – usually, but not necessarily, the payment of a debt with or without interest.¹ It is a mode of financing where the ship is made available as a security for a loan.²

The salient feature of a mortgage is that it is merely a security transaction and it will be extinguished as soon as there is a satisfaction of the debt which it secures. There is no transfer of ownership between the mortgagor and the mortgagee; however, there is a transfer of interest on the property primarily for the purpose of securing the repayment of the debt and such transfer of interest gives rise to a right against the property in case of failure to repay the executed mortgage.³

A mortgage is essentially a contract and the parties are bound to the terms of the contract. It is, therefore, not necessary for a mortgage to be in writing to be considered as a mortgage as long as the legal owner performs an act, although

¹ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, Informa, London, 2001, p. 37. Interest, in this context at the end of the definition, refers to a fee paid for the use of borrowed money. See also UK MSA 1995 Schedule 1, Paragraph 7.

² Hodges, S and Hill, C., *Principles of Maritime Law*, Informa, London, 2001, p. 345.

³ Ibid. See also Meeson, N. and Kimbell, J., *Admiralty Jurisdiction and Practice Fourth Edition*, Informa, London, 2011, p. 349. See also Meeson, N., *Ship and Aircraft Mortgages*, Lloyd's of London Press Ltd., 1989, p. 1.

insufficient to confer a legal title to the lender, which demonstrates a binding intention to create a security in favor of the lender and such conferment of interest is redeemable by the owner.⁴ The rights of the mortgagee, in this case, are not affected as the claim against the vessel exists and continues to be binding. The mortgage is still effective between the mortgagor and mortgagee despite of its lack of form.⁵ However, this has an effect on the priority for claims, as a perfected mortgage by means of an instrument is the only form of mortgage that can be registered, which if registered consequently, ranks higher than unregistered mortgages.⁶

A mortgage can be made for the entire ownership interest of a vessel or a share of the vessel.⁷ If there is a single owner, then the mortgage is in full. If there is more than one person owning the property and all the shares of the property have been mortgaged, the owners will be joint parties to the mortgage. If the owners are parties severally, then there will be separate mortgages to the owners mortgaging their shares.⁸

The scope of the mortgage includes the ship and its appurtenances. Appurtenances are anything on board the ship that belongs to the owner for the accomplishment of the voyage and adventure on which the ship is engaged.⁹ It does not include other articles on board the vessel, bunker or fuel oil, cargo on board and freight unless the mortgagor owns them or the mortgagor has interests in them.¹⁰

⁴ See *Swiss Bank Corp. v. Lloyds Bank Ltd.* [1982] A.C. 584 (C.A.)

⁵ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 56.

⁶ Mandaraka-Sheppard, A., *Modern Maritime Law and Risk Management Second Edition*, Routledge-Cavendish, Oxon and New York, 2001, p.372. See also Meeson, N. and Kimbell, J., *Admiralty Jurisdiction and Practice Fourth Edition*, op. cit., p. 357. See also Meeson, N., *Ship and Aircraft Mortgages*, op. cit., p. 51.

⁷ UK MSA 1995 Schedule 1, Paragraph 7(1).

⁸ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 72.

⁹ *Ibid.*, p. 70. See also Meeson, N. and Kimbell, J., *Admiralty Jurisdiction and Practice Fourth Edition*, op. cit., p. 358-359. See also Meeson, N., *Ship and Aircraft Mortgages*, op. cit., p. 55. See also *Coltman v. Chamberlain* [1890] 25 QBD 328. See also *The Dundee* [1823] 1 Hagg 109.

¹⁰ Mandaraka-Sheppard, A., *Modern Maritime Law and Risk Management Second Edition*, op. cit., p.365. See also Meeson, N. and Kimbell, J., *Admiralty Jurisdiction and Practice Fourth Edition*, op. cit., p. 359-360. See also Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 71-

The mortgage period begins at the inception of the mortgage contract and not on the registration of the mortgage. It is valid from the date it has been granted and is effective henceforth. The date of registration is solely for the purpose of determining the priority of such mortgage in relation to other mortgages.¹¹

Mortgage versus Absolute Transfer

A mortgage used to be perceived as an absolute transfer of property prior to the Merchant Shipping Act 1854. Traditionally, common law has regarded a ship mortgage as a mortgage of a chattel wherein legal title has been passed on to the mortgagee upon the execution of the mortgage.¹² However, MSA 1854 has contradicted this view and distinguished mortgage from absolute transfer by stating that the transfer of property is not absolute and such transfer is only a security of the debt.¹³

It may appear that the form of a mortgage shows an absolute transfer of property but it can be argued that such transfer of property is only a security transaction by way of mortgage. It is necessary to look into the substance of the transaction rather than the form. The burden of proof lies with the person claiming it is an absolute transfer rather than a security transaction.¹⁴

As ownership is retained with the mortgagor, he can mortgage the same property again and again provided that the interests of prior encumbrances or mortgagees are not affected by such act.¹⁵

72. See also Tetley, W., *International Maritime and Admiralty Law*, International Shipping Publications, Quebec, 2002, p. 489-490.

¹¹ Meeson, N. and Kimbell, J., *Admiralty Jurisdiction and Practice Fourth Edition*, op. cit., p. 357. See also Meeson, N., *Ship and Aircraft Mortgages*, op. cit., p. 51.

¹² Ibid., p.360. See also Hodges, S and Hill, C., *Principles of Maritime Law*, op. cit., p. 346.

¹³ The notion of mortgage as distinguished from absolute transfer is incorporated under the UK Merchant Shipping Act of 1995. See also *Keith v. Burrows* [1876] 1 C.P.D. 722.

¹⁴ Meeson, N. and Kimbell, J., *Admiralty Jurisdiction and Practice Fourth Edition*, op. cit., p. 350. See also Meeson, N., *Ship and Aircraft Mortgages*, op. cit., p. 1-2.

¹⁵ *Downsview Nominees Ltd. v. First City Corp* [1993] AC 295 (PC).

Types of mortgage

There are two general types of mortgages namely: legal mortgage and equitable mortgage.

Legal mortgage is also referred to as statutory mortgage. A legal or statutory mortgage is a security created by the registered owner of a vessel, completed and executed in the appropriate form; which is subsequently registered with the Registrar.¹⁶ A legal mortgage may also be called a registered mortgage. A registered mortgage arises only from mortgages on registered ships.

The perfection of a legal mortgage is made through its registration giving the mortgagee a legal right against the property of the mortgagor rather than only a personal remedy against him.¹⁷ This registration gives protection of the rights of the mortgagee by statute and contract, herein the right of redemption.¹⁸

Equitable mortgage is also referred to as common law mortgage or unregistered mortgage.¹⁹ Suffice to say that, equitable mortgages are mortgages that do not take or comply with the form of legal mortgages.²⁰ Equitable mortgage arises from two instances: when there is an agreement to make a legal mortgage but one has not been registered and mortgage of an equitable interest.

Since mortgages are contracts that are neither necessarily in writing nor registered, any mortgages that are lacking in form are construed to be equitable mortgages. This

¹⁶ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 43 and 56. See also Odeke, A. *Bareboat Charter (Ship) Registration*, Kluwer Law International, The Hague, 1998, p. 147. See also Tetley, W., *International Maritime and Admiralty Law*, op. cit., p. 488.

¹⁷ Mandaraka-Sheppard, A., *Modern Maritime Law and Risk Management Second Edition*, op. cit., p.364.

¹⁸ Ibid.

¹⁹ Ibid. See also Meeson, N. and Kimbell, J., *Admiralty Jurisdiction and Practice Fourth Edition*, op. cit., p. 354. See also Meeson, N., *Ship and Aircraft Mortgages*, op. cit., p. 6.

²⁰ Tetley, W., *International Maritime and Admiralty Law*, loc. cit.

may occur when the owner enters into a contract to grant a mortgage to a creditor and such mortgage is never formalized yet the mortgage contract exists or when there is a defect in the mortgage and a legal mortgage cannot be created.²¹

A mortgage on an equitable interest arises from subsequent mortgages registered following a legal mortgage of a property. Although the formalities and the perfection to constitute a legal mortgage exist and there is already an existing legal mortgage, any succeeding mortgages are deemed to be equitable mortgages as the right of redemption has already been vested on the earlier mortgagee. The mortgagor only has equitable interest in the property to create subsequent mortgages.²²

Equitable mortgages have lower priority over legal mortgages regardless of the fact that they occur prior to the registration of legal mortgages and the legal mortgagor has knowledge of the existence of prior equitable mortgages.²³

The third dimension on the types of mortgage is unregistered mortgage on unregistered vessels. The preceding types of mortgage encompass mortgage on registered vessels; however, not all vessels are registered, and unregistered vessels may be placed into a mortgage as well. A mortgage under this scenario remains binding between the parties and may be enforced against a third party regardless that he has no knowledge of the unregistered mortgage. This kind of mortgage does not need a prescribed form. Such mortgages may either be legal or equitable mortgages. Only the first mortgage remains as a legal mortgage despite the fact that it has not been registered; hence, it has a right against the title of the vessel. Subsequent mortgages constitute equitable mortgages and will be secured on the mortgagor's equity of redemption.²⁴

²¹ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 46.

²² Ibid., See also Meeson, N. and Kimbell, J., *Admiralty Jurisdiction and Practice Fourth Edition*, op. cit., p. 354. See also Meeson, N., *Ship and Aircraft Mortgages*, op. cit., p. 7.

²³ Black v. Williams [1895] 1 Ch. 408.

²⁴ Mandaraka-Sheppard, A., *Modern Maritime Law and Risk Management Second Edition*, op. cit., p.368-369. See also Meeson, N. and Kimbell, J., *Admiralty Jurisdiction and Practice Fourth Edition*,

3.2 Parties to Mortgage

There are two parties to the mortgage: the mortgagor and the mortgagee.

3.2.1 Mortgagor

The mortgagor is simply defined as the borrower or the debtor who offers security to a lender.²⁵ He has the legal title to the property and with that he is able to assign the ownership interest of the property at his disposal. Only the registered owner of the property can enter into a contract binding the property as a security for repayment of a loan.²⁶ Not even the beneficial owner of the property can execute a mortgage.²⁷

Rights of Mortgagor

There are two principal rights of the mortgagor: right of redemption and right of possession to operate the vessel.

Right of redemption is an inherent right of the mortgagor and any stipulation to abrogate that right is unenforceable.²⁸ Right of redemption is the right of the mortgagor to redeem the vessel or claim back possession and control of his vessel upon discharge of the mortgage by repayment of the debt and interest at any time regardless of a default. The mortgagor is not bound to any contractual period for the right of redemption to be exercised.²⁹

op. cit., p. 357. See also Jackson, D.C., *Enforcement of Maritime Claims Fourth Edition*, Informa, 2005, p. 579-581. See also The Shizelle [1992] 2 Lloyd's Rep. 444.

²⁵ Mortgagor (2002), In Martin, E., *Oxford A Dictionary of Law Second Edition*, Oxford University Press, 2002, p. 320. See also Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 29.

²⁶ Ibid., p. 72.

²⁷ Ibid.

²⁸ Meeson, N. and Kimbell, J., *Admiralty Jurisdiction and Practice Fourth Edition*, op. cit., p. 364. See also Meeson, N., *Ship and Aircraft Mortgages*, op. cit., p. 77.

²⁹ Mandaraka-Sheppard, A., *Modern Maritime Law and Risk Management Second Edition*, op. cit., p.386.

It should be noted that the mortgagee will be liable for damages when he refuses to honor the right of redemption of the mortgagor or its assignor; for example, if he subsequently sold the vessel, hence, making it impossible for the mortgagor to exercise his right³⁰ or if he refuses to accept full payment to extinguish the debt.

The mortgagor has the right of possession of the mortgaged property. He remains the owner of the property³¹ and has all the rights, privileges and full control to operate the vessel, take the earnings and make repayment under the mortgage agreement. He will bear such expenses for the operations of the vessel and will be entitled to the earnings such as freight hereto, unless there is a stipulation to the contrary.³²

Obligations of Mortgagor

The mortgagor's primary responsibilities are to repay the debt and redeem the vessel, to pay the debt regardless of what the collateral deed says and to pay interest if stipulated.³³

The mortgagor's other obligations are two-fold: contractual obligations and statute obligations.

The mortgagor is bound to his contractual obligations and such obligations, *inter alia*, are: the obligation to register and insure the vessel, and with that maintaining the ship in good condition and repair, the obligation to notify the mortgagee of the movement of the vessel including legal trading of the vessel, the obligation to discharge claims and liens against the vessel that may result in an arrest for non-settlement, the obligation not to sell or grant a charge on the ship without discharging

³⁰ Fletcher & Campbell v. City Marine Finance Ltd. [1968] 2 Lloyd's Rep. 520.

³¹ Collins v. Lamport [1864] 34 LJ Ch 196.

³² Meeson, N. and Kimbell, J., *Admiralty Jurisdiction and Practice Fourth Edition*, op. cit., p. 369-370.. See also Meeson, N., *Ship and Aircraft Mortgages*, op. cit., p. 83. See also Hodges, S and Hill, C., *Principles of Maritime Law*, op. cit., p. 349. See also Chinnery v. Blackburne [1784]1 H. Bl. 118.

³³ Tetley, W., *Maritime Liens and Claims*, International Shipping Publications, Quebec, p. 483.

first the debt to the mortgagee and the obligation to notify the mortgagee of long-term charter agreements.³⁴

The statute obligation of the mortgagor is implied by nature. It is his obligation to make the vessel available if he impairs the security or if he defaults on repaying the loan.³⁵

3.2.2 Mortgagee

The mortgagee is simply defined as the lender or the creditor who provides money to a debtor for a security.³⁶ He does not acquire ownership of the property rather he is vested with proprietary interest in the property.

Rights of Mortgagee

The rights of the mortgagee are derived from contract, statute and common law. The principal right of the mortgagee is the right to take possession and subsequently the power to enforce sale of the property.³⁷ However, this right does not exist nor is it enforceable unless there is a fault on the side of the mortgagor.

The mortgagee's right to take possession arises in two scenarios: if there is a default by the mortgagor or if the security is impaired.

Default is defined as any failure to perform a contractual or other legal duty. Mortgage default arises when the mortgagor fails to pay the sum of money at the time or in the manner that is agreed upon by the parties. In other words, default is a

³⁴ Mandaraka-Sheppard, A., *Modern Maritime Law and Risk Management Second Edition*, op. cit., p.382-384.

³⁵ Ibid.

³⁶ Ibid., p. 359. See also Mortgagee (2002), In Martin, E., *Oxford A Dictionary of Law Second Edition*, op.cit., p. 320. See also Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 29.

³⁷ Ibid., p. 390.

breach of the mortgage contract.³⁸ Once there is a default, it does not automatically give the mortgagee a right of possession. He should initially send a notice to the mortgagor of the existence of the default and propose remedy thereto as per the contract. He may demand payment of the debt within a reasonable time³⁹; however, if the mortgagor is still unable to pay the debt then he can claim his right of possession unless he waives this right.⁴⁰

Impairment of security depends on circumstances and the burden of proof lies with the mortgagee. To consider that there is an impairment of security, there are a few factors that may result in impairment such as, *inter alia*: the possibility of burdening the vessel with maritime liens due to financial difficulties of the mortgagor,⁴¹ failure to maintain and insure the vessel,⁴² unprofitable charter agreement, and illegal trading or trading in perilous seas and territories.⁴³

However, it should be noted that a wrongful possession of the mortgagee might make him liable for damages⁴⁴ especially when contracts with third parties, such as the charterers, are affected.⁴⁵

There are two kinds of possession available for the mortgagor: actual possession and constructive possession.

³⁸ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 125.

³⁹ See *Lister v. Dunlop Can. Ltd* [1982] 135 DLR(3d) 1.

⁴⁰ Mandaraka-Sheppard, A., *Modern Maritime Law and Risk Management Second Edition*, op. cit., p.390.

⁴¹ *Laming & Co. v. Seater* [1889] 16 SC (4th Series) 828. See also *The Manor* [1907] P 339. See also Gaskell, N. et. al., *Chorley & Giles' Shipping Law* Eight Edition, Pitman Publishing, London, 1987, p. 63.

⁴² *Ibid.*

⁴³ *Law Guarantee and Trust Society v. Russian Bank for Foreign Trade and others* [1905] 1 KB 815, CA.

⁴⁴ *The Halcyon Skies (No.2)* [1977] 1 Lloyd's Rep 22. See also *The Blanche* [1887] 6 Asp. MLC 272.

⁴⁵ *The Innis fallen* [1866] LR 1 A. & E. 72.

Actual possession is when the mortgagor puts a man on board the vessel without assistance from the court and the arrest is merely through the action of the mortgagor.⁴⁶ Actual possession can only be done within the ports and cannot be exercised when the vessel is still at sea.⁴⁷ He can acquire possession by constructive possession. Constructive possession can be achieved by sending notice of possession to the parties concerned. The master and the crew of the vessel, consequently, answer to the mortgagee.⁴⁸

As a mortgagee in possession, the mortgagee has rights to the earnings and the freight of the vessel from the time he takes over possession of the vessel. He is not entitled to any earnings or freight accrued prior to his possession.⁴⁹

Obligations of Mortgagee

The obligations of the mortgagee arise when he takes possession of the vessel. The mortgagee is not obliged to sell the vessel when he is already in possession of the vessel. He has an option to operate the vessel and earn profits to satisfy his security.⁵⁰ If he decides to operate the vessel, he is obliged to shoulder the liabilities and expenses pertaining to the operation of the vessel from the time he took over the vessel⁵¹ and he is expected to apply a standard duty of care of a reasonable person in protecting the property as if he is the owner of the property.⁵²

⁴⁶ Odeke, A. *Bareboat Charter (Ship) Registration*, op. cit., p. 148.

⁴⁷ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 136.

⁴⁸ Ibid.

⁴⁹ Ibid., p. 138. See also Odeke, A. *Bareboat Charter (Ship) Registration*, op. cit., p. 148. See also Meeson, N. and Kimbell, J., *Admiralty Jurisdiction and Practice Fourth Edition*, op. cit., p. 380. See also Meeson, N., *Ship and Aircraft Mortgages*, op. cit., p. 95. See also Mandaraka-Sheppard, A., *Modern Maritime Law and Risk Management Second Edition*, op. cit., p.394.

⁵⁰ Mandaraka-Sheppard, A., *Modern Maritime Law and Risk Management Second Edition*, op. cit., p.395. See also Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 137.

⁵¹ Ibid.

⁵² Ibid. See also Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 173. See also Meeson, N. and Kimbell, J., *Admiralty Jurisdiction and Practice Fourth Edition*, op. cit., p. 382. See also Meeson, N., *Ship and Aircraft Mortgages*, op. cit., p. 97. See also *Marriott v. The Anchor Reversionary Co.* [1861] 2 Giff 457.

The mortgagee has an obligation to the liens attached to the property he took over. A claimant of a maritime lien or a statutory lien can arrest the vessel regardless of the fact that the mortgagee took possession of the vessel and he is obliged to settle the liability pertaining to it.⁵³

The mortgagee is bound to the contracts, such as charter parties, made by the owner prior to the grant of the mortgage provided that the mortgagee has prior knowledge of them.⁵⁴

If the mortgagee opts to exercise his power to sell the property, he is not obliged to seek to improve or increase its value.⁵⁵ His obligation is to exercise his power of sale in a prudent way⁵⁶ and to consider the rights of subsequent mortgagees if the proceeds of the sale exceed the amount due to him⁵⁷

3.3 International Law on Mortgage

The CMI has initiated efforts to establish an international regime for mortgage. The International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgage 1926 was the first international convention that dealt with the rules and treatment of mortgage. This convention was appropriately titled for its purpose, which was to unify certain rules with regard to maritime liens and mortgages. It was succeeded by the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgage 1967 which has never been in

⁵³ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 141.

⁵⁴ Ibid. p. 178-181. See also Meeson, N. and Kimbell, J., *Admiralty Jurisdiction and Practice Fourth Edition*, op. cit., p. 376-377. See also Meeson, N., *Ship and Aircraft Mortgages*, op. cit., p. 91-93. See also Tetley, W., *Maritime Liens and Claims*, op. cit., p. 485. See also *De Mattos v. Gibson* [1858] 28 L.J. Ch. 165.

⁵⁵ Mandaraka-Sheppard, A., *Modern Maritime Law and Risk Management Second Edition*, op. cit., p.396-397.

⁵⁶ Meeson, N. and Kimbell, J., *Admiralty Jurisdiction and Practice Fourth Edition*, op. cit., p. 387. See also Meeson, N., *Ship and Aircraft Mortgages*, op. cit., p. 101.

⁵⁷ Mandaraka-Sheppard, A., *Modern Maritime Law and Risk Management Second Edition*, op. cit., p.397.

force. Eventually, these two conventions were merged to incorporate concepts from both conventions into one convention, the International Convention on Maritime Liens and Mortgages 1993. The essence of these regimes is to establish the law of the state in which the ship is registered, controlling the registration and ranking of mortgages.⁵⁸

International Convention on Maritime Liens and Mortgages 1993

The International Convention on Maritime Liens and Mortgages 1993 combines the 1926 and 1967 conventions. The 1926 Convention specifies “charges of a similar nature” which is not in the 1967 Convention and the latter stipulates the application of the convention only to “sea-going vessels.”⁵⁹

The provisions of this convention focus on the requirements of registration, deregistration and ranking of mortgages which depend on the national laws of the state of registration. Mortgages registered are to be recognized and enforced with respect to other member states.⁶⁰

3.4 Private Law on Mortgage

A mortgage is a contract; hence, it falls under Contract Law.⁶¹ A mortgage may arise from oral agreements but in order to be perfected should be in writing in a prescribed form, usually the mortgage deed. A default on a mortgage contract comes from nonpayment of the obligation to pay the required amount at an agreed time or impairment of the security. Any default is a breach of contract with that the initial remedy is repayment on demand. If payment has not been made, then the mortgagee’s remedy is to take possession of the property and sell it subsequently.

⁵⁸ Odeke, A. *Bareboat Charter (Ship) Registration*, op. cit., p. 151.

⁵⁹ Ibid.

⁶⁰ Ibid. See also Maritime Liens and Mortgages Convention 93 Article 2.

⁶¹ See 2.4 above for formation and perfection of a contract in Contract Law. See also 3.1 above.

Mortgage law depends on various jurisdictions. The basic principle is that the law applicable is the law of the state where the vessel is registered. This is important specifically for priority in ranking as against maritime liens on the vessel.

CHAPTER 4

MORTGAGE ON BAREBOAT CHARTER REGISTRATION

4.1 Effect of Mortgage on Bareboat Charter Registration

Mortgages on bareboat-chartered vessels are not uncommon in the industry. Observing the financial crisis of 2009, shipping has not been spared and suffered immense losses and a sharp decline in seaborne trade.¹ Ship financing during the same period has suffered and has seen a dramatic fall. Financiers providing mortgages have been skeptical as to whether to grant mortgages or not.² Ship operators opt for bareboat chartering rather than purchasing new vessels, as this seems a more feasible option with the current surplus of tonnage of vessels available in the market.³ Consequently, some of the chartered vessels are under mortgage. The fusion of mortgage and bareboat chartering has legal and practical implications for all parties involved.

4.1.1 On the mortgagor

Mortgaging remains an important method in ship financing.⁴ The intention of the mortgagor is to raise funds for his disposal whether to acquire another vessel or to use the money for the operation of the vessel.⁵ Once the owner has entered into a

¹ UNCTAD, *Review of Maritime Transport*, 2011, p. 5.

² *Ibid.*, p. 152.

³ *Ibid.*, p. 53.

⁴ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, Informa, London, 2001, p. 1.

⁵ Gold, E., et.al., *Essentials of Canadian Law: Maritime Law*, Irwin Law, Toronto, 2003, p. 242.

mortgage contract, he is bound to honor his expressed and implied contractual obligations.

The primary effect on the mortgagor in a bareboat charter registration is transparency. On a mortgaged vessel, the mortgagor may need the consent of the mortgagee for subsequent long-term charter parties that he will employ to the vessel. Although the mortgagor has the right to operate the vessel freely, it is necessary to ensure the mortgagee that the security will not be impaired and the mortgagee will not be prevented from exercising his right in case that the mortgagor defaults on the mortgage if he wishes to enter into a long-term charter agreement.⁶

The owner is bound as well to his contractual obligations with regard to the charter agreement. The standard charter party agreement stipulates the warranty of the owner of no further mortgages, other than those existing prior to the contract, will be entered into without the consent of the charterers.⁷

4.1.2 On the mortgagee

The mortgagee's concern is geared primarily toward the property secured. He needs to be ensured that his security will not be impaired and he will not be prevented from exercising his rights if the mortgagor has defaulted on the mortgage contract. However, in a bareboat charter registration the rights of the third parties, particularly the charterers, should not be impeded with the exception of onerous charter agreements the mortgagor may have entered into.⁸

⁶ Mandaraka-Sheppard, A., *Modern Maritime Law and Risk Management Second Edition*, Routledge-Cavendish, Oxon and New York, 2001, p.384.

⁷ Davis, M., *Bareboat Charters*, LLP Professional Publishing, London, 2000, p.63. See also BARECON 2001 Clause 12(b). See sample on Annex C.

⁸ Meeson, N. and Kimbell, J., *Admiralty Jurisdiction and Practice Fourth Edition*, Informa, London, 2011, p. 376. See also Meeson, N., *Ship and Aircraft Mortgages*, Lloyd's of London Press Ltd., 1989, p. 90.

In a bareboat charter, the mortgagee cannot immediately take possession of the vessel without warranting the existence and fulfillment of the charter agreement despite the default of the mortgagor. An act of disrupting the charter agreement by his possession may expose him to liabilities specifically when the charterer suffers from delays and losses. The charterer may claim damages against him for interference.⁹

An exclusion of this clause, however, is if the charterer impairs the security, the mortgagee is entitled to claim possession of the vessel.¹⁰

4.1.3 On the Charterer

The charterer is bound by contract for the protection of the security, hereunto the vessel chartered. The provisions are incorporated on standard bareboat charter contracts and deed of covenants, which include employment, insurance, repairs and maintenance to the vessel.¹¹ The charterer should familiarize himself with all the listed conditions to prevent any violations that may occur and may result in impairment of the security. On a mortgaged vessel, this is highly important as any indication of an impairment of the security may follow a claim by the mortgagee to exercise his right to take possession of the vessel.

The charterer takes complete possession and control of the vessel, hence, he takes over the responsibilities and obligations to the vessel with regard to operating the vessel being deemed as the owner *pro hac vice*.¹² During the charter period, he will

⁹ The *Halcyon Skies* (No.2) [1977] 1 Lloyd's Rep 22. See also *The Blanche* [1887] 6 Asp. MLC 272. See also *The Heather Bell* [1901] P. 272. See also *Collins v. Lamport* [1864] 34 L.J.Ch. 196. See also *The Innisfallen* [1866] LR 1 A. & E. 72.

¹⁰ See Subsection 3.2.2 for criteria in determining impairment of security. See also Meeson, N. and Kimbell, J., *Admiralty Jurisdiction and Practice Fourth Edition*, op. cit., p. 373. See also Meeson, N., *Ship and Aircraft Mortgages*, op. cit., p. 88. See also *Law Guarantee and Trust Society v. Russian Bank for Foreign Trade and others* [1905] 1 KB 815, CA.

¹¹ Davis, M., *Bareboat Charters*, loc. cit. See also BARECON 2001 Clause 12(b).

¹² See 2.2.2 above.

also assume the obligations of the operations, specifically, settlement of the expenses incurred to prevent any claims after the duration of the charter.

Moreover, it is his responsibility to make the vessel available on the expiry of the charter agreement.

4.1.4 On the Flag States

The flag states in a bareboat charter registration concern themselves with maintaining the record for the vessel, and with that, having the necessary information available to the concerned parties whenever requested.¹³ This record serves as the basis for rankings of mortgages in case of a default.¹⁴ It is imperative that the laws of both the flagging-in and flagging-out states be compatible to avoid conflict in the treatment and application of laws for the existing or future mortgage contracts.

The consent of the flagging-out state is a requirement in granting bareboat charter registration.¹⁵ This practice protects the interests of the mortgagees as the flagging-out state, by virtue of the issuance of the permit to bareboat-out, informs the flagging-in state of any existing registered mortgages to the vessel. Some states may require the consent of the mortgagee for the registration of bareboat charter in their registry.¹⁶

Following the registration of the bareboat charter, the flagging-in state ensures that the vessel will be under its full jurisdiction and control.¹⁷ In addition, the flagging-in

¹³ Maritime Liens and Mortgages Convention 93 Article 1(b).

¹⁴ Maritime Liens and Mortgages Convention 93 Article 1(c).

¹⁵ UNCCROS 86 Article 11(5). See also The Philippines under MARINA Memorandum Circular 182 Section VII(1)(c). See excerpt on Annex N. See also Antigua and Barbuda under AB MSA 2006 Chapter 2 Section 28(b)(iii). See excerpt on Annex K.

¹⁶ Antigua and Barbuda under AB MSA 2006 Chapter 2 Section 28(b)(iv). See excerpt on Annex K.

¹⁷ See 2.2.4 above. See also UNCCROS 86 Article 12(4).

state is obliged to inform the flagging-out state when the bareboat charter registration has ceased.¹⁸

4.2 Implications of Defaulted Mortgage on Bareboat Charter Registration

Default of the mortgage on a bareboat charter registration is a complex issue which gives rise to further conflict. The parties involved are in a difficult situation in terms of how to deal with the situation as one's claim may impede another's right to the vessel. The default may arise from two scenarios: default by the mortgagor of payment of the stipulated amount and impairment of security by the charterer.

The subsequent subsections will tackle the implications of a defaulted mortgage on bareboat charter registration by specifying the responsibilities of the mortgagor/owner of the vessel, the rights of the mortgagee on the default, the rights of the charterer and the role of the flag states in the situation.

4.2.1 Responsibilities of Mortgagor

The default of the mortgagor by failing to pay the stipulated amount in the prescribed manner and time gives the mortgagee the right to claim possession of the vessel. This default, however, can still be corrected provided that he will be able to repay the debt within a reasonable time upon the demand of the mortgagee.¹⁹

In a bareboat charter, the responsibilities with regard to the operations of the vessel are vested in the charterer. If there is an impairment of the security, the mortgagee may stake a claim to take possession of the vessel or may demand repayment of the debt. The mortgagor, in this case, is responsible for the repayment of the debt on an enforceable demand by the mortgagee. Repayment of the debt is the primary

¹⁸ Ibid., See also UNCCROS 86 Article 11(5).

¹⁹ *Lister v. Dunlop Can. Ltd* [1982] 135 DLR(3d) 1.

obligation of the mortgagor. Having said that, it is his ultimate responsibility to fulfill that obligation regardless of the fact that the default arose from the charterer's action.

Granting that the mortgagor is not able to repay the debt upon default, the mortgagee may take possession of the vessel and subsequently enforce his right to sell the vessel.

4.2.2 Rights of Mortgagee

Once default on mortgage has occurred, the right of the mortgagee is his inherent right to receive payment from the mortgagor. He may demand payment of the entire debt amount or the interest whichever is due. It is vital that a breach of contract exists otherwise any claim will be invalid.

The mortgagee has the right to take possession of the vessel provided that the rights of the charterer will not be infringed.²⁰ However, if the default is caused by the impairment of the security resulting from the charterer's actions then the charterer is estopped of his right and the mortgagee may exercise his rights provided that the mortgagor will be notified and the mortgagor fails to settle the debt.²¹

Certain situations may arise when the mortgagor suffers financial difficulties and will not be able to perform according to the charter contract entered into. If the mortgagor becomes unable to satisfy his obligations to other parties consequently exposing the vessel to maritime claims, the mortgagee may take possession of the vessel despite the fact that there is an existing charter contract that is binding during such financial difficulties.²² One case in point is when the mortgagor brings the vessel for repairs and he is not able to pay off the expenses hereafter, the mortgagee can take over, take

²⁰ See 4.1.2 above.

²¹ Davis, M., *Bareboat Charters*, op. cit., p. 64.

²² *The Manor* [1907] P 339. See also *The Lord Strathcona* [1925] P 143.

possession and satisfy the obligation on behalf of the mortgagor without consideration of the outstanding charter parties due to the fact that the mortgagor himself cannot fulfill the charter contract.²³

4.2.3 Rights of Charterer

The rights of the charterer are not affected in a defaulted mortgage provided that the default did not arise from his side. The charter contract remains binding and enforceable as such enabling the charterer to continue the charter agreement without interference from the mortgagee.²⁴ However, if the charter party was made to impair the security then the charter party is not binding against the mortgagee who may take possession of the vessel. If the possession was made for some other reason, then the mortgagee is bound to complete performance of the charter.²⁵

In a mortgage default, it is necessary to consider the knowledge factor in assessing whether or not the mortgagee will be bound to the charter party. More often than not, a mortgagee entering into a financial agreement would have inquired about the background of the vessel including any charter agreement that the vessel may have been entered into; hence, the mortgagee will eventually acquire knowledge of existing charter party of the subjected property. There is a risk of negligence on the mortgagee's side if he fails to do so.²⁶

²³ Laming v. Seater [1889] 16 SC (4th Series) 828.

²⁴ The Halcyon Skies (No.2) [1977] 1 Lloyd's Rep 22. See also The Blanche [1887] 6 Asp. MLC 272. See also The Heather Bell [1901] P. 272 (C.A.). See also Collins v. Lamport [1864] 34 L.J.Ch. 196. See also The Innisfallen [1866] LR 1 A. & E. 72. See also The Fanchon [1880] 5 P.D. 173.

²⁵ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 135-136. See also Boyd, S. et. al., *Scrutton on Charter Parties and Bills of Lading Twenty-first Edition*, Sweet & Maxwell, London, 2008, p. 40. See also De Mattos v. Gibson [1858] 4 De G.&J. 276., Cory, Brothers & Co. v. Stewart [1886] 2 T.L.R. 508. See also The Myrto [1977] 2 Lloyd's Rep 243.

²⁶ Mandaraka-Sheppard, A., *Modern Maritime Law and Risk Management Second Edition*, op. cit., p.408.

Any pre-existing charter party at the time of the grant of the mortgage known to the mortgagee will be binding to the mortgagee²⁷ unless the consequent circumstances dictate that the owner can no longer perform the contractual obligations in the charter agreement.²⁸

4.2.4 Role of Flag States

The role of the flag states boils down to preventing the rights of the mortgagee from being prejudiced by the default on the mortgage. Flag states are vested with the responsibility of maintaining records of the vessels including the details of the owners, the particulars of the vessel and any registered liens or encumbrances.²⁹ Such information must be available whenever necessary upon request of the concerned parties. This is a protection of the mortgagee's interest particularly to bareboat charter registration wherein the underlying registration of the vessel, through which the mortgage is registered, is suspended or cancelled temporarily. The flagging-out state is responsible for ensuring that the vessel will not change ownership or flag unless the mortgage has been satisfied.³⁰

On a defaulted mortgage in a bareboat charter registration, this record is vital in determining the rankings of mortgages among themselves and as against other maritime liens.³¹ Some jurisdictions, such as the US, consider registration of the mortgage highly important to establish the mortgage as a preferred mortgage. Preferred mortgages are mortgages that have been registered either within the US or under another foreign jurisdiction. A preferred mortgage in the US creates a maritime lien on the vessel. Thus, this has an effect on the rankings of the maritime claims as

²⁷ De Mattos v. Gibson [1858] 4 De G.&J. 276. See also Cory, Brothers & Co. v. Stewart [1886] 2 T.L.R. 508.

²⁸ The Celtic King [1894] P 175. See also The Manor [1907] P 339. See also Laming v. Seater [1889] 16 SC (4th Series) 828.

²⁹ Coles, R. and Watt, E., *Ship Registration: Law and Practice Second Edition*, op. cit., p. 9.

³⁰ Maritime Liens and Mortgages Convention 93 Article 16(d).

³¹ Maritime Liens and Mortgages Convention 93 Article 1(c).

to the distribution of proceeds from an enforced sale of the vessel.³² A preferred mortgage under Greek law needs to be registered; otherwise, the mortgage is deemed to not exist at all. Hence, a claim of an unregistered mortgagee will have no bearing against other maritime liens.³³

4.3 Jurisdiction

Mortgage is governed by the law of the state where it is registered. Usually, mortgage is registered alongside with the ship's registration through which its creation, validity and priority among other mortgages is determined.³⁴ The law of that state is the *prima facie* jurisdiction that will regulate its formation and existence.³⁵

In bareboat charter registration, the public law and private law aspects of the registration are split between two states. The public law domain is transferred to the flagging-in state while the private law domain remains with the flagging-out state. Therefore, in bareboat charter registration, the mortgage will be governed under the flagging-out state.³⁶

On the other hand, the enforcement of the mortgage will be governed by *lex fori*³⁷ or the law of the state where the mortgage will be enforced.³⁸ *Lex fori* will be the basis

³² Schoenbaum, T., *Admiralty and Maritime Law Fifth Edition Volume 1*, West, St. Paul, 2011, p. 714.

³³ Karatzas, T. and Ready N., *The Greek Code of Private Maritime Law*, Martinus Nijhoff Publishers, The Hague, 1982, p. 52.

³⁴ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 240-242. See also Jackson, D., *Enforcement of Maritime Claims Fourth Edition*, Informa, London, 2005, p. 581. See also Maritime Liens and Mortgages Convention 93 Article 1.

³⁵ Mandaraka-Sheppard, A., *Modern Maritime Law and Risk Management Second Edition*, op. cit., p. 375.

³⁶ Maritime Liens and Mortgages Convention 93 Article 16(c).

³⁷ *Lex fori* means the law of the forum that governs matters of procedure and mode of trial in private international law as defined in *Lex fori* (2002), In Martin, E., *Oxford A Dictionary of Law Second Edition*, Oxford University Press, 2002, p. 287.

for the legal proceedings of the court.³⁹ This is highly critical in establishing the ranking of the mortgage as opposed to other maritime liens. The law of the forum determines whether certain claims are indeed maritime liens and will classify such accordingly to establish their ranking among other maritime claims.⁴⁰

On a defaulted mortgage, the laws of the state of registration protect the rights of the mortgagee and such rights will be recognized by any jurisdiction where legal proceedings will be instigated. However, if there are maritime claims on the vessel, the issue is how will the maritime claims be recognized and which jurisdiction will the claims be subjected to?

Prior to the Rome Convention, the recognition of the claims and their classification as to the kind of liens they are were based on the law of the forum. This created confusion as similar cases in different jurisdictions yielded to contradicting results. The mortgage ranked higher than a maritime lien in one jurisdiction⁴¹ while a similar circumstance has ranked mortgage subordinate to a maritime lien in another jurisdiction.⁴²

Rome Convention 1980

The Rome Convention 1980 clarified the conflict of laws issue with regard to contracts. Prior to the convention, the law applied to mortgage contracts was the law of the state of registration and the ranking of the maritime claims was determined by the law of the forum. However, the Rome Convention stipulates that the law governing the contract will be either the law expressed and implied on the formation of the contract or the law that has the most substantive connection to the contract.

³⁸ Mandaraka-Sheppard, A., *Modern Maritime Law and Risk Management Second Edition*, loc. cit., See also Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 241. See also Maritime Liens and Mortgages Convention 93 Article 2.

³⁹ Ibid.

⁴⁰ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 242.

⁴¹ *The Halcyon Isle* [1980] 2 Lloyd's Rep. 325.

⁴² *The Ioannis Daskalelis* [1974] 1 Lloyd's Rep. 174.

Parties may expressly state the law of a particular jurisdiction that will be applied to the contract and the courts will respect such choice of law.⁴³ However, the courts may reject the choice of law of the parties if such choice of law will circumvent the application of a rule of law with which compliance is mandatory, if the choice of law will be a breach of any existing law of the forum or if the choice of law contradicts any public policy.⁴⁴

In the absence of any stipulation in the contract for the choice of law, the law applicable for the contract will be the law that has the most substantial connection to the contract. The substantial connection will be either the place that has the closest connection to the contract or the system of law that has the closest connection to the contract but the system of law that has the closest connection to the contract remains to be the applicable law for the contract.⁴⁵

This convention harmonized the laws applicable to the European states and the application is not restricted to the contracting states.⁴⁶ However, this convention is applicable only to the European states. The current biggest maritime nations do not belong to the European Union. They are not parties to the convention in which the convention does not apply.

4.4 Remedy

In case of a defaulted mortgage, the mortgagee has various options on how to exercise his rights against the mortgagor. These options vary from one jurisdiction to another as each state applies the system of law either under civil or common law. The distinction can be illustrated by the method of realizing a maritime claim. In

⁴³ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 245.

⁴⁴ Ibid., p. 245-246.

⁴⁵ Ibid., p. 248.

⁴⁶ Rome Convention 80 Article 2.

civil law, realization is made through conservatory attachment or seizure of the vessel, which will serve as a security until judgment is rendered.⁴⁷ In common law, realization is made through an *in rem* claim by which the vessel becomes the defendant and will be arrested as a security, as well for future judgment.⁴⁸

What constitutes a defaulted mortgage?

Default on a mortgage arises from the following: failure to pay in the agreed manner and time, financial and legal incapacity of the mortgagor to fulfill his obligations, violation or a breach of the terms of the deed of the covenants and impairment of the security.⁴⁹

Once default on a mortgage has occurred, the mortgagee has to give notice to the mortgagor of the default. If it is possible to cure the default, then the mortgagor is given a reasonable time to remedy the default or the mortgagee may do so on behalf of the mortgagor at his expense otherwise the mortgagee may proceed with the claim.⁵⁰

4.4.1 Demand for repayment

The mortgagee may demand repayment of the entire outstanding amount of the debt with interest if the mortgagor is unable to cure the default. Such demand is also called an acceleration of debt.⁵¹ The amount due will be the unpaid principal and accrued interest. Any stipulation for future interests is deemed as a penalty.⁵²

⁴⁷ Tetley, W., *International Maritime and Admiralty Law*, International Shipping Publications, Quebec, 2002, p. 508.

⁴⁸ *Ibid.*, p. 509.

⁴⁹ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 126.

⁵⁰ *Ibid.*, p. 129.

⁵¹ *Ibid.*, p. 131. See also Mandaraka-Sheppard, A., *Modern Maritime Law and Risk Management Second Edition*, op. cit., p. 390.

⁵² *The Angelic Star* [1988] 1 Lloyd's Rep. 122 (C.A.).

4.4.2 Possession

There is no immediate right to possession in civil law despite a default on a mortgage. What exists is a right against the proceeds of a judicial sale of the vessel.⁵³ On the other hand, in common law the mortgagee is vested with an immediate right of possession. Such possession may be made without court proceedings.⁵⁴ The mortgagee in possession has the option to operate the vessel or to exercise his power to sell.⁵⁵

4.4.3 Action *in rem* and action *in personam*

The mortgagee may also institute an action *in rem* for the defaulted mortgage. In action *in rem*, the mortgagee claims against the thing itself, hereunto as the vessel, to enforce the proprietary interest in the vessel.⁵⁶ The mortgagee applies to a court a *writ in rem* to issue an arrest warrant against the vessel. Action *in rem* is exclusive to common law jurisdictions.⁵⁷

The mortgagee may also instigate an action *in personam* for the defaulted mortgage. In action *in personam*, the mortgagee claims against the owner of the vessel wherein the claim may be enforced against all the properties of the owner within the court's jurisdiction regardless of whether the property is the subject of the claim.⁵⁸ The purpose of an action *in personam* is for the mortgagor to make an appearance at the court proceedings. It is also filed when there is a deficiency in the foreclosure of the mortgage and such action is against the mortgagor or if there is any, co-maker or guarantor.⁵⁹ This happens when the proceeds of the sale is inadequate, the sale is not

⁵³ Tetley, W., *International Maritime and Admiralty Law*, op. cit., p. 487.

⁵⁴ Ibid. See also 3.2.2 above.

⁵⁵ See 3.2.2 above.

⁵⁶ Meeson, N. and Kimbell, J., *Admiralty Jurisdiction and Practice Fourth Edition*, op. cit., p. 87.

⁵⁷ Tetley, W., *International Maritime and Admiralty Law*, op. cit., p. 406.

⁵⁸ Ibid.

⁵⁹ Schoenbaum, T., *Admiralty and Maritime Law Fifth Edition Volume 1*, West, St. Paul, 2011, p. 720.

made in a commercially reasonable fashion⁶⁰ or the proceeds of the sale are not sufficient to cover the damages.⁶¹

An action *in rem* or *in personam* is enforced by acquiring an arrest warrant for the vessel in order to proceed to a judicial sale.

4.4.4 Arrest ship

An arrest means any detention of a ship by judicial process to prevent removal of the property from the jurisdiction of the court to secure a maritime claim.⁶² The mortgagee may pursue court proceedings for an arrest on a defaulted mortgage.⁶³ An arrest may be done on the vessel itself that is subject to the mortgage default claim or to other properties of the mortgagor including other vessels belonging to him.⁶⁴

The effect of an arrest of the vessel on the mortgage default is vesting of jurisdiction on the merits of the case. Such arrest is for the sole purpose of ensuring security over the claim by preventing the prejudice of the mortgagee's security⁶⁵ and not on commercial grounds.⁶⁶ However, the arrest may be lifted provided that adequate security is provided.⁶⁷

In a bareboat charter, an arrest may infringe upon the rights of the charterer. It is necessary to take precautions to avoid the impingement of the charterer's right to uninterrupted operations of the vessel; otherwise, the charterer may counterclaim

⁶⁰ Ibid.

⁶¹ Meeson, N. and Kimbell, J., *Admiralty Jurisdiction and Practice Fourth Edition*, op. cit., p. 93. See also *Nelson v Couch* [1863] LJ CP 46.

⁶² Tetley, W., *International Maritime and Admiralty Law*, op. cit., p. 406. See also definition of Arrest in The Arrest Convention 1999 Article 1(2) and The Arrest Convention 1958 Article 1(2).

⁶³ The Arrest Convention 1999 Article 1(1)(u) and The Arrest Convention 1958 Article 1(1)(q).

⁶⁴ Sister ship doctrine under The Arrest Convention 1999 Article 3(2). The Arrest Convention 1958 Article 3(1).

⁶⁵ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 165.

⁶⁶ Jackson, D., *Enforcement of Maritime Claims Fourth Edition*, op. cit., p. 398.

⁶⁷ Ibid.

against the arrest.⁶⁸ The arrest may still proceed; hence, the charterer may claim against the owner/mortgagor for breach and/or frustration of the contract. The same case may be if the circumstances are reversed and the charterer is at fault resulting in a default on the mortgage; thus, the owner can file against the charterer.⁶⁹

4.4.5 Freezing injunction

The mortgagee may opt to apply for a freezing injunction⁷⁰ against the mortgagor in case of a default to prevent the mortgagor from removing his assets or dissipating his assets wherever they are before or during the suit⁷¹ in order to satisfy a possible future judgment.⁷² It is necessary to have a legal justification for the injunction that a removal of the assets or dissipation of the same by the mortgagor is likely to frustrate judgment otherwise any abusive, excessive or wrongful injunction may result in damages against the mortgagor.

4.4.6 Sale of the vessel

The mortgagee's principal remedy on the mortgage default is to sell the vessel either under his power or under a judicial sale to satisfy the debt.⁷³ The mortgagee⁷⁴ may exercise his extra judicial power to sell as soon as he takes possession of the vessel. The proceeds of the sale will be applied in accordance to the priority of ranking of the lien holders on the vessel, including the mortgagee himself. Any unpaid rightful

⁶⁸ The Myrto [1977] 2 Lloyd's Rep. 243.

⁶⁹ Tetley, W., *Maritime Liens and Claims Second Edition*, International Shipping Publications, Quebec, 1998, p. 1107.

⁷⁰ Previously called The Mareva Injunction. See also *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509.

⁷¹ Tetley, W., *International Maritime and Admiralty Law*, op. cit., p. 410. See also Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, loc. cit.

⁷² Tetley, W., *Maritime Liens and Claims Second Edition*, op. cit., p. 995.

⁷³ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 165.

⁷⁴ Only a legal mortgagee can exercise his power of sale otherwise he needs to apply an order for a judicial sale from the court. Any succeeding mortgagee can only exercise his power to sell with the consent of prior mortgagees or by an order of the court.

lienholders may still claim after the vessel in spite of the sale.⁷⁵ However, if there is an excess amount after realizing all the debts, then the mortgagor has the right to the surplus; hence, the mortgagee acts as a trustee of the amount.⁷⁶

On the other hand, the court may force a sale of the vessel upon application of an order for the sale of the vessel by the mortgagee regardless of the place where it is registered and the system of law that governs it.⁷⁷ The key aspect of a judicial sale is that once the sale has been enforced, the buyer earns an absolute title over the vessel free from encumbrances.⁷⁸ The proceeds of the sale will be distributed to the claimants, and with that any deficiency in the payment will be extinguished. Any excess in the proceeds will be returned to the mortgagor. However, in the Philippines, the law states that in the case that there is a deficiency in the sale of the vessel, the mortgagee may file an action *in personam* against the mortgagor for the deficiency amount.⁷⁹

Usually, in the sale of a vessel under bareboat charter, the purchasers of the vessel will be aware of the existence of the charter contract. Hence, despite the fact that the vessel's ownership has already been transferred to the new owner, the contract remains binding and the new owners are to continue the charter party or will engage the vessel without contradicting the terms of the charter agreement.⁸⁰

⁷⁵ Mandaraka-Sheppard, A., *Modern Maritime Law and Risk Management Second Edition*, op cit., p. 403.

⁷⁶ Gaskell, N. et. al., *Chorley & Giles' Shipping Law Eight Edition*, Pitman Publishing, London, 1987, p. 65.

⁷⁷ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 152-153.

⁷⁸ Mandaraka-Sheppard, A., *Modern Maritime Law and Risk Management Second Edition*, loc. cit. See also Tetley, W., *Maritime Liens and Claims Second Edition*, op. cit., p. 1094.

⁷⁹ Philippines PD 1521 Section 17(b).

⁸⁰ Tetley, W., *Maritime Liens and Claims Second Edition*, op. cit., p. 1107.

Effect of insolvency of the mortgagor

The mortgagor's insolvency does not affect the security of the mortgage unless such insolvency gives rise to further maritime claims. The mortgagee may take over the vessel and his rights rank above other maritime claims as this case imperils the security as such insolvency prevents the mortgagor from fulfilling his duties under the contracts he has entered.⁸¹

4.5 Hierarchy of Maritime Claims

After an enforced sale, the proceeds will be appropriated according to the priority in rankings of maritime claims. The basis of the ranking will be the law of the registration of the vessel. This prevents the claimants from law shopping through which the jurisprudence and outcome will remain the same regardless of the state where the vessel will be arrested or sold.

The ranking will vary from one jurisdiction to another; however, most jurisdictions follow the order of the ranking as:⁸²

- a) special legislative rights
- b) costs of seizure, *custodia legis* and judicial sale
- c) maritime liens
- d) mortgages
- e) other maritime claims

There may be variations in some countries particularly in the recognition of certain claims as to whether they are preferred maritime liens or other maritime claims.

⁸¹ Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, op. cit., p. 134. See also *The Manor* [1907] P 339. See also *The Lord Strathcona* [1925] P 143.

⁸² Tetley, W., *International Conflict of Laws - Common, Civil and Marine*, International Shipping Publications, Quebec, 1994, p. 539-540.

4.5.1 The Philippines

The priority in ranking in the Philippines is as follows:

- a) expenses and fees allowed and costs taxed by the court and taxes due to the government
- b) crew's wages
- c) general average
- d) salvage, including contract salvage
- e) maritime liens arising prior in time to the recording of the preferred mortgage
- f) damages arising out of tort
- g) preferred mortgage registered prior in time
- h) other maritime liens

4.5.2 Antigua and Barbuda

The priority in ranking in Antigua and Barbuda is as follows:

- a) cost of arrest and sale and *custodia legis*⁸³
- b) maritime liens (wages and other sums due to the master and crew, port/canal/other waterway dues/pilotage, claims against the owner based on tort, loss of life and personal injury, claims for salvage/wreck removal/general average)⁸⁴
- c) possessory liens⁸⁵
- d) mortgages, hypothecs and other charges
- e) other maritime liens

⁸³ AB MSA 2006 Chapter 5(50).

⁸⁴ AB MSA 2006 Chapter 5(49)(1).

⁸⁵ AB MSA 2006 Chapter 5(51).

4.5.3 United Kingdom

The priority in ranking in the UK is as follows:⁸⁶

- a) special legislative rights
- b) cost of arrest and *custodia legis*
- c) possessory liens
- d) traditional maritime liens (salvage, damage liens, seaman and master's wages, master's disbursements and bottomry)
- e) mortgages
- f) Statutory rights *in rem* (necessaries, repairmen's lien, towage liens, general average, pilotage, cargo damage liens and charterer's liens against the ship).

4.5.4 Zanzibar

The priority in ranking in Zanzibar is as follows:

- a) cost of arrest and sale and *custodia legis*⁸⁷
- b) maritime liens (wages and other sums due to the master and crew, port/canal/other waterway dues/pilotage, claims against the owner based on tort, loss of life and personal injury, claims for salvage/wreck removal/general average)⁸⁸
- c) possessory liens⁸⁹
- d) mortgages, hypothecs and other charges
- e) other maritime liens

⁸⁶ Tetley, W., *Maritime Liens and Claims Second Edition*, op. cit., p. 884-890.

⁸⁷ Zanzibar MTA 2006 Section 95.

⁸⁸ Zanzibar MTA 2006 Section 86.

⁸⁹ Zanzibar MTA 2006 Section 89.

4.5.5 Canada

The priority in ranking in Canada is as follows:⁹⁰

- a) special legislative rights
- b) cost of arrest and *custodia legis*
- c) possessory liens
- d) traditional maritime liens (salvage, damage liens, seaman and master's wages, master's disbursements and bottomry)
- e) mortgages
- f) Statutory rights in rem (necessaries, repairmen's lien, stevedore's liens, towage liens, cargo damage liens and charterer's liens against the ship, claims for marine insurance premiums and general average)
- g) security interests under provincial law and non maritime liens.

4.5.6 United States

The priority in ranking in the US is as follows:⁹¹

- a) special legislative rights
- b) expenses, fees and cost of justice
- c) preferred maritime liens (wages, maintenance and cure of the crew and master, salvage and general average, maritime torts, longshoremen or stevedores, maritime liens that arose prior to the filing of the preferred ship mortgage)
- d) preferred maritime mortgage
- e) all contract maritime liens filed after the filing of the preferred ship mortgage
- f) foreign ship mortgage

⁹⁰ Ibid., p. 892-897.

⁹¹ Ibid., p. 873-876. See also Schoenbaum, T., *Admiralty and Maritime Law Fifth Edition Volume 1*, op. cit., p. 725-726.

- g) contract cargo damage and contract charter liens
- h) unregistered mortgage and non-maritime liens, state chattel mortgage, liens for maritime attachment.

4.5.7 International Convention on Maritime Liens and Mortgages 1993

The priority in ranking in International Convention on Maritime Liens and Mortgages 1993 is as follows:⁹²

- a) cost of arrest and sale and *custodia legis*⁹³
- b) maritime liens⁹⁴
- c) mortgages, hypothecs and other charges⁹⁵
- d) liens and rights of retention granted by national law⁹⁶

⁹² Tetley, W., *International Maritime and Admiralty Law*, op. cit., p. 499.

⁹³ Maritime Liens and Mortgages Convention 93 Article 12(2).

⁹⁴ Maritime Liens and Mortgages Convention 93 Article 4.

⁹⁵ Maritime Liens and Mortgages Convention 93 Article 5(1).

⁹⁶ Maritime Liens and Mortgages Convention 93 Article 6.

CHAPTER 5

ANALYSIS

5.1 Divergent experiences of bareboat charter registration in flag states

Bareboat charter registration has increasingly gained popularity within the shipping industry in recent years. Various maritime nations have considered utilizing the regime for the promotion of their registries to both shipowners and charterers. However, each state has varying laws that separate those that are successful in availing of the regime from those that are still striving to break into the market.

5.1.1 Philippines

The Philippine overseas fleet is composed of bareboat-chartered vessels. The fleet reached a peak of more than 400 vessels in the late 80's. The registry has experienced a significant decrease mainly as a result of the International Transport Worker's Federation's (ITF) treatment of Philippine registered bareboat charters as flag of convenience. The Philippine government is sensitive about this stigma regarding flags of convenience. In effect, its expansion has been stalled because of the label instilled on the registry. This sensitivity is ungrounded in the fact that it can be argued that the genuine link requirement is not compromised. The laws of the Philippines have not changed at all. Vessels flying the Philippine flag remain in the ownership of Philippine nationals.¹

¹ Philippine nationals are citizens of the Philippines, companies/partnership that are wholly owned by citizens of the Philippines or corporations with 60% paid-up capital stock outstanding owned by citizens of the Philippines.

The Philippines is keen to promote its flag overseas; however, its legislation restricts Philippine flagged vessels to those owned by Filipino nationals or companies with 60% Filipino ownership.² This restriction applies to vessels bareboat-chartered as well. Any bareboat charter registration is restricted to Filipino companies.³ This hinders the expansion of the Philippine fleet, as potential charterers who want to avail of the benefits of the flag are required to have a presence in the country and comply with the strict requirements of the registry.

The criteria for eligibility for registration are tedious⁴ and entail financial implications. The charter agreement is subject to a 4.5% final tax based on the gross charter hire. Ship companies are required to place a deposit amounting to Php200,000 which represents a cash bond by the shipping company for probable default on payment of the mentioned final tax collection upon deletion of the vessel from the registry. The registration must be for at least one year and any premature deregistration will incur a penalty amounting to 6 months of the final tax on the charter hire.

For the Philippine registry to compete with other bareboat chartering registries, the Philippines needs to amend the laws of the country pertaining to the regime. The country has difficulty in amending the property law because the constitution stipulates that ownership of Philippine property including Philippine vessels must be only for Philippine nationals. This is the key factor because it also encompasses the bareboat charter regime.

The Philippine Congress, the legislative arm of the country, has repeatedly attempted to amend the constitution of the Philippines but failed to do so due to strong opposition. Amending the constitution requires a complex process of garnering the required percentage of the Congress and the registered voters to propose and ratify

² Philippine RA 7471. See also MARINA MC 181. See also MARINA MC 182.

³ MARINA MC 181.

⁴ See MARINA MC 182 for detailed criteria for eligibility for registration in Annex N.

the amendment. Usually, but not necessarily, the process of changing the constitution demands a complete amendment of the vital sections of the constitution. It is impractical to change the constitution part by part; thus, it is a grueling task to identify the sections which are of utmost importance, that is, amenable for amendment. The main resistance to amend the constitution is the possibility of extending or even abolishing the term of the president in power. This hinders any constitutional change, as the misconception is far more evident for political purposes rather than economic reasons. If the lawmakers of the country are able to move past the political motives and concentrate on the economic prospects of constitutional change, then it will be easier for any amendments to be upheld and accepted by the public. Thus, the restriction on ownership can be lifted, which can pave the way for a more effective bareboat charter registration regime or, if not, even an open registry for the Philippines.

Many shipping operators have found a loophole in the ownership restriction of the regime by establishing dummy shipping companies in the Philippines. This shipping company will be exempt from income tax for 10 years as an incentive of the government. However, after 10 years the same company will again be subject to income tax in addition to the 4.5% final tax that the charter hire is already subjected to.

Taxation is one of the primary attractions of open registries and bareboat charter registries because shipowners and operators are not subjected to any taxes other than minimal tonnage fees. With the Philippine registry imposing taxes on bareboat-chartered vessels, this deters potential clients. Ship operators initially look for flag states that will let them escape the tax burden on their operations. The government is dispelling these operators because of the levy. Instead, the government may remove the tax duties to attract more operators to the flag. Consequently if taxation is removed, then the deposit will be eliminated as well. The country may opt to impose tonnage tax on the vessels rather than tax on the operation of the vessels.

The manning restriction regarding the nationality of the crew of the vessel also dissuades operators. Bareboat-chartered vessels in the Philippines are required to be fully manned by Filipino crew. In spite of being a labor supplying country, Filipino salaries are relatively higher than other labor supplying countries. Removing this restriction adds in the attractiveness of the flag for operators. The manning sector of the country may oppose this proposition because it can be argued that this may affect the employability of Filipino seafarers. However, there are actually no adverse implications to the hiring of Filipino crew; instead, it opens up possibilities for getting hired. Having the manning restriction repels the operators wanting to flag their vessels in the state because these operators want to have their options open regarding their ship operations. If the restriction is eradicated, these charterers will consider, even more, flagging their vessels in the country. There are more chances that a Philippine-flagged vessel will hire Filipino seafarers. The Filipino seafarers are regarded highly in their marketability in the industry; hence, let the reputation of the seafarers promote itself rather than compel the operators to do so.

5.1.2 Antigua and Barbuda

Antigua and Barbuda remains one of the most successful bareboat charter registrations in the world today. 79% of the vessels under its fleet are bareboat chartered-in. There is no ownership restriction in the registry. More than 90% of the owners and charterers availing of this regime in the state are from Germany. The primary reason for this high demand for the Antigua and Barbuda flag is the freedom from taxation. The state only imposes annual tonnage fees on vessels registered under its flag. In comparison to German-flagged vessels, Germany imposes income tax on the vessels under its registry. These vessels are also subjected to extremely high custom duties and value added taxes on bunkers, spare parts and other repairs availed of within the ports of Germany. German owners and operators tend to escape this taxation by transferring their flags to Antigua and Barbuda. As long as these

vessels are under a foreign flag, they will not be subjected to these custom duties and value added taxes on the necessities and repairs for the vessel.

But why do these German owners choose Antigua and Barbuda? Antigua and Barbuda is reputable in the market being constant in maintaining high quality among its vessels. The flag state consistently belongs to the white lists of various MOUs. This attracts ship operators even more because it is unlikely for Antigua and Barbuda vessels to be targeted by port states for inspection. This is attributable to the maritime administration adherence to quality standards. The administration has been ISO certified which means that the system in place is effective and exceeds the standards. With regard to the vessels, Antigua and Barbuda only authorizes recognized organizations that are members of the International Association of Class Societies Ltd. (IACS). IACS is known for maintaining quality vessels at par with standards. No doubt, German vessels choose Antigua and Barbuda because of the combination of reduction of costs and the highly regarded image of the flag.

5.1.3 Zanzibar

Bareboat charter registration is beneficial to a budding registry. This practice helps in promoting the flag not only to shipowners but also to charterers. With the increasing number of vessels chartered out, bareboat charter registration opens up an opportunity for new registries to increase their fleet consequently increasing the income generated from the registration.

Zanzibar's legislation permits bareboat charter registration; however, it is limited to vessels chartered by the nationals of the United Republic of Tanzania or entities that are domiciled within the country. The restriction deters potential charterers to register with the state primarily due to financial and statutory obligations. A company having a presence in the country is automatically subject to income tax. This is crucial because other bareboat charter registration states do not require

charterers to pay income tax; instead, the charterers are only subjected to tonnage fees.

In order for the registry to avail of the benefits of bareboat charter registration, the government needs to amend the Zanzibar Maritime Transport Act, specifically, the provisions on bareboat charter registration. The legislation should also allow vessels bareboat-chartered by foreign nationals to be registered.

5.1.4 Effectiveness of bareboat charter registration

A thriving registry can learn from the model exhibited by Antigua and Barbuda to become a successful bareboat charter registration. The national legislation of Antigua and Barbuda is open for foreign ownership in contrast to the national laws of the Philippines and Zanzibar, which restrict bareboat charter registration only to the nationals of their states. There is no requirement for the charterers/operators of Antigua and Barbuda vessels to have a physical presence or office in the state. If the Philippines and Zanzibar want to follow suit, they must amend their laws to allow foreign ownership for bareboat chartering.

It is necessary for an effective bareboat charter registration to exempt vessels under its flag from taxes on operation of the vessel. The driving force for choice of flag among ship operators is to escape from being subjected to any form of tax with the exception of acceptable annual tonnage fees. Antigua and Barbuda is consistent with this condition making it more attractive because Antigua and Barbuda vessels are only subject to tonnage fees unlike the Philippines where a final tax based on the gross charter hire of the charter agreement and Zanzibar where an income tax is likely to be imposed because of the requirement for the charterer to have a local office within the state.

Finally, there should be no restriction with regard to manning of the vessel. It may affect the choice of flag because operators want to have the option to choose whoever they want to man their vessels and being restricted to the nationals of the bareboat charter registry is a drawback from opting for that flag state. An implication of the flag state forcing operators to employ nationals of their state is the possibility of a language barrier between the operators and the crew. Ship operators need to be comfortable and able to communicate well with the crews of their vessels, which can be a difficulty if neither party speaks the same language.

5.2 Existing conventions: a question of sufficiency

Are the current conventions sufficient to govern bareboat charter registration and mortgages? There are no international conventions that govern bareboat charter registration. States have different rules and regulations for the regime; thus, there is no uniformity of the rules and regulations.

5.2.1 United Nations Convention on Conditions for Registration of Ships 1986

The current international convention available with provisions for the regime, the United Nations Convention on Conditions for Registration of Ships 1986, is not yet in force. It has fourteen (14) states as of 31 August 2011 that are signatories to the convention. It needs to have at least forty (40) states representing 25% of the world tonnage for the convention to be enforced. UNCCROS 86 has addressed the issue of genuine link for bareboat charter registration through effective jurisdiction and control of a state over the bareboat chartered vessels registered under its flag; however, it does not provide clear procedures on how the states will implement the regime. Implementation still depends on the national legislation of each state.

Considering also the scope of UNCCROS 86, it is applicable only to ships above 500GRT that are engaged in seaborne trade of goods and passengers.⁵ The limitation in scope of the convention creates a vacuum as to how other vessels are to be subjected to registration. More often than not, the criterion for states for mandatory registration of vessels is that vessels must be above 24 meters in length. Those vessels that do not meet the criterion may not be registered. The convention leaves out vessels having more than 24 meters in length but less than 500GRT. Regardless of whether the convention is enforced, the regulations will be uniform only to vessels with more than 500GRT. What about those vessels not covered by the convention? These vessels will be subjected again to the national legislations of each state, which are likely to vary from one another.

UNCCROS 86 stipulates that either the shipowning company, subsidiary of the shipowning company, the management or a representative of the vessel shall have an established business within the territory of the registration state. With the emergence of open registries today, this provision is clearly not applicable anymore. The shipowners and managers of the vessels now do not have physical presence within the state of registration. Most open registries do not require their vessels to have a company incorporated in their territories. The common trend in the market today is illustrated on scenarios like this: a vessel is flagged in a state in the Pacific ocean such as the Marshall Islands with the registered owner as an offshore company incorporated in the British Virgin Islands that is wholly owned by Greeks having their principal business in Malta who chartered out the vessel to an Italian company who subsequently registered the bareboat charter to Antigua and Barbuda. Nobody has any connection to the flag state of registration, hereunto the Marshall Islands. This means that the provision is unlikely to be enforced today because of these interlocking relationships among the domiciles of the players in the industry.

⁵ UNCCROS 86 Article 2 defines ship as “any self-propelled sea-going vessel used in international seaborne trade for the transport of goods, passengers, or both with the exception of vessels of less than 500 gross registered tons.”

UNCCROS 86 also mentioned that in case of a bareboat chartered-in vessel, the state must ensure that the right to fly the flag of the previous flag state is suspended through a document indicating also the registered encumbrances.⁶ However, the convention failed to identify whether the flagging-in state must record the encumbrances attached to the vessel. Holders of registered encumbrances of a vessel may be skeptical with the security as the convention also failed to mention whether such registered encumbrances would still be enforceable and, if they were enforceable, under which jurisdiction would those vessels be governed? It is necessary then for the convention to specify exactly which jurisdiction will govern the registered mortgage and encumbrances to prevent questions of the appropriate law that is applicable once a legal action takes place. A provision clarifying this issue will prevent further conflict as the convention has presented it beforehand.

5.2.2 International Convention on Maritime Liens and Mortgages 1993

The other current international convention acknowledging the existence of bareboat charter registration is the International Convention on Maritime Liens and Mortgages 1993 enforced in 5 September 2004.⁷ The convention stipulates the jurisdiction governing mortgages with regard to recognition, enforcement and ranking as opposed to maritime liens. The issue with this convention is that it is not compatible with the national legislations of numerous maritime countries. The UK and US for example have different ranking systems in comparison to the ranking laid down by the convention. This creates another conflict of law especially if the jurisdictions for the ranking and enforcement differ. A maritime lien to be enforced in the US may rank higher than the mortgage while the same maritime lien to be enforced in the UK may rank lower than the mortgage if the convention is applied. For example, a stevedore's claim is recognized in the US as a preferred maritime lien which ranks higher than the mortgage while in the UK, it is under the bracket of other maritime liens which ranks lower than the mortgage.

⁶ UNCCROS 86 Article 11(5).

⁷ Maritime Liens and Mortgages Convention 1993 Article 16 – Temporary change of flag.

In addition, the convention fails to address the issue of possessory lien or *custodia legis*. The claim of a ship repairer will lose its priority as soon as the vessel leaves the port. As a result, the ship repairer will hold on to the vessel until he gets paid. Sometimes, he provides credit to the shipowner to sail out and operate to be able to repay the debt. There is a likelihood that a mortgagee may wait for the vessel to leave the port before he exercises his right over the vessel to prevent a *custodia legis* claim against the vessel, which will rank higher in priority against a mortgage. If there is a clear protection of the ship repairer's claims regardless of whether he loses possession of the vessel, it will avoid forum shopping by the mortgagee. It is, therefore, recommended that the ship repairer's claims should be fixed as to whether it is a preferred lien or not to prevent the mortgagee or other claimants from delay of legal action so *custodia legis* will no longer be inapplicable due to loss of possession by the ship repairer.

5.2.3 Conventions on current realities

UNCCROS 86 was adopted in 1986, yet, failed to attract support from maritime states. The convention is clearly not applicable to major maritime countries. More than a quarter century has passed since the convention was adopted. Each year that passes decreases the chances of the convention entering into force. In fact, no one seems to be under the illusion that it will ever do so. Liberia is the only major registry that is signatory to the convention. The industry has developed immensely and there is a need for a new convention that will address the current issues of registration of vessels particularly focusing on certain concerns on uniformity of the rules governing registration. Given the fact that UNCCROS 86 requires 40 states to be enforced, this is no longer applicable as the current top 5 flag states already control more than 50% of the fleet of the world; hence, any new convention may not need this high number of signatories for enforcement.

Open registries are the current dominant flag states with the top 3 flag states representing about 41% of the world fleet. Most open registries do not require their registered owners to have domiciles within their state. In fact, it would be ironic if these registries required the owners to do so when the registries themselves have their headquarters outside their territories. Liberia and Marshall Islands for example both have their ship registration head offices in Virginia in the US.

The other convention, which is the Maritime Liens and Mortgages Convention 1993, may have been enforced but it still failed to tackle the important issue of recognition of maritime liens. There is no need to create another convention. An amendment may suffice to correct the deficiency.

There are two crucial points that can be identified as deficiencies of the convention. The first is that there is no provision in the convention identifying transmission of mortgages. Most national legislation of maritime states acknowledges the practice of transferring a mortgage. It is ordinary for mortgagees to be in need of immediate financing as well, especially with the financial downturn, but unable to discharge the mortgage and demand premature repayment of the debt because the mortgage is not in default nor is it due. The option for the mortgagee is to seek another entity to take over the mortgage. The convention fails to address this practice. It is therefore recommended that provisions for transmission of mortgages be inserted within the convention to recognize the existence of such practice.

The other point to be raised is that it may also help if maritime liens can be registered to avoid surprise claims when a vessel is sold or a claim has been enforced. This can also advise potential mortgagees or creditors of the vessel's encumbrances. It is beneficial not only to the mortgagees and the creditors of the vessel but also to lienholders of the vessel. The convention presents a statute of limitations for lienholders to be able to claim against the vessel when it is arrested and due for sale. A registered mortgage is protected because the registrar of ships is obliged to notify

the mortgagee of the existing arrest and legal proceedings against the vessel. However for small lienholders such as crews that have been discharged and remained unpaid, they may never know whether the vessel is held up in court or subsequently sold. The convention stipulates a time bar that if no claims are filed within one (1) year, the lien is automatically extinguished. It is, therefore, recommended that maritime liens be recorded as well to protect the interests of other maritime lienholders. It is widespread that some maritime lienholders have limited access to information regarding the vessels that they hold lien to. Enabling these liens to be registered helps them to preserve their claims and prevent the owners from escaping the obligation by selling the vessel or the mortgagee taking legal action in a jurisdiction that can impede the rights of other lienholders. The ranking remains the same anyway regardless of the jurisdiction in which the claim will be enforced.

5.3 Question on conflict of laws.

Shipping is an international business that crosses states' boundaries. This situation makes the industry prone to conflict of laws. Different jurisdictions entail varying laws that may not be compatible with each other.

An international convention harmonizing and dealing with the conflict of laws issue seems to be an attractive solution. The Rome Convention has initiated a resolution for potential legal conflicts on contracts. However, this convention is only applicable to European countries. The Rome Convention has proven that it is possible to create a convention on contracts that spans both civil law and common law states. It will be beneficial if a convention of this nature expands throughout other states. Any conflict of laws may be minimized and parties concerned will be prevented from forum shopping, as any case will yield the same results regardless of the place in which the claims will be enforced.

CHAPTER 6

CONCLUSION

With the current status of the sea-borne trade and shipping market, ship operators must continue to explore different options for financing their businesses. The costs of running ships are fluctuating and usually entail a high capital outlay with evident risks involved for potential losses. Bareboat chartering is a viable option for avoiding such immediate capital costs and yet is still able to operate to cater to the needs of the market. The charterers then avail of bareboat charter registration to reduce costs and maximize gains.

Bareboat charter registration is a key alternative form of registration available in the market today. The advantages of bareboat charter registration exceed the drawbacks it entails. It is feasible for charterers to take advantage of it. Numerous states have allowed this practice to cater to the needs of the market without jeopardizing the quality of the vessels as regards to the safety, pollution control and security of such vessels. Certain states have recognized this demand; thus, such states have provisions in their respective existing legislations.

The benefits of bareboat charter registration are the reason why Antigua and Barbuda remains as one of the top maritime nations. The country has achieved an exceptional performance level making it enticing to other states wishing to operate the regime. The Philippines and Zanzibar can learn from the success story exhibited by Antigua and Barbuda to take advantage of the potential of the regime.

The shipowners have been subjected to the critical situation of the market during the financial turmoil of 2009. As world trade has suffered a steep decline, shipowners seek alternative means of financing in maintaining their vessels at the same time protecting their businesses during the crisis. Mortgage is the predominant method of acquiring immediate financing. Shipowners tend to avail of mortgages in order to operate as necessary. However, defaults in mortgages are likely to occur due to the volatile status of the shipping industry since 2009. This is highly critical as legal actions arise within the industry affecting the market, as vessels are being arrested and held up in courts, interfering with the operations and movement of cargoes.

Shipping is an international business. The interpretation and application of laws in different jurisdictions create conflict in determining the results of such legal actions. The international community has responded by formulating conventions that address these issues to harmonize the procedures in dealing with mortgage, registration and chartering. The International Convention on Maritime Liens and Mortgages 1993 has codified rules relating to mortgages mentioning also the possibility of bareboat charter registration. Its enforcement paved the way for uniformity of rules on the subject matter. However, the convention is still insufficient to govern mortgages, particularly their impact on bareboat charter registration. An amendment of the convention may alleviate the deficiency.

A default in mortgage generates a conflict of laws. There are three salient issues that arise from such defaults: jurisdiction, recognition and ranking.

The first issue is whether the court has jurisdiction over the mortgage. It can be concluded that the state that permits the arrest of a vessel due to a mortgage default claim has jurisdiction over the case. Once a state has presided to keep the legal proceedings, it is deemed that the jurisdiction remains with that state regarding the enforcement of the mortgage. Enforcement is a procedural concept; hence, any measures in hearing the case will be according to that state or *lex fori* applies.

The second issue is the recognition of the mortgage. It can be concluded that the law governing the recognition of mortgage as to its validity is the law of the registration of the mortgage, which follows the state of registration of the vessel. In bareboat charter registration, this particular state is the underlying registry or the flagging-out state. The foreign liens, however, will be recognized according to the most substantial or closest connection to such liens.

The third issue is the ranking of the claims. It can be concluded that the priority in ranking will be according to the flag of registration. However, the distribution of the proceeds will be governed by *lex fori*.

Incorporating this default of mortgage to bareboat charter adds another conflict. The charterer enters into the picture to complicate the situation. Any claim may be raised by the charterer in order for his rights to be protected unless the default is caused by his actions. The claims of the charterer will also involve questions of jurisdiction, recognition and ranking. The issues boil down to national legislations, which vary among states and more often than not are incompatible.

Creating a new convention or amending the current ones to harmonize regulations governing mortgage and bareboat charter registration may not necessarily be a panacea to the aforementioned issues. However by doing so, it is a small effort to address the issue that may entail long-term benefits. Prevention is better than cure.

While mortgage and bareboat charter registration belong to the basket of options available to prospective owners and operators of ships, they are discordant regimes that clash with each other from time to time.

REFERENCES

Books/Journal Articles/Publications

Bowtle G. and McGuinness, K., *The Law of Ship Mortgages*, Informa, London, 2001.

Boyd, S., et. al., *Scrutton on Charter Parties and Bills of Lading 21st Edition*, Sweet and Maxwell Limited, London, 2008.

Coles, R. and Watt, E., *Ship Registration: Law and Practice Second Edition*, Informa, London, 2009.

Davis, M., *Bareboat Charters*, LLP Professional Publishing, London, 2000.

Gaskell, N. et. al., *Chorley & Giles' Shipping Law Eight Edition*, Pitman Publishing, London, 1987.

Gold, E., et. al., *Essentials of Canadian Law: Maritime Law*, Irwin Law, Toronto, 2003.

Goldrein, I and Turner, P., *Ship Sale and Purchase Fourth Edition*, Informa, London, 2003.

Goode, R., *Commercial Law Second Edition*, Penguin, London, 1995.

Hodges, S and Hill, C., *Principles of Maritime Law*, Informa, London, 2001.

International Chamber of Commerce (ICC), *Bareboat Charter Registration: Legal Issues and commercial benefits*, A report of the Symposium 1987.

ITF Seafarers Bulletin No. 3, 1988.

Jackson, D., *Enforcement of Maritime Claims Fourth Edition*, Informa, London, 2005.

Karatzas, T. and Ready N., *The Greek Code of Private Maritime Law*, Martinus Nijhoff Publishers, The Hague, 1982.

Mandaraka-Sheppard, A., *Modern Maritime Law and Risk Management Second Edition*, Routledge-Cavendish, Oxon and New York, 2001

MARINA, Annual Report 2009.

Martin, E., *Oxford A Dictionary of Law Second Edition*, Oxford University Press, 2002.

Meeson, N., *Ship and Aircraft Mortgages*, Lloyd's of London Press Ltd., 1989.

Meeson, N. and Kimbell, J., *Admiralty Jurisdiction and Practice Fourth Edition*, Informa, London, 2011.

MOU Annual Reports.

Mukherjee, P.K., 'Flagging Options: Legal and Other Considerations', *Mariner*, Jan/Mar 1993.

Odeke, A. *Bareboat Charter(Ship) Registration*, Kluwer Law International, The Hague, 1998.

Odeke, A. 'Evolution and development of ship registration', *Il Diritto Marittimo*, 1997.

Pamborides, G.P., *International Shipping Law: Legislation and Enforcement*, Kluwer Law International, The Hague, 1999/Ant. N. Sakkoulas Publishers, Athens, 1999.

Ready, N., *Ship Registration Third Edition*, LLP Reference Publishing, 1998.

Schoenbaum, T., *Admiralty and Maritime Law Fifth Edition Volume 1*, West, St. Paul, 2011.

Schoenbaum, T., *Admiralty and Maritime Law Fifth Edition Volume 2*, West, St. Paul, 2011.

Tetley, W., *International Conflict of Laws – Common, Civil and Marine*, International Shipping Publications, Quebec, 1994.

Tetley, W., *International Maritime and Admiralty Law*, International Shipping Publications, Quebec, 2002.

Tetley, W., *Maritime Liens and Claims Second Edition*, International Shipping Publications, Quebec, 1998.

UNCTAD, *Review of Maritime Transport*, 2011.

International Conventions

Convention on the Law Applicable to Contractual Obligations, 1980
(Rome Convention 1980)

International Convention Relating to the Arrest of Sea-going Ships, 1952
(The Arrest Convention 1952)

International Convention on the Arrest of Ships, 1999
(The Arrest Convention 1999)

United Nations Convention on Conditions for Registration of Ships, 1986

United Nations Convention on the High Seas, 1958

United Nations Convention on the Law of the Seas, 1982

United Nations Convention on Maritime Liens and Mortgage, 1993

National Legislation

Antigua and Barbuda – Merchant Shipping Act 2006

Philippines –

- MARINA, Marine Circular 181.
- MARINA, Marine Circular 182.
- Philippines Executive Order No. 438.
- Philippines Executive Order No. 667.
- Philippines Presidential Decree 760.
- Philippines Presidential Decree 866.
- Philippines Presidential Decree 1521.
- Philippines Presidential Decree No. 1711.
- Philippines Republic Act No. 7471.

United Kingdom – Merchant Shipping Act 1995.

Zanzibar – Merchant Transport Act 2006.

LIST OF CASES

- Baumwoll v. Furness [1893] A.C. 8.
- Black v. Williams [1895] 1 Ch. 408.
- Chinnery v. Blackburne [1784] 1 H. Bl. 118.
- Collins v. Lamport [1864] 34 LJ Ch 196.
- Coltman v. Chamberlain [1890] 25 QBD 328.
- Cory, Brothers & Co. v. Stewart [1886] 2 T.L.R. 508.
- De Mattos v. Gibson [1858] 28 L.J. Ch. 165
- De Mattos v. Gibson [1858] 4 De G.&J. 276.
- Downsview Nominees Ltd. v. First City Corp [1993] AC 295 (PC).
- Fletcher & Campbell v. City Marine Finance Ltd. [1968] 2 Lloyd's Rep. 520.
- Hooper v. Gumm [1867] L.R. 2 Ch. App. 282.
- Keith v. Burrows [1876] 1 C.P.D. 722.
- Laming & Co. v. Seater [1889] 16 SC (4th Series) 828.
- Law Guarantee and Trust Society v. Russian Bank for Foreign Trade and others [1905] 1 KB 815, CA.
- Leary v. United States, 81 US (14 Wall) 607, 20 L.Ed. 756 (1872).
- Liechtenstein v. Guatemala, ICJ Reports [1955] 4.
- Lister v. Dunlop Can. Ltd [1982] 135 DLR(3d) 1.
- Mareva Compania Naviera S.A. v. International Bulkcarriers S.A. [1975] 2 Lloyd's Rep. 509.
- Marriott v. The Anchor Reversionary Co. [1861] 2 Giff 457.
- Nelson v. Couch [1863] LJ CP 46.

Outtrim v. British Columbia [1948] 3 D.L.R. 273 (B.C.C.A.).

Swiss Bank Corp. v. Lloyds Bank Ltd. [1982] A.C. 584 (C.A.).

Tankexpress A/S v. Compagnie Financiere Belge des Petroles SA [1948] 82 L1 L Rep43.

The Angelic Star [1988] 1 Lloyd's Rep. 122 (C.A.).

The Aventicum [1978] 1 Lloyd's Rep 184.

The Blanche [1887] 6 Asp. MLC 272.

The Celtic King [1894] P 175.

The Dundee [1823] 1 Hagg 109.

The Fanchon [1880] 5 P.D. 173.

The Guiseppe Di Vittorio [1998] 1 Lloyd's Rep 136.

The Halcyon Skies (No.2) [1977] 1 Lloyd's Rep 22.

The Heather Bell [1901] P. 272.

The Innisfallen [1866] LR 1 A. & E. 72.

The Ioannis Daskalelis [1974] 1 Lloyd's Rep. 174.

The Lord Strathcona [1925] P 143.

The Manor [1907] P 339.

The Maritime Trader [1981] 2 Lloyd's Rep 153.

The Myrto [1977] 2 Lloyd's Rep 243.

The Saudi Prince [1982] 2 Lloyd's Rep 255.

The Shizelle [1992] 2 Lloyd's Rep. 444.

William Cory & Son Limited v. Dorman Long & Co. Limited, [1936] 41 Com Cas 224.

United Nations Convention on Conditions for Registration of Ships
(Geneva, 7 February 1986)

...

Article 1: Objectives

For the purpose of ensuring or, as the case may be, strengthening the genuine link between a State and ships flying its flag, and in order to exercise effectively its jurisdiction and control over such ships with regard to identification and accountability of shipowners and operators as well as with regard to administrative, technical, economic and social matters, a flag State shall apply the provisions contained in this Convention.

Article 2: Definitions

For the purposes of this Convention:

"Ship" means any self-propelled sea-going vessel used in international seaborne trade for the transport of goods, passengers, or both with the exception of vessels of less than 500 gross registered tons;

...

Article 4: General provisions

1. Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.
2. Ships have the nationality of the State whose flag they are entitled to fly.
3. Ships shall sail under the flag of one State only.
4. No ships shall be entered in the registers of ships of two or more States at a time, subject to the provisions of paragraphs 4 and 5 of article 11 and to article 12.
5. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

...

Article 8: Ownership of ships

1. Subject to the provisions of article 7, the flag State shall provide in its laws and regulations for the ownership of ships flying its flag.
2. Subject to the provisions of article 7, in such laws and regulations the flag State shall include appropriate provisions for participation by that State or its

nationals as owners of ships flying its flag or in the ownership of such ships and for the level of such participation. These laws and regulations should be sufficient to permit the flag State to exercise effectively its jurisdiction and control over ships flying its flag.

...

Article 11: Register of ships

...

4. Before entering a ship in its register of ships a State should assure itself that the previous registration, if any, is deleted.
5. In the case of a ship bareboat chartered-in a State should assure itself that right to fly the flag of the former flag State is suspended. Such registration shall be effected on production of evidence, indicating suspension of previous registration as regards the nationality of the ship under the former flag State and indicating particulars of any registered encumbrances.

Article 12: Bareboat charter

1. Subject to the provisions of article 11 and in accordance with its laws and regulations a State may grant registration and the right to fly its flag to a ship bareboat chartered-in by a charterer in that State, for the period of that charter.
2. When shipowners or charterers in States Parties to this Convention enter into such bareboat charter activities, the conditions of registration contained in this Convention should be fully complied with.
3. To achieve the goal of compliance and for the purpose of applying the requirements of this Convention in the case of a ship so bareboat chartered-in the charterer will be considered to be the owner. This Convention, however, 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.
4. A State should ensure that a ship bareboat chartered-in and flying its flag, pursuant to paragraphs 1 to 3 of this article, will be subject to its full jurisdiction and control.
5. 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.
6. All terms and conditions, other than those specified in this article, relating to the relationship of the parties to a bareboat charter are left to the contractual disposal of those parties.

International Convention on Maritime Liens and Mortgages
(Geneva, 6 May 1993)

...

Article 1: Recognition and enforcement of mortgages, "hypothèques" and charges

Mortgages, "hypothèques" and registrable charges of the same nature, which registrable charges of the same nature will be referred to hereinafter as "charges", effected on seagoing vessels shall be recognized and enforceable in States Parties provided that:

- (a) Such mortgages, "hypothèques" and charges have been effected and registered in accordance with the law of the State in which the vessel is registered;
- (b) The register and any instruments required to be deposited with the registrar in accordance with the law of the State in which the vessel is registered are open to public inspection, and that extracts from the register and copies of such instruments are obtainable from the registrar; and
- (c) Either the register or any instruments referred to in subparagraph (b) specifies at least the name and address of the person in whose favour the mortgage, "hypothèque" or charge has been effected or that it has been issued to bearer, the maximum amount secured, if that is a requirement of the law of the State of registration or if that amount is specified in the instrument creating the mortgage, "hypothèque" or charge, and the date and other particulars which, according to the law of the State of registration, determine the ranking in relation to other registered mortgages, "hypothèques" and charges.

Article 2: Ranking and effects of mortgages, "hypothèques" and charges

The ranking of registered mortgages, "hypothèques" or charges as between themselves and, without prejudice to the provisions of this Convention, their effect in regard to third parties shall be determined by the law of the State of registration; however, without prejudice to the provisions of this Convention, all matters relating to the procedure of enforcement shall be regulated by the law of the State where enforcement takes place.

Article 3: Change of ownership or registration

1. With the exception of the cases provided for in articles 11 and 12, in all other cases that entail the deregistration of the vessel from the register of a State Party, such State Party shall not permit the owner to deregister the vessel unless all registered mortgages, "hypothèques" or charges are previously

deleted or the written consent of all holders of such mortgages, "hypothèques" or charges is obtained. However, where the deregistration of the vessel is obligatory in accordance with the law of a State Party, otherwise than as a result of a voluntary sale, the holders of registered mortgages, "hypothèques" or charges shall be notified of the pending deregistration in order to enable such holders to take appropriate action to protect their interests; unless the holders consent, the deregistration shall not be implemented earlier than after a lapse of a reasonable period of time which shall be not less than three months after the relevant notification to such holders.

...

Article 4: Maritime liens

1. Each of the following claims against the owner, demise charterer, manager or operator of the vessel shall be secured by a maritime lien on the vessel:
 - (a) Claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;
 - (b) Claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;
 - (c) Claims for reward for the salvage of the vessel;
 - (d) Claims for port, canal, and other waterway dues and pilotage dues;
 - (e) Claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel.

...

Article 5: Priority of maritime liens

1. The maritime liens set out in article 4 shall take priority over registered mortgages, "hypothèques" and charges, and no other claim shall take priority over such maritime liens or over such mortgages, "hypothèques" or charges which comply with the requirements of article 1, except as provided in paragraphs 3 and 4 of article 12.
2. The maritime liens set out in article 4 shall rank in the order listed, provided however that maritime liens securing claims for reward for the salvage of the vessel shall take priority over all other maritime liens which have attached to the vessel prior to the time when the operations giving rise to the said liens were performed.
3. The maritime liens set out in each of subparagraphs (a), (b), (d) and (e) of paragraph 1 of article 4 shall rank *pari passu* as between themselves.
4. The maritime liens securing claims for reward for the salvage of the vessel

shall rank in the inverse order of the time when the claims secured thereby accrued. Such claims shall be deemed to have accrued on the date on which each salvage operation was terminated.

Article 6: Other maritime liens

Each State Party may, under its law, grant other maritime liens on a vessel to secure claims, other than those referred to in article 4, against the owner, demise charterer, manager or operator of the vessel, provided that such liens:

- (a) Shall be subject to the provisions of articles 8, 10 and 12;
 - (b) Shall be extinguished
 - (i) after a period of 6 months, from the time when the claims secured thereby arose unless, prior to the expiry of such period, the vessel has been arrested or seized, such arrest or seizure leading to a forced sale; or
 - (ii) at the end of a period of 60 days following a sale to a *bona fide* purchaser of the vessel, such period to commence on the date on which the sale is registered in accordance with the law of the State in which the vessel is registered following the sale;
- whichever period expires first; and
- (c) Shall rank after the maritime liens set out in article 4 and also after registered mortgages, "hypothèques" or charges which comply with the provisions of article 1.

Article 7: Rights of retention

1. Each State Party may grant under its law a right of retention in respect of a vessel in the possession of either:
 - (a) A shipbuilder, to secure claims for the building of the vessel; or
 - (b) A shiprepairer, to secure claims for repair, including reconstruction of the vessel, effected during such possession.
2. Such right of retention shall be extinguished when the vessel ceases to be in the possession of the shipbuilder or shiprepairer, otherwise than in consequence of an arrest or seizure.

Article 8: Characteristics of maritime liens

Subject to the provisions of article 12, the maritime liens follow the vessel, notwithstanding any change of ownership or of registration or of flag.

Article 9: Extinction of maritime liens by lapse of time

1. The maritime liens set out in article 4 shall be extinguished after a period of one year unless, prior to the expiry of such period, the vessel has been arrested or seized, such arrest or seizure leading to a forced sale.

2. The one-year period referred to in paragraph 1 shall commence:
- (a) With respect to the maritime lien set out in article 4, paragraph 1(a), upon the claimant's discharge from the vessel;
 - (b) With respect to the maritime liens set out in article 4, paragraph 1(b) to (e), when the claims secured thereby arise;
- and shall not be subject to suspension or interruption, provided, however, that time shall not run during the period that the arrest or seizure of the vessel is not permitted by law.

...

Article 11: Notice of forced sale

1. Prior to the forced sale of a vessel in a State Party, the competent authority in such State Party shall ensure that notice in accordance with this article is provided to:
- (a) The authority in charge of the register in the State of registration;
 - (b) All holders of registered mortgages, "hypothèques" or charges which have not been issued to bearer;
 - (c) All holders of registered mortgages, "hypothèques" or charges issued to bearer and all holders of the maritime liens set out in article 4, provided that the competent authority conducting the forced sale receives notice of their respective claims; and
 - (d) The registered owner of the vessel.

...

Article 12: Effects of forced sale

1. In the event of the forced sale of the vessel in a State Party, all registered mortgages, "hypothèques" or charges, except those assumed by the purchaser with the consent of the holders, and all liens and other encumbrances of whatsoever nature, shall cease to attach to the vessel, provided that:
- (a) At the time of the sale, the vessel is in the area of the jurisdiction of such State; and
 - (b) The sale has been effected in accordance with the law of the said State and the provisions of article 11 and this article.
2. The costs and expenses arising out of the arrest or seizure and subsequent sale of the vessel shall be paid first out of the proceeds of sale. Such costs and expenses include, *inter alia*, the costs for the upkeep of the vessel and the crew as well as wages, other sums and costs referred to in article 4, paragraph 1(a), incurred from the time of arrest or seizure. The balance of the proceeds shall be distributed in accordance with the provisions of this Convention, to the extent necessary to satisfy the respective claims. Upon satisfaction of all claimants, the residue of the proceeds, if any, shall be paid to the owner and it shall be freely transferable.

3. A State Party may provide in its law that, in the event of the forced sale of a stranded or sunken vessel following its removal by a public authority in the interest of safe navigation or the protection of the marine environment, the costs of such removal shall be paid out of the proceeds of the sale, before all other claims secured by a maritime lien on the vessel.
4. If at the time of the forced sale the vessel is in the possession of a shipbuilder or of a shiprepairer who under the law of the State Party in which the sale takes place enjoys a right of retention, such shipbuilder or shiprepairer must surrender possession of the vessel to the purchaser but is entitled to obtain satisfaction of his claim out of the proceeds of sale after the satisfaction of the claims of holders of maritime liens mentioned in article 4.

...

Article 16: Temporary change of flag

...

- (b) The law of the State of registration shall be determinative for the purpose of recognition of registered mortgages, "hypothèques" and charges.
- (c) The State of registration shall require a cross-reference entry in its register specifying the State whose flag the vessel is permitted to fly temporarily; likewise, the State whose flag the vessel is permitted to fly temporarily shall require that the authority in charge of the vessel's record specifies by a cross-reference in the record the State of registration.
- (d) No State Party shall permit a vessel registered in that State to fly temporarily the flag of another State unless all registered mortgages, "hypothèques" or charges on that vessel have been previously satisfied or the written consent of the holders of all such mortgages, "hypothèques" or charges has been obtained.


**BIMCO STANDARD BAREBOAT CHARTER
CODE NAME: "BARECON 2001"**

PART I

First issued by
The Baltic and International Maritime Council (BIMCO), Copenhagen, in 1974
as "Barecon A" and "Barecon B", Revised and amalgamated 1989, Revised 2001

Copyright, published by
The Baltic and International Maritime Council (BIMCO), Copenhagen, Issued November 2001

1. Shipbroker		2. Place and date	
3. Owners/Place of business (Cl. 1)		4. Bareboat Charterers/Place of business (Cl. 1)	
5. Vessel's name, call sign and flag (Cl. 1 and 3)			
6. Type of Vessel		7. GT/NT	
8. When/Where built		9. Total DWT (abt.) in metric tons on summer freeboard	
10. Classification Society (Cl. 3)		11. Date of last special survey by the Vessel's classification society	
12. Further particulars of Vessel (also indicate minimum number of months' validity of class certificates agreed acc. to Cl. 3)			
13. Port or Place of delivery (Cl. 3)		14. Time for delivery (Cl. 4)	15. Cancelling date (Cl. 5)
16. Port or Place of redelivery (Cl. 15)		17. No. of months' validity of trading and class certificates upon redelivery (Cl. 15)	
18. Running days' notice if other than stated in Cl. 4		19. Frequency of dry-docking (Cl. 10(g))	
20. Trading limits (Cl. 6)			
21. Charter period (Cl. 2)		22. Charter hire (Cl. 11)	
23. New class and other safety requirements (state percentage of Vessel's insurance value acc. to Box 29)(Cl. 10(a)(ii))			
24. Rate of interest payable acc. to Cl. 11(f) and, if applicable, acc. to PART IV		25. Currency and method of payment (Cl. 11)	

Printed and sold by Fr. G. Knudtzons Bogtrykkeri A/S,
Vallejsbaekvej 61, DK-2625 Vallensbaek, Fax: +45 4366 0701

continued

(continued) "BARECON 2001" STANDARD BAREBOAT CHARTER		PART I
26. Place of payment; also state beneficiary and bank account (Cl. 11)	27. Bank guarantee/bond (sum and place)(Cl. 24)(optional)	
28. Mortgage(s), if any (state whether 12(a) or (b) applies; if 12(b) applies state date of Financial Instrument and name of Mortgagee(s)/Place of business)(Cl. 12)	29. Insurance (hull and machinery and war risks)(state value acc. to Cl. 13(f) or, if applicable, acc. to Cl. 14(k))(also state if Cl. 14 applies)	
30. Additional insurance cover, if any, for Owners' account limited to (Cl. 13(b) or, if applicable, Cl. 14(g))	31. Additional insurance cover, if any, for Charterers' account limited to (Cl. 13(b) or, if applicable, Cl. 14(g))	
32. Latent defects (only to be filled in if period other than stated in Cl. 3)	33. Brokerage commission and to whom payable (Cl. 27)	
34. Grace period (state number of clear banking days)(Cl. 28)	35. Dispute Resolution (state 30(a), 30(b) or 30(c); if 30(c) agreed Place of Arbitration must be stated (Cl. 30))	
36. War cancellation (indicate countries agreed)(Cl. 26(f))		
37. Newbuilding Vessel (indicate with "yes" or "no" whether PART III applies)(optional)	38. Name and place of Builders (only to be filled in if PART III applies)	
39. Vessel's Yard Building No. (only to be filled in if PART III applies)	40. Date of Building Contract (only to be filled in if PART III applies)	
41. Liquidated damages and costs shall accrue to (state party acc. to Cl. 1) a) b) c)		
42. Hire/Purchase agreement (indicate with "yes" or "no" whether PART IV applies)(optional)	43. Bareboat Charter Registry (indicate "yes" or "no" whether PART V applies)(optional)	
44. Flag and Country of the Bareboat Charter Registry (only to be filled in if PART V applies)	45. Country of the Underlying Registry (only to be filled in if PART V applies)	
46. Number of additional clauses covering special provisions, if agreed		

PREAMBLE - It is mutually agreed that this Contract shall be performed subject to the conditions contained in this Charter which shall include PART I and PART II. In the event of a conflict of conditions, the provisions of PART I shall prevail over those of PART II to the extent of such conflict but no further. It is further mutually agreed that PART III and/or PART IV and/or PART V shall only apply and only form part of this Charter if expressly agreed and stated in the Boxes 37, 42 and 43. If PART III and/or PART IV and/or PART V apply, it is further agreed that in the event of a conflict of conditions, the provisions of PART I and PART II shall prevail over those of PART III and/or PART IV and/or PART V to the extent of such conflict but no further.

Signature (Owners)	Signature (Charterers)

PRESIDENTIAL DECREE No. 760
July 31, 1975

**ALLOWING THE TEMPORARY REGISTRATION OF FOREIGN-OWNED
VESSELS UNDER TIME CHARTER OR LEASE TO PHILIPPINE
NATIONALS FOR USE IN THE PHILIPPINE COASTWISE TRADE
SUBJECT TO CERTAIN CONDITIONS**

WHEREAS, in the interest of the national economy, it is imperative that Philippine domestic shipping be expanded to meet the ever-increasing inter-island cargo and passenger traffic;

WHEREAS, due to the heavy capital requirements of the shipping industry, local ship owners and operators cannot raise sufficient financial resources to acquire new tonnage to replace their uneconomic and over aged fleet; and

WHEREAS, in order to alleviate the present plight of domestic shipping, it is necessary to temporarily relax certain aspects of the restrictive and constrictive legal framework under which vessels may be registered in the Philippines;

NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines, by virtue of the powers in me vested by the Constitution, do hereby order and decree the following as part of the law of the land:

Section 1. Any provision of law, decree, executive order, or rules and regulations to the contrary notwithstanding, any foreign-owned vessel under time charter or lease to a Philippine national, as the term is defined in Section 3 of Presidential Decree No. 474, may be issued a temporary certificate of Philippine registry by the Maritime Industry Authority: Provided, That the said Charter or lease (1) has had the prior written approval of the Maritime Industry Authority, (2) shall be valid and effective for a period of not less than five years, and (3) shall be used exclusively in the coastwise trade in the Philippines: Provided, further, That the operation of the vessel shall be entirely in the hands of Philippine nationals and free from any participation or interference from the alien owner, except insofar as such action shall be to directly protect his rights as owner thereof: Provided, finally, That the registered vessel shall be manned completely by a Filipino crew, except in the case of specialized fishing vessel.

The effectivity of any charter or lease contract entered into pursuant to this Decree shall not extend beyond the year 1990, unless otherwise extended by the President of the Republic of the Philippines.

- Section 2.** Any vessel issued a temporary certificate of Philippine registry as provided for in the section immediately preceding shall be entitled to all the rights and privileges of a vessel of a Philippine registry, as well as the protection of Philippine law so long as its temporary certificate of registration is valid and subsisting. Correspondingly, the vessel shall also be subject to all requirements, limitations and all the duties and obligations imposed upon vessels of Philippine registry.
- Section 3.** The Maritime Industry Authority shall promulgate the rules and regulations, together with the procedures and guidelines, for the implementation of this Decree, subject to approval by the Office of the President.
- Section 4.** Any provision of law, decree, executive order, or rules and regulations inconsistent with this Decree is hereby repealed, amended or modified accordingly.
- Section 5.** This Decree shall take effect immediately.

Done in the City of Manila, this 31st day of July, in the year of Our Lord, nineteen hundred and seventy-five.

PRESIDENTIAL DECREE No. 866

January 2, 1976

AMENDING PRESIDENTIAL DECREE NO. 760 BY REDUCING THE TERM OF THE LEASE OR CHARTER PERIOD TO NOT LESS THAN ONE YEAR, DELETING THE WORD "TIME" IN THE TITLE AND BODY OF THE DECREE, AND ALLOWING OVERSEAS USE IN CERTAIN CASES

WHEREAS, the use of the term "time charter" in the decree is too technical and restrictive as to exclude other forms of charter parties;

WHEREAS, the requirement of "not less than five years" for the charter or lease period has deterred many a shipowner and/or charterer from availing of the incentives under this decree;

WHEREAS, there is a need to give a certain degree of flexibility to the charter or lessee in the use of the vessel;

WHEREAS, it is imperative to amend the decree accordingly so as to attain the objectives sought to be achieved by the same.

NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Republic of the Philippines, by virtue of the powers in me vested by the Constitution, do hereby order and decree:

Section 1. The title of Presidential Decree No. 760 is hereby amended to read as follows:

"ALLOWING THE TEMPORARY REGISTRATION OF FOREIGN-OWNED VESSELS UNDER [TIME] CHARTER OR LEASE TO PHILIPPINE NATIONALS FOR USE IN THE PHILIPPINE COASTWISE TRADE SUBJECT TO CERTAIN CONDITIONS."

Section 2. Section 1 of Presidential Decree No. 760 is hereby amended to read as follows:

"Sec. 1. Any provision of law, decree, executive order, or rules and regulations to the contrary notwithstanding, any foreign-owned vessel under [time] charter or lease to a Philippine national, as the term is defined in Section 3 of Presidential Decree No. 474, may be issued a temporary certificate of Philippine registry by the Maritime Industry Authority: Provided, That the said charter or lease (1) has the prior written approval of the Maritime Industry Authority, (2) shall be valid and effective for a period of not less than [five] ONE YEAR, and (3) shall be used exclusively in the coastwise trade in the Philippines, UNLESS OTHERWISE PERMITTED BY THE MARITIME INDUSTRY AUTHORITY TO BE USED FOR OVERSEAS TRADE SUBJECT TO TERMS AND CONDITIONS IT MAY IMPOSE: Provided, further, That the operation of the vessel shall be entirely in the hands of Philippine nationals

and free from any participation or interference from the alien owner, except insofar as such action shall be to directly protect his rights as owner thereof: Provided, finally, That the registered vessel shall be manned completely by a Filipino crew, except in the case of specialized fishing vessel.

The effectivity of any charter or lease contract entered into pursuant to this Decree shall not extend beyond the year 1990, unless otherwise extended by the President of the Republic of the Philippines."

Section 3. This Decree shall take effect immediately.

Done in the City of Manila, this 2nd day of January, in the year of Our Lord, nineteen hundred and seventy-six.

PRESIDENTIAL DECREE No. 1711

FURTHER AMENDING PRESIDENTIAL DECREE NO. 760, AS AMENDED BY FURTHER ENCOURAGING THE CHARTERING OF SPECIALIZED OCEAN-GOING VESSELS AND BY EXTENDING THE EFFECTIVITY OF THE DECREE UNTIL 1999

WHEREAS, it is the declared policy of the Philippine government to accelerate the expansion and modernization of the Philippine overseas fleet and further increase the generation of foreign exchange earnings as well as maritime employment;

WHEREAS, there is a recognized need to broaden the legal framework under the present law such that the incentive granted under P.D. 760 is extended to overseas shipping projects including the temporary registration of specialized vessels; and

WHEREAS, long term investment in shipping requires a corresponding long term incentive in the availment of temporary Philippine flag registration.

NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Republic of the Philippines, by virtue of the powers vested in me by the Constitution, do hereby order and decree the further amendment of Presidential Decree No. 760, as amended, as follows:

Section 1. Section 1 of Presidential Decree No. 760, as amended, is further amended to read as follows:

"Sec. 1. Any provision of law, decree, executive order, or rules and regulations to the contrary notwithstanding, any foreign owned vessel under charter or lease to a Philippine national as the term is defined in Section 3 of Presidential Decree 474, may be issued a temporary certificate of Philippine registry by the Philippine Coast Guard; Provided, That said charter or lease, (1) has the prior written approval of the Maritime Industry Authority, (2) shall be valid and effective for a period of not less than one year; Provided, further, That the operation of the vessel shall be entirely in the hands of Philippine nationals and free from any participation or interference from alien owner, except insofar as such action shall be to directly protect his rights as owner thereof, Provided, finally, That the registered vessel shall be manned completely by a Filipino crew except in the case of specialized vessels and subject to rules and regulations MARINA may prescribe in relation thereto."

The effectivity of any charter or lease contract entered into pursuant to this Decree shall not extend beyond the year 1999 unless otherwise extended by the President of the Republic of the Philippines.

Section 2. The Maritime Industry Authority, in coordination with the Philippine Coast Guard, shall promulgate the rules and regulations together with procedures and guidelines, for the implementation of this Decree.

Section 3. Any provision of law, decree, executive order or rules and regulations inconsistent with this Decree is hereby repealed, amended or modified accordingly.

Section 4. This Decree shall take effect immediately.

Done in the City of Manila, this 21st day of August, in the Year of Our Lord, Nineteen Hundred and Eighty.

EXECUTIVE ORDER NO. 438
November 27, 1990

IMPOSING AN ADDITIONAL DUTY OF FIVE PERCENT (5%) AD VALOREM ON ALL IMPORTED ARTICLES SUBJECT TO CERTAIN EXCEPTIONS AND CONDITIONS

Pursuant to the powers vested in me by Section 410 of the Tariff and Customs Code of the Philippines, as amended, I, CORAZON C. AQUINO, President of the Philippines, do hereby order:

Section 1. Imposition of Additional Duty. Except as herein specifically provided, there shall be levied, collected and paid, in addition to any other duties, taxes and charges imposed by law on all articles imported into the Philippines, an additional duty of five percent (5%) ad valorem.

Section 2. Importations Exempt Under Existing Laws. The additional duty of five percent (5%) ad valorem shall also be levied, collected and paid on imported articles which are exempt under existing laws, except as provided in Section 3 hereof. In case of importation of articles which are exempt in part, the five percent (5%) additional duty shall be added to the non-exempt portion.

Section 3. Exempt Importation. The imported articles exempt from the additional duty of five percent (5%) ad valorem imposed in this Executive Order are as follows:

- a. Those conferred by effective international agreements to which the Government of the Republic of the Philippines is a signatory;
- b. Those of the diplomatic corps or for the official use of foreign embassies under the provisions of paragraph (k), Section 105 of the Tariff and Customs Code of the Philippines, as amended;
- c. Those of bonded manufacturing warehouses under the provisions of Section 2002, Presidential Decree No. 1464, as amended;
- d. Those of bonded smelting warehouses under the provisions of Section 2005, Presidential Decree No. 1464, as amended;
- e. Those of enterprises or firms registered with the Export Processing Zone Authority pursuant to Presidential Decree No. 66, as amended;
- f. Those enterprises or firms registered with the Philippine Veterans Investment and Development Corporation (PHIVIDEC) Authority pursuant to Presidential Decree No. 538, as amended;
- g. Those released under bond under Section 105 of the Tariff and Customs Code, as amended; and,
- h. Those covered by Republic Act No. 6647, entitled: "An Act Further Restructuring The Import Duty Rates And Classification Of Certain Articles Under Section 104 Of The Tariff And Customs Code of 1978 (PD 1464), As Amended".

Section 4. Repealing Clause. All executive orders, rules or regulations or parts thereof which are inconsistent with this Executive Order are hereby repealed or modified accordingly.

Section 5. Effectivity. This Executive Order shall take effect after ten (10) days following the completion of its publication in two (2) national newspapers of general circulation, and shall remain effective until June 30, 1992, or unless sooner revoked or modified.

DONE in the City of Manila, this 27th day of November, in the year of Our Lord, nineteen hundred and ninety.

EXECUTIVE ORDER No. 667

EXTENDING INDEFINITELY THE EFFECTIVITY OF ANY CHARACTER OR LEASE CONTRACT PURSUANT TO PRESIDENTIAL DECREE NO. 760, AS AMENDED

WHEREAS, Presidential Decree No. 760, as amended, allows the temporary registration under Philippine flag foreign owned ships to meet the ever-increasing demand for ships to move water-borne cargoes and passengers;

WHEREAS, chartering/leasing of ships pursuant to Presidential Decree No. 760, as amended, has provide growth and, development of the Philippine shipping sector as a major importance to the national economy, thereby realizing a sustainable and reliable water transport industry with safe, secure, efficient and well-maintained and well-managed ships.

WHEREAS, the existing financing schemes for the capital-intensive shipping industry remain insufficient to encourage Filipino operators to acquire ships, thus necessitating the continuation of the charter/leasing of ships pursuant to Presidential Decree No. 760, as amended;

WHEREAS, Presidential Decree No. 760, as amended, provides that the effectivity of any charter or lease contract entered into pursuant to the Decree shall not be extended unless otherwise extended by the President of the Republic of the Philippines;

WHEREAS, Executive Order No. 438 issued on 15 September 1997 extended the effectivity of any charter or lease contract entered into under PD 760, as amended, provided it shall not go beyond the year 2009; unless otherwise further extended by the President of the Republic of the Philippines;

Now, THEREFORE, I, GLORIA MACAPAGAL-ARROYO, President of the Republic of the Philippines, by virtue of the power vested in me by law, do hereby order:

Section 1. Effectivity of any charter or lease contract pursuant to Presidential Decree No. 760, as amended. The effectivity of any charter or lease contract entered into under the said Decree is hereby extended indefinitely, unless otherwise revoked by the President of the Republic of the Philippines.

Done, in the City of Manila, this 11th day of October in the year of our Lord, Two Thousand and Seven.

REPUBLIC ACT NO. 7471

**AN ACT TO PROMOTE THE DEVELOPMENT OF PHILIPPINE
OVERSEAS SHIPPING**

...

Section 2. Declaration of Policy. — It is hereby declared the policy of the Government of the Philippines to:

- (a) Develop and maintain a Philippine Metropolitan Marine composed of well-equipped, safe and modern vessels most suited for, Philippine requirements and conditions, manned by qualified Filipino officers and crew, and owned and operated under the Philippine flag by citizens of the Philippines or by associations or corporations organized under the laws of the Philippines, at least sixty percent (60%) of the capital of which is owned by citizens of the Philippines;

...

Section 3. Definition. — As used this Act: chan robes virtual law library

...

- (b) "Philippine shipping enterprise" means a citizen of the Philippines or an association or corporation organized under the laws of the Philippines, at least sixty percent (60%) of the capital of which is owned by citizens of the Philippines and engaged exclusively in Philippine overseas shipping;

...

Section 6. Exemption from Import Duties and Taxes. — The importation by a Philippine shipping enterprise of oceangoing vessels for registration under the Philippine flag shall be exempt from the payment of import duties and taxes. The spare parts for the repair and/or overhaul of vessels shall likewise be exempt from the payment of import duties and taxes: Provided, That such items are destined or consigned either to:

- (a) A Philippine dry-docking or repair facility, accredited by the MARINA and registered as a customs-bonded warehouse, which will undertake the necessary repairs and works on the vessel;
- (b) The vessel in which the items are to be installed: Provided That, if such items are found in locations other than the two (2) aforementioned ones or in places not authorized by customs, the person or entity in possession of such items shall be subject to full duties and taxes, including surcharges and penalties.

Local manufactures or dealers who sell machinery, equipment, materials and spare parts to a Philippine shipping enterprise shall be entitled to tax credits for the full amount of import duties and taxes actually paid thereon, or on parts or components thereof, subject to the approval of the Secretary of Finance, upon the recommendation of the MARINA.

Section 7. Exemption from Income Tax. — A Philippine shipping enterprise shall be exempt from payment of income tax on income derived from Philippine overseas shipping for a period of ten (10) years from the date of approval of this Act: Provided, That:

- (a) The entire net income, after deducting not more than ten percent (10%) thereof for distribution of profits or declaration of dividends, which would otherwise be taxable under the provisions of Title II of the National Internal Revenue Code, is reinvested for the construction, purchase, or acquisition of vessels and related equipment and/or in the improvement or modernization of its vessels and related equipment in accordance with the regulations; and
- (b) The cumulative amount so reinvested shall not be withdrawn for a period of ten (10) years after the expiration of the period of income tax exemption or until the vessel or related equipment so acquired have been fully paid, whichever date comes earlier.

Table 2.7. The 35 flags of registration with the largest registered deadweight tonnage, as at 1 January 2011^a

Flag of registration	Number of vessels	Share of world total, vessels	Deadweight tonnage, 1 000 dwt	Share of world total, dwt	Cumulated share, dwt	Average vessel size, dwt	Dwt growth 2011/2010 as %
Panama	7 986	7.72	306 032	21.93	21.93	38 321	5.98
Liberia	2 726	2.64	166 246	11.91	33.84	60 985	16.97
Marshall Islands	1 622	1.57	98 757	7.08	40.91	60 886	26.89
China, Hong Kong SAR	1 736	1.68	91 733	6.57	47.48	52 841	23.11
Greece	1 433	1.39	71 420	5.12	52.60	49 840	5.61
Bahamas	1 384	1.34	67 465	4.83	57.44	48 747	5.24
Singapore	2 667	2.58	67 287	4.82	62.26	25 230	9.13
Malta	1 724	1.67	61 294	4.39	66.65	35 553	9.15
China	4 080	3.95	52 741	3.78	70.43	12 927	16.79
Cyprus	1 014	0.98	32 321	2.32	72.74	31 875	3.25
Japan	6 150	5.95	22 201	1.59	74.33	3 610	25.38
Republic of Korea	2 913	2.82	20 155	1.44	75.78	6 919	-3.19
Italy	1 649	1.59	19 440	1.39	77.17	11 789	12.53
Isle of Man	385	0.37	19 422	1.39	78.56	50 447	16.22
Norway (NIS)	521	0.50	18 065	1.29	79.86	34 674	-3.12
Germany	931	0.90	17 566	1.26	81.11	18 867	-0.03
United Kingdom	1 638	1.58	16 999	1.22	82.33	10 378	-4.27
India	1 404	1.36	15 278	1.09	83.43	10 882	2.06
Denmark (DIS)	524	0.51	14 304	1.02	84.45	27 297	5.95
Antigua and Barbuda	1 293	1.25	13 892	1.00	85.45	10 744	6.59
United States	6 371	6.16	12 662	0.91	86.35	1 987	-1.02
Indonesia	5 763	5.57	12 105	0.87	87.22	2 100	15.61
Bermuda	158	0.15	10 860	0.78	88.00	68 732	7.45
Malaysia	1 391	1.35	10 725	0.77	88.77	7 710	4.89
Turkey	1 334	1.29	8 745	0.63	89.39	6 556	11.01
France (FIS)	160	0.15	7 880	0.56	89.96	49 253	-5.40
Russian Federation	3 485	3.37	7 400	0.53	90.49	2 123	1.61
Netherlands	1 302	1.26	7 036	0.50	90.99	5 404	-2.98
Philippines	1 946	1.88	6 946	0.50	91.49	3 570	-1.23
Belgium	245	0.24	6 800	0.49	91.98	27 755	3.42
Saint Vincent and the Grenadines	942	0.91	6 701	0.48	92.46	7 114	-8.57
Viet Nam	1 451	1.40	5 899	0.42	92.88	4 065	8.93
Thailand	888	0.86	4 564	0.33	93.21	5 139	21.80
China, Taiwan Province of	677	0.65	4 310	0.31	93.52	6 366	9.28
Cayman Islands	158	0.15	3 688	0.26	93.78	23 344	-6.87
Total: top 35 flags of registrationⁱⁱ	70 051	67.75	1 308 939	93.78	93.78	18 686	10.02
World total	103 392	100.00	1 395 743	100.00	100.00	13 500	9.37

Source: Compiled by the UNCTAD secretariat, on the basis of data supplied by IHS Fairplay.

^a Seagoing propelled merchant ships of 100 gross tons and above, ranked by deadweight tonnage.

**ANTIGUA AND BARBUDA
MERCHANT SHIPPING ACT 2006**

...

**CHAPTER 2
REGISTRATION OF CHARTERED BAREBOATS**

27. Registration of chartered bareboats.

(1) Notwithstanding sections 11 and 19, but subject to section 28, a chartered bareboat may be registered as an Antigua and Barbuda ship and may use the national colours when registered in a foreign register, if she is a bareboat chartered by a citizen of Antigua and Barbuda, or a person other than a citizen of Antigua and Barbuda, or a body corporate which is either Antigua and Barbuda or otherwise.

...

(4) Bareboat chartering within the meaning of this Chapter is the chartering by virtue of which the charterer, for an agreed period of time —

- (a) acquires full control and possession of the ship;
- (b) has the shipping management and operation of the ship;
- (c) is responsible towards third parties as if he were the ship owner, and generally, so long as the chartering continues, he is substituted in all respects in place of the owner except that he has no right to sell or mortgage the ship.

28. Certification for registration of chartered bareboats.

A chartered bareboat may be registered under this Chapter on the application of the charterer for such period as the Director may for a prescribed period approve if —

- (a) the law of the country of the foreign register allows registration out of chartered bareboats registered in its register, and
- (b) the following duly certified documents are submitted together with the application —
 - (i) a copy of the charter agreement in lieu of the title of ownership and declaration of ownership;
 - (ii) the written consent of the ship owner;
 - (iii) the written consent of the appropriate maritime authorities of the country of the foreign registry and containing a conformation as to the ownership of the ship and as to the mortgages or other encumbrances of the ship, if any; and

(iv) the written consent of the mortgagees.

...

32. Mortgages in respect of chartered bareboat registration.

(1) Where a chartered bareboat is registered under this Chapter, mortgages and other encumbrances which are a charge on the ship at the time of registration in the Antigua and Barbuda register continue to exist and to be a charge on the ship.

(2) Mortgages and encumbrances referred to in subsection (1) continue to be governed by the law of the country governing them at the time of their creation, and are not affected by the fact of the registration of the ship in the Antigua and Barbuda register; and such mortgages and other encumbrances shall be recorded in the Antigua and Barbuda register for purposes of information only.

(3) After a chartered bareboat has been registered under this Chapter, a mortgage or encumbrances may be created over the ship only by the owner and in accordance with the law of the country of the foreign register in which such mortgage or encumbrances is recorded.

(4) A mortgage in respect of a chartered bareboat registered under this Chapter may not be registered in the Antigua and Barbuda register.

...

CHAPTER 5 MARITIME LIENS

48. Registration on deregistration.

A Registrar shall not permit the de-registration of a ship without the written consent of all the holders of mortgages and preference rights in the said ship registered under this Act.

49. Priority of maritime liens-claims secured by maritime liens.

(1) Notwithstanding the protection enjoyed by a mortgagee under section 47, a maritime lien shall take priority over the mortgages and preferential rights registered under this Part or arising under the law relating to bankruptcy and no other claim shall take priority over them, except as provided in section 51. For the purpose of this section, the claims which give rise to maritime liens are the following:

- (a) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship;
- (b) port, canal and other waterway dues and pilotage dues;
- (c) claims against the owner, based on tort and not capable of

being based on contract, in respect of loss of or damage to property occurring, whether on land or on water, in direct connection with the operation of the ship;

- (d) claims against the owner in respect of loss of life or personal injury, occurring, whether on land or on water, in direct connection with the operation;
- (e) claims for salvage, wreck removal and contribution in general average.

(2) In this section, “owner” includes the charterer, manager or operator of a ship.

50. Order of priority of claims.

(1) The maritime liens set out in section 49 (1) shall rank in the order listed therein, provided, however, that maritime liens securing claims for salvage, wreck removal and contribution in general average shall take priority over all other maritime liens which have attached to the ship prior to the time when the operations giving rise to the said liens were performed.

(2) The maritime liens set out in each of the paragraphs (a) , (b) , (c) and (d) of section 49 (1) shall rank *pari passu* as between themselves.

(3) The maritime liens set out in paragraph (e) of section 49 (1) shall rank in the inverse order of the time when the claims secured thereby accrued. Claims for contribution in general average shall be deemed to have accrued on the date on which the general average act was performed; claims for salvage shall be deemed to have accrued on the date on which the salvage operation was terminated.

51. Rights of ship builders and repairers.

In the event that preferential rights are granted, pursuant to the provisions of the law relating to bankruptcy, in respect of a ship in the possession of:

- (a) a shipbuilder, to secure claims for the building of the ship; or
- (b) a ship repairer, to secure claims for repair of the ship effected during such possession, such lien or right of retention shall be postponed to all maritime liens set out in section 49 (1) but may be preferred to registered mortgages or preferential rights so long as the ship is in possession of the shipbuilder or the ship repairer, as the case may be.

52. Over-riding nature of maritime liens.

(1) The maritime liens set out in section 49 (1) arise whether the claims secured by such liens are against the owner or against the demise or other charterer, manager or operator of the ship.

(2) Subject to the provisions of section 47, the maritime liens securing the

claims set out in section 49 (1) follow the ship notwithstanding any change of ownership or of registration.

...

54. Limitation period.

The maritime liens set out in section 49 (1) shall be extinguished after a period of one year from the time when the claims secured thereby arose unless prior to the expiry of such period the ship has been arrested, such arrest leading to a forced sale.

...

56. Effect of forced sale of ship.

(1) In the event of forced sale of the ship, preferential rights except those assumed by the purchaser with the consent of the holders, and all liens and other encumbrances of whatsoever nature shall cease to attach to the ship.

(2) No charter party or contract for the use of the ship shall be deemed a lien or encumbrance for the purpose of this section.

57. Proceeds of sale.

The costs awarded by the Court and arising out of the arrest and subsequent sale of the ship and the distribution of the proceeds shall first be paid out of the proceeds of such sale. The balance shall be distributed among the holders of maritime liens under section 49 (1), the holders of preferential rights under section 51 and the holders of mortgages and other preferential rights registered under this Part in accordance with the provisions of this Part and to the extent necessary to satisfy their claims.

**UNITED KINGDOM
MARITIME SHIPPING ACT 1995**

...

9 Registration of ships: basic provisions.

- (1) A ship is entitled to be registered if—
- (a) it is owned, to the prescribed extent, by persons qualified to own British ships; and
 - (b) such other conditions are satisfied as are prescribed under subsection (2)(b) below; (and any application for registration is duly made).
- (2) It shall be for registration regulations—
- (a) to determine the persons who are qualified to be owners of British ships, or British ships of any class or description, and to prescribe the extent of the ownership required for compliance with subsection (1)(a) above;
 - (b) to prescribe other requirements designed to secure that, taken in conjunction with the requisite ownership, only ships having a British connection are registered.

...

17 Ships bareboat chartered-in by British charterers.

- (1) This section applies to any ship which—
- (a) is registered under the law of a country other than the United Kingdom (“the country of original registration”),
 - (b) is chartered on bareboat charter terms to a charterer who is a person qualified to own British ships, and
 - (c) is so chartered in circumstances where the conditions of entitlement to registration prescribed under section 9(2)(b), read with the requisite modifications, are satisfied as respects the charterer and the ship.
- (2) The “requisite modifications” of those conditions are the substitution for any requirement to be satisfied by or as respects the owner of a ship of a corresponding requirement to be satisfied by or as respects the charterer of the ship.

...

- (5) Section 9(5) does not apply to a ship registered by virtue of this section but registration regulations shall include provision for securing that the authority responsible for the registration of ships in the country of original registration is notified of the registration of the ship and of the termination of its registration whether by virtue of subsection (4) above or registration regulations.

...
(7) The private law provisions for registered ships shall not apply to a ship registered by virtue of this section and 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 country of original registration.

...
(11) In this section—

“bareboat charter terms”, in relation to a ship, means the hiring of the ship for a stipulated period on terms which give the charterer possession and control of the ship, including the right to appoint the master and crew; and

“the charter period” means the period during which the ship is chartered on bareboat charter terms.

...

SCHEDULE 1
Private Law Provisions for registered ships

...

Mortgages of registered ships

- 7 (1) A registered ship, or share in a registered ship, may be made a security for the repayment of a loan or the discharge of any other obligation.
(2) The instrument creating any such security (referred to in the following provisions of this Schedule as a “mortgage”) shall be in the form prescribed by or approved under registration regulations.
(3) Where a mortgage executed in accordance with sub-paragraph (2) above is produced to the registrar, he shall register the mortgage in the prescribed manner.
(4) Mortgages shall be registered in the order in which they are produced to the registrar for the purposes of registration.

Priority of registered mortgages

- 8 (1) Where two or more mortgages are registered in respect of the same ship or share, the priority of the mortgagees between themselves shall, subject to sub-paragraph (2) below, be determined by the order in which the mortgages were registered (and not by reference to any other matter).
(2) Registration regulations may provide for the giving to the registrar by

intending mortgagees of “priority notices” in a form prescribed by or approved under the regulations which, when recorded in the register, determine the priority of the interest to which the notice relates.

Registered mortgagee’s power of sale

- 9 (1) Subject to sub-paragraph (2) below, every registered mortgagee shall have power, if the mortgage money or any part of it is due, to sell the ship or share in respect of which he is registered, and to give effectual receipts for the purchase money.
- (2) Where two or more mortgagees are registered in respect of the same ship or share, a subsequent mortgagee shall not, except under an order of a court of competent jurisdiction, sell the ship or share without the concurrence of every prior mortgagee.

Protection of registered mortgagees

- 10 Where a ship or share is subject to a registered mortgage then—
- (a) except so far as may be necessary for making the ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be treated as owner of the ship or share; and
 - (b) the mortgagor shall be treated as not having ceased to be owner of the ship or share.

Transfer of registered mortgage

- 11 (1) A registered mortgage may be transferred by an instrument made in the form prescribed by or approved under registration regulations.
- (2) Where any such instrument is produced to the registrar, the registrar shall register the transferee in the prescribed manner.

Transmission of registered mortgage by operation of law

12 Where the interest of a mortgagee in a registered mortgage is transmitted to any person by any lawful means other than by a transfer under paragraph 11 above, the registrar shall, on production of the prescribed evidence, cause the name of that person to be entered in the register as mortgagee of the ship or share in question.

Discharge of registered mortgage

13 Where a registered mortgage has been discharged, the registrar shall, on production of the mortgage deed and such evidence of the discharge of the mortgage as may be prescribed, cause an entry to be made in the register to the effect that the mortgage has been discharged.

**THE REVOLUTIONARY GOVERNMENT OF ZANZIBAR
THE MARITIME TRANSPORT ACT 2006
(ACT NO. 5 OF 2006)**

**AN ACT TO PROVIDE FOR THE REGISTRATION OF SHIPS, SAFETY
AND SECURITY OF SHIPPING AND THE PROTECTION OF MARINE
ENVIRONMENT AND OTHER MATTERS RELATED THERETO**

...

**PART III
REGISTRATION OF SHIPS**

- 8 Zanzibar Registry and Tanzania Zanzibar Ship.
- (1) There shall be established registers of Tanzania Zanzibar ships to be known as –
- (a) Tanzania Zanzibar International Register of Shipping for ocean going ships; and
 - (b) Tanzania Zanzibar Register of Shipping for coastal ships.
- (2) A ship shall be a Tanzania Zanzibar ship for the purposes of this act if that ship is registered under this Part.
- 9 Qualifications for owning Tanzania Zanzibar registered ships.
- (1) Subject to section 53 of this Act a ship shall not be registered under this Act unless she is owned wholly by persons qualified to own a Tanzania Zanzibar ship, namely –
- (a) Tanzanians;
 - (b) Individuals or corporations owning ships hired out on bareboat charter to nationals of Tanzania;
 - (c) Individuals or corporation in bona fide joint venture shipping enterprise relationships with nationals of Tanzania as may be prescribed;
 - (d) Bodies corporate incorporated in Foreign Countries and foreign individuals.

...

**PART VI
PROPRIETARY INTEREST IN REGISTERED SHIPS**

...

Mortgages

- 72 Mortgage of ship or share
- (1) A registered share in any such ship may be made security for the repayment of a loan or the discharge of any other obligation.
- (2) The instrument creating any such security referred to in this Part as a “mortgage” shall be in the form prescribed.

(3) Where a mortgage executed in accordance with subsection (2) of this section is produced to the Registrar of Ships, he shall register the mortgage in the prescribed manner.

(4) Mortgages shall be registered in the order in which they are produced to the Registrar of Ships for the purpose of registration and he shall enter and sign on each mortgage a statement to the effect that it has been registered by him, stating the date and time of the registration.

(5) Where it is stated in the mortgage instrument that it is prohibited to create further mortgages over a vessel without the prior written consent of the mortgagee, the Registrar of Ships shall make a note in the register to such effect, and the Registrar shall not register any further mortgage unless the consent in writing of the holder of a prior mortgage is produced to him, and any mortgage registered in violation of this provision shall be null and void.

...

73 Priority of mortgage

(1) Where two or more mortgages are registered in respect of the same ship or share, the priority of the mortgagees between themselves shall, subject to subsection (2) of this section, be determined by the order in which the mortgages were registered and not by reference to any other matter.

(2) Registration regulations may provide for the giving to the Registrar of Ships by intending mortgagees of "priority notices" in a form prescribed by or approved under the regulations which, when recorded in the register, determine the priority of the interest to which the notice relates.

...

Maritime Liens

86 Maritime Liens

(1) Subject to the provisions of this Act the following claims may be secured by maritime liens:

- (a) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship;
- (b) port, canal and other waterway dues and pilotage dues;
- (c) claims against the owner, based on tort and not capable of being based on contract, in respect of loss of or damage to property occurring, whether on land or on water, in direct connection with the operation of the ship;
- (d) claims against the owner in respect of loss of life or personal injury, occurring, whether on land or on water, in direct connection with the operation;
- (e) claims for salvage, wreck removal and contribution in general average.

(2) In this section, "owner" includes the charterer, manager or operator of

a ship.

87 Priority of Liens

The maritime liens set out in section 86 of this Act shall take priority over mortgages and preferential rights registered under this Part, or arising under the law relating to bankruptcy, and except as provided in section 86 no other claim shall take priority over them.

88 Order of priority of liens

The maritime liens set out in section 86 of this Act shall –

- (a) shall rank in the order they are set out in that section, so however, that maritime liens securing claims for salvage, wreck removal and contribution in general average shall take priority over all other maritime liens which have attached to the ship prior to the time when the operations giving rise to the said liens were performed;
- (b) in the case of claims arising under paragraph (a), (b), (c) and (d) of section 86 of this Act rank *pari passu* among themselves;
- (c) in the case of claims arising under paragraph (e) of section 86 of this Act, rank in the inverse order of the time when the claim secured thereby accrued; and for this purpose claims for salvage shall be deemed to have accrued on the date on which salvage operation was terminated, and claims for general average shall be deemed to have accrued on the day on which the general average act was performed.

89 Rights of ship builders and ship repairers

Where a preferential right arises, pursuant to the provisions of law relating to bankruptcy, or insolvency, in respect of a ship in the possession of –

- (a) a shipbuilder, in order to secure claims for the building of the ship; or
- (b) a ship repairer, in order to secure claims for the repair of the ship, effected during such possession,

such rights shall be postponed to all maritime liens set out in section 86 of this Act but may take precedence over any mortgage or other preferential right registered under this Part so long as the ship is in the possession of the ship builder or ship repairer, as the case may be.

90 Maritime liens attached to a ship

The maritime liens set out in section 86 shall arise whether the claims accrued by such liens are against the owners, the demise or other charterer, manager or operator of the ship and such liens shall (subject to the provisions of section 94 of this Act) remain attached to the ship, notwithstanding any change of ownership or of registration.

...

92 Limitation

(1) The maritime liens relating to a ship set out in section 86 of this Act shall be extinguished period of one year from the time when the claims secured thereby arose unless, prior to the such period, the ship has been arrested and the arrest has led to a forced sale pursuant to the Order of Court or any other law for the time being in force relating to the property in admiralty proceedings.

(2) The one year period referred to in subsection (1) of this section shall not be subject to interruption or suspension except that time shall not run during the period the lien holder is legally prevented from arresting the vessel.

93 Notice of sale to be given

(1) Prior to the forced sale of a ship as described in section 92 of this Act, the executing officer shall give or cause to be given thirty days written notice of the time and place of such sale to –

- (a) all holders of mortgages and other preferential rights registered under this Part which have not been issued to the bearer;
- (b) the holders of such mortgages and rights as have been issued to bearer, whose claims have been notified to the officer;
- (c) the holders of maritime liens set out in section 86, whose claims have been notified to the officer
- (d) the Registrar of Ships

...

95 Disposition of proceeds of sale

The costs awarded by the Court and arising out of the arrest and subsequent sale of a ship shall be paid first out of the proceeds of such sale, and the balance of such proceeds shall be distributed among –

- (a) the holders of maritime liens under section 86;
- (b) the holders of preferential rights under section 88 and
- (c) the holders of mortgages and other preferential rights registered under this part,

in accordance with the provisions of this Part and to the extent necessary to satisfy their claims.

**PHILIPPINES – MARINA
MEMORANDUM CIRCULAR NO. 182**

RULES IN THE ACQUISITION OF SHIPS UNDER PRESIDENTIAL DECREE (PD) 760, AS AMENDED, AND PROVIDING HERewith THE IMPLEMENTING RULES UNDER CHAPTER XV OF THE 1997 PHILIPPINE MERCHANT MARINE RULES AND REGULATIONS (PMMRR) ON REGISTRATION, DOCUMENTATION AND LICENSING OF SHIPS FOR INTERNATIONAL VOYAGES

...

V. CONDITIONS FOR SHIP REGISTRATION

1. Only companies which have complied with the following requirements may bareboat charter ships under PD 760, as amended:

- 1.1 The company is accredited under Memorandum Circular No. 181, provided, that such accreditation shall be maintained for the period that it has a bareboat chartered ship.
- 1.2 Shipowning companies must have a paid-up capital of Seven Million Pesos (P7 M) and companies without owned ships must have a paid-up capital of Ten Million Pesos (P10 M);
- 1.3 The company shall have the following management profile:
 - a. The Chief Executive and Chief Operating Officer (but if he is one and the same, the next ranking Operating Officer) shall be citizen and resident of the Philippines; and
 - b. Two (2) principal officers of the company shall have at least five (5) years experience in ship management, shipping operations and/or chartering.

...

4. If the bareboat charter party is pre-terminated within one (1) year from date of delivery of the ship, the charterer shall be liable to pay the MARINA as penalty the amount equivalent to six (6) months withholding tax or the balance of the withholding taxes due for the whole year, whichever is higher. For purposes of this provision, a ship which has continuously been registered for more than one (1) year under the Philippine flag under the same group of companies shall be deemed to have complied with Regulation V.2 hereof.

...

6. Ships registered under this Circular shall be completely manned by Filipino crew except in cases as may be determined by the Administration. For this purpose, Filipino crew onboard Philippine-registered ships shall be covered by prescribed Shipping Articles which shall be submitted for notation by the Administration.

...

13. The bareboat charterer shall ensure that payment of the 4.5% withholding tax on gross charter hire is remitted to the Bureau of Internal Revenue.

14. Companies with bareboat chartered ships shall deposit in favor of the Maritime Industry Authority with any reputable commercial bank the amount equivalent to One Hundred Thousand Pesos (P100,000.00) per ship to answer for the payment of the 4.5% withholding tax, fines and penalties due the government in the event that company fails to settle the same upon deletion of the ship from the Philippine Registry. In addition, companies shall also post a surety bond per ship in an amount equivalent to the cash bond. After the deletion of the ship from the Philippine Register of Ships, the amount of (P100,000.00) may be withdrawn provided that proof of payment of all taxes/penalties due to the government by reason of the registration of the ship under the Philippine flag had been submitted. Shipowning companies shall be exempted from this requirement for their bareboat chartered ships.