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# Parallel Registration of Ships

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## **PREFACE**

I would like to begin by thanking my supervisor Professor Svante O. Johansson who has provided me with support and valuable remarks during the course of writing this thesis. I would also like to thank Jerker Sellén at Mannheimer Swartling Law Firm who has illuminated the problems connected to bareboat registration of ships from a practical perspective.

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## **ABSTRACT**

In present there is no Swedish legislation regulating bareboat registration of Swedish ships. Despite this absence however shipowners with vessels already registered in the Swedish Vessel Register do not hesitate to take advantage of the positive aspects of bareboat registration and thereby allowing the registration of their ships in another State as well. The fact that there is a lack of legislation in this area has left a legal loophole resulting in Swedish ships being registered in a second State without any regulation providing options or protection for the different parties involved.

With this as a background, the main objective of this thesis is to analyze parallel registration of ships, its consequences and the future of dual registration in Sweden. To fulfil this objective another aim is to impart a collected legal and economical presentation of the problems that may occur when a bareboat chartered vessel is registered in two different States simultaneously.

After having presented the legal basis of regular registration, the functions of ship registration and the legal aspects of parallel registration it is clear that there are both strong arguments in favour of and against bareboat registration. But due to that bareboat registration has already been accepted as a possibility around the world and by the Swedish authorities due to their passivity, the conclusion of this thesis is that the only available solution is to set conditions for this type of registration and thereby make an attempt to minimize negative consequences.

Therefore a practical proposal is to create a system where the responsibilities and obligations connected to ship registration initially are divided between Sweden and the State of the bareboat registration. This division can imply that the private law jurisdiction remains within the Swedish authority while the public law enforcement is left to the State of the bareboat registration. This solution is the most optimal as it allows Sweden to uphold the protection of the private parties as it is intended in the Swedish Maritime Code.

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## ABBREVIATIONS

EC	European Community
EC Treaty	Treaty Establishing the European Community
ECJ	European Court of Justice
EEA	European Economic Area
EU	European Union
GCHS	Geneva Convention on the High Seas
ICC	International Chamber of Commerce
MSA	The Merchant Shipping Act
MSR	The Merchant Shipping Regulations
ND	Nordiske domme i sjöfartsanliggender- Case Law from the Supreme Courts of the Nordic countries
NJA	Nytt juridiskt arkiv- Case law from the Swedish Supreme Court
NP	Navigational Proclamation (Sjöfartsverkets kungörelse med föreskrifter för sjötrafiken m m)
OISR	Ordinance with instructions for the Shipping Registry (Förordning med instruktion för sjöfartsregistret)
SMA	Swedish Maritime Administration
SMC	Swedish Maritime Code
SMSI	Swedish Maritime Safety Inspectorate
SRO	Ship Registration Ordinance (Fartygsregisterförordningen)
VCLT	Vienna Convention on the Law of Treaties
UK	United Kingdom
UNC CRS	United Nations Convention on Conditions for Registration of Ships
UNCLOS	United Nations Convention on the Law of the Sea
UNICMLM	United Nations International Convention on Maritime Liens and Mortgages

## CONCEPTS

The fundamental discrepancies between different concepts will be explained here with the purpose to create a better understanding of the problem of the essay. Most of the concepts will however also be more thoroughly examined below.

### *Documentation:*

Documentation is an evidentiary document that establishes that competent authorities have verified that the ship fulfils the needed requirements for flying the national flag of that State. Even though registration and documentation often come about simultaneously, it is critical to make a distinction between the two, especially in dual-registry situations.<sup>1</sup>

### *Flag:*

The flag is an evidence of nationality and gives the assumption that a certain State has exclusive jurisdiction and control over the vessel. The flag should be flown on every occasion where identification of the vessel's nationality is necessary. Such situations are at hand when for example sailing through a State's national waters or when visiting ports.<sup>2</sup>

### *Nationality:*

As a main principle, a ship possesses the nationality of a State solely in terms of ownership.<sup>3</sup> A ship is for example considered to be Swedish if it is owned more than one half by Swedish nationals or Swedish legal persons. The nationality of a ship is thus irrespective of its registration or documentation. It should however be noticed that nationality is often followed by an obligation to register the ship.<sup>4</sup>

### *Registration:*

The public law function of registration is to act as a precondition and a test of a vessel's nationality. Thus when a ship is registered, public law will for example allocate the vessel under the registration States jurisdiction, grant the ship the right to fly the State flag and provide the vessel with both diplomatic and naval protection.<sup>5</sup>

The private law purpose of registration is to give protection of title to the owner of the ship. Persons holding security interests over a vessel also gain a proof of title and preservation of priorities through registration.<sup>6</sup>

### *Ship:*

A vessel whose hull has a length over all of at least twelve metres and a maximum breadth of at least four metres is designated as a ship.<sup>7</sup>

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<sup>1</sup> Coles & Ready, *Ship registration: Law and Practice*, pp. 4-5.

<sup>2</sup> Coles & Ready, *Ship registration: Law and Practice*, p. 5.

<sup>3</sup> There are however two exceptions to this rule according to the Swedish Maritime Code (SMC). These are presented below at section 2.3.1 of the essay.

<sup>4</sup> SMC 1:1 and 2:1.

<sup>5</sup> Ds 1996:60, pp. 38-44.

<sup>6</sup> Ds 1996:60, pp. 38-44.

<sup>7</sup> This definition is given by SMC 1:2.



# 1. INTRODUCTION

In a world where maximising profits has become the chief concern of businesses; globalisation has opened up a realm of possibilities endorsing the advantages of international economic integration through trade, foreign direct investment, capital flows, migration, and spread of technology.<sup>8</sup> In the area of sea transport, globalization has contributed to dissolving some of the compulsory regulations and boundaries confining a vessel to the jurisdiction of traditional maritime States. Consequently, so called parallel or bareboat registration has become a possibility.

Parallel registration of a ship implies that a ship that already has been registered in one State may also be registered in the bareboat register of another, if certain conditions are fulfilled. As a result the vessel may fly the flag of the second State for a determined period of time. This option has become a popular alternative in the shipping community due to the vast economic advantages that can be gained. But dual registration is far from unproblematic.

When a ship is registered in the vessel registry of a certain country, it is automatically subjected to the jurisdiction and control of that State. Accordingly it is the rules and regulation of that country that will become applicable when resolving different conflicts connected to the vessel. So if a ship is for example registered in Sweden, it is the Swedish labour conditions, the tax regulation, and the property laws of Sweden that will become applicable. Because ship registration determines the jurisdiction that the ship is subjected to, it implies foreseeability, transparency and thus legal security for all the parties involved.

If a ship becomes registered in two different States at the same time there will be complications when trying to determine what law to apply and especially State responsibility for maintaining safety at sea. It is therefore of the utmost importance for States allowing dual registration to create a system solving jurisdictional issues and other problems that might arise from such registration.

In Sweden however, such legislative solution does not exist. Since registration in a second State is not a prerequisite for deregistration of a ship from the Swedish Vessel Registry, a vessel can easily be registered in a second country as well without the intervention of Swedish authorities. As a result Sweden and the other State involved will have to come to an agreement every time the vessel becomes bound by a conflict. This is not always very easy due to bureaucracy or political differences between the countries. The lack of Swedish legislation in the area also means that the protection of the parties with an interest in the ship will be compromised.

With the main objective to analyse the effects of the existent Swedish legal loophole concerning bareboat registration, the topic of this thesis will be parallel registration of ships, its consequences and the future of dual registration in Sweden.

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<sup>8</sup> Goldin, *Globalization for development: trade, finance, aid, migration and policy*, p. 2.

## 1.1 Background

Maritime law derives its foundation from very old tradition and thus both current legislations and established practices in the area are connected to history. National registration of ships can for example be linked to a record of statutes associated to the Rhodian Sea Law dated to a period between 600 C.E. and 800 C.E.<sup>9</sup> It's true origins can nevertheless be traced to the laws of imperial Rome that required registration of the name of the owner and ship and also registration of the vessel's tonnage. Its modern form in both Sweden and worldwide, has however been derived from the compulsory British Navigation Act from 1660 C.E.<sup>10</sup>

Initially national registration of ships was to function as an act of restricting commerce to a country's own vessels. Hence only ships with for example a Swedish flag were entitled to trade at Swedish ports. Today nonetheless flag registration is used to convey State protection to the ships that are registered.<sup>11</sup> It also determines jurisdictional issues and has domestic significance when it comes to the areas of public and private law.<sup>12</sup>

Nevertheless, the history of parallel registration cannot be traced as far back into time. Instead bareboat registration is considered as one of the consequences of the Second World War. To be able to increase the amount of foreign currency invested in Western-Germany, public authorities in the country believed that it was necessary to rebuild the German merchant fleet that had been confiscated as a spoilt of war. But due to economic deficiency Western-Germany did not have the resources to buy tonnage from abroad. Hence the only way to rebuild the fleet was to allow foreign registered ships, which were leased to Germans, to fly the German flag during the period of the lease.<sup>13</sup>

Although the possibility to simultaneously register a vessel in two different countries was not utilized as extensively during 1960-1970, it has regained its popularity in recent years. At present it is possible to bareboat register a ship in countries such as Denmark, United Kingdom, Russia, the Philippines, Panama, Cyprus, and Australia.

## 1.2 Purpose

The problems connected to parallel registration of ships are both numerous and versatile due to the many different parties involved. On one hand parallel registration can result in inter-State conflicts arising due to the lack of compatibility in domestic regulations. On the other hand the lack of creditor protection that usually is a consequence of dual registration may lead to reduction of investments which will have implications for the economy of a certain country.

Thus the main purpose of this thesis is to impart a collected legal and economical presentation of the problems that may occur when a bareboat chartered vessel is registered in two different States simultaneously. To fulfil this purpose I have chosen to examine the legal aspects of

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<sup>9</sup> Hattendorf, (ed), *The Oxford Encyclopaedia of Maritime History* (vol. 2), pp. 418-419.

<sup>10</sup> Rinman & Brodefors, *Sjöfartens historia*, p. 10.

<sup>11</sup> Hattendorf, (ed), *The Oxford Encyclopaedia of Maritime History* (vol. 3), p. 71.

<sup>12</sup> Falkanger, Bull & Brautaset, *Scandinavian Maritime Law*, pp. 48-49.

<sup>13</sup> Saeter, *Bareboat ("parallell-") registrering av skip- i jus og praksis*, p. 24.

both bareboat and customary registration according to International, European and Swedish domestic law and also to review the different purposes of registration.

Since there is a lack of Swedish legislation in the area, this essay also aims to study the future of dual registration in Sweden. To accomplish this I will make a brief comparison to British law and the British solutions to the different problems.

### **1.3 Delimitation**

The topic of this thesis is parallel registration of ships. But to be able to provide a better understanding of the subject, I have chosen to also describe the legal aspects of customary registration. In this part, I will only examine registration of ships according to the definition given in the Swedish Maritime Code (SMC). Therefore boats or any other leisure crafts will not be included in this presentation.

There are also separate rules when it comes to registration of ships under construction and so called government ships. As parallel registration of ships is only restricted to ready built vessels and those under the merchant fleet, the rules regarding ships under construction and government ships will be excluded for natural reasons.

The second part of the essay is entirely dedicated to parallel registration. One of the requirements necessary for a bareboat registration is that the ship is operated under a so called bareboat charterparty. Although there is a distinction between a so called operating bareboat charter and a finance bareboat charter, I will not examine this distinction any further. This is due to my aim to provide a simple and relevant depiction of the subject. The distinction between the two types of bareboat charters is not necessary for understanding dual registration or its consequences and will therefore not be included in this thesis.

Furthermore it should be mentioned that parallel registration bears a close resemblance to so called Flags of Convenience. Even though ships registered under such a flag are registered in one State only, the reasons behind choosing to bareboat register a vessel are quite similar to those connected to Flags of Convenience. The two types of registrations also bear resemblance when it comes to the negative effects. Irrespective of these similarities, Flags of Convenience will not be examined in this essay beyond some single remarks when required.

### **1.4 Method**

I have chosen a traditional legal dogmatic approach when searching for relevant information and material applicable to the problem of this essay. The primary sources that have been used in the first part of the thesis have been legal text, preparatory work, legislative history, case law and legal doctrine.

As the SMC is a result of co-operation between Sweden, Denmark and Norway, the three countries almost have identical Codes. It is therefore customary to apply case law from other Scandinavian countries when trying to interpret the SMC.<sup>14</sup> In this essay case law from both

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<sup>14</sup> Falkanger, Bull & Brautaset, *Scandinavian Maritime Law*, pp. 26- 29.

Scandinavian and non-Scandinavian countries will be recited. The latter will however only have an illustrative effect when applicable and not the legal status of case law with origins in Scandinavia.

When it comes to the problems related to parallel registration of ships in Sweden however, most of the above mentioned customary sources could not be used due to that the issue of bareboat registration has not been addressed in Swedish domestic law. Therefore a limited part of the thesis is to a large extent based on my own thoughts and ideas. Information concerning the applied practice of the Swedish Maritime Administration (SMA) in these matters originates from interviews with legal advisors representing this authority.

The method used in the comparative part of this essay also deserves a comment. When information in a section of an essay such as this has been based on second-hand sources, there might be issues concerning the accuracy of the information. I have therefore tried to make a distinction between the sources based on the authority of the authors in the parts where legal texts could not be used. Such sources are assumed to be more reliable.

Finally I would also like to mention that I have chosen not to make a clear division between the descriptive and analytical parts of the thesis. This because I believe that direct analysis of a descriptive text will help enhancing reader comprehension.

## **1.5 Disposition**

I have chosen to divide this thesis into two main parts. The first part, which deals with customary registration of ships, begins with a quite detailed survey of the legal aspects of registration. Initially there is a description of the International Conventions, continuing with the aspects of EC regulation in the area. Finally there is a presentation of Swedish domestic rules. This first part of the essay ends with a description of the purposes of registration.

To be able to comprehend both the legal aspects of customary registration and parallel registration itself, it is essential to understand the purposes behind ship registration as a whole. A presentation of the legal aspects of customary registration is also important since it will provide a background to the main problem. Because there is a lack of Swedish regulation, this survey is also significant because it will act as guidance when discussing the future of parallel registration in Sweden. This due to that any suggestion given in the conclusion must coexist with current Swedish, EC and International law.

The second part of the thesis is entirely devoted to parallel registration. In this section, I will examine the main features of parallel registration, the reasons why it has become popular<sup>15</sup> and its consequences. As this is the primary problem of the essay there will be a more detailed run-through. Furthermore I will continue with a comparison with the British solution to the problem both because of increased internationalization and most importantly due to the lack of Swedish legislation in the area. A comparison will not only give a broader perspective to the problem, but it will also act as a guideline when analysing and discussing the future of parallel registration of Swedish ships.

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<sup>15</sup> The assumption about the popularity of parallel registration is based on the increasing number of bareboat registration cases at prominent Swedish law firms.

To conclude I will make an attempt summarize the different problems presented in the thesis and discuss the future of dual registration in Sweden by illuminating both the benefits and disadvantages of dual registration. In this section all the different components of this essay will hopefully result in at least a better understanding of the problem and also act as an inspiration for how to solve it.

# PART I

## 2. THE LEGAL ASPECTS OF REGISTRATION

### 2.1 Background

Because parallel-registration is not an isolated legal phenomenon but simultaneous registration in two separate States it is important to understand the rules and principles behind registration before examining dual-registration, its consequences and its future.

Below, there will be given a short presentation of the rules concerning nationality, flag, registration and documentation from an International, European and National perspective. Due to the close connection between registration, inscription of title and deregistration the two latter subjects will also be illuminated in the section where the Swedish domestic rules are described.

The purpose of this section of the essay is therefore to outline the most fundamental structures connected to registration of ships and thereby create a better understanding of the problems of parallel-registration. This presentation is by no means conclusive.

### 2.2 International Conventions

#### 2.2.1 Introduction

Maritime Law is based on International Conventions and custom. When a treaty is ratified, a duty to incorporate the treaty into Domestic law arises. In Sweden, where the dualistic doctrine is applied, there is a legislative ad hoc incorporation of international rules. Thus the International Conventions become applicable in the State's national legal system only if parliamentary authorities pass a specific implementing legislation. Yet it should be noted that a party to a treaty, cannot invoke the provisions of Domestic law as a justification for failure to perform according to a treaty.<sup>16</sup>

Before separately discussing registration, nationality and flag from an international perspective it is important to mention the principle of *the freedom of the high seas* which constitutes one of the essential rules of International Maritime Law. The principle entails an unrestricted access to all parts of the sea that are not included in exclusive economic zones, the territorial sea or internal or archipelagic waters of a State. Vessels belonging to all nations thus have the right to take advantage of this freedom.<sup>17</sup> There are however restrictions. It is

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<sup>16</sup>Article 27 of Vienna Convention on the Law of Treaties (VCLT). For further information also see Cassese, *International law*, pp. 213-221.

<sup>17</sup> Geneva Convention on the High Seas (GCHS), article 2 and United Nations Convention on the Law of the Sea (UNCLOS), articles 86-87.

only the State to which the vessel belongs that has jurisdiction over the vessel. Therefore, possession of a nationality is compulsory for all vessels utilizing the high seas.<sup>18</sup>

### 2.2.2 Nationality

According to International law a ship on the high seas must possess a nationality to be able to prove its existence. In fact every State has an obligation to establish the conditions that are required for a ship to be able to obtain a nationality, to register the vessel in the States territory and to acquire the right to fly the State flag.<sup>19</sup>

A national character provides the ship with protection when on the high seas and certifies that the vessel is subject to a system of laws and accordingly brings about certain obligations for the State. Nationality also ensures a right to engage in lawful trade at different ports.<sup>20</sup>

Consequently a ship without a nationality does not enjoy protection according to International law. This principle has been established in *Naim-Molvan v. Attorney-General of Palestine*<sup>21</sup> and *United States v. Marino Garcia*.<sup>22</sup> In both cases it was concluded that ships without nationality have no right to navigate freely on the high seas.<sup>23</sup> Nor can such vessels maintain the right of access to foreign ports.<sup>24</sup>

### 2.2.3 Flag

When a ship fulfils the conditions that are required for obtaining a certain nationality, the vessel is also granted the right to fly the flag of that State. This principle has been established in both article 5, paragraph 1 of the Geneva Convention on the High Seas (GCHS) and article 91 of the United Nations Convention on the Law of the Sea (UNCLOS).

Since State responsibility towards a vessel is best represented by the national flag, a ship flying two flags is considered to have fallen outside the protection of both nationalities that it is claiming. In fact, according to article 6 (2) of the GCHS and article 92 (2) of the UNCLOS, a ship that flies two flags is to be considered stateless.<sup>25</sup> It should however be noted that a ship may be stateless based on other reasons as well. Such grounds are for example not being registered in a State or flying the flag of a State not recognised by the International Community.<sup>26</sup>

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<sup>18</sup> Coles & Ready, *Ship Registration: Law and Practice*, p. 1.

<sup>19</sup> GCHS article 5 and UNCLOS article 91.

<sup>20</sup> Özçayir, *Port State Control*, p. 8.

<sup>21</sup> *Naim-Molvan v. Attorney-General of Palestine* (1948), A.C. 351.

<sup>22</sup> *United States v. Marino-Garcia*, 679 F.2d 1373. U.S. Court of Appeals, 11<sup>th</sup> Cir, 1982.

<sup>23</sup> Özçayir, *Port State Control*, p. 9.

<sup>24</sup> Brown, *The International law of the Sea (vol. 1), Introductory Manual*, pp. 286-292.

<sup>25</sup> This principle has been applied in *United States v. Passos-Paternina*, 918 F.2d 979, U.S. Court of Appeals, 1<sup>st</sup> Cir, 1990.

<sup>26</sup> Brown, *The International law of the Sea (vol. 1), Introductory Manual*, p. 291.

## 2.2.4 Registration

According to article 94 (2a) of the UNCLOS, a flag State has a duty to keep a register of all ships flying its flag. The competence to decide the conditions necessary to obtain a registration has however been left to the scrutiny of each State.<sup>27</sup> After the vessel has been registered it falls within the jurisdiction of that State. In reality this means that the State assumes national and international responsibilities in relation to the vessel.<sup>28</sup>

Today so called open registers<sup>29</sup> exist alongside the national registers. Shipowners utilize these to gain economic advantages such as lower taxation and lower salary costs. Due to that the existence of these open registers has been questioned, attempts have been made to define international minimum requirements that need to be fulfilled before a ship can be considered to have gained a certain nationality.<sup>30</sup> A general prerequisite that needs to be fulfilled is the existence of a *genuine link* between the vessel and the State.<sup>31</sup> In 1986 there were attempts made to define the meaning of this requirement in the United Nations Convention on the Conditions for Registration of Ships (UNCCRS). Even though the Convention reconfirms the *genuine link* principle in its preamble, it also reaffirms flag State supremacy. What exactly constitutes a *genuine link* therefore remains unclear. However examples that are given in the doctrine are ownership links to the registration State and State control through profit taxation.<sup>32</sup>

## 2.2.5 Documentation

The flag State has a duty to produce documentation as a proof of a ship having the right to fly the State flag.<sup>33</sup> This is affirmed in *The Merritt* case where U.S. Supreme Court stated that “documents a vessel carries furnish the only evidence of her nationality”.<sup>34</sup> A ship sailing without documents that proves its nationality can consequently be refused authorization to enter foreign ports and engage in commercial activities.<sup>35</sup>

## 2.3 The rules and regulations of the European Union

### 2.3.1 Introduction

Sweden has been a member of the European Union (EU) since 1 January 1995. Due to this membership Sweden is obliged to comply with European Community (EC) law.<sup>36</sup> With this as a background, it is necessary to review EC regulation that influence Swedish domestic law in the area of ship registration.

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<sup>27</sup> GCHS article 5 and *The Muscat Dows: Great Britain v. France (1916)*, *Hague Court Reports* 93.

<sup>28</sup> Özçayır, *Port State Control*, p. 10.

<sup>29</sup> Registration in these open registers is connected to the practice of flying a flag of convenience.

<sup>30</sup> Falkanger, *Introduction to Maritime Law*, pp.51-54.

<sup>31</sup> GCHS, article 5 and UNCLOS article 91.

<sup>32</sup> Özçayır, *Port State Control*, p. 17.

<sup>33</sup> UNCLOS article 91 (2) and GCHS article 5 (2).

<sup>34</sup> *The Merritt*, 84 U.S. 582, 1873, p. 586.

<sup>35</sup> Tiberg, *Svensk sjörätt- fartyget*, p. 10.

<sup>36</sup> [www.eu-upplysningen.se](http://www.eu-upplysningen.se) (2007-10-19, 14.32).



### 2.3.2 The right of establishment

One of the main objectives of the EU is to create an internal market characterized by the abolition of obstacles to free movement of goods, persons, services and capital. This goal is to be fulfilled by implementing common policies or activities throughout the EC.<sup>37</sup>

Due to the purpose to create a common market, one of the most fundamental principles of EC law is to ensure the right of establishment in the member States. This principle, which has been codified in article 43 of the Treaty establishing the European Community (EC Treaty), implies the right to take up and pursue activities as a self-employed person as well as to set up and manage undertakings in member States under the conditions laid down for its own nationals by the law of the country where such establishment is effected.<sup>38</sup>

Consequently natural persons or legal persons<sup>39</sup> within the EC may establish a business in any other member State in the EC without being subjected to discrimination. Furthermore article 43 of the EC Treaty has direct effect which means that both natural and legal persons can enforce the principle in the national courts of the member States.<sup>40</sup>

### 2.3.3 Nationality, flag, registration and documentation

Initially it should be noted that there are no specific EC rules on nationality, flag, registration or documentation of ships. Instead, the general rules and regulations of EC law are applicable *mutatis mutandis*.<sup>41</sup> This has been established in a judgement by the European Court of Justice (ECJ), where the court found that the principle of right of establishment is applicable in the context of sea transport.<sup>42</sup>

Due to that EC regulation lacks specific rules covering ship registration, International Conventions signed and ratified by member States are applicable according to EC law as long as these conventions do not conflict with the rules given in the EC Treaty.<sup>43</sup>

The supremacy of EC law has been maintained in many different judgements by the ECJ. In the *Factortame*<sup>44</sup> case, where one of the disputed questions was whether British conditions set for ship registration in the British Vessel Registry were discriminating according to EC regulation, the ECJ stated that “*it is for the member States to determine, in accordance with the general rules of International law, the conditions which must be fulfilled in order for a*

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<sup>37</sup> Articles 2 and 3 of the EC Treaty.

<sup>38</sup> There are four exceptions to the right of establishment given in articles 45 and 46 of the EC Treaty. These are exercise of official authority, public policy, public security and public health.

<sup>39</sup> If certain requirements are fulfilled all legal persons with a profit-making purpose are to be treated as natural persons according to article 48 of the EC Treaty. The requirements that need to be fulfilled are that the legal person has its registered office, central administration or principal place of business within the EC and that it has been constituted under the civil or commercial law of the State where the establishment is to be effected.

<sup>40</sup> *Van Gend en Loos v. Nederlandse Administratie der Belastingen (Case 26/62)*; [1963] ECR I.

<sup>41</sup> Powers, *EC Shipping Law*, p. 181.

<sup>42</sup> *Commission v. France (Case 167/73)*; [1974] E.C.R. 359.

<sup>43</sup> Xuereb, *Transport: The International and Comparative Law Quarterly*, p. 701 and European Parliament Report, Com. (86) 523 Final.

<sup>44</sup> *The Queen v. Secretary of State, ex parte Factortame Ltd. (Case 221/89)*; (No. 2) [1991] E.C.R. I-3905.

vessel to be registered in their registers and grant the right to fly their flag, in exercising that power, the member States must comply with the rules of Community law”.<sup>45</sup>

In the same judgement the ECJ also concluded that once an undertaking fulfils the establishment criteria of a given member State and becomes an undertaking in that State, it has the right under the EC Treaty to establish in any other member State and thus have access to that member State’s ship register.<sup>46</sup>

## 2.4 Swedish domestic law

### 2.4.1 Introduction

Maritime law has had a long tradition in Sweden. Ever since 1667 the country has had rules and regulations concerning this area of law.<sup>47</sup> Today, the most essential rules governing ship registration in the Swedish Vessel Register can be found in the SMC, the Swedish registration Ordinance (SRO) and the Ordinance with Instructions for the Shipping Registry (OISR). Although it is mainly Swedish legal sources that give guidance when presenting the current SMC rules, Scandinavian case law, reported in three Nordiske domme i sjöfartsanliggander (NDs), will also play a significant role due to the almost identical Maritime Codes in the Scandinavian countries.

### 2.4.2 Nationality

The duty to register a ship is to a large extent based on the ship’s nationality. If more than half of the ownership of a ship lies with Swedish nationals or Swedish legal persons,<sup>48</sup> the ship is considered Swedish according to the main rule given in SMC 1:1 and thus has the right to fly a Swedish flag. Registration of a Swedish vessel according to this rule is mandatory according to Swedish domestic law.<sup>49</sup> Consequently the owners have a duty to register the vessel in the Swedish Vessel Register’s section for ships if it fulfils the ownership requirements given in SMC 1:1, first paragraph.

A vessel can however also be considered Swedish under other circumstances. Firstly, it can be regarded as Swedish, according to SMC 1:1 a, if it has been entered into the Vessel Register in the section for ships.<sup>50</sup> Such registration is not mandatory by law and is given in the second paragraph of SMC 2:1. If a shipowner wishes so, a ship can be registered in Sweden if the

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<sup>45</sup> *The Queen v. Secretary of State, ex parte Factortame Ltd. (Case 221/89); (No. 2) [1991] E.C.R. I-3905.*

<sup>46</sup> Greaves, *EC Transport Law*, p. 83.

<sup>47</sup> [www.sjofartsverket.se](http://www.sjofartsverket.se) (2007-10-22, 11.19).

<sup>48</sup> According to SMC 1:1 there are two exceptions from this rule. For more information see SMC 1:1 second paragraph.

It should be noted that this paragraph is based on the principle of freedom of establishment given in article 43 of the EC Treaty and should hence be interpreted according to the rules of the EC.

The other exception deals with pleasure boats.

<sup>49</sup> SMC 2:1 and Rune, *Rätt till skepp*, p. 39.

<sup>50</sup> A condition for the implementation of SMC 1:1a and 2:1 is that the vessel fulfils the conditions defining a ship given in SMC 1:2.

vessel is part of an economic activity<sup>51</sup> in Sweden, conducted and controlled from here and also owned, to at least the extent of one half, by physical persons who are nationals of a country within the European Economic Area (EEA). The shipowner can also be a legal person, established according to the legislation of a country in the EEA, which has its seat, head office or principal operation within the same area.<sup>52</sup>

Secondly, a ship can also be considered Swedish if either the Government or the SMA grants the vessel the right of nationality. According to SMC 1:1 b, such consent may only be given if the operation of the vessel is essentially under Swedish control or the owner has his permanent residence in the country.

### 2.4.3 Flag

The right to fly a Swedish flag is given at the same time a vessel has fulfilled the conditions of nationality given in SMC 1:1-1b. But the only time a Swedish ship has a duty to fly the flag is when a Swedish warship is in sight or when the vessel is in a restricted area.<sup>53</sup> In other circumstances there is no general obligation to fly the flag. Swedish rules that penalize vessels that fly a flag without authorization are non-existent.<sup>54</sup>

### 2.4.4 Registration

Registration of ships that are ready-built and considered Swedish according to SMC 1:1 and 1:1b are mandatory according to Swedish domestic law.<sup>55</sup> The second paragraph of SMC 2:1 however opens up a possibility to register ships that do not have Swedish ownership predominance.<sup>56</sup> Registration according to this section is nevertheless voluntary for the vessel owners.

The duty to register lies with the physical or legal person who is the owner of the ship at the time the obligation to register the vessel enters. The ownership must however be confirmed through derivation to the manufacturer if it is to be registered in the Swedish Vessel Register. If the ship has been acquired from abroad and registered in a foreign register, then derivation to the owner named in that register is proof enough according to SMC 2:14.<sup>57</sup>

According to SMC 2:2, the owner of a ship that has a duty to register the vessel, must do so within one month calculated from the time the ownership of the vessel was passed on to

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<sup>51</sup> This includes all business activity which have the purpose of profit-making. It is not relevant if the business is making an actual profit or not. See Prop. 1996/97: 130 p. 53.

<sup>52</sup> It should be noted that there is another exception to the rule of Swedish predominance as a requirement for registration. This exception is given in SMC 2:1 second paragraph, and deals with leisure boats. This subject however falls outside the scope of this essay and will therefore not be examined any further. For more information see, Tiberg, *Svensk sjörätt- fartyget*, p. 15.

<sup>53</sup> Navigational Proclamation (NP) 4:1-2.

<sup>54</sup> Tiberg, *Svensk sjörätt- fartyget*, p. 15.

<sup>55</sup> SMC 2:1 first paragraph.

<sup>56</sup> As explained above this rule only applies to vessels that are part of an economic activity in Sweden, conducted and controlled from here and also owned, to at least the extent of one half, by physical or legal persons who are nationals of a country within the EEA. The rule also applies to pleasure boats.

For more detailed information see section 2.3.1 and footnote 19 of the essay.

<sup>57</sup> Rune, *Rätt till skepp*, p. 41.

him.<sup>58</sup> If a ship has become Swedish only through transfer of a share, then the time calculation starts from the date the transaction was completed. Has the ship instead become Swedish through a change of the owner's citizenship, then the time is calculated from the date the owner was granted a Swedish nationality.<sup>59</sup> A foreign ship that has obtained Swedish nationality through for example purchase may not be registered in the Swedish Vessel Register until it has been proven that the ship is no longer registered in another country.<sup>60</sup>

A ship that has been acquired with the condition of reservation of title or a condition equivalent to such reservation must apply for registration as soon as this reservation has ceased to apply.<sup>61</sup> It should be noted that it is without significance whether a ship has become Swedish permanently or only for a transitory stage. The duty to register a vessel applies no matter how long the ship withholds a certain nationality.<sup>62</sup>

The rule of mandatory registration within one month is obviously not applicable to those ships that do not have a duty to acquire registration according to SMC 2:1.<sup>63</sup>

## 2.4.5 Inscription of title

The duty to register a ship is closely followed by the duty of inscription of title. Registration requires that all matters concerning the ownership questions of a vessel have been clarified. Without such clarification it cannot undoubtedly be established whether the ship has a Swedish nationality and whether the rules of mandatory registration are applicable or not. Even though inscription of title and registration can be separated technically, legally the two are interdependent according to SMC 2:3 and thus need to occur simultaneously. According to SMC 2:4 the time limit given for mandatory inscription<sup>64</sup> of title is the same as for mandatory registration as the two are supposed to correlate. Failure to inscribe will hence lead to the same outcomes as failure to register the ship.<sup>65</sup>

Due to that it is both of individual and public interest to have information about the ownership of ships accessible, every completed acquisition of a ship or a share in a ship that fulfils the conditions for obtaining a Swedish nationality, must be inscribed according to SMC 2:3. This includes both acquisitions through purchase, barter and gift transactions as well as through inheritance and division of property. However the estate of a deceased does not have such obligation until the ship is transferred to another.<sup>66</sup>

There are no specific demands on either the form or conditions of an acquisition when a vessel is transferred from one owner to another.<sup>67</sup> There are nevertheless two types of contract

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<sup>58</sup> According to SMC 2:20 (second paragraph) failure to register the ship will lead to an injunction from the Register Authority. Such an injunction may be sanctioned by a fine.

<sup>59</sup> Rune, *Rätt till skepp*, pp. 40-41.

<sup>60</sup> SMC 2:25.

<sup>61</sup> SMC 2:2.

<sup>62</sup> ND 1974 p. 456 and ND 1985 p. 10.

<sup>63</sup> Prop 1996/97: 130, p. 58.

<sup>64</sup> Voluntary inscription, as described below, does not have a time limit.

<sup>65</sup> Rune, *Rätt till skepp*, p. 45.

<sup>66</sup> There are other rules in the SMC that become applicable due to acquisition through inheritance and division of property, but these will not be discussed here. Tiberg, *Svensk sjörätt- fartyget*, p. 22.

<sup>67</sup> The buyer has an obligation to show some evidence to both validate the acquisition as well as to show that it is not blatantly void. See ND 1977 p. 10.

stipulations that are of importance when discussing ship acquisition and inscription of title. The first implies that the *completion* of an acquisition is dependent on a certain prerequisite in the contract and means that the transfer of ownership is delayed until the condition demanded is fulfilled.<sup>68</sup> In the SMC this condition is for example manifested as a reservation of title but can also take the form of a prohibition of the right of disposal.<sup>69</sup> The other stipulation involves conditions that affect the *existence* of the contract itself.<sup>70</sup> It is only the first type of stipulation that can be registered if the buyer wishes it. Such an inscription is of great importance since the buyer has the right to transfer his uncompleted acquisition to another.<sup>71</sup> The inscription will entail the conditions that are needed for the completion of the acquisition without cancelling the seller's inscription of title.

It should be noted that inscription of title becomes mandatory as soon as such stipulation ceases to exist due to the completion of the conditions in the contract.<sup>72</sup>

Moreover, the SMA has an obligation to inscribe any other conditions that restricts the transferee's right to transfer or mortgage the property according to his will.<sup>73</sup> The inscription acts as an inhibitor of good faith of a third party.<sup>74</sup>

#### 2.4.6 Issuance of documents

After the ship has been registered, the SMA will issue a Certificate of Nationality for the vessel. The certificate must contain information about the ship's name, nationality and registration mark, port of registry, construction year, tonnage and measurements.<sup>75</sup>

If an instant registration of the ship is not achievable, a temporary Certificate of Nationality may be issued. Such certificate is however only produced if it is necessary to avoid unconscionable intermission of the operation of a ship that has a duty to register or due to other special circumstances.<sup>76</sup>

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<sup>68</sup> This stipulation is called a "suspensivt villkor" in Swedish Domestic law and acts as a security for the seller until the buyer has fulfilled his part of the contract. The condition can for example take the form of a reservation of title or a prohibition of the right of disposal as these are not considered the same according to NJA 1974 p. 376. Both of these can thus be registered as an inscription of title according to SMC 2:4, paragraph 3.

It should also be noted that a discussion about the completion of the acquisition *only* becomes relevant in a purchase, barter or gift transaction.

<sup>69</sup> See SMC 2:4, paragraph 3.

<sup>70</sup> This stipulation is called a "resolutivt villkor" in Swedish domestic law.

<sup>71</sup> Also the second buyer has the right to transfer the acquisition and get an inscription of title.

<sup>72</sup> Rune, *Rätt till skepp*, p. 49.

<sup>73</sup> See SMC 2:27, second paragraph.

<sup>74</sup> Rune, *Rätt till skepp*, p. 57.

<sup>75</sup> SRO 6:1.

<sup>76</sup> SRO 6:8.

## 2.4.7 Deregistration

There are many various situations that lead to deregistration of a Swedish ship. The vessel can for example have been destroyed, disappeared at sea, no longer hold a Swedish nationality or even lose its characteristics as a ship as defined in the SMC. Even though a ship must be deregistered due to these circumstances given in SMC 2:6, there are some rules protecting different parties that prevents such deregistration.<sup>77</sup>

Partners in a Shipping Partnership always have the right to pre-empt any share of a vessel transferred to an outsider or pre-empt a co-partner that has requested or caused dissolution of the partnership.<sup>78</sup> These pre-emption rules prevent deregistration according to SMC 2:7 even if the conditions in SMC 2:6 have been fulfilled.

When a ship is registered the owner has the right to mortgage the vessel as a security for a creditor's claim. This is done by obtaining an inscription through an application to the Register Authority.<sup>79</sup> Due to the rule of law and protection of the creditors, a vessel that is subject to such mortgage cannot be deregistered according to SMC 2:6, until all creditors who have claims secured in the ship have given their written consent to the deregistration and returned their Deeds of Mortgage.<sup>80</sup> An exception to this rule is given for ships that due to modification have lost their characteristics as ships according to SMC. When this is the case, creditor consent is not necessary for deregistration. Furthermore the creditors are protected through the right of application for payment out of the property within one month from the time they were informed about the deregistration. Such creditors may apply for payment irrespective of if their claim is due or not.<sup>81</sup>

## 2.5 Some reflections regarding the legal aspects of ship registration

One aspect that has become very apparent to me after reviewing the legal aspects of registration is the very close connection that exists both between the different legal systems as well as between nationality, registration, flag and documentation within each legal system.

Even though the main focus of this thesis is the Swedish view on parallel registration of ships, the ECJ has nevertheless repeatedly maintained that member States in the EU must comply with the rules of Community law regardless of International Conventions or domestic regulations. Hence by entering the EU in 1995, Sweden has accepted the supremacy of EC law both before Domestic law and International Conventions.

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<sup>77</sup> Rune, *Rätt till skepp*, pp. 65-66.

<sup>78</sup> See SMC 5:13 and 5:16.

<sup>79</sup> See SMC 3:1.

<sup>80</sup> See SMC 2:7, third paragraph. A Deed of Mortgage that exists but has not been used to secure a claim must still be presented to the Vessel Register for deregistration of the ship. If the Deed of Mortgage cannot be presented it needs to be cancelled to obtain deregistration.

The lack of a creditor's consent will not result in a rejection of the application to deregister. The matter will only be put on ice until the situation has been resolved. This result is very important when a ship has been acquired by a foreigner who wishes to register the ship in a foreign register. In the case consent is not given, an entry into the section for ships will be made according to SMC 2:28. Tiberg, *Svensk sjörätt- fartyget*, p. 25.

<sup>81</sup> Rune, *Rätt till skepp*, p. 71.

Regardless of the evident hierarchy between EC, International and Domestic law in the area of sea transport, one must not forget that EC law lacks specific rules on nationality, flag registration and documentation of ships. This lack indicates that it is the International Conventions that play an important role in forming the Swedish rules in the area. Because as long as the International Conventions do not collide with the general principles of EC law, they provide a more specific guidance and thus affect the formation of Swedish maritime law to a greater extent. These connections between the different legal systems should not be forgotten when analysing dual registration.

Another interdependent relationship that has become obvious is the correlation between ship registration, nationality, flag and documentation. Even though each of these are theoretically separate topics, they cannot entirely be separated in reality.

As it has been mentioned above it is not the registration that determines the nationality of the vessel but the Swedish nationality that constitutes an obligation to register the ship according to SMC 2:1. Hence a ship can have a Swedish nationality before the registration and likewise a foreign nationality during the time it is registered.<sup>82</sup> But even though it is the nationality that constitutes an obligation to register the ship, the registration itself implies recognition of the nationality and evidence thereof.<sup>83</sup> Therefore the two cannot be separated.

A connection between registration, documentation and nationality is also existent. It is the registration that provides the foundation needed to issue documentation. Furthermore documentation provides another evidentiary measure to establish the nationality of a vessel.<sup>84</sup>

The link between ship nationality and flag is given in the SMC 1:1-1b where it is stated that the right to fly a Swedish flag is, as with nationality, based on different conditions given in those sections. Initially the Swedish flag does not decide the nationality of a vessel but is only a reminder of the right of a Swedish ship to outwardly mark its nationality.<sup>85</sup> International law however stipulates that ships have the nationality of the State whose flag they are entitled to fly.<sup>86</sup> When applying this article in UNCLOS it is clear that the flag State should be identical to the State that has registered the ship and that the two are inseparable.<sup>87</sup> In Swedish case law the Supreme Court has verified this assumption by equalising the terms 'flag State' and 'State of registration'.<sup>88</sup>

Even though it is important to know the fundamental differences between nationality, registration and flag it is impossible to separate the three when examining the legal outcomes that are bound to them. It should on the contrary be clear that when discussing the different purposes of registration, the function of both nationality and flag must sometimes also be included in the assessment. In conclusion the correlations between nationality, flag, registration and documentation indicate that the four cannot and should not always be separated. This is also of great importance in the assessment of dual registration below.

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<sup>82</sup> Prop. 1973:42, p. 298.

<sup>83</sup> This is given in chapter 6 of the SRO.

<sup>84</sup> SOU 1970:74, p. 72.

<sup>85</sup> Ds 1996:60, p. 49.

<sup>86</sup> UNCLOS article 91.

<sup>87</sup> Ds 1996:60, p. 49.

<sup>88</sup> NJA 1987 p. 884, p. 906.

Finally I would like to mention the provisions given in article 6 (2) of the GCHS and article 92 (2) of the UNCLOS which prohibit ships against flying two flags. Because even though this review has made many things very obvious and provided a good background to the main problem of this thesis, it has also led some confusion. One of the questions that remain very unclear is:

How can parallel-registration be lawful when there is a general prohibition against ships flying two different flags?



## 3. THE PURPOSES OF REGISTRATION

### 3.1 Introduction

After having examined the legal aspects of registration, the next step is to understand *why* vessel registration is a requisite. The purpose of this part of the essay is to grasp the reasons behind registration and to comprehend the complications that arise when a ship is simultaneously registered in two different countries.

Although there are many various explanations to why ships are registered, it can by way of introduction be necessary to divide the purposes of registration into public and private law functions. The significance of the two categories in relation to a vessel is best described by Coles:

*“If it may be said that the public law sees the ship in the dynamic sense of a floating community carrying with it the sovereignty of the State whose flag it flies, private law sees the ship in the static sense of a chattel, an item of movable property over which one or more persons may have rights which the law considers worthy of protection.”<sup>89</sup>*

Due to that there is a difference between the public and private law functions of registration, the presentation below will continue making this distinction. Even though the thoughts behind the necessity of registration are quite similar in most States, Swedish domestic law will serve as an example when examining the outcomes of ship registration. In accordance with the discussion above<sup>90</sup> regarding the connection between nationality, flag and registration, it should be noticed that the three will not be distinguished more than necessary in the presentation below.

### 3.2 Public law functions

#### 3.2.1 Background

Public law is a general classification of law concerned with the political and sovereign capacity of a State. Most relevantly depicted to this case, it can be best described as a judicial system governing the relationship between a State and its citizens.<sup>91</sup>

The Public law functions of ship registration bestow the authorities with both certain rights and obligations. Through the registration a State confirms that a vessel has a certain nationality which for example affects the choice of jurisdiction and concurrently obligates

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<sup>89</sup> Coles & Ready, *Ship registration: Law and Practice*, p. 6.

<sup>90</sup> See section 3 of the essay.

<sup>91</sup> Oxford Dictionary of Law.

State protection of the ship.<sup>92</sup> For the shipowner the registration conveys a duty to act according to the rules and regulations of the State but also grants him the right to engage in certain activities.<sup>93</sup>

Some of the different public law functions of ship registration will be examined in this section of the thesis.

### 3.2.2 Jurisdiction and State obligations

After a ship has been registered in a State it is automatically subjected to both legislative and enforcement jurisdiction of that State. This principle was established in the *Lotus* case where the court affirmed that a ship on the high seas is not subjected to any other authority except the State where it is registered.<sup>94</sup> There are many State obligations that follow a Swedish registration. Some illustrative examples will be given below.

One of the main purposes of registration is flag State control. Accordingly the flag State must certify that the ship is operated and sustained in a way which diminishes risks to seafarers, the maritime environment and the cargo. The Swedish state must therefore take precautions to guarantee safety at sea with regards to construction, maintenance, seaworthiness, manning, labour conditions, crew training and prevention of both pollution and collisions.<sup>95</sup> In practice, this requirement is satisfied by constant inspections and certificate renewal by the Swedish Maritime Safety Inspectorate (SMSI) so vessels can meet the terms set out in International Conventions.<sup>96</sup>

Another State obligation due to registration is the duty to supply the ship with naval protection within Swedish territorial waters.<sup>97</sup> This means that protection can be given by use of arms but also by ensuring that all Swedish ships are furnished with documentation that maintains their nationality so for example the rights given to neutral countries can be utilized during time of war.<sup>98</sup> Diplomatic protection and consular assistance is also circumscribed to ships that are considered Swedish.<sup>99</sup>

Finally there should be a reference made to the State investigations of accidents that occur on sea. These investigations are foremost limited to mishaps within the Swedish territory. An accident that affects a Swedish ship must however still be investigated even if it happened abroad. The only limitation is that the investigation cannot interfere with Swedish international commitments or undertakings.<sup>100</sup>

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<sup>92</sup> Falkanger, Bull & Brautaset, *Scandinavian Maritime Law*, p. 55.

<sup>93</sup> Coles & Ready, *Ship registration: Law and Practice*, p. 6.

<sup>94</sup> *The Lotus (1927) PCIJ, Series A No. 10*, p. 25.

<sup>95</sup> UNCLOS article 94. Also see fartygssäkerhetslagen (1988:49) and fartygssäkerhetsförordningen (1988:594) for specific Swedish rules and regulations.

<sup>96</sup> UNCLOS article 217 and Özçayir, *Port State Control*, p. 22.

<sup>97</sup> Förordning (1982:756) om försvarsmaktens ingripanden vid kränkningar av Sveriges territorium under fred och neutralitet m m, 3 §.

<sup>98</sup> Kungörelse (1904:12 s. 3) angående vad till svenska handelns och sjöfartens betryggande under krig mellan främmande makter bör iakttas m.m, 1 §.

<sup>99</sup> The obligations of legations and consulates are more specifically given in förordning (1991:1379) om handläggning av sjöfartsärenden vid utlandsmyndigheterna.

<sup>100</sup> Lag (1990:712) om undersökning av olyckor, 4 § and Ds 1996:60, p. 30.

### 3.2.3 Jurisdiction and its effects on registered ships

An implication of State jurisdiction is that the rules and regulations of that State become applicable law as soon as the ship is registered. To be able to understand the extent of which this influences a ship some illustrative examples will be given below.<sup>101</sup>

As soon as a ship becomes Swedish the Swedish criminal and procedural laws become relevant.<sup>102</sup> Both the owner of the ship and the crew are obliged to pay taxes according to the Swedish law and hence the Swedish taxation rate.<sup>103</sup> Another consequence is that certain sections of the SMC become applicable. Examples that can be given are the rules concerning sequestration<sup>104</sup> and mandatory insurance for ships carrying oil as bulk cargo.<sup>105</sup> Rules and collective agreements covering terms of employment, working conditions and salary become dependent on the law of the State of registration.<sup>106</sup> The rules that become applicable on distraint also differ depending on if a ship is registered or not.

The registration does not only entail rules the ship must abide, but brings forth certain rights as well. Besides giving the crew, other personnel and passengers the right to vote in Swedish elections,<sup>107</sup> the registration also gives the right to fish on a commercial scale in Swedish territorial waters.<sup>108</sup> Another positive aspect is that Swedish ships transporting fish into Sweden, which has been captured by a Swedish fishing vessel, do not require an import license.<sup>109</sup>

## 3.3 Private law functions

### 3.3.1 Background

Private law is a branch of the judicial system that regulates, enforces and governs relationships between individuals, associations and corporate bodies. It includes components such as contract and property law.<sup>110</sup>

The Private law functions of ship registration entail proof of title for the owner and protection of title and preservation of priorities for persons with securities. Registration also provides protection for third parties and gives the right to the name of the ship.<sup>111</sup>

Some of the different private law functions of ship registration will be examined in this section of the essay.

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<sup>101</sup> It should be noticed that the examples given are only a selected few chosen to provide a better understanding of the situation. This presentation is not complete.

<sup>102</sup> UNCLOS article 97, brottsbalk (1962:700) 2:2 and 2:3 (1) and rättegångsbalk (1942:740) 10:1 and 19:1-2.

<sup>103</sup> Ds 1996:60, p. 27.

<sup>104</sup> SMC 4:1.

<sup>105</sup> SMC 10:12.

<sup>106</sup> Regulation (EEC) no 1408/71, articles 13-14 and sjömanslagen (1973:282).

<sup>107</sup> Vallagen (2005:837) 1:4, 7:11 and folkomröstningslagen (1979:369) 10 §.

<sup>108</sup> Fiskeriverkets föreskrifter om kontroll på fiskets område (FIFS 1995:23), 12 §.

<sup>109</sup> Förordning (1984:53) om import- och exportreglering, 6 §.

<sup>110</sup> Oxford Dictionary of Law.

<sup>111</sup> Coles & Ready, *Ship Registration: Law and Practice*, p. 7.

### 3.3.2 Proof of title for owner

According to Swedish domestic law title to a ship is inscribed, not registered. As it has been mentioned earlier, registration and inscription can however only be separated technically. Legally they are interdependent and thus need to occur simultaneously according to SMC 2:3. Inscription of title can therefore be considered a result of registration. Consequently the purposes of such inscription are important when analyzing the topic of this thesis and will therefore be examined below.

Initially it should be noticed that inscription of title does not constitute substantive law.<sup>112</sup> Case law references show that although inscription can be *regarded* as strong evidence, it can never be considered an actual proof of title. This was concluded both in *Reg v Bjornsen*<sup>113</sup> and in *The Bineta*<sup>114</sup> case. As a principal rule, the SMC therefore allows information to be tried notwithstanding registration or inscription of title.<sup>115</sup>

This principal rule is however not without exception. When a ship is transferred<sup>116</sup> from one owner to another, the person who has acquired title and inscribed this will gain protection against the transferor's creditors. This according to the so called principle of inscription laid down in SMC 2:9.<sup>117</sup> The acquirer will be given protection from the time he has applied for inscription, under the assumption that the application actually leads to an inscription.<sup>118</sup> This arrangement has many advantages. Besides protecting the new owner from the transferor's creditors, it also results in a certain level of publicity which is beneficial for the creditors as they are informed about the acquisition. Inscription of title also helps to prevent fictitious transactions as it obligates the new owner to pay stamp tax.<sup>119</sup>

It should also be mentioned that an inscription of title registered in a foreign country may be acknowledged according to Swedish law if certain conditions have been satisfied.<sup>120</sup>

Another issue that may arise when a ship is acquired is that the transferor may have not been *entitled* to transfer the ship. This can be due to a reservation of title or judicial deficiencies established in the transferors own acquisition or detected earlier in the purchase chain. The

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<sup>112</sup> Prop 1973:42, p. 242.

<sup>113</sup> *Reg v Bjornsen (1865) 12 TR 473.*

<sup>114</sup> *The Bineta (1966) 2 Lloyd's Rep. 409.*

<sup>115</sup> SMC 2:8.

<sup>116</sup> This irrespective of if the entire ship or only a part of it is transferred. It is also without regard if there is a reservation of title. The new owner is still protected against the creditors of the previous owner as it is described above. It should however be noticed that protection from the creditors is only given if the ship is acquired through purchase, barter or gift transaction and not in any other cases.

<sup>117</sup> Acquisitions through distress sales give the new owner protection already through the sales contract. Evidently the inscription does not cancel mortgages or maritime liens. It does not either protect the new owner against a distraint that was applied for before the inscription application. Håstad, *Sakrätt avseende lös egendom*, p. 250.

<sup>118</sup> There are discussions in the doctrine about whether the creditors of the new owner can lay claim to the vessel *before* an inscription of title has been made. This question has not been answered in the legislation. There are however some who believe that such claim may be made *after* the creditors of the transferor have been paid.

It is also debatable whether the new owner only gains protection against the creditors of the transferor or if he also is protected against the creditors of previous owners as soon as he inscribes his title to the ship. This problem has not been resolved. Because this part of the essay is only suppose to illustrate the functions of registration and inscription, this topic will not be examined any further. For more information see Rune, *Rätt till skepp*, pp. 77-79.

<sup>119</sup> Rune, *Rätt till skepp*, p. 77.

<sup>120</sup> SMC 2:14.

transferor may also have *lost* the right to transfer the vessel because an already finalized transfer to a third party. In all these cases the acquirer is protected if it can be shown that he has applied for inscription of title while in good faith.<sup>121</sup> This means that the transferor's title to the ship must have been inscribed and unchallenged at the time the ship was acquired. In the case the transferor is the true owner but does not have the right to transfer the ship due to a reservation of title, the acquirer can only claim good faith if the transferor's title to the vessel was inscribed without an entry describing such reservation.<sup>122</sup>

This use of inscription of title also provides safety for the new owner. Based on his good faith and lack of information, the acquirer must be considered the party with least fault in such situations which makes it reasonable to provide him with most protection. Economic theory also suggests that protection of an acquirer protects the turnover which maximises both the advantages and the profits in society.<sup>123</sup>

It should also be mentioned that the person that has inscribed title to the ship is furthermore the only one who may inscribe a hypothec in the property and affect such mortgage by delivering the Deed of Mortgage as a pledge for a claim.<sup>124</sup> It is this person who also has the right to engage in legal proceedings concerning the ship due to his inscription.<sup>125</sup> The reason for this construction is to prevent fraud as well as to avoid unnecessary legal proceedings that create needless costs for society.

### 3.3.3 Proof of title for persons with security

As soon as a ship is registered the owner may inscribe a hypothec in the vessel and affect the mortgage by delivering the Deed of Mortgage as a pledge for a claim.<sup>126</sup> If the Deed is in the possession of a third party, then the pledge is made valid when this party has been notified of the pledge. The Deed of Mortgage is not the bearer of the pledge but only represents the value of the inscribed hypothec.<sup>127</sup>

If a pledge is to be considered legally conclusive, then two separate conditions need to be fulfilled. Firstly the person making the inscription must be the true owner of the vessel and have an unlimited right to dispose over the property. He cannot therefore have his acquisition challenged by another, be a part-owner and apply for inscription alone or have acquired the ship with a reservation of title.<sup>128</sup>

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<sup>121</sup> Good faith means that the transferee neither knew nor ought to have known that the transferor was not the true owner. SMC 2:10.

<sup>122</sup> There are some circumstances a good faith acquisition is not valid. These circumstances are described in the second and third paragraphs of SMC 2:10. Good faith of the acquirer also cancels sequestration and distraint applications that are made against the transferor. Mortgages are however not cancelled.

There are also special rules that apply if there is more than one transferor or when multiple transfers are made through succession. Håstad, *Sakrätt avseende lös egendom*, pp. 74-75.

<sup>123</sup> Dahlman, Glader & Reidhav, *Rättsekonomi. En introduktion*, p. 14

<sup>124</sup> SMC 3:1-2.

<sup>125</sup> Rune, *Rätt till skepp*, pp. 86-88.

<sup>126</sup> SMC 3:1-2 and Håstad, *Sakrätt avseende lös egendom*, p. 301.

<sup>127</sup> Rune, *Rätt till skepp*, pp. 91-95.

<sup>128</sup> If there are several owners, then they must jointly apply for inscription of the hypothec and then pledge it for a claim. A ship transfer with a reservation of title entails that both the new and old owner must take part in the application for inscribing and pledging the ship.

Secondly the owner must have applied for inscription of title and through this gained protection against the transferor's creditors.<sup>129</sup> These two requirements act as safety measures for the new creditors. Because even though a pledge that has been made by the wrong owner or the right owner bound by a reservation of title is initially ineffective,<sup>130</sup> it gains validity if the creditor was in good faith at the time the mortgage was effected. Good faith is attained if the mortgager's title was inscribed, or became so inscribed upon application made before the mortgage was affected and if no entry had been made in the register mentioning the reservation of title.<sup>131</sup> If the Deed of Mortgage is in the possession of a third party, then the creditors' good faith must extend until the time the pledge becomes valid through the notice.<sup>132</sup>

In addition there are regulations that allow a pledge registered in a foreign country to be acknowledged according to Swedish law. For such recognition certain requirements need to be satisfied.<sup>133</sup>

The registration also has a litigatory function which is put into effect when a creditor seeks to enforce a mortgage. In such a case a claim can only be brought against the person or corporate body whose title of the ship was last inscribed in the register.<sup>134</sup>

These methods of utilizing the Vessel Register help to create a safe environment for business and financing. The inscription of title lowers the procedural costs since legitimate claims cannot be brought against any other person than the one registered as the owner. By also creating a system that allows validation of a pledge only through a simple control of the Vessel Register, the legislator ensures a balance which lowers the risks of the financier without compromising the legal position of the owner. These solutions are important as they by means of clarification and simplicity facilitate obtaining loans against security.

Finally, the holder of the Deed of Mortgage can apply for a registration of his possession of the document and thereby publicize his claim.<sup>135</sup> The registration thus provides valuable information for other players in the market that are interested in the ship in one way or another. It also constitutes as more tangible evidence of the creditor's proof of title for his security.

### **3.3.4 Preservation of priorities between persons holding securities**

Another function of the Vessel Register is the preservation of priorities between persons holding security. When a hypothec is registered the principal rule is that priority in relation to other hypothecs is given in the order of which inscription of respective hypothec was applied for. If not otherwise demanded by the mortgager, inscriptions that have been applied for on the same day will be given equal rights.<sup>136</sup>

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<sup>129</sup> SMC 3:2.

<sup>130</sup> SMC 3:7-8.

<sup>131</sup> SMC 3:9 and Rune, *Rätt till skepp*, pp. 98-99.

<sup>132</sup> In cases where a pledge competes with sequestration or distraint other rules become applicable and decide when and how the good faith of the creditor must have been attained. For more information see Rune, *Rätt till skepp*, pp. 100-101.

<sup>133</sup> SMC 3:19-21.

<sup>134</sup> SMC 2:11.

<sup>135</sup> SMC 3:33.

<sup>136</sup> SMC 3:12-13 and 3:27 and Rune, *Rätt till skepp*, p. 140.

The purpose of registration in this case is to provide clarity for the creditors as well as information needed to assess the value of each claim in the ship.

### **3.3.5 Protection of third parties**

There may be occasions when the owner of a vessel is liable for certain loss or damage. Therefore it is crucial to be able to confirm the owner's identity. Thus the register supplies valuable information to third parties during events when the owner needs to be found.

In certain circumstances such as when the shipowner is being sued or when bankruptcy or arrest of the ship becomes reality, an entry into the Vessel Register's section for ship must be made according to SMC 2:28. This mandatory rule has the purpose of informing creditors and other third parties.<sup>137</sup>

The registration also implies a simplification of matters when a person is trying to establish superior title to the ship. In such a case the law provides that the claim should primarily be brought against the person or corporate body whose application of inscription of title is more recent.<sup>138</sup> If it has been noted in the Vessel Register that a dispute concerning title is existent, then action may also be brought against an alleged owner in possession of the ship.<sup>139</sup>

Registration of a shipping partnership leads to important consequences for the partners. By reason of such registration the liability between the partners is divided instead of being joint and several.<sup>140</sup> This presents a meaningful difference since joint and several liability means that one partner alone can be claimed for the entire debt of the partnership, risking not being compensated by the others due to their insolvency.

### **3.3.6 Right to the name of the ship**

Finally SMC 2:5 provides an opportunity to reserve a ship name if it differs distinctly from other ship names in the section for ships of the Vessel Register. This regulation provides a potential trademark protection.

## **3.4 Some reflections regarding the purposes of registration**

Due to that there seem to be almost infinite functions, involving almost infinite parties, connected to ship registration, it is easy to comprehend the importance of upholding these functions. Assuming that bareboat registration has not been regulated domestically or between the States involved, the result concerning for example flag State control will be dual inspections. This will not only be burdensome for the shipowner and the charterer but also constitute a problem for the two States since the results from their inspections are not likely to be the same.

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<sup>137</sup> Ds 1996:60, p. 40.

<sup>138</sup> SMC 2:11.

<sup>139</sup> SMC 2:11 and Ds 1996:60, p. 39.

<sup>140</sup> SMC 5:1.

When it comes to private law matters, unregulated parallel registration will undermine the rights of the parties that are based on the underlying registration because these are not secured in the State of the bareboat registry. Having all the different private law functions of registration in mind, bareboat registration will thus lead to conflicts in regards to the owner, the bareboat charterer, third parties and certainly the different creditors involved.

After having reviewed the different purposes of ship registration it is therefore clear that dual registration of a vessel will undoubtedly lead to complications as long as the different functions connected to ship registration are not divided between the two States involved. Admittedly such a division may not be optimal since it will result in States losing control over some legal areas that are linked to registration of a vessel. Yet it is necessary both for practical and economical reasons as well as for providing sufficient protection and foreseeability for the parties involved.



## PART II

### 4. PARALLEL-REGISTRATION OF SHIPS

#### 4.1 Introduction

One of the most fundamental rules concerning ship registration is that a ship can only be registered in *one* country at a time. As it has been shown above a ship is often registered in a country best representing its nationality which is often based on the ownership structure of the vessel.

In certain circumstances however, a ship can also be registered in a second State. So called *bareboat-registration* implies that a ship that has already been registered in one State can *simultaneously be registered in another*.

Because of the lack of regulation in bilateral or multilateral Conventions, parallel-registration is entirely dependent on the compatibility of the legal systems of the two States involved.<sup>141</sup> But when the dual-registration involves a State such as Sweden that does not even address the problems of bareboat-registration in its legislation there cannot be any compatibility. Therefore parallel-registration of a Swedish ship results in problems that cannot be solved by the application of Swedish law.

To be able to understand the magnitude of this problem it is necessary to comprehend parallel-registration itself, why bareboat registration occurs, the different problems that are the consequence of dual registration and also the different legal aspects according to International, European and Domestic law. The purpose of this section is to understand parallel-registration and to provide a background to the discussion about the future of parallel-registration in Sweden.

Since bareboat-registration is dual or parallel-registration in a sense, these concepts will be used interchangeably throughout the rest of the thesis.

#### 4.2 The main features of a Bareboat Charter

One absolute condition for a ship to be eligible for a bareboat-registration is that the vessel is operated under a bareboat charterparty. Such charterparty is characterized by the owner passing over the possession and the control of the ship to the charterer.<sup>142</sup> According to the provisions of such a charter contract, the charterer leases the hull of the ship and takes control over both the nautical and commercial operation. Because it is the charterer that becomes responsible for the manning and equipping of the vessel and decides where and when to sail, he will be regarded as the “owner pro tempore” for the duration of the charter. This means

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<sup>141</sup> Coles & Ready, *Ship registration: Law and Practice*, p. 35.

<sup>142</sup> Davis, *Bareboat Charters*, p. 1 and see BARECON 2001, part II, clause 10 (a)-(b).

that he becomes liable for all the damages the actual owner would have been legally responsible for according to for example the SMC.<sup>143</sup>

A bareboat charter is usually advantageous for a charterer whom does not have the possibility to buy a ship but still wishes to have as much control over the ship as possible. A bareboat charterparty does not only facilitate this but also gives foreign charterers the opportunity to operate the vessel under the flag of a State other than the State it was primarily registered in during the time of the charter.<sup>144</sup>

When discussing bareboat registration it is important to make a distinction between bareboat chartering-in and bareboat chartering-out of vessels. While bareboat chartering-in of a ship implies registration of an already registered ship in a bareboat-register without the vessel being deregistered from the underlying registry, bareboat chartering-out implies the right to operate the ship under a flag of a second State in connection with the vessel being registered in that State's bareboat-register. Thus, a ship is bareboat chartered-out of the State with the primary registration and bareboat chartered-in to the State where the vessel is bareboat-registered.

It is always important to make the distinction between bareboat chartering-in and out because the rules and regulations always differ due to which State holds the primary registration and which State the bareboat-registration that result in the parallel-registration.

### **4.3 Why parallel-registration?**

When a ship is bareboat chartered, bareboat registration of the ship is not mandatory, but a conscious choice that is made by the charterer. So even though the ship has already been registered by the owner, in for example the Swedish Vessel Register, the charterer nonetheless chooses to register the vessel in another State as well. As it has been discussed above the outcome of a dual-registration may be both negative and very complicated. So why does the charterer knowingly choose to bareboat register the ship while aware of all the problems that follow such registration?

The most apparent reason for a charterer to register a ship in a second State is increasing the profits either by lowering costs or by increasing revenue. When a ship is registered in a State it is subjected to the jurisdiction of that State. This means that a bareboat charterer can save money by choosing to register the ship in a second country with a more advantageous fiscal regime or lower registration and harbouring costs.<sup>145</sup> A second registration also implies increased profits due to the right to sail in cabotage traffic and the right to fish commercially in a desired State.<sup>146</sup>

Furthermore the charterer can save considerable sums by lowering the labour costs. Registration of a vessel in traditional maritime countries sometimes implies a restriction to

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<sup>143</sup> Falkanger, Bull & Brautaset, *Scandinavian Maritime Law*, p. 142.

<sup>144</sup> Davis, *Bareboat Charters*, p. 2. It should be noted that there is a distinction between a so called operating bareboat charter and a finance bareboat charter. This distinction will however not be considered further in this essay.

<sup>145</sup> Coles & Ready, *Ship registration: Law and Practice*, p. 43.

<sup>146</sup> Saeter, *Bareboat ("parallell-") registrering av skip- i jus og praksis*, p. 29.

employ crew members who are nationals of that country or at least forces the charterer to negotiate with local trade unions concerning the rate of pay, manning levels, conditions onboard and other benefits. But bareboat registration of the ship in a State where the labour costs are lower and the workers are not given the same level of protection means that the charterer can save vast amounts of money.<sup>147</sup> By for example employing Filipino officers with Filipino ratings instead of United Kingdom (UK) officers with UK ratings the charterer can save up to almost 56% of the crewing costs.<sup>148</sup>

Because it is the State of registration that certifies that the ship is operated and sustained in a way which diminishes risks to seafarers, the maritime environment and the cargo, a charterer who wishes to be subjected to somewhat lower standards of flag State control, may take advantage of the bareboat registration to avoid constant inspections. In countries with higher level of corruption it is easier to circumvent the requirements that are mandatory according to International Conventions and even domestic regulation.

Bareboat registration can also serve as a solution for charterers that wish to register their ship under a certain flag but are unable to do so due to very strict regulation concerning the ownership of the vessel. One example that can be given is a Brazilian bareboat charterer that wishes a Norwegian bareboat chartered-in ship to sale under Brazilian flag. Due to the fact that Brazil has very strict regulation when it comes to registration of foreign vessels; it is much easier to gain the same result by only bareboat registering the ship in Brazil.<sup>149</sup>

Another reason to bareboat register a vessel is the difficulty to raise funds for the acquisition of ships registered in third-world countries or State-controlled economies such as China. While a shipowner can save a lot of money by registering the ship in a State with low labour costs and advantageous fiscal regime, international banks are often hesitant to advance funds to enterprises established in such countries. This can be because a history of default in repayment and judiciary problems. But by registering the ship in a traditional maritime State, leasing the ship to a charterer who can bareboat register the ship in a second State and then retake the possession of the vessel by time chartering the ship back, the owner can both raise necessary funds and benefit from the lower costs due to the scheme.<sup>150</sup>

## 4.4 The legal aspects of parallel-registration

### 4.4.1 General remarks

Before reviewing the legal aspects of dual-registration, it is important to understand that the legal solutions concerning bareboat charter registration are by no means standardized among the variety of States that permit this practice. While some States demand cancellation of a vessel's underlying registration during the time of the bareboat registration, others choose to

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<sup>147</sup> Saeter, *Bareboat ("parallell-") registrering av skip- i jus og praksis*, p. 15.

<sup>148</sup> The numbers used in this calculation can be found in Coles & Ready, *Ship registration: Law and Practice*, p. 46. The percentage value that has been given as an example has been calculated by dividing the numbers given on the mentioned page by Coles & Ready (£ 279, 841 / £ 635,362 ≈ 0, 44 = 44 %, 100-44 = 56 %)

<sup>149</sup> Saeter, *Bareboat ("parallell-") registrering av skip- i jus og praksis*, p. 32.

<sup>150</sup> Saeter, *Bareboat ("parallell-") registrering av skip- i jus og praksis*, p. 26. This system also results in positive effects for the bareboat registration country since the country thereby ensures the training and employment of local seafarers, gains know-how and expands the national fleet without exhausting the country's own finances. See Coles & Ready, *Ship registration: Law and Practice*, p. 35.

have an operative primary registration. There are also differences concerning registration of mortgages, hypothecs and other liens that can be registered. When a ship is bareboat chartered-in, some States prefer to re-record these instruments whereas others consider the primary registration sufficient.<sup>151</sup>

Due to these differences it is impossible to present a fully complete presentation in this area as there may exist some legal solutions that are unique to specific States. To be able to portray a presentation that is as accurate as possible, this section will mainly concentrate on International law and briefly illuminate the rules and regulations of the European Union and Swedish domestic law. As there is a lack of detailed legislation in this area of law, both the BARECON 2001 and International Chamber of Commerce (ICC) Recommendations will supply some additional guidance.

## 4.4.2 International Conventions

### 4.4.2.1 Articles 11 and 12 in the UNCCRS

The most general provisions regarding bareboat registration of ships are primarily given in UNCCRS. Even though the Convention has not entered into force, it indicates the best solutions on how to regulate this second simultaneous registration in Domestic law.

According to article 12 (1) of the UNCCRS a State may grant registration and the right to fly its flag to a ship that has been bareboat chartered-in into that State. In such a case, the following information should to be recorded in the register of the flagging in State:

- the name of the owner or, if Domestic laws so provides, the bareboat charterer.<sup>152</sup>
- details of any mortgages or other similar charges.<sup>153</sup>
- personal particulars of the bareboat charterer.<sup>154</sup>

The UNCCRS also stipulates that the State of the bareboat charter registry should ensure that the right to fly the flag of the former State is suspended.<sup>155</sup> This is quite important since the vessel is to be subjected to the State of the bareboat registers' full jurisdiction and control.<sup>156</sup>

Finally it should be noted that the UNCCRS provides that the charterer will be regarded as the owner during the time of the charter. The reason for this is to open up the possibility to apply the requirements of the Convention to the charterer. This stipulation does not however provide any effect in the ownership rights other than stipulated in the charterparty.<sup>157</sup>

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<sup>151</sup> Coles & Ready, *Ship registration: Law and Practice*, p. 38.

<sup>152</sup> Articles 12 (1) and 11 (1) UNCCRS.

<sup>153</sup> Articles 12 (1) and 11 (2) (i) UNCCRS.

<sup>154</sup> Articles 12 (1) and 11 (2) (h) UNCCRS.

<sup>155</sup> Articles 12 (1) and 11 (5) UNCCRS.

<sup>156</sup> 12 (4) UNCCRS.

<sup>157</sup> Article 12 (3) UNCCRS.

#### 4.4.2.2 Bareboat registration and the prohibition against flying two flags

As mentioned earlier, a ship flying the flags of two different States is considered to have fallen outside the protection of both nationalities that it is claiming and is thus considered to be stateless.<sup>158</sup> Accordingly bareboat registration should simply be disregarded with the mere reference to this principle.<sup>159</sup> This is however not the case.

Due to the fact that the prohibition has been tied to the flag and thus the nationality of the ship, it is possible to have a ship registered in two different States simultaneously. When a ship is bareboat registered, it is only considered to have the nationality of the State of the bareboat registry. The fact that it is registered in two States at the same time does not have any significance in this matter. Thus bareboat registration does not contradict the prohibition and can therefore be considered lawful according to International law.<sup>160</sup>

#### 4.4.2.3 The relationship between the two States - Public law

When it comes to the relationship between the two States of registration, there are no specific binding regulations. Due to this there can be some discrepancy between the facts presented below and the relationship between two specific States of registration since each country can decide how to regulate this relationship itself. But based on established practice around the world and article 12 (4) of the UNCRCRS, it can be said that when a ship is bareboat registered the public law functions of the registration are usually transferred from the State of the underlying registration to the State of the bareboat registry. This means that the vessel is not usually bound by the public law rules and regulations of the primary State of registration or the Conventions that have been ratified by this State. But since it is up to the flagging-out State to set the conditions for approving a bareboat registration, this State can demand that certain rules continue to apply regardless of the fact that the public law functions are transferred upon the registration in the second State. One example on such a condition is that the rules on safety or manning of the State of the primary registration should continue to apply.<sup>161</sup>

Since the main principle in International law is that it is the State of the bareboat registry that has succeeded the jurisdiction and control of the ship, it is also this State that must ensure that the vessel complies with International rules and standards. So as long as the State of the underlying registration has not specifically set up certain conditions maintaining that certain public functions should remain the responsibility of that State, the State of the bareboat registration is fully responsible for all the matters concerning the public law functions of registration.

As there are no specific international rules in this area it becomes quintessential to ensure that the rules and regulations of the States involved are compatible.<sup>162</sup> Otherwise any incident affecting the vessel will imply enormous problems due to that the rules of the countries might

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<sup>158</sup> Article 6 (2) of the GCHS and article 92 (2) of the UNCLOS. For more information, see section 2.1.2 of this essay.

<sup>159</sup> This discrepancy has been mentioned earlier in section 2.4 of the essay.

<sup>160</sup> Saeter, *Bareboat ("parallell-") registrering av skip- i jus og praksis*, p. 39.

<sup>161</sup> Saeter, *Bareboat ("parallell-") registrering av skip- i jus og praksis*, pp. 42-43.

<sup>162</sup> Coles & Ready, *Ship registration: Law and Practice*, p. 38.

overlap or collide making for example distribution of liability very difficult. Hence it is important for the shipowner, the charterer and the States involved to verify that such compatibility exists.

#### 4.4.2.4 *The relationship between the two States - Private law*

When it comes to the private law functions of registration, the division of responsibility between the two States becomes more difficult. Initially however it can be said that the private law functions of registration remains with the State of the primary registration. This can be derived from article 12 (4) of the UNCCRS *e contrario*.

But despite this division, protection of creditor's interests sometimes requires the participation of the State of the bareboat registry. It is in such cases that the lack of international uniformity of rules and regulations concerning bareboat registration often instigate disturbances for all the different parties involved.

One of the most common problems connected to bareboat registration of vessels is fraudulent conversion. Even though bareboat registration does not provide the charterer with a proprietary right according to article 12 (3) (2) of the UNCCRS, the common practice to bareboat register the ship in name of the charterer may cause certain confusion for third parties.<sup>163</sup> Sometimes the ship is also registered under a different name which might add to this confusion.<sup>164</sup> As it has been mentioned above one of the primary purposes of registration is to identify the shipowner and inscribe his title to the ship. Thus by registering the ship in the name of the charterer there is an increased chance that a third party might mistake the charterer for the shipowner. This misconception will result in problems for both the shipowner and the creditors as it may jeopardize the rights of the creditors in certain situations.<sup>165</sup>

For creditors it is therefore of the utmost importance that the law applied by the court in the jurisdiction where their actions are heard is the law of the State of the primary registration. By not recognizing the law of the State of registration in the State of the bareboat registry, creditor protection is highly compromised since the security may not be enforceable.

To avoid third party conflicts it is also important that third parties are given notice of the legal ownership and the registered encumbrances since the enforceability of mortgages against these parties are dependent on their knowledge of such encumbrances.<sup>166</sup>

Hence when a ship is bareboat registered providing creditor protection, in terms of enforcing a security or preservation of priorities, may prove to be quite difficult if the States involved have not resolved these problems before the bareboat registration. Therefore there have been attempts made to provide protection of mortgages or other charges in the United Nations International Convention on Maritime Liens and Mortgages (UNICMLM), which has not yet

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<sup>163</sup> Bareboat registration of a ship in the name of the charterer is common practice in certain States which allow this type of registration. It should nonetheless be noted that this does not apply to all States with a bareboat register.

<sup>164</sup> Coles & Ready, *Ship registration: Law and Practice*, p. 40.

<sup>165</sup> Saeter, *Bareboat ("parallell-") registrering av skip- i jus og praksis*, p. 50.

<sup>166</sup> Coles & Ready, *Ship registration: Law and Practice*, pp. 40-41.

entered into force. According to article 16 (b) of the Convention it is the law of the State of the primary registration that should be determinative for the purpose of recognition of registered mortgages, hypothecs and other charges. The protection of the creditors is furthermore developed in article 16 (d) which requires the consent of the holders of all registered mortgages, hypothecs or charges.

The Convention makes an attempt to provide protection for third parties by presenting an obligation for the two States involved to make cross-references in their registers. While the State of the primary registration should make a notice of whose flag the vessel is permitted to fly temporarily, the State of the bareboat registry should instead name the State of the primary registration in their Vessel Register.<sup>167</sup>

Even though the Convention can be considered a positive step towards resolving the private law problems connected to bareboat registration, the UNICMLM does not provide a fully satisfactory solution on its own. This due to that important issues such as recordation of information in the State of the bareboat registry or consent from creditors to bareboat register the vessel, are not made mandatory but left to the scrutiny of each State.<sup>168</sup>

Another issue that should be mentioned is that both the State of the primary registration and the State of the bareboat registration are often given the right of requisition of a vessel during time of war as a result of the registration in both these countries. If the State of the bareboat registry decides to enforce its right of requisition on a ship that has been bareboat chartered-in into the country, this will lead to serious complications for the shipowner who might lose his ship entirely. In such cases the lack of compatibility between the regulations of the States involved will lead to great difficulty for the shipowner. It is therefore quite important that the risks of war are considered before leasing the vessel to a charterer who wants to operate the ship in a political unstable environment. By also ensuring that there is a right to cancel the bareboat charter in a clause in the charterparty and get the vessel redelivered in the event of outbreak of war, the shipowner can make an attempt to secure his proprietary right to the ship.<sup>169</sup>

#### 4.4.3 The rules and regulations of the European Union

Just as there are no specific EC rules on nationality, flag, registration or documentation of ships, there are neither any specific articles regulating bareboat registration of vessels. Therefore it is the general rules and regulations of EC law that are applicable in this area as well.<sup>170</sup>

The question regarding the conformity of parallel-registration of ships with EC law has only been illustrated in the so called *Sloman Neptun*<sup>171</sup> case. In the case, which concerned State aid, the ECJ was to determine whether it was compatible with the EC Treaty that foreign seamen, with no permanent abode or residence in Germany, were not covered by the German

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<sup>167</sup> Article 16 (c) UNICMLM.

<sup>168</sup> Coles & Ready, *Ship registration: Law and Practice*, pp. 41-42.

<sup>169</sup> Saeter, *Bareboat ("parallell-") registrering av skip- i jus og praksis*, p. 51. Such clause that is mentioned can be found in BARECON 2001, clause 26 (f).

<sup>170</sup> Powers, *EC Shipping Law*, p. 205.

<sup>171</sup> *Sloman Neptun Schiffahrts AG v. Seebetriebsrat Bodo Ziesmer der Sloman Neptun Schiffahrts AG (joined cases C-72/91 and C73/91) [1993]*.

collective agreements and consequently employed at lower home country rates and less favourable conditions than German seamen. “In essence, the ECJ held that a member State could have a parallel international register as well as its national register without conflicting with the EC Treaty rules on State aid.”<sup>172</sup>

Due to the ECJ:s judgement in the *Sloman Neptun* case and the lack of EC regulation, there cannot be any other conclusion than that International Conventions continue to serve as guidance also in this area. This provided as long as they do not conflict with the general principles of the EC Treaty.

#### **4.4.4 Swedish domestic law**

The SMC is based on the assumption that a ship can only possess one nationality and therefore does not regulate bareboat registration of ships. This can be concluded from SMC 1:1 and 2:25, which declare conditions that need to be fulfilled for a ship to be registered in the Swedish Vessel Register. Due to that article 1:1 requires that one half of the ownership of a ship lies with a Swedish entity and article 2:25 entails that a vessel must be deregistered from any foreign Vessel Register before being entered into the Swedish Vessel Register, parallel registration of ships is virtually impossible according to the SMC.

However, when a foreign ship is bareboat chartered-in into Sweden, the operation of the vessel is considered to be essentially under Swedish control, allowing the ship to be considered Swedish according to SMC 1:1b. Thus the SMA can grant the vessel the right of nationality, enabling the vessel to be registered in Sweden according to SMC 2:1. Yet it must be noticed that the bareboat chartered-in vessel is given this right to be registered according to SMC 2:1 only if it can be shown that it has been deregistered from the foreign Vessel Register according to SMC 2:25. Thus a bareboat charter-in agreement does not create a problem in Sweden since the bareboat chartered vessel is never registered in two countries simultaneously.<sup>173</sup>

When it comes to vessels that are bareboat chartered-out from Sweden, there is however a legal loophole. As it has been mentioned the SMC does not permit parallel registration. But when a Swedish ship has fulfilled the conditions given in SMC 2:1 and thus gotten registered in Sweden, it can only be deregistered from the Swedish Vessel Registry if one of the prerequisites in SMC 2:6 are fulfilled. Unfortunately dual registration does not constitute one of the grounds for deregistration according to this article, and hence a Swedish vessel that has been bareboat chartered-out from Sweden can in reality also be bareboat registered in a second country.

This situation creates a lot of difficulties since the Swedish legal system is not compatible with the State of the bareboat registry due to the lack of Swedish regulation in this matter. Consequently the SMA cannot set conditions for the ship being flagged-out to another State. This means that if a Swedish ship is bareboat chartered-out to another country and bareboat registered in that State, conflicts connected to the vessel can arise both in the areas of public and the private law.

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<sup>172</sup> Powers, *EC Shipping Law*, p. 206.

<sup>173</sup> According to Katrin Sundholm, the common practice at the SMA is therefore to register bareboat chartered-in vessels by virtue of these articles.



In reality, the Swedish Maritime Administration is often informed about a ship being bareboat registered in another country. In fact, the SMA often officially certifies such registrations as it is shown below:

*”At your request the Swedish Register of Shipping hereby confirms that the vessel (X) is registered in the Swedish Register of Ships with (Y) as the owner. According to the information from (Y) the vessel will be bareboat chartered to a Russian legal entity and registered in the Russian bareboat register. According to the Swedish Maritime Code a vessel shall be considered to be Swedish if it is owned to the extent of more than one half by a Swedish national or a Swedish legal entity, and a Swedish ship shall be registered in the Swedish Register of Ships.*

*Consequently the Register of Shipping can confirm that the registration in the Swedish Register of Ships will not be affected by a bareboat charter of X to a Russian legal entity or by the registration of the vessel in a Russian bareboat register.”<sup>174</sup>*

It is important to notice that the SMA maintains that the certificate only affirms the actual status of the ship in Sweden and does not imply an approval of the bareboat registration.<sup>175</sup> Yet the existence of such certificates can be interpreted as consent through established practice. By confirming that the “registration in the Swedish Register of Ships will not be affected” despite a registration in a foreign bareboat register, perhaps the SMA indirectly reserves a Swedish right to implement jurisdictional and legislative enforcement on the ship.

In practice the Swedish right of inspection is not affected by the bareboat registration and thus SMSI sometimes also inspect bareboat chartered-out vessels. However if a ship has been bareboat registered to a State that is geographically far from Sweden and also operated from that State, the SMSI is for practical reasons prevented from conducting these inspections. In such cases, the SMSI considers the State of the bareboat registry responsible for the flag state control and thus the liability that follows from failure to properly inspect a vessel.<sup>176</sup>

When it comes to applicable law in other areas connected to the ship, the SMA presuppose that it is the Swedish domestic law that is to be applied due to that dual registration is not permissible according to the SMC. However according to article 12 (4) of the UNCCRS the public law functions of the registration are usually transferred from the State of the underlying registration to the State of the bareboat registry when a vessel is bareboat registered. The flagging-out State may set other conditions before approving a bareboat registration, but since no such conditions are set when a Swedish ship is bareboat chartered-out from Sweden, nothing can be taken for granted.

As mentioned before, the private law functions usually remain with the State of the primary registration. As it has been shown above protection of creditor interests nevertheless

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<sup>174</sup> Swedish register of shipping, document no 20026-002.

<sup>175</sup> Interview with Katrin Sundholm.

<sup>176</sup> Interview with Kristina Nilsson.

sometimes requires the participation of the State of the bareboat registry. Due to the lack of legal compatibility between Sweden and the State of the bareboat registry, not even this can be considered evident. Thus the current SMA regime and the lack of Swedish legislation in this area impair most of the protection that is given to creditors in the Swedish legislation.

#### **4.4.5 ICC Recommendations for a legal and regulatory framework for bareboat charter registration**

The ICC is a worldwide business organization which has the principal aim to serve world business by promoting trade and investment, open markets for goods and services, and the free flow of capital. Even though the organization is a representative for businesses around the world it aims to represent a balanced view of all the interested parties in their different assessments.<sup>177</sup>

Due to that bareboat charters are frequently reoccurring type of contract in the maritime industry, bareboat registration becomes an international phenomenon which affects the maritime nations of the world. Even though it is necessary to review International Conventions, EC law and Swedish domestic law it must not be forgotten that it is non-state actors such as shipping companies and other businesses that become affected by the rules in reality and that it is these actors that have to apply the rules connected to bareboat registration on a day to day basis. Since the so called ICC recommendations channel the voices of such actors, these recommendations are equally important when trying to provide an overall picture of how the problems connected to bareboat registration should be solved.

The ICC recommendation for legal and regulatory frameworks of bareboat charter registration<sup>178</sup> was presented in 1988 after a conference where 144 representatives from 38 States participated.<sup>179</sup> In this recommendation the organization made an attempt to set up some guidelines, trying to harmonize the rules and regulations connected to bareboat registration of ships internationally. Due to that there are often problems concerning the protection of creditors when a ship is simultaneously registered in two different countries, ICC recommends that mortgages already registered in the underlying register should continue in full force and effect even though the vessel is bareboat chartered and registered in another State as well.<sup>180</sup> Furthermore mortgages created during the period of bareboat charter registration should be registered in the underlying registry as well.<sup>181</sup> When it comes to the jurisdictional issues, the ICC underlines that all mortgages mentioned should be governed exclusively by the laws of the State of the underlying registry.<sup>182</sup>

These recommendations have been used by BIMCO when setting up the provisions in BARECON 2001 presented below.<sup>183</sup>

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<sup>177</sup> [www.iccwbo.org](http://www.iccwbo.org) (2008-01-02, 10.21).

<sup>178</sup> ICC Recommendations for a Legal and Regulatory Framework for Bareboat Charter Registration

<sup>179</sup> [www.iccwbo.org](http://www.iccwbo.org) (2008-01-02, 10.21).

<sup>180</sup> ICC recommendations, 6 (a), 7 (a) and 13 (a).

<sup>181</sup> ICC recommendations, 7 (b) and 13 (b).

<sup>182</sup> ICC recommendations, 7 (c) and 13 (c).

<sup>183</sup> [www.bimco.org](http://www.bimco.org) (2008-01-04, 10.28).

#### 4.4.6 BARECON 2001

BARECON 2001 is an agreed document that has been created by BIMCO which is the world's principal organisation responsible for the development of maritime contracts. The purpose of BARECON 2001 is to serve as a balanced alternative for both shipowners and charterers when a ship is bareboat chartered.<sup>184</sup>

Due to the lack of regulation, bareboat charter conditions are often solely based on the contract between the different parties. Because BARECON 2001 is the most frequently used contract, it can be said that the contract creates international custom in this area.<sup>185</sup> To be able to present an overall picture of the legal aspects of ship registration, it is therefore necessary to review the BARECON stipulations concerning bareboat registration of ships.

The right for a charterer to change the flag of a vessel during the period of the Charter is initially introduced in sub-clause 10 (d) of BARECON 2001. The specific BARECON 2001 stipulations concerning bareboat registration given in PART V of the contract are however optional and only apply if this has been expressly agreed in PART I.<sup>186</sup>

One aspect that should be noticed is that BARECON 2001 normally provides the contracting parties with an alternative when it comes to the conditions concerning mortgages in the contract. When entering into a contract, the owner and the charter can thus choose between clause 12 (a) and its more severe counterpart 12 (b). Nevertheless when PART V of the BARECON 2001 is integrated into the charter party, clause 2 of that part automatically conveys the applicability of clause 12 (b). Unlike clause 12 (a), which only provides that the owner warrants that the mortgages have not and will not be effected without the prior consent of the charterer, clause 12 (b) additionally conveys an obligation for the charterer to get acquainted with the information concerning the mortgages, to comply with it and also to give the owner the information needed that enables him to comply.

The reason this stipulation comes into force when PART V of the BARECON 2001 is integrated into the charterparty, is that BARECON 2001 has recognised the problems with lack of protection for creditors when a vessel is bareboat registered. Because of this awareness, there has been an attempt made to increase the protection of the creditors by trying to divide the liability between the owners and the charters more evenly.<sup>187</sup>

Clause 3 of PART V states that, if the mortgagee requires it, the charterer has an obligation to direct the owner to re-register the vessel in the underlying registry if the owner defaults in the payment of any amounts due under the mortgage. Even though the mortgagee has not been given the right to direct the owner to re-register the vessel himself, this does not prevent the mortgagee from protecting his rights by signing a collateral agreement with the charterer.<sup>188</sup>

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<sup>184</sup> [www.bimco.org](http://www.bimco.org) (2008-01-04, 10.28).

<sup>185</sup> Saeter, *Bareboat ("parallell-") registrering av skip- i jus og praksis*, p. 39-40.

<sup>186</sup> BARECON 2001, PART I, BOX 43. Boxes 44 and 45 also need to be filled in.

<sup>187</sup> [www.bimco.org](http://www.bimco.org) (2008-01-04, 10.28).

<sup>188</sup> [www.bimco.org](http://www.bimco.org) (2008-01-04, 10.28).

#### 4.4.7 Case Law

Unfortunately there is no case law concerning bareboat registration of vessels either from international courts or courts in countries which allow parallel-registration.<sup>189</sup>

#### 4.5 Some reflections regarding parallel registration of ships

After having reviewed all the different aspects of parallel registration it has become clear that bareboat registration implies both positive and negative effects. On one hand such registration can entail lower costs, economic advantages and a good option for those who need to fly the flag of a certain State. It is also beneficial for shipowners who need to finance the acquisition of a ship that is going to be operated from a third world country.

On the other hand bareboat registration can entail lower standards of flag State control, worse labour conditions for workers and exploitation of fishing quotas as well. Without any legal compatibility it can also result in difficulties connected to both public and private law.

Since there are no binding conventions or specific EC rules in the area, regulating the requirements for bareboat registration has been left to the scrutiny of each State as long as the national legislation does not collide with the fundamental principles of the EC. Although guidance can also be found in the ICC recommendations and the provisions in BARECON 2001, which both recognize the importance of protecting creditors with mortgages, hypothecs and other charges, it is still up to each country to provide the conditions for allowing dual registration of a vessel, making sure that these rules are compatible with the regulation of the second country involved.

Consequently I am quite fascinated that there has been no Swedish legal development in the area despite the knowledge of the authorities that more and more Swedish ships are being bareboat chartered-out from the country and registered in a foreign bareboat registers. The SMA is aware of the problems but is left with no real power to deal with them. The Swedish legislation provides no rules enabling prohibition or claiming damages for bareboat registration of a Swedish ship, nor does it provide the SMA with the mandate to at least set conditions for bareboat registration of a Swedish ship.

Finding solutions to problems that might occur has thus been left to individual employees at the SMA that do not share a common view on how a specific public law or private law problem should be solved. This lack of a uniform policy implies rulings on a case-by-case basis and therefore leads to vast implications regarding legal security and foreseeability for parties that become exposed due to this absence. Because even though the public law difficulties for the States involved might cause problems, it is the private parties that are exposed without the possibility of repair. So while relationships between States can be solved diplomatically, the private entities that must be recognized as most protection worthy are left without any protection.

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<sup>189</sup> Saeter, *Bareboat ("parallell-") registrering av skip- i jus og praksis*, p. 41.

## 5. A BRIEF COMPARISON TO BRITISH MARITIME LAW

### 5.1 Introduction

The British judicial system is mainly based on *common law*, which in its most extreme form implies that the law is created and refined by judges.<sup>190</sup> Even though the UK is bound by the same International Conventions and rules of the EC as Sweden, the country has managed to create a system that allows dual registration of bareboat chartered ships. While Swedish Maritime law has been produced to ensure utmost protection of creditors, third parties and employees on vessels, British maritime law has made aims at forming a system that ensures shipowners economical advantages at the same time as protection is given to other parties through semi-application of British law. Thus it is a question of a protectionist system versus a system that aims to bring about accessibility and flexibility.

To be able to discuss the future of parallel registration of ships in Sweden it is essential to review another legal system that has successfully implemented bareboat charter registration. This will be done by first studying the registration procedure according to British law to understand the similarities and differences between the two judicial systems. After this general background the provisions applicable to registered bareboat chartered ships in the Merchant Shipping Act (MSA) will be examined. This section of the thesis will then be concluded by presenting a reflection on the positive and negative aspects of the British solution.

### 5.2 Registration of ships according to British law

British vessels are registered in the Central Registry for British ships which has its base in Cardiff. The current register is divided into four parts where Part IV is used for registering bareboat chartered vessels.

At an initial stage, registration of British ships was compulsory according to section 2 of the MSA of 1894. This provision was nonetheless revoked by section 2 and 3 of the MSA of 1988. In present, registration is considered a right if certain conditions are fulfilled. According to the section 2 of the 1995 MSA, a ship is entitled to be registered if two requirements are satisfied. Firstly the vessel must be owned to a prescribed extent by persons qualified to own British ships.<sup>191</sup> Secondly a *genuine link*<sup>192</sup> must exist between the ship and UK. The Central British Registry is free to set out the requirements needed for fulfilment of the conditions that are necessary to obtain a British registration.<sup>193</sup>

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<sup>190</sup> Bogdan, M, *Komparativ rättskunskap*, p. 93

<sup>191</sup> MSA 1995 section 9 (1) (a).

<sup>192</sup> For further information about the genuine link requirement see GCHS, article 5 and UNCLOS article 91 as well as section 2.1.3 of this essay. In MSA 1995, section 9 (2) (b) *genuine link* is described as a *British connection*.

<sup>193</sup> MSA 1995 sections 9 (1) (b) and n 9 (2) (b).

The British connection that is required in MSA 1995 is satisfied if a ship is owned by British citizens<sup>194</sup> or EC member State nationals that are established in the United Kingdom. Also bodies corporate having their principal place of business in the UK fulfil this requirement. Today the list also includes all persons that are non-UK EC nationals and nationals of the EEA.<sup>195</sup>

When it comes to the ownership conditions it can be said that a ship may be registered if a legal title to 33 or more shares in the ship is owned by persons or Bodies corporate that have been mentioned above. In addition MSA 1988 section 4 (4) (a) provides that the owners of a British ship must be resident in the UK. According to section 4 (4) (b) however the owner may appoint a representative person instead. The representative person should be resident in the UK and if it is a corporate body it should be incorporated as well as have its principal place of business in UK.<sup>196</sup>

### **5.3 Parallel registration of a bareboat chartered ship**

The goal of registering a bareboat chartered ship according to British law is to create a situation where the bareboat charterer gets as close as possible to “being the true owner without actually owning”.<sup>197</sup>

Section 17 of the MSA from 1995 allows registration of foreign ships that are already registered under the law of a foreign country. A requirement that needs to be fulfilled is that the ship is bareboat chartered to a charterer who holds all the features<sup>198</sup> necessary for being eligible to own a British ship. It is important to notice that such parallel registration only applies to bareboat chartered-in vessels and not chartered-out.

The British solution to the problems that occur with a dual-registration has been solved by only applying the British public law rules to the ship. The owner and the creditors of the vessel are given a continued protection of their rights since the private law rules of the country where the original registration was made continues to apply despite the new registration in the UK.<sup>199</sup>

In practice, the application for registration of a bareboat chartered ship must be made to the Registrar at the General Registry of Shipping and Seamen. The charterer submits an application as if he was the owner. The claim must however be complemented with a declaration of eligibility, a copy of the charterparty and the certificate of registry. If the charterer is a corporate body, the application must also contain details about the incorporation of the corporate body in the UK.<sup>200</sup> The Registrar has a duty to notify the foreign registry both when a ship has been registered and when the registration has been closed.<sup>201</sup>

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<sup>194</sup> Citizens of British dependent territories, overseas citizens as well as persons, who under the British Nationality Act 1981 are British subjects, are also added to this category.

<sup>195</sup> See Statutory instrument 1976 that came into force in 1999. Hodges & Hill, *Principles of Maritime Law*, p. 17.

<sup>196</sup> Hodges & Hill, *Principles of Maritime Law*, p. 18.

<sup>197</sup> Hodges & Hill, *Principles of Maritime Law*, p. 22.

<sup>198</sup> These features have been discussed above under section 5.1 of the essay.

<sup>199</sup> MSA 1995 section 17 (7).

<sup>200</sup> The Merchant Shipping Regulation (MSR), regulation 77 and Hill, *Maritime Law*, p. 18.

<sup>201</sup> MSR regulation 86.

The bareboat registration will be maintained until the expiration date of the charter period or for a period of five years starting from the date of registration specified in the certificate of the bareboat charter.<sup>202</sup> During this time the vessel is free to fly the British flag as it is simultaneously subjected to all the merchant shipping legislation and other enactments according to British law.<sup>203</sup> If any eligibility affecting changes occur that impinge on the registration, the charterer must notify the Registrar as soon as possible.<sup>204</sup> For cancellation of the registration, the charterer must surrender the certificate of bareboat charter to the Registrar.<sup>205</sup>

The right to register a bareboat chartered-in ship in the UK is a British acknowledgment of the charterer's powers as they are given in clause 10 (a) of BARECON 2001. The clause which states that "the vessel is in the full possession and at the absolute disposal for all purposes of the charterer and under his complete control in every respect" serves as a model in the British judicial system which aims to both enable shipowners to maintain the different advantages of being registered in a foreign country as well as providing the bareboat charterer with the authority prescribed in BARECON 2001.<sup>206</sup>

## 5.4 Some reflections regarding the British solution

The British solution to the problems with bareboat registration is simple and effective. The country has chosen to create a flexible system allowing all the advantages of bareboat registration without weakening the essential protection of creditors.

Admittedly the UK solution concerns bareboat chartering-in of vessels which does not present a problem in Sweden as the SMA always requires deregistration from the foreign underlying register. However I believe that the British legislation shows the importance of clarity and addressing current problems as they arise. The UK has chosen not to permit bareboat chartering-out and has made this obvious unlike the Swedish approach where bareboat-out occurs without any control from the State authorities.

The British solution also shows how a country which is a member of the EU can adjust its system of registration to include bareboat registration without acting contrary to the core principles of EC law. It additionally illustrates the importance of compatibility with the State of the underlying registry. Thus the functioning UK model, which makes a clear division between private and public law functions of registration, can act as a good prototype for the Swedish authorities if Sweden chooses to legalise bareboat registration.

The British solution does however have a weakness. It does not consider the situation where the State of the underlying registry sets additional requirements for allowing bareboat registration of a ship in the UK. Since it is not unlikely that such conditions can impose on the public law functions of ship registration and thus UK jurisdiction, the inflexibility of the

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<sup>202</sup> MSR regulation 83.

<sup>203</sup> Hill, *Maritime Law*, p. 18.

<sup>204</sup> MSR regulation 84.

<sup>205</sup> MSR regulation 87 (2).

<sup>206</sup> Hodges & Hill, *Principles of Maritime Law*, pp. 22-23.

British regulation in this area will create problems. At the moment it is unclear how the UK authorities handle bareboat registrations that have been conditionalized.



## **6. THE FUTURE OF PARALLEL REGISTRATION OF SHIPS IN SWEDEN**

### **6.1 Introduction**

The future of parallel registration of ships in Sweden is not easy to foresee. Due to the fact that there are both positive and negative aspects to be considered, the Swedish authorities are presented with many alternatives on how to solve the problems connected to bareboat registration of Swedish ships. On one hand steps can be taken to prohibit any kind of dual registration. Legally this prohibition can be enforced in different ways based on the level of strictness of such prohibition.

On the other hand a Swedish solution embracing bareboat registration of ships is also a possibility and is most likely to constitute the outcome in the future. But also in this case there are many different options. Rules concerning bareboat registration can be based on many different legal constructions, depending on different variables.

Consequently the substance of a potential upcoming legislation concerning bareboat registration of Swedish ships is anything but apparent. The only thing that is undoubtedly clear is that the problems connected to bareboat registration must be addressed in the Swedish legislation in one way or another.

Subsequently the sections below will contain presentations of the different possible solutions available to the Swedish authorities. It should however be noted that the effects of each solution will be of much greater magnitude than presented below, deserving a comprehensive examination of their own. As a result this presentation does not claim to be comprehensive in any way but has the aim to show some of the different consequences when choosing between the different options.

Since bareboat chartering-in does not present a problem in Sweden, this presentation is restricted to bareboat chartering-out of Swedish vessels.

### **6.2 Prohibition**

After having reviewed parallel registration of vessels it has become obvious that there are some negative effects that will follow such registration. Of course the State of the underlying registry can set different conditions before allowing a ship to become bareboat registered in another State. By providing regulation in this area, creditor protection can be provided to some extent and the public law issues can be solved.

However as it has been mentioned earlier bareboat registration is very dependent on the State of the bareboat registration. Even if it becomes clear that the private law functions of ship registration remains within the jurisdiction of Sweden, it will still be difficult to enforce the private law given rights when the ship is operating in another country. I believe this to be the case despite setting clear conditions before allowing bareboat registration. In some countries,

such as the members of the EU, enforcement will be much easier, but in other countries such as China and Russia, it can take years before a creditor can actually enforce his right.

Bareboat registration may also entail lower standards of flag State control which cannot in reality be remedied by Sweden. Even though the country can require that the inspection rights and issuing documentation should be left to Swedish authorities, it is almost impossible to enforce these requirements if the ship is operated far from the Swedish boarders.<sup>207</sup> Such scheme would also impose large economic burdens and result in a much slower inspection process.

With this as a background a Swedish prohibition against bareboat registration of Swedish ships is not unreasonable. But then there will be difficulties finding a suitable method to implement the prohibition and appropriate sanctions to uphold it.

There will also be complications when it comes to controlling violation of this rule. Assuming that the State of the bareboat registry takes responsibility and checks the underlying registration before registering the Swedish ship, the prohibition might be effective. But if such a confirmation rule does not become mandatory through an International Convention, Sweden is held virtually powerless when it comes to controlling Swedish vessels.

Then there are also problems when it comes to determining appropriate sanctions. Currently the shipowner can decide whether the charterer is to be allowed to bareboat register the ship. Such clauses are existent in BARECON 2001 and may also be inflicted in any other contract between the shipowner and the charterer. Thus the most reasonable outcome is to sanction the shipowner if the Swedish prohibition is violated. The shipowner can then counter-claim the charterer for the fines that he has been convicted to pay,<sup>208</sup> if the charterer has violated the charterparty. Such claim can even be secured by a pledge. Nevertheless there are other parties involved. If the ship in fact has been bareboat registered without the permission of the owner,<sup>209</sup> then the creditors should also be able to claim damages. This will be difficult since the charterer probably resides in another country. Maybe a solution here is to allow creditors to claim the shipowner who can thereafter claim the charterer.

Furthermore a prohibition means that there is no compatibility between the legislation of the States involved leading to conflicts if the ship does become bareboat registered without the knowledge of the Swedish state.

Even though the above described situation seems quite improbable, there are still risks that cannot be entirely avoided. This implies that a prohibition might be quite effective as long as the rule is not broken. But if the prohibition is violated, the many private law and public law complications will undoubtedly lead to non-effectiveness and economical losses. Weighing these negative effects against the negative aspects that may follow from bareboat registration it is quite clear that a prohibition is not the best alternative.

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<sup>207</sup> Interview with Kristina Nilsson.

<sup>208</sup> This naturally assuming that there is an economic sanction.

<sup>209</sup> This situation is of course very unlikely since the countries allowing bareboat registration most probably check whether the shipowner has given his permission.

### **6.3 Authorization**

There are also many arguments in favour of allowing bareboat registration. The vast economical benefits, the fact that it enables choosing a flag of preference during a certain time and that it facilitates raising funds for the acquisition of ships registered in third-world countries or State-controlled economies, cannot be ignored. The increasing popularity of bareboat registration of Swedish ships cannot either be denied. Thus it is not irrational for the Swedish authorities to be able to allow bareboat chartering-out of Swedish vessels.

But also this alternative presents difficulties. Even if the private law functions based on the underlying registration remain within the authority of the State, Sweden cannot affect the lower standards of inspection even if the country requires inspecting the vessel itself or sets conditions for the State of the bareboat registry. As it has been mentioned many times, maintaining the inspection right and accepting this obligation does not present a practical solution. Thus the fact that bareboat registration will perhaps automatically mean lower standards of flag state control must be accepted as a probable outcome of a Swedish authorization.

A Swedish legislation in favour of bareboat registration would nevertheless be very positive in one aspect. Creditors with mortgages and other charges can be given protection. Where a prohibition would mean that there would be no condition setting or legal compatibility between the two States involved, legalising bareboat registration would result in a mandate for Swedish authorities to ensure creditor protection. By setting mandatory regulation and ensuring that Swedish law will be enforceable in the State of the bareboat registry, the legal loophole that exist today, impairing creditor protection, could be diminished.

Of course Swedish legislation in the area cannot either guarantee cooperation from the other States involved. Nonetheless taking into account that a prohibition will neither be free of risks, authorizing bareboat registration seems to be the best available solution due to that it does not entail the same economical burdens and since it creates greater opportunities to protect the creditors.

Naturally, launching these protective measures will be difficult. Since the enforcement possibilities, the standard of flag state control and the overall legal systems in different States vary, it may become necessary to set different conditions for different countries. Swedish authorities must also make sure that the bareboat register contains information about the shipowner and the mortgages if fraudulent conversions are to be avoided. These procedures will be difficult to implement in other countries and initially constitute an expensive procedure.

### **6.4 A practical proposal**

Presently Swedish ships are being bareboat registered in other countries without Swedish authorities having any power to set rules or conditions for such registration. Since the first and foremost problem with this lack of Swedish legislation is the diminished creditor protection, I believe that the best way to solve this problem is to legalise bareboat registration and thereby try to secure the creditor protection that follows customary registration.

As a chief principle, the *division between public and private law* between Sweden and the State of the bareboat registration is optimal. Since the responsibility of maintaining both the private law and public law functions of ship registration will be too vast for the Swedish authorities to handle practically, all the public law responsibilities and obligations should initially be left to the scrutiny of the State of the bareboat registration despite some negative outcomes.

It should however be noticed that a clear division between public and private law does not provide a realistic solution in all cases. Even though a strict system would provide simplicity and clarity, it is understandable that Swedish conditions allowing bareboat registration cannot be universal but must reflect the level of legislation of the State of the bareboat registration. Consequently it is also necessary to provide an exception rule which allows setting public law stipulations when a vessel is to be registered in a State with an unsatisfactory level of legislation in different areas. Although State individual stipulations conflict with the right of establishment given in article 43 of the EC Treaty, a State-by-State assessment is a practical option that can be relevant when Swedish ships apply for bareboat registration in countries that are not members of the EU.<sup>210</sup>

When it comes to the private law issues the Swedish authorities should be allowed to *set all essential conditions to ensure enforceability of mortgages, hypothecs and other charges* as much as possible. Such conditions should involve the applicability of Swedish private law at all times and an effective practical implementation. Hence a creditor who wishes to enforce a mortgage in a vessel that is bareboat registered and operated in another State, should be able to apply for enforcement, have the case tried according to Swedish private law and also demand quick execution. Yet due to that the enforcement procedure takes place in the State of the bareboat registration the Swedish authorities cannot exercise any real power in that foreign jurisdiction. Hence bareboat registration will continue constituting a comparatively greater risk for creditors. It is therefore of the utmost importance that the SMA provides the creditors with information regarding these risks before allowing bareboat registration.

Swedish authorities should also demand a *written consent from the creditors* providing them with the opportunity to either secure their mortgages in other ways as well or to demand payment irrespective of if their claim is due or not. Such a written consent should be mandatory and constitute one of the conditions for allowing bareboat registration of Swedish ships.

Finally it is also essential that Swedish conditions are set regarding mandatory information that should be registered in the State of the bareboat registration. Examples of such information can include:

- *information* regarding the *shipowner*.
- a note establishing the *time-period* the ship has the right to fly the flag of the state of bareboat registration.
- that the ship should be registered in the *same name* as it has already been in the Swedish Vessel Register.

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<sup>210</sup> For EU member States there should be a joint set of rules and stipulations that are applied consistently throughout the union.

- that *mortgages, hypothecs or other charges* should all be *registered in the bareboat register in their given priority* to facilitate enforceability.
- it should be made undoubtedly clear that it is the *shipowner alone that has the right to dispose over the ship*. It should therefore be specifically emphasized that bareboat registration does not provide the charterer with an inscription of title.

## 7. SUMMARY

Currently there is no Swedish legislation regulating bareboat registration of Swedish ships. Despite this absence however shipowners with vessels already registered in the Swedish Vessel Register do not hesitate to take advantage of the positive aspects of bareboat registration. Thus the lack of a prohibition rule or regulation that provides conditions for authorization has left a legal loophole resulting in Swedish ships being registered in a second State without any regulation providing options or protection for the different parties involved.

With this as a background, the main objective of this thesis was to analyze parallel registration of ships, its consequences and the future of dual registration in Sweden. To fulfil this objective another aim was to impart a collected legal and economical presentation of the problems that may occur when a bareboat chartered vessel is registered in two different States simultaneously.

After having presented the legal basis of regular registration, the importance of nationality, flag and documentation and their connections with registration has become apparent. The significance of ship registration alone has become comprehensible due to International Conventions. Even though EC law does not regulate ship registration specifically it has become obvious that any Swedish attempt to regulate bareboat registration must correspond with the principles of the EC.

The analysis of Swedish domestic law entailed the functions of ship registration in Sweden but also illuminated the fact that the SMC has a very protectionist aim. Protection of title, protection of persons with security in a Swedish ship and protection of third parties seem to be one of the main objectives of the legislation. This leads to the conclusion that bareboat registration can only be authorized in Sweden if the intended protection for these parties can be secured.

Looking at the legal aspects of parallel registration, provisions in International Conventions, the ICC recommendations and BARECON 2001, all underline the importance of upholding the different functions of registration at the same time as making a clear division of responsibilities and obligations between the two States involved. After having reviewed all the different purposes of registration, I also believe these conditions to be apparent necessities.

As it is clear that there are both strong arguments in favour of and against bareboat registration, the Swedish state is left with two options. Either regulation prohibiting bareboat registration should be developed, or parallel registration should be accepted as a current legal phenomenon but conditionalized to ensure protection for the different parties concerned.

Since bareboat registration has already been accepted as a possibility around the world and by the Swedish authorities due to their passivity, I believe that the only available solution is to set conditions for this type of registration and thereby make an attempt to minimize negative consequences. Because even though bareboat registration may be followed by judicial complications regarding for example enforcement of private law rights and perhaps lower standards of flag State control., these negative considerations are clearly outweighed by economical benefits, the ability to choose a flag of preference and the possibility to raise

funds for the acquisition of ships registered in third-world countries or State-controlled economies.

Thus a practical proposal can be based on a system where the responsibilities and obligations of registration in connection to the areas of public and private law initially are divided between Sweden and the State of the bareboat registration. This division will imply that the private law jurisdiction will remain within the Swedish authority while the public law enforcement will be left to the State of the bareboat registration. This solution is the most optimal as it allows Sweden to uphold the protection of the private parties as it is intended in the SMC. This chief principle should however also be combined with an exception rule that enables Swedish authorities to set additional stipulations if the level of legislation in the State of the bareboat registration is below satisfaction.

As the private law issues will continue to remain within the jurisdiction of Sweden, it is important to lay down conditions for authorization of bareboat registration of Swedish ships as well. Creating a solution ensuring the enforceability of mortgages, hypothecs and other charges and also setting conditions regarding mandatory information available in the Vessel Register of the State bareboat registration is fundamental.

Nationally creditor protection should be enhanced by demanding a written consent from the creditors as a stipulation for bareboat registering the ship and by the SMA providing information regarding the risks that might follow bareboat registration.

By taking all of the aspects presented into account the only conclusion available is that bareboat registration of Swedish ships must become legalised. By avoiding legislation in any direction Sweden fails to provide the legal shelter essential for the parties involved. What should be remembered however is that International law, the principles of the EC and the protectionism that seems to permeate the current Swedish legislation must not become lost in the assessment.

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