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FUEL FOR A FLAGGING DEBATE

by

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“...the freedom of the open sea...is the freedom of ships which fly, and are entitled to fly, the flag of a state which is within the comity of nations”

Where to flag? The flag flying on a vessel will immediately, in the minds of other mariners, cause the vessel concerned to be categorised and labelled in a manner that the vessel owner did not anticipate when the choice of flag was made.

It is common knowledge that the flying of a flag is a statement of the vessel's nationality. From this well known fact many consequences flow, which include the right to engage in certain activities within the territorial waters of the flag state (coastal fishing), the right to diplomatic protection and consular assistance, and the protection of the title of the registered owner to name but a few.

When faced with a choice of flag, vessel owners are faced with a maze of often competing demands that will ultimately determine the choice of flag. The choices that are made are no longer emotive ones, but a result of a considered debate on all aspects, including the manning and safety requirements of the vessel, the tax benefits of registering in a particular jurisdiction, a lower cost associated with a particular flag, less bureaucratic control of the administration of the vessel.

Often, the primary driving force, particularly in the case of the owners of cargo vessels, who wish to secure the anonymity of the ownership of the vessel, the company law structures of the jurisdiction concerned are of paramount importance. This is particularly appropriate where a particular individual or company owns multiple vessels and wishes to restrict his exposure to potential claims to individual vessels in his or her fleet. With fishing vessels, the imperatives are different and are normally driven by the ability of the owner of the vessel to access scarce marine resources within the Exclusive Economic Zones of different jurisdictions. Typically, a fishing vessel owner will seek to flag his or her vessel in a jurisdiction where ownership of the vessel would allow him access to a fishing vessel licence or permit. This gives rise to many complicated and creative structures including joint ventures, demise (bare boat) charters and others that give rise to their own difficulties. Add to the mix, various international and regional instruments that regulate the activities of vessels, normally by reference to the flag of the vessel, and the unfortunate and bewildered owner is left bemused.

The net result for the vessel owner is a multitude of papers appearing on his desk, each of which has different legal and fiscal consequences that he or she should be aware of prior to taking the plunge. Often in our experience a vessel owner has made a choice of flag for a particular operational need, incurred the cost of setting up company structures, re-surveying and re-flagging the vessel (which may include a dry-docking and underwater inspection at the behest of the class society) only to be faced with a simple, yet fundamental hurdle that scuppers the whole concept.

The debate is further fuelled by the insistence by mortgagee banks, upon adequate security for the monies advanced for the purchase or operation of vessels. Banks will seek to force borrowers to flag vessels on registries that secure their position, particularly in the event of the unfortunate vessel owner encountering heavy weather. The latter half of last century was characterised by a flight of tonnage from the traditional registries to so called “convenience” registries. More recently, with increased international regulation through the IMO (International Maritime Organisation), and other international bodies and, more particularly, on the insistence of the vessel’s insurers who ultimately pick up the tab for slipshod vessel management, there has been an increasing return to more established and respectable registries. This has a beneficial effect on the vessel’s insurance premium, which can range between 1% and 5% of the value of the vessel and becomes a significant operating cost of the vessel. The better the flag the lower the premium. This move is to be welcomed and in our experience the placement of any vessel on a reputable flag, whilst on the face of it may appear to be more expensive in order to meet the manning and safety requirements of the flag, has undoubted benefits down the line for the owner.

The bewildering array of choices that have to be made between good and bad registries, good and bad company structures, good and bad class societies make the choice a complex and difficult one, particularly for the new or singleton vessel owners.

Added to the complexities of these issues, fishing vessel owners are faced with additional complications in understanding the complex web of international treaties and regulations governing access rights to fisheries on both the High Seas and within the Exclusive Economic Zones of various jurisdictions. The fishing industry is often characterised by “registry hopping” where less than scrupulous vessel owners transfer their vessels from one convenience registry to another in order to secure anonymity from prosecution for illegal exploitation of fisheries resources. These vessels are often termed “illegal, unregulated and unreported vessels” (IUU vessels) and fishing vessel owners should avoid the lure of short-term gain to be obtained from these forms of activities. It is on these registries that safety and manning standards are often not enforced or applied, which can lead to vessel casualties with loss of life. It is ironic that the pursuit of the “fast buck” is inevitably at the expense of the unfortunate crew on these vessels who are often forced to spend months at sea in inhumane conditions. It is not unknown, through bureaucratic inefficiency on the part of the less reputable agent registries for vessels to be “registered” in more than one registry. This is clearly contrary to international law and assists the vessel owners in avoiding the scrutiny of regional fisheries organisations for contravention of local and international fisheries legislation.

The recent arrest by Australian authorities of two fishing vessels fishing illegally in their Exclusive Economic Zone is to be welcomed and effective trade sanctions should be considered and implemented against the flag states of these vessels to cool their enthusiasm for registering vessels with this pedigree. Recent trade measures against IUU vessels flagged in Equatorial Guinea and Sao Tome taken by the International Commission for the Conservation of Atlantic Tunas (ICCAT) during 2000 and 2001 have resulted in a flight of tonnage from these registries to less stigmatised registries (mainland China seems the flavour of the moment) but it is only a question of time before the new flag loses its lustre.

In summary, there is much merit in a vessel owner seeking respected registries with high standards for the safety and manning, that relies on good class societies and

that is in a place that is recognised for having an effective and well respected company -legal jurisdiction.

The New Zealand Register is highly regarded internationally and maintains high standards of manning and safety and registration of a mortgage on the New Zealand Register represents good security for holders of mortgages. In general all New Zealand owned ships exceeding 24 metres in length, which are not pleasure vessels, are required to be registered in New Zealand. There are some exceptions to this rule, for example 6 of the Ship Registration Act provides that where a New Zealand owned ship is operated by a foreign resident (or company) under demise charter, the Director of the Maritime Safety Authority may exempt the vessel during the term of the charter from the requirement to be registered on the New Zealand flag. Put differently, application would have to be made to the MSA for consent to have a vessel demise chartered into a second state.

International law lays down a matrix of rules that restrict the exercise of the freedom of the seas referred to in the quote above. This matrix is complex and ever shifting and not to be treated lightly.

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