



## SHOPPING FOR A FLAG STATE

### **Peter Dawson**

Peter Dawson is a Partner in Oceanlaw New Zealand, and specialises in Shipping Law. He has a broadly based international practice and holds a Masters degree in Shipping Law.

## **THE CHOICE OF A SHIP'S REGISTRY**

It has occurred to me a number of times in the past two years that I have been in the unusually privileged position (for a maritime lawyer that is) of advising a ship's registry. Prior to this my previous experience with ships registries was from the outside looking in and was (normally) characterised by the frustration implicit in communicating with lethargic registries across time zones in order to settle urgent transactions for the sale of vessels. To coordinate multiple mortgagees, sellers and buyers (especially if syndicated) with a recalcitrant registry requires sinister dexterity and no small measure of luck.

Having been involved on the other side of the fence in the engine room of the Cook Islands Registry, I can perhaps pass a different perspective to readers wishing to flag, (or reflag) their vessels in a jurisdiction outside New Zealand.

In my quest to provide coherent advice to the Cook Islands, I have canvassed the views of vessel owners and operators around New Zealand, Australia the Pacific and elsewhere as to what they require of their registry, and I was somewhat surprised at their priorities. These owners include the owners of commercial cargo and fishing vessels, ferry operators, luxury yachts, offshore supply vessels and tugs, barge owners, sail training vessels. Through many discussions I have distilled a number of rules of thumb that will may vessel owners in their choice of flag. I have not assigned any order of priority to these rules.

**Keep the Bank Happy.** More often than not, the choice of jurisdiction is often dictated by the requirements of a lender, whether they be an investor or a bank. Banks will normally seek to make it a condition of their lending that the vessel be registered in a jurisdiction that offers them the best security. Good security, from the critical view of the banker, must go hand in hand with a good underlying legal system, robust legislation, stable government and the Rule of Law. New Zealand and Australian based vessel owners or demise charterers, would be well advised to seek former British Commonwealth jurisdictions as their choice of flag state, as the principles of law applicable in these jurisdictions, will coincide with those in their home countries. Familiarity with the levers of control within the corporate structures in each jurisdiction certainly provides an edge. It goes without saying, the Shipping Act, or applicable statute (the equivalent to the NZ Maritime Transport Act) should incorporate modern provisions that ensure that the mortgagee's protection is paramount. Coupled with this it should have a modern solid Admiralty jurisdiction, spelling out the priorities of their claims, or incorporating the general body of British Admiralty Law (which is often an arcane field of law). Thus should an unfortunate owner have the misfortune of having his vessel sold being sold by judicial auction, the pecking order is clearly set out.

**Sort out the Tax Minefield.** Most international open registries offer the use of international companies with a low or zero tax regime. Whilst the prospect of avoiding the fiscus is initially attractive there is an inherent pitfall for New Zealand based entities, as New Zealand residents are taxed on their world wide income. It may be possible to implement cost effective tax structuring between the two jurisdictions.

**Deal with Your Crewing Issues.** Whilst most flag states follow the IMO standard for minimum manning (STCW-95 as amended) and there may be cost savings in that fewer officers and crew, with lower certification may be permitted, these benefits may be counteracted by the complexities inherent in the domestic immigration/work permit requirements. Additionally, the rules relating to PAYE are not for the fainthearted and careful consideration should be given to the interaction of these rules with those of the foreign flag, in regard to manning. If the vessel is to work exclusively within NZ (on a port to port basis), additional complications can be expected from the interaction with the s198 of the Maritime Transport Act.

**A Uniform Safety Standard.** Once again, as flag states apply the IMO minimum standard, contained in SOLAS. Here it is a question of degree in that some flag states are less rigorous (and scrupulous) in applying the IMO regulations. This will normally redound upon the owner's Hull and Machinery and Protection and Indemnity premiums, the less savoury flags attracting higher premiums. Perhaps a more onerous result of being flagged in a less savoury jurisdiction is the likelihood of more Port State detentions, with consequent delays. Thus a flag state should be sought with a good record of enforcement of (at least) the IMO minimum standard.

**Beware the Hidden Costs.** Over the years I have received a variety of complaints from clients regarding Ship's Registries but most often these complaints centre around hidden costs sprung on the unsuspecting owner by some flag states, anxious to maximise revenue from their captive audience. These hidden costs include consular fees, translation fees, added documentary fees, courier charges, radio licence costs, costs for renewal of certificates, hidden company costs etc. This list goes on. You need to be aware of all hidden costs prior to committing to a particular flag.

**Time Zones.** This may seem a minor issue when stacked up against the other complexities but it tends to assume a larger significance, the more urgent the need. For example, when settling the sale of a vessel, and attempting to communicate with a registry in an ongoing basis, it is particularly handy to have one in the same (or similar) time zone as New Zealand/Australia. It is my (limited) perception that ships appear to float on paper and not water, and any advantage that may be gained from communicating on the same time zone with somebody who speaks English is most welcome-particularly when a large vessel is delayed for lack of appropriate documentation.

**A Boutique Flag.** The days of the large "general department store flag" would seem to be coming to an end. Increasingly flag states are offering a variety of boutique services, particularly for smaller vessels including super yachts (beware the tax and manning issues), fishing vessels, (beware the intricate licensing and manning requirements), off shore support vessels (beware the rules that apply to vessels below 500 tonnes). It is like a breath of fresh air to come across a flag state that has an in depth knowledge of the peculiarities of a particular type of vessel that you are seeking to register. The impact of Regional Fisheries Organisations and their particular licensing and reporting requirements is a good example.

In conclusion it must be emphasised that is a complex area of maritime law, with many pitfalls and downstream costs for the unwary. Caution is advised for the vessel owners going "forum shopping".