

"Bareboat Charter Registration in the light of International Instruments"

Par Carlos Moreno.

UNCTAD, Geneva.

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Concept and definitions We could consider bareboat charter registration as a legal arrangement whereby the nationality of the bareboat charterer, as owner of the ship *pro hac vice*, ("acting owner"), is allocated to the ship and evidenced by flying the flag of that nation during the life of the charter party¹. Although common agreed definitions do not exist for the basic elements of "bareboat charter registration", the International Chamber of Commerce, in an effort to arrive at some basic definitions, prepared in 1988 a set of "Recommendations for a legal and regulatory framework for bareboat charter registration" (ICC publication no 466A). The following are the ICC definitions : (a) Bareboat charter registration means the registration of a vessel in a Bareboat Charter Registry in the name of the bareboat charterer. (b) Bareboat charter registry means the registry of the State whose flag the vessel will fly and in which the charterer is registered as the bareboat charterer during the period of the bareboat charter. (c) Underlying registry means the registry of the State in which the owner of the vessel is registered as owner and to which jurisdiction and control of the vessel will revert upon termination of the Bareboat Charter Registration².

Origins of the system In 1951 the Federal Republic of Germany enacted the Law of the Flag Act,³ allowing a ship registered abroad, but bareboat-chartered by a West German entity, to be registered under the Federal Republic flag for a fixed period of time; The reason for that law was that at that time there was only a small residual merchant fleet in the RFA and large problems to finance reconstruction due to the combined effect of war losses and the allied expropriation of merchant ships as war reparations. It became an urgent necessity to rebuild a national merchant marine, but the immense capital investment required was not at that time available in Germany. This necessity was the origin of the invention of bareboat charter registration as we know it today, though there are some old historical antecedents⁴. Although the 1952 law was primarily intended to permit bareboating-in to the German flag, it contained provisions for bareboating-out an ordinarily -registered German ship to a foreign flag. Thus the Minister of Transport may on application exempt a ship registered in Germany and bareboat chartered-out to a foreign charterer from the obligation to fly the German flag, provided that the foreign country grants the ship the right to fly its flag for the duration of the bareboat charter. The permission to fly the foreign flag may be granted for a period of up to two years. The fact that the ship is permitted to fly the foreign flag during the bareboat charter period is noted in the ship's certificate and the ship's registry remains unaffected by the change of flag⁵. The German model with a few variations illustrates the basic elements of all current bareboat charter registration laws and arrangements⁶. **Allocation of State duties under international Conventions** It is a well-known practice in international law that a ship may fly the flag of only one State. Both the 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea (UNCLOS 82) provide that "...ships shall sail under the flag of the one State only." Article 5 of the Convention on the High Seas and article 91 of the United Nations Convention on the Law of the Sea provide that "Ships have the nationality of the State whose flag they are entitled to fly." It is important at this point to make a difference between "nationality" and "registration"⁷ Article 2 of the United Nations Convention on Conditions for Registration of Ships, 7 February 1986, provides the following definitions : "Flag State" means a State whose flag a ship flies and is entitled to fly ; "State of registration" means the State in whose register of ships a ship has been entered ; "Register of ships" means the official register or registers in which particulars referred to in article 11 of the Convention are recorded. Articles 94 and 217 of the 1982 Convention on the law of the Sea request the State whose flag the ships flies to exercise "effective jurisdiction and control" over the ship as to social matters and safety and other public law requirements :

Article 94- Duties of the flag State 1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. 2. In particular every State shall : (a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size ; and (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship. 3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia to : (a) the construction, equipment and seaworthiness of ships ; (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments ; (c) the use of signals, the maintenance of communications and the prevention of collisions. 4. Such measures shall include those necessary to ensure : (a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship, (b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship ; (c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance. 6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation. 7. Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall co-operate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.

Article 217 - Enforcement by flag States 1. States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards, established through the competent international organization or general diplomatic conference, and with their laws and regulations adopted in accordance with this Convention for the prevention, reduction and control of pollution of the marine environment from vessels and shall accordingly adopt laws and regulations and take other measures necessary for their implementation. Flag States shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs. 2. States shall, in particular, take appropriate measures in order to ensure that vessels flying their flag or of their registry are prohibited from sailing, until they can proceed to sea in compliance with the requirements of the international rules and standards referred to in paragraph 1, including requirements in respect of design, construction, equipment and manning of vessels. 3. States shall ensure that vessels flying their flag or of their registry carry on board certificates required by and issued pursuant to international rules and standards referred to in paragraph 1. States shall ensure that vessels flying their flag are periodically inspected in order to verify that such certificates are in conformity with the actual condition of the vessels. These certificates shall be accepted by other States as evidence of the condition of the vessels and shall be regarded as having the same force as certificates issued by them, unless there are clear grounds for believing that the condition of the vessel does not correspond substantially with the particulars of the certificates. 4. If a vessel commits a violation of rules and standards established through the competent international organization or general diplomatic conference, the flag State, without prejudice to articles 218, 220 and 228, shall provide for immediate investigation and where appropriate institute proceedings in respect of the alleged violation irrespective of where the violation occurred or where the pollution caused by such violation has occurred or has been spotted. 5. Flag State conducting an investigation of the violation may request the assistance of any other State whose cooperation could be useful in clarifying the circumstances of the case. States shall endeavour to meet appropriate requests of flag States. 6. States shall, at the written request of any State, investigate any violation alleged to have been committed by vessels flying their flag. If satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, flag State shall without delay institute such proceedings in accordance with their laws. 7. Flag States shall promptly inform the requesting State and the competent international organization of the action taken and its outcome. Such information shall be available to all States. 8. Penalties provided for by the laws and regulation of States for vessels flying their flag shall be adequate in severity to discourage violations wherever they occur.

The coexistence of what some authors refer to as "dual " or " parallel " registration during the flagging-out or the flagging-in period may raise private international law problems wherever the proper law is the "national law of the vessel". Professor Berlingieri⁸ refers to four different expressions which are used in international Conventions : (i) The State of which the vessel is "ressortissant" translated into English as "State to which the vessel belongs" ; (ii) The State of which the vessel is flying the flag ; (iii) The place of registration ; (iv) The nationality of the vessel.

Those Conventions falling under the first category, "State to which the vessel belongs", might be subject to different interpretation. We refer specifically to the 1910 Collision and Salvage Conventions (respectively in article 12 and 15), the 1926 Maritime Liens and Mortgages Convention (article 14), and the 1952 Civil Jurisdiction Convention.⁹ Another example of the difficulties encountered in identifying the State of the ship's registry arises in the application of the 1969 Civil Liability Convention for Oil Pollution Damage. Article 7 (2) of the said Convention provides that a certificate attesting that insurance or other financial security is in force in accordance with the provisions of the Convention shall be issued or certified by the appropriate authority of the State of the ship's registry . When the Convention was made, ships were registered in one register only and the possibility of the so-called "dual or parallel registration " had not gained international attention. The question that arises in connection with article 7 (2) of the said Convention is therefore whether for the purpose of the delivery or certification of the certificate of insurance, the State of the ship' s registry is the State of the underlying registry or the State in whose registry the ship is temporarily registered.¹⁰

International Conventions regulating Bareboat Charter Registration Article 2 of the 1986 United Nations Convention on Conditions for Registration of Ships draws an important distinction between "flag State " and "State of registration". Article 4 of the Convention established: "... 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. " Articles 11 and 12 of the Convention for the first time regulate in an international instrument the practice of bareboat charter registration. Thus article 11 (5) provides :

"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."

In article 12.1, the 1986 Convention grants the right, "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." More recently article 16, "Temporary change of flag ", of the 1993 International Convention on Maritime Liens and Mortgages incorporates provisions that allow temporary suspension of flag for vessels registered in their registers when they are bareboat chartered to a foreign charterer and are permitted to fly the flag of the charterer's State and conversely allow that foreign vessels bareboat chartered by nationals temporarily fly the flag of such States. This article is based on the theory that while a ship is bareboat registered and flying the flag of the State in which the bareboat charter party is itself on record, the right to fly the flag of the "underlying" registry is withdrawn, and the underlying registration is suspended during the period of the bareboat registration, except for registered encumbrances.¹¹

Article 16 reads as follows : Article 16 - Temporary change of flag If a seagoing vessel registered in one State is permitted to fly temporarily the flag of another State, the following shall apply : (a) For the purposes of this article, references in this Convention to the "State in which the vessel is registered" or to the "State of registration" shall be deemed to be references to the State in which the vessel was registered immediately prior to the change of flag, and references to "the authority in charge of the register" shall be deemed to be references to the authority in charge of the register in that State. (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. (e) The notice referred to in article 11 shall be given also to the competent authority in charge of the vessel's record in the State whose flag the vessel is permitted to fly temporarily. (f) Upon production of the certificate of deregistration referred to in article 12 paragraph 5, the competent authority in charge of the vessel's record in the State whose flag the vessel is permitted to fly temporarily shall, at the request of the purchaser, issue a certificate to the effect that the right to fly the flag of that State is revoked. (g) Nothing in this Convention is to be understood to impose any

obligation on States Parties to permit foreign vessels to fly temporarily their flag or national vessels to fly temporarily a foreign flag.

Conclusions The 1986 United Nations Convention on Conditions for Registration of Ships and the 1993 International Convention on Maritime Liens and Mortgages do not impose any obligation on State Parties to permit bareboat charter registration. Both Conventions do, however, regulate such growing practice when permitted by Contracting States. A bareboat charter registration arrangement should be approached with care by all the parties involved.¹² Particular attention should be given to mortgage protection, making it clear that bareboat charter registration is something different to registration of ownership or title and other recorded lien claims or charges, and that as far as mortgages are concerned the law of the original registration "underlying registry" applies.¹³

1 For a definition of "bareboat charter", see article 2 of the United Nations Convention on Conditions for Registration of Ships, 1986. 2 Some of the definitions contained in the ICC Recommendations have been included in Optional Part I of the "BARECON 89" Standard Bareboat Charter. Mr Jorjen Hojer, "BARECON 89 Standard Bareboat Charter", UNCTAD/BIMCO Colloquium on Chartering and Ship Finance, Santiago de Chile, 19-27 October 1994. 3 Gesetz über das Flaggenrecht der Seeschiffe und die Flaggenführung der Binnenschiffe-Flaggenrechtsgesetz, vom 8. Februar 1951 (BGB 1. IS. 79). 4 F L Wiswall : "Bareboat charter parties and bareboat charter (ship) registration as joint venture tools", ICC International Symposium on Maritime Joint Ventures, Singapore, 5-6 October 1989. 5 Consideration of maritime liens and mortgages and related subjects, in accordance with the terms of reference of the joint Intergovernmental Group. TD/B/C.4/AC.8/12 : "Current practices in bareboat charter registration", pages 18-19. 6 See Bernd Kröger and Peter Ehlermann, ICC Symposium on Bareboat Charter Registration, Paris, 1987. 7 Frank Wiswall, op cit : "To make a loose analogy, the accepted proof of nationality of an individual is not his birth certificate but his passport. The document issued to the ship by the flag State is its 'passport' under international law". 8 The new Italian Law on Temporary Registration of Bareboat Chartered Vessels. *Journal of Maritime Law and Commerce*, vol 21, No 2, April 1990. 9 Berlingieri, op cit, pages 210-211 : "When registration and nationality differ, it is necessary to find out which type of control is relevant. The flag State normally has the control over all safety and labour aspects of the operation of the vessel. The State of registration normally maintains control over the nationality requirements, the conditions under which, and the time during which, the vessel may fly a flag other than that of such State, and ensures the continued registration of the vessel in its registers. In the abstract, the permanent character and the characteristics of the control by the State of registration would justify the conclusion that the vessel "belongs" to that State. However, this may not necessarily be so for all Conventions, for in some of them the safety and social (or manning) aspects may be more relevant. This is the case with respect to the 1910 Collision and Salvage Conventions, and also the 1952 Convention on Civil Jurisdiction. Registration, on the contrary, seems to be the controlling factor in the case of the 1926 Convention on Maritime Liens and Mortgages". 10 Such question was raised by the President of the CMI with the Secretary-General of IMO and was considered by the Legal Committee of IMO at its 66th session held from 16-20 March 1992. See IMO documents LEG 66/6/1 and LEG 71/7. A majority of replies received to a questionnaire submitted by the CMI underlined that the Certificate of Insurance is a document of public law nature which must be issued by the State having jurisdiction, i.e., the Flag State, and not by the State in whose private law register the vessel is registered (State of the Underlying Register). See IMO document LEG 71/7 of 6 July 1994. 11 Guy E C Maitland : "The Role of the Register in Ship Finance : Bareboat registration as defined in international Conventions", UNCTAD/BIMCO Colloquium on Ship Finance and Chartering, Santiago, Chile, 19-27 October 1994. 12 It is interesting in this respect to note the "fundamental principles" adopted by the ICC among its recommendations for a legal and regulatory framework for bareboat charter registration (ICC publication No 466A) : 1. The laws of both the State of Underlying Registry and the State of Bareboat Charter Registry should be compatible with respect to Bareboat Charter Registration. 2. The basis of Bareboat Charter Registration should be a charter whereby the charterer acquires control and possession of the vessel including the right to appoint the master and crew, and, in general throughout the period of the charter, is in the position of the owner save for the rights to sell or mortgage the vessel, which rights remain with the owner. 3. A vessel may fly the flag of one State only, and should bear a certificate of registration issued by the State whose flag it flies. During the period of Bareboat Charter Registration, the vessel should fly the flag of the State of Bareboat Charter Registry while the right of the vessel to fly the flag of the State of Underlying Registry should be withdrawn, although the vessel remains recorded in the State of Underlying Registry. 4. The State whose flag the vessel flies is the State which has sole responsibility for exercising effective jurisdiction and control over the operation and management of the vessel. 5. Bareboat Charter Registration is dependent upon the existence of a bareboat charter. The termination of the bareboat charter for whatever reason therefore automatically should terminate the Bareboat Charter Registration, so that the sole jurisdiction and control over the vessel reverts to the State of Underlying Registry. 6. The validity and enforceability of the owner's title to the vessel and of any mortgages should be governed by the laws of the

State of Underlying Registry. 7. A vessel registered in a Bareboat Charter Registry may not be registered simultaneously in another Bareboat Charter Registry.

13 Peter Ehlermann : "Bareboat Charter Registration and Mortgage Security - Seminar on Bareboat Charterparties". Knokke-Zoute, April 1989 : "Serious observers argue that some countries might not recognize a mortgage on a ship which was not created in accordance with the laws of the country of the flag and/or in particular is not registered in the country of the vessel's flag".