**The Ownership and Nationality of a Ship from a Maritime Cabotage Law Perspective**

**Abstract**

In the world of maritime commerce, questions that pertain to the nationality of a ship and its ownership emanate from a liability and responsibility context. Hence, it is a cardinal principle in international law to abdicate authority over a vessel in international waters to the sovereign nation which the vessel belongs. This of course is subject to the proviso that all ships traversing the international waters possess a national character which includes a domicile where she is registered and whose flag she is entitled to fly. The importance of ensuring that a ship has a legal regime which regulates its operations is bolstered by the fact that ordinarily, the international waters are free from jurisdiction. Therefore, ships would otherwise traverse the high seas in a legal vacuum in the absence of a national identity of a sovereign state whose laws she is subjected to.

However, the nationality and ownership of a ship takes on a distinguished significance under the law of maritime cabotage. This is because maritime cabotage legislations and policies proactively reserve the right to carry out commercial activities in territorial waters to the country's national instrumentalities of commerce. This is an indication that the importance of nationality and ownership of a ship is viewed from a national development rather than a liability and responsibility perspective. Hence, national cabotage legislations which stipulate that vessels must be owned by its citizens and registered in that country are designed to focus on facilitating national economic development. For instance, a vibrant domestic ship register can be a valuable source of Government revenue and capacity building. Furthermore, a stable pool of domestic shipowners may serve as a veritable base for enterprise which open doors for onshore and offshore employment.

Therefore, it is essential to investigate the concept of ownership and nationality of a ship that is premised on a national economic development agenda in contra distinction to the traditional premise of liabilities and responsibilities of a Sovereign State.

## 1. A Synopsis of Ownership and Nationality of a Ship Under International Law

All ships must of essence have an owner and a nationality with which they are identified with. In principle, there are two primary categories of ship ownership namely, the ultimate owner and the beneficial owner. The former is usually the one who has legal title to the ship and may have financed the ship purchase. This owner is usually some form of financial corporation such as a bank. The latter is usually the entity who has the responsibility to control the commercial activities of the ship. For instance, where a Swiss bank finances the purchase of a ship through a mortgage on behalf of its Nigerian customer. Should the bank opt to retain legal title to the ship, she will be the ultimate owner while its Nigerian customer will be the beneficial owner.

In addition to the two categories of ship ownership identified above, shipping law recognises other forms of ship ownership necessary to facilitate business operations in the commercial world. Typically, this is seen in cases of bareboat or time charters that results in a disponent owner. This can also be seen when the commercial operations of the ship are entrusted to the care of a third party managing company thereby resulting in a managing owner.

The distinction between the various forms of ship ownership is not always apparent. This is because it is possible for the ultimate owner, the beneficial owner and the managing owner to be one and the same entity. However, it is generally easy to identify the beneficial owner of a ship. This is because the commercial activities with which this owner is involved with is either in the public domain or leaves an identity trace. On the contrary, the ultimate owner is more likely to stay anonymous to the public, unless there is a dispute which goes to the root of legal proprietorship.

On the other hand, the nationality of a ship is concerned with her documentation which shows the country whose laws the ship is governed and regulated by.[1] Nationality is the legal relationship between a subject and a country. This relationship confers some protection and places certain obligations on the subject towards the country.[2] The nationality of a ship is acquired through the process of registering the ship in accordance with the laws of a particular country, which is thereafter known as the Flag state. Therefore, the ship acquires certain rights and protection, including the right to fly the flag of its country of registry.[3]

The idea of granting nationality to vessels was conceived originally to help with identifying vessels that traversed the often unregulated high seas of the eighteen and nineteenth century. In particular, the aim of assigning a nationality to a vessel was to offer protection to the owners of those vessels and her crew.[4] Assigning nationality to a vessel became mandatory under the *1958 Geneva Convention on the High Seas*.[5] From then onwards, every newly built or newly

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[1] There is a story told long ago about a ship named *The Virginius* which was captured in 1873 by Spanish authorities as she voyaged towards Cuba. The vessel carried false documentation and presented herself to be of American nationality. It was successfully argued that regardless of the false documentation, the United States had jurisdiction over the vessel and she was subject to the laws of the United States.

[2] P. DUARA, *Sovereignty and Authenticity: Manchukuo and the East Asian Modern*. Maryland, 2004, pp. 9-40.

[3] See: *Naim-Molvan v. Attorney-General of Palestine* (1948) A.C. 351. See also: *United States v. Marino-Garcia* (1982) 679 F.2d 1373. U.S. Court of Appeals, 11th Cir.

[4] See: K. LI, J. WONHAM, *New Developments in Ship Registration*, in *The International Journal of Marine and Coastal Law*, 1999, 14(1), pp. 137–146.

[5] See: Article 5(1) of The Convention on the High Seas, 1958. However, there are reports that ship registration may date back to the early 1800's where the idea of ships as legal residents first appeared in some bilateral treaties between countries who agreed to recognize the nationality of each other's vessels.

purchased vessel was required to be documented and granted the nationality of the country that the vessel is documented.[6]

The process of assigning nationality to a ship by registration is an old practice dating back to ancient England and imperial Rome.[7] It began as a means of controlling ships entitled to carry cargoes within the seaborne empires of Europe. In present times, ship registration has become a convenient means of establishing title to the property in a vessel.[8] For the purposes of all relevant legal, administrative and social matters, registration confers nationality on a ship and brings it within the jurisdiction of the law of its country of registration.[9] This consists of all responsibilities and liabilities such as safety of the ship, ship mortgages, health and welfare of the crew.[10]

It should be noted that the registration of a ship performs both a public and private law function. The public law function involves conferring nationality and providing diplomatic protection. On the other hand, the private law function deals with preserving the sanctity of legal title and proprietary rights.[11] For many centuries, there was a simplistic and straightforward process for registering a vessel for both domestic and international purposes. The shipowner was required to register his vessel in his country of residence, which was invariably his country of nationality. Hence, the vessel consequently acquired the owner's nationality.[12] This is no longer the case, as shipowners are increasing inclined to register their vessels in registries stipulating for the barest minimum legal requirement. In these registries, the concept of the 'genuine link' remains just that – a concept, which is circumvented easily.[13]

Although there is no express definition for 'the genuine link' concept, its meaning and the scope of its application can be deduced correctly from the *1958 Convention of the High Seas*.[14] A combination of low taxes and poorly enforced safety, labour and environmental regulatory standards entice shipowners to overseas ship registries. This allows them the opportunity to benefit from competitive advantage through lower operating cost.[15] It is suggested that consideration should be given to the concept of an international harmonised ship registry. This is because of both the legal implication and economic impact that arises from different sovereign States determining the minimum standard to comply with in their ship registries.[16]

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[6] R. COLES, E. WATT, *Ship Registration: Law and Practice*, London, 2013.

[7] See the laws under King Richard II in 1382 and Charles II in 1660 at 5 Richard II. Stat. i, c. 3 and 12 Charles II. C. 18, i, iii & vi respectively. For a more comprehensive read on these issues, see; A. AKPAN, *op cit*

[8] See Article 8 of the United Nations Convention on Conditions for Registration of Ships 1986.

[9] Article 94 (1), (2), (3) of United Nations Convention on the Law of the Sea (UNCLOS 1982)

[10] MARITIME NEW ZEALAND, *A Guide to Ship Registration,* Wellington, 2010.

[11] *Liverpool Borough Bank v Turner* (1860), 29 L.J. Ch. 827

[12] For a broader discussion on the issue, see: B. BAKER, *Flags of Convenience and the Gulf Oil Spill: Problems and Proposed Solutions*, in *Houston Journal of International Law*, 2012, 34(3), pp. 697 -715

[13] One of the Treaties that allude to the 'Genuine Link' Concept is the United Nations Convention on the Law of the Sea – See: Article 91(1) of UNCLOS 1982. See also: *Liechtenstein v. Guatemala* (1955), I.C.J. Rep. p. 4

[14] *Article 5(1) of The Convention on the High Seas, 1958*: Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. A genuine link between the State and the ship must exist; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. This thesis argues that the words 'in particular' set up a threshold for the relationship between the flag State and the ship. It is suggested that anything below that threshold will be a derogation of the standard every flag State should be held to. See also: *Article 91(1) of UNCLOS 1982*.

[15] J. MANSELL, *Flag State Responsibility: Historical Development and Contemporary Issues*, Dordrecht, 2009.

[16] For a broader read on the issue, see: A. CAFRUNY, *Flags of Convenience*, in: R. Jones, (edited by) *Routledge Encyclopaedia of International Political Economy*, New York, 2002

Traditionally, ships were registered in the country of their owners' nationality. However, since the 1970s, shipowners have gradually moved away from national shipping registers to open registries. This has allowed shipowners the opportunity to take economic advantage of low operating cost and a less stringent regulatory environment that characterise the open registries.[17] There are four categories of registries for shipowners, namely: traditional home registries, traditional open registries, offshore registries, and international registries.

Traditional registries only accept vessels that are owned by persons who are citizens and residents of that country.[18] In a traditional registry, such vessels are usually required to employ crew who are nationals of the country of registration. This forms part of the 'genuine link' between the vessel and the country of registration.[19]

Open registries allow shipowners from other countries to register their vessels under their flag.[20] The requirements for registration are relatively lax and allow for a 'genuine link' to the registry country to be easily established. Open registries operate more relaxed regulations in the areas of taxation, safety, crewing, licensing, inspection, and management. Hence, many shipowners are tempted to abandon their traditional flags for the benefits of open registries.[21] The relaxed application of stringent requirements has led to vessels registered in open registries to be said sometimes to fly under *'Flags of Convenience'*.[22] More than fifty-five percent of the world shipping tonnage is registered in open registries, with Panama, Liberia and Marshal Island (PanLibMar) accounting for more than forty percent of the world merchant fleet.[23]

Offshore registries are based in dependent territories and are designed to attract the fleet of the particular country. They are more restrictive than open registries but more flexible than the traditional registry.[24] Vessels registered in offshore registries fly the flag of the traditional ship register, but enjoy benefits of open registries such as tax privileges and choice of crew.[25]

International registries are second national registries, which have been developed to provide competition to open registers.[26] This category of ship registry has grown because the traditional maritime nations are seeking to prevent shipowners from transferring to an open registry. Furthermore, traditional maritime countries have opened international registries in

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[17] L. THUONG, *From Flags of Convenience to Captive Ship Registries*, in *Transportation Journal*, 1987, 27(2), pp. 22–34.

[18] Traditional registries include: Japan, Germany, France, United Kingdom and USA, etc.

[19] J. PERKINS, *Ship registers: An international update*, in *Tulane Maritime Law Journal*, 1997, 22(1), pp. 197–199.

[20] Open registries include: Bahamas, Canary Islands, Cayman Islands, Liberia, Malta, Marshal Islands, Netherlands Antilles, Panama, St. Vincent.

[21] H. ANDERSON, *Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, in *Tulane Maritime Law Journal*, 1996, 21(1), pp. 139–170.

[22] The term 'Flag of Convenience' is increasingly being viewed as derogatory and is gradually fading away as more upmarket nations are joining the club offering open registry services. Singapore, Hong Kong and the Philippines all operate registration on a ship by ship basis, but offer the same benefits as the open registers. The Philippines register foreign owned vessels which are bareboat chartered to by a Philippine national. Singapore registers foreign shipping without approved agreements.

[23] UNCTAD, *Review of Maritime Transport*, Geneva, 2009.

[24] Offshore registries include: Bermuda, the Cayman Island, and the Isle of Man – for the United Kingdom; the Kerguelen Islands – for France; the Netherlands Atilles – for the Netherlands; Luxembourg - for Belgium; and the Faroe Islands for Denmark.

[25] G. SLETMO, S. HOSTE, *Shipping and the Competitive Advantage of Nations: The Role of International Ship Registers*, in *Maritime Policy & Management*, 1993, 20(3), pp. 243–255.

[26] The International registers of Denmark (DIS), Germany (GIS), Norway (NIS) and Finland (FIS) are the most common second registers. Others include: The Isle of Man (UK), Kerguelen (France), Luxembourg (for Belgian shipping only), Madeira (Portugal), the Canary Islands (Spain) and the Netherlands Antilles (Holland).

an attempt to attract back those shipowners who have flagged out.[27] Ships documented under international registers fly the flag of the traditional ship register. This kind of registry supports the development of domestic shipping industries into international markets, and offer shipowners benefits similar to the open registries. They are still subject to stringent rules concerning ownership, management, crewing and operation, albeit the rules are not applied as strictly as in the traditional registry.[28]

It is observed that traditional maritime countries have attempted to discourage shipowners from migrating to the open registries by introducing a variety of measures. For instance, Hong Kong, Singapore, Canada and the United Kingdom have introduced favourable tax schemes, ship financing schemes, mandatory training requirements, and incentives for employing domestic maritime labour.[29]

The overriding importance of the flag state is evidenced in the decision of the International Court of Justice in the *IMO Advisory Opinion case*.[30] Here, several traditional maritime nations challenged the membership entitlement of Liberia and Panama to the Maritime Safety Committee of the IMO. It was held in favour of Liberia and Panama that entitlement to membership of the Committee was based on the size of the national tonnage and not on the nationalities of the beneficial owners of ships. The continued drifting away from the traditional process of assigning a ship's nationality that corresponds to the owner's nationality poses both a practical and academic question. Take for instance, where the ultimate owner, the beneficial owner, the managing owner, and the desponent owner all have different nationalities. In addition, the ship may be registered and assigned a nationality that does not correspond to any of the above owner's nationality. It is clear that this would result in a serious blurring of the lines and distorts the meaning of what has come to be known as the national fleet.

A good example of the kind of confusion hinted at above is as follows: A Singaporean bank (ultimate owner) finances the building of a new ship in France (where according to French laws, a ship built in France can acquire French nationality[31]) on behalf of its Indian customer (Beneficial owner). The ship is then put under the management of a UK company (managing owner). The ship is classed by the American ABS but she is registered and flies the Liberian flag. She is then chartered to a Nigerian national (desponent owner) who intends to use the ship to perform cabotage activities in Nigerian waters. The ship plans to have Filipino crew. However, in Nigeria, ships used for cabotage activities must be built in Nigeria, owned by Nigerian nationals, registered and documented in Nigeria, and employ Nigerian crew.[32]

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[27] G. SLETMO, S. HOSTE, *op cit*, pp. 243–255.

[28] T. WEST, *Outflagging and Second Ship Registers: Their Impact on Manning and Employment*, Luxembourg, 2000, pp. 1-51

[29] R. WEBB, *Coastal Shipping: An Overview*, Canberra, 2004.

[30] Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion [1960], ICJ Rep. 150

[31] See the French Acte de Navigation of 1793 which stipulates that ships built in France should acquire French Nationality. In the past, a variety of criteria have been considered as appropriate for determining a ship's nationality, see; *Chartered Mercantile Bank of India v. Netherlands Steam Navigation Co. Ltd.* (1883)10 Q.B.D. 521

[32] It should be noted however that the Nigerian Cabotage Act of 2003 makes provisions (unnecessarily) for waivers on some of these stipulations apart from the ship registration stipulation.

## 2. An Overview of Maritime Cabotage Law

Maritime cabotage law is defined as the sovereign authority of a country to reserve to herself national instrumentalities of commerce, all maritime trade and services between two points of her maritime border. This is subject to the proviso that the two territorial points are on the coasts of one and the same country as a political and geographical unit, in contradistinction to the coasts of another sovereign nation. The rule of thumb is that these two territorial points stretches up to 200 nautical miles from the baseline of that country.[33]

In the *Anglo-Norwegian Fisheries* case,[34] McNair J. opined that the possession of a territorial sea by a coastal nation is a compulsory responsibility. Hence, it is neither optional nor dependent upon the will of that State. He posited that to every nation whose land territory is washed by sea, international law attaches a corresponding portion of maritime territory consisting of territorial waters. As such, international law does not present an option to any maritime nation to decide if they wish to lay claim to their territorial waters. Hence no maritime nation can refuse to claim. Rather, such a maritime State must perform the obligation and exercise the rights conferred upon it by sovereignty, which it must exert over its maritime territory.[35]

There are three primary approaches of maritime cabotage law that have been adopted by many countries. They are protectionist, liberal, and flexible maritime cabotage law approaches. The most protectionist maritime cabotage countries stipulate that vessels engaged in maritime activities in its territorial waters must be built and repaired in that country, employ mainly citizens of that country as crew, the vessels must be owned by citizens of that country, and she must be registered and thus have the nationality of that country.[36]

Many countries now adopt a particular approach of maritime cabotage on the premise of national economic development. From the stipulations listed above, this work is focused on the ship ownership and ship nationality element. Therefore, for the purpose of this work, the importance of ship nationality and ship ownership is viewed from a national development perspective under the law of maritime cabotage. This is in contrast to the liability and responsibility perspective under international law.[37]

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[33] For a comprehensive understanding of the law of maritime cabotage, see: A. AKPAN, *The Law of Maritime Cabotage: A New Conceptualisation in Legal Theory*, London, 2016.

[34] *United Kingdom v. Norway* 1951 I.C.J. Rep. 116

[35] The Fisheries Case (United Kingdom v. Norway) was a dispute over the extent of the body of water surrounding Norway was Norwegian waters (that Norway thus had exclusive fishing rights to) and how much was 'high seas' (that the UK could thus fish). The United Kingdom challenged the baseline system employed by Norway in measuring its territorial sea rather than using the low water mark system, claiming that the Norwegian method extended the limit of their territorial sea into the high sea, thus breaching international law. The International Court of Justice upheld Norway's claims that the limit of its waters were consistent with international laws with regards to the ownership of local sea-space because cognizance had to be given to the geographical realities of the region.

[36] See the maritime cabotage legislations of the United States of America and Nigeria in order to understand the far reaching scope of these protectionist approaches.

[37] See: Article 91 of UNCLOS 1982 which states the basis of assigning nationality to a ship as follows: (1) Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship. (2) Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

## 3. The Ownership Requirement From a Maritime Cabotage Law Perspective

The word shipowner comes with a lot of confusion and there have been difficulties in ascertaining who the shipowner really is. The coming into force of the *Maritime Labour Convention of 2006* has further exacerbated the confusion.[38] The convention's definition of a shipowner extends to include ship managers (who in fact are only service providers), agents, and charterers. This definition appears to contradict the traditional definition of a shipowner.[39]

Guidance from the *International Association of Classification Societies (IACS)* suggests that the MLC shipowner should be the entity that holds the *International Safety Management Document (ISMD)* of Compliance.[40] However, this line of thought is likely to create legal uncertainty such that an 'owner' and a 'shipowner' would be considered as two distinct entities, i.e., the 'ship operator' and the 'cash buyer' respectively.

Generally, the ship ownership requirement demands that maritime cabotage vessels must be wholly or substantially owned by nationals of that country.[41] Where a company owns the vessel, there is usually the requirement that citizens of that country must hold all of the shares in the vessel free from any encumbrance to any foreigner.[42] What makes matters doubly difficult is the fact that in many countries, the ownership requirement is often accompanied by another onerous requirement. This is that any such persons or company engaging in maritime cabotage must establish and have its principal place of business in that country.[43] Where there is a waiver of the whole ownership structure by the citizens of a country, there is usually a less friendly substitute. Any such substitute may require anything between forty percent and seventy-five percent ownership in favour of nationals of that country.[44]

In the United States, the stringent *Merchant Marine Act 1920* requires that all merchandise transported between points in the United States by water shall be carried only on vessels owned by United States citizens.[45] The legislative text of the *Nigerian Cabotage Act of 2003* is

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[38] The *Maritime Labour Convention of 2006* came into force internationally on the 20th of August 2013 for the thirty countries with registered ratifications on August 20, 2012. For all other countries that have ratified, it will enter in force twelve months after their ratifications were registered. The Convention came into force on the 7th of August 2014 in the United Kingdom.

[39] See: Article II(j) of Maritime Labour Convention, 2006.

[40] L. MCMAHON, *MLC 2006: Who is the Shipowner and Why Does It Matter?* in Lloyds List,2013, 22nd August.

[41] See the maritime cabotage legislations in: The United States, Nigeria, India, Indonesia, Japan, and Indonesia.

[42] See the maritime cabotage legislations in: Philippines and China. See also; M. BROOKS, *Maritime Cabotage: International Market Issues in the Liberalization of Domestic Shipping*, in A. Chircop, et al. (edited by), *The Regulation of International Shipping: International and Comparative Perspectives*, Leiden, 2012, pp. 293-324

[43] See the maritime cabotage legislations of Chile, Brazil, Nigeria, and Japan. See also; C. LIU, *Maritime Transport Services in the Law of the Sea and the World Trade Organization*, Bern, 2009.

[44] See: B. SLATTERY, B. RILEY, N. LORIS, *Sink the Jones Act: Restoring America's Competitive Advantage in Maritime-Related Industries*, in *BACKGROUNDER*, 2014, NO. 2886, pp. 1-9.

[45] See: 46 U.S.C. App. § 833, 46 U.S.C. 50101 and 46 U.S.C. 55102. There are however, few exceptions such as the *'1958 Bowaters Amendment'*, which permits foreign owned companies based in the United States of America to own vessels for the carriage of their own merchandise for their own account (see: Public Law 85 – 902, 72 Stat. 1736: An Act to Amend Section 27 of the Merchant Marine Act 1920 (*Bowaters Amendment*). H.R. 9833, 2nd September 1958). Also *Section 1113(d) of the 1996 Coast Guard Authorization Act* creates an exception to the Jones Act citizenship ownership requirements (see: Public Law 104 – 324, 110 Stat. 3971: An Act to Authorize Appropriations for the United States Coast Guard and for other Purposes. S.1004. Dated 19th October 1996). It permits the endorsement of a vessel built in the United States but owned by a non-American citizen for coastwise trade, if such a vessel is on demise charter for at least three years to a coastwise-eligible United States citizen. (see: Public Law 104 – 324, 110 Stat. 3971: An Act to Authorize Appropriations for the United States Coast Guard and for other Purposes. S.1004. Dated 19th October 1996).

similar to the United States *Merchant Marine Act of 1920*. For instance, the Nigerian *Act* stipulates for a vessel that is owned ultimately and beneficially by Nigerian citizens or a Nigerian company. In addition, all of the shares in the vessel must be held by Nigerian citizens free from any encumbrance to any foreigner.[46]

Other maritime countries that stipulate for indigenous vessel ownership requirements in their maritime cabotage regulations include Indonesia.[47] In China, wholly foreign capital enterprises and Sino-foreign joint ventures without permission from the competent authority are excluded from the operation and management of maritime transport in Chinese waters.[48] In the Philippines, vessels engaged in the coastal trade must have at least seventy five percent of its capital stock vested in citizens of the Philippines. In the case of corporations engaged in maritime cabotage trade, the president or managing directors shall be citizens of the Philippines.[49] Vessels engaged in the Japanese coastal trade must satisfy even more onerous ownership requirements. Such vessels must be owned by a State organ, a Japanese national, a company established under Japanese law (if its representatives and more than two-thirds of its officers are Japanese), or a foreign company (if its representatives are Japanese nationals).[50]

Despite its acclaimed liberal approach, the EU Regulation on maritime cabotage restricts ownership eligibility to:

(a) Nationals of a Member State or a maritime company established in a Member State in accordance with the legislation of that Member State and pursuing shipping activities.
(b) Shipping companies established in accordance with the legislation of a Member State, and whose principal place of business is situated, and effective control exercised, in a Member State.
(c) Nationals of a Member State or shipping companies established outside the Community and controlled by nationals of a Member State, if their ships are registered in and fly the flag of a Member State in accordance with its legislation.[51]

The second and third category of shipowners, as stipulated for in Articles *2(2b) and 2(2c) of Council Regulation 3577/92* respectively, raise serious questions as to where the 'effective control' of the vessel lies in the event of an emergency, pursuant to the EU law on maritime cabotage.[52] On the one hand, a maritime cabotage policy that stipulates for indigenous ownership of vessels for the purposes of maritime cabotage may empower and build indigenous capacity. On the other hand, it should be noted that only a very small percentage of indigenous persons might be empowered in reality. Hence, a stipulation for an indigenous ship ownership requirement may turn out to hamper growth, development and investment.[53]

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[46] Section 3 of the Coastal and Inland Shipping (Cabotage) Act' No. 5 of 2003 of the Laws of the Federation of Nigeria. However, there is provision for a Joint Venture ownership structure stipulating that a minimum of sixty percent of the shares of the ship owning company must be held freely by Nigerian Citizens. (see: Section 12 of the Coastal and Inland Shipping (Cabotage) Act' No. 5 of 2003 of the Laws of the Federation of Nigeria). This provision prima facie, appears to contradict the *'wholly owned'* stipulation as provided for in *Section 3 of the Cabotage Act*.

[47] See: Article 158 of Law 17 of 2008. It stipulates that vessels used for maritime cabotage must be owned by Indonesian citizens or business entity domiciled in Indonesia

[48] Article 7 of The 1987 Regulation on Waterway Transport Administration of the People's Republic of China.

[49] Section 806 of the Tariff and Custom Code of the Philippines (RA 1937) of 1957.

[50] Article 1 of the 1899 Ship Law of Japan

[51] Article 2(2) of Council Regulation (EEC) No. 3577/92.

[52] For a more detailed reading, see: the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01), OJ C 95, 16th April 2008, p.1.

[53] See, for instance, the impact that such requirement has had in the Nigerian maritime sector, and to a large extent, its impact on the coastal trade of the United States.

## 4. Who is the Shipowner in the Context of Maritime Cabotage Law

For the purpose of this work, the concept of ship ownership investigates two separate but identical issues. It queries the definition of a shipowner, and identifies the conflicts between the various conceptions surrounding the definition of a shipowner. Furthermore, it identifies the various dimensions in which the ownership requirement has been enacted and implemented in the maritime cabotage law of several countries.

In order to carry out a comprehensive investigation on the ownership requirement, it is imperative to revisit the identity of the shipowner in the context of maritime cabotage law. The understanding of this issue takes on added significance, as the identity of the shipowner is an issue that is balanced precariously between public law and commercial law. Shipowners are increasingly wary of exposing their identity, hence the rise in the use of a 'one ship company' structure.[54] This allows them take advantage of the legal protection by virtue of the concept of the corporate veil, first espoused in the landmark case of *Salomon v A Salomon.*[55]

In public law, there is an insatiable appetite for piercing the corporate veil, or at the minimum, lifting it.[56] On the other hand however, there is a conscious strive to preserve the corporate veil principle in commercial law, and thereby continue to accord a corporate entity a legal personality distinct from the human person.[57] It is suggested that, except where the corporate entity is proven to be a sham or used as a façade, the commercial approach is the sensible option, particularly when other remedies are available in law for the claimant.[58] Therefore, the short answer to the question of who the shipowner is in the context of maritime cabotage law is that it could be any one of the following:

(a) The financial purchaser of the vessel (who bears the risks, enjoys the profits and suffers the loss),
(b) An agent (acting either for the shipowner or charterer),
(c) The ship management company,
(d) The charterer,
(e) The financial lender (such as a bank),
(f) The entity that holds the *International Safety Management Document (ISMD)* of Compliance,
(g) A lien holder, or
(h) A combination of any two or more of these persons.

In order to answer the question, it is important to understand the theory behind why different maritime nations opt for the ship ownership requirement in their various maritime cabotage

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[54] *Adams v Cape Industries* [1991] 1 All ER 929

[55] [1897] AC 22 (HL)

[56] As per Staughton LJ: 'To pierce the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To lift the corporate veil or look behind it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose'. *Atlas Maritime Co SA v Avalon Maritime Ltd (The Coral Rose)* [1991]1 Lloyd's Rep 563, at 571

[57] In the event of a dispute against a shipowner, it will appear that the legal position in English law is that the corporate veil may only be lifted or pierced in very limited circumstances. The positions are slightly different in other jurisdictions like South Africa (In the context of associated ship arrest), the United States of America (the doctrine is known as 'Alter Ego',where the indicators applicable for piercing the corporate veil are broadly based on who controls, or dominates the company in question) and Greece.

[58] *VTB Capital Plc v Nutritek International Corp & Ors* [2013] UKSC 5. Also, see the judgement of: Munby J. in: *Ben Hashem v Shayif* [2008] EWHC 2380 at paras 160 -166: 'if the court had the power to pierce the veil, it could only do so when all other, more conventional, remedies had proved to be of no assistance.

legislations.[59] Assuming that the objective of maritime cabotage law is to stimulate the economic development of a country via its maritime sector, it must follow that the ship ownership requirement is tied to the economic arguments espoused to justify the protectionist maritime cabotage approach.[60] It could be argued that a successful indigenous ship owning company can be pivotal in attracting further investment into the domestic maritime sector. This would include opening the door to the related areas of ship finance, ship classification, and ship broking.

Therefore, with regard to the above consideration, it is suggested that the most appropriate definition of a shipowner for the purposes of maritime cabotage law should be 'A person or group of persons that truly own and control the equity both in the vessel and the ship owning company. This would be the beneficial owner and not necessarily the registered or legal owner'.[61] This definition of the shipowner is the most consistent with the ideology behind the law of maritime cabotage. It is argued that to find otherwise would require a total disregard for the principles and objectives of the law of maritime cabotage as defined above. Nevertheless, the above definition of the shipowner forces a slightly different kind of question. That is, how countries whose maritime cabotage legislation stipulates for the ownership requirement deal with the many complex personalities of the identity of the shipowner. For the purposes of this work, the author suggests that it should be considered whether the identification of the shipowner nullifies the doctrine of 'piercing or lifting the corporate veil' within the context of the law of maritime cabotage?[62] In other words, has the veil been pierced or lifted already such that the identity of the shipowner is already known?[63] Perhaps more intriguing is whether the ownership requirement has inadvertently prevented shipowners from wearing the veil at all, with the effect that there is no longer the need to lift or pierce the veil within the context of maritime cabotage.[64]

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[59] As a reminder, the ship ownership requirement stipulates that any vessel engaging in the maritime cabotage activities of the country must be wholly or substantially owned by persons who are citizens of the country. Owning any kind of vessel, whether it is for the dry bulk, wet bulk, container, passenger or other specialized trades is a very expensive venture. Whether the vessel has come into ownership as a new build or a second hand tonnage, the burden of financial responsibilities and legal requirements are such that there is no room for non-compliance. The need to adhere to requirements and responsibilities takes on added significance when the laws which need to be complied with are those of another country – which may be different from what international legal frameworks generally stipulate for.

[60] See: A. AKPAN, *op cit*. However, to give an overview, the argument in favour of protecting indigenous shipowners from foreign competition in the maritime cabotage trade and services of the country is that: revenue generated by the indigenous vessels from freight rates and hire is the income of the indigenous shipowner and hence, the income is available for PAYE and corporate tax, thereby contributing to the national revenue purse.

[61] See the Obiters of Lords Neuberger (Paras 75 -80) and Sumption (Para 27) in: *Petrodel Resources Ltd v Prest* [2013] UKSC 34. It should be noted that in this case, the veil was not pierced as there was no need to. The court reached its decision using another criterion: the beneficial ownership link. Also S. 24(1)(a) of the Matrimonial Causes Act, 1973 may have played an influential part in the minds of the judges. Lady Hale and Lord Wilson alluded to that in their judgement.

[62] *Atlas Maritime Co SA v Avalon Maritime Ltd (The Coral Rose)* [1991]1 Lloyd's Rep 563, at 571

[63] This work does not claim to be the apotheosis on the subject matter of the corporate veil, nor is it designed to deal with the abuse of corporate structure that leads to the desire to lift or pierce the corporate veil. This work is only concerned only to the extent to which the identity of the beneficial shipowner is important with regards to the principle of maritime cabotage law. For the reader who wishes to delve deeper into this subject, a good starting point would be; K. VANDEKERCKHOVE, *Piercing the Corporate Veil: A Transnational Approach (European Company Law),* London, 2008.

[64] For a detailed read on piercing the corporate veil, see: A. SHEPPARD, *New trends in piercing the Corporate Veil: The Conservative Versus the Liberal Approaches*, Athens, 2013.

## 5. The Ship Nationality Concept in the Context of Maritime Cabotage Law

A vessel may still acquire the nationality of a state even if it is unregistered and has no documents evidencing that nationality.[65] The theory of assigning nationality to a ship is based on the nature of a ship's function. In the course of performing her function, a ship is likely to traverse the unregulated high seas. This would take her outside the jurisdiction of a sovereign littoral state to which she would at any rate be subjected to its laws and regulations. Therefore, the conferring of nationality to a ship eliminates the legal vacuum which would otherwise exist if ships were allowed to float in the high seas without an assigned nationality.

The ship nationality requirement under maritime cabotage law stipulates that all vessels seeking to engage in the maritime cabotage activities of a country must be registered in the appropriate ship registry of that country and fly its flag in what is commonly termed as the 'Flag State'.[66] The author suggests that perhaps there is need to reconsider whether it is best to saddle flag states with the responsibility of upholding international ship registration standards.[67] This is because, if flag states were relieved of that compulsory duty, the effect would be maritime cabotage countries would lose the authority to demand that maritime cabotage vessels must be registered in their country. If this view were upheld, it would certainly call into question the authority of a sovereign maritime nation over its territorial waters. This would provoke a debate on the need to pursue a harmonised compliance package of international ship registration and its application in the different maritime jurisdictions.[68]

It is noted that ship registration undertaken for the purpose of satisfying international legislations, does not necessarily qualify such vessels to participate in a country's maritime cabotage activities. In many countries, there is a requirement to register in a special maritime cabotage ship register. In Nigeria, for instance, vessels seeking to participate in maritime cabotage activities must register in a 'special register' in addition to fulfilling all the other pre-requisites.[69] In Brazil, foreign vessels that have suspended their original flag to fly the Brazilian flag because the vessel was built in Brazil must register in the Special Brazilian Registry (REB) for maritime cabotage purposes.[70] Even in the European Union, where a liberal maritime cabotage policy exists amongst Member States, freedom to engage in maritime cabotage activities requires community shipowners to have their ships registered in, and flying the flag of, a Member State.[71] Moreover, offshore registers, as well as some second registers of Member States, are prohibited from engaging in maritime cabotage activities within the

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[65] *R. v Robert Allen Bolden* [1998] 2 Cr. App. R. 171. Prior to its amendment in 1988, the UK Merchant Shipping Act of 1894 defined a British ship purely in terms of ownership, regardless of whether she had been registered in accordance with the Act. provided that the shipowner had its principal place of business in mainland Britain or a British possession or overseas territory. The active legislation in the UK on this issue is the Merchant Shipping Act 1995 which has carried over the 1988 amendment and thus a ship can assume British character only by registration.

[66] S. SUCHARITKUL, *Liability and Responsibility of the State of Registration or the Flag State in Respect of Sea-Going Vessels, Aircraft and Spacecraft Registered by National Registration Authorities*, in *The American Journal of Comparative Law*, 2006 54(1), 409 – 442. American Law in the 21st Century: U.S. National Reports to the XVII International Congress of Comparative Law (Fall, 2006).

[67] See: *R. v. Anderson* (1868), II Cox Crim. Cas. 198. See also: *People v. Tyler* (1859), 7 Mich. 160

[68] For a slightly different take on the argument, see: S. GALBRAITH, *Thinking Outside the Box on Coastal shipping and Cabotage*, in *Maritime Trade Intelligence,* 2014.

[69] Article 22(1) and Article 29(1) of the Coastal and Inland Shipping (Cabotage) Act 2003 of Nigeria

[70] Decree No. 2256/97 in pursuant of Article 10(III) of Law No. 9432/97.

[71] Article 1 of European Union Regulation 3577/92.

European Union under *Council Regulation 3577/92*.[72] Furthermore, countries with international or offshore ship registries are expected to commit to the same international maritime regulatory agreements that their traditional ship registries have signed up to. However, some serious constraints such as the crewing requirements are generally relaxed for vessels registered in these second registries.[73]

This is where open registries differ from those registries set up for maritime cabotage purposes. International and offshore registries generally relax crewing requirements, whereas countries that set up a special register for maritime cabotage purposes are more stringent in this area. These registries generally stipulate for an indigenous crew requirement to be met by shipowners as an integral and important condition.[74] The registration requirement is one of the most upheld pre-requisites in the maritime cabotage law of any maritime nation. Many maritime nations require shipowners to ensure that their vessels are registered and fly the flag of the host cabotage country, regardless of the maritime cabotage approach it adopts.

When the concept of a maritime cabotage law is carefully considered, the requirement to register vessels in the host cabotage country correlates with the 'genuine link' concept under international law of the *1958 Geneva Convention on the High Seas*.[75] The *United Nations Conference on Trade and Development (UNCTAD)* demonstrated the relationship between the registration feature of maritime cabotage law and the 'genuine link' concept. It stated that to satisfy the 'genuine link' condition, a vessel must:

(a) Contribute to the national economy and be reflected in national accounting;
(b) Employ indigenous crew on board the vessel;
(c) The ownership of the vessel must be beneficial to the country of registration.[76]

This clarification on the concept of a 'genuine link' lies at the centre of the principles of the modern maritime cabotage law, which aims to promote the economic development of the host country. It achieves this by ensuring that there is a genuine link between where the vessel is built, the shipowner, where the vessel is registered, and crew nationality on the one hand, and the host maritime cabotage country on the other hand.[77]

Before the modern practice of maritime cabotage law began to gain traction, it was perceived that the only success of the genuine link concept was that it stimulated academic debate on the issue. However, this debate has continued without any meaningful headway in the legal application of the concept in reality within the maritime industry. Generally, a vessel seeking to be registered for the purposes of maritime cabotage would need to have satisfied already,

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[72] The European Union have in the past considered plans of setting up a European Union wide International ship registry. See: S. MOLONEY, *Euros Flag Drive Stepped Up: EU Presidency Will Draw Up Legislation with Commission*, in *Lloyd's List*, 1994, 3rd February, p. 12.

[73] The relaxation of these constraints in the second registries is intentional and is aimed at minimizing national shipowners from flagging out and to attract foreign shipowners to their registries.

[74] For more analysis on the issue, see the maritime cabotage legislations in the United States, Nigeria and Australia, all of which stipulate for stringent crew requirements.

[75] The genuine link concept received some support in international law under the *1986 United Nations Convention on the Conditions for the Registration of Ships (UNCCORS),* which is not yet in force and is not expected to get enough support through party signatories to come into force. The Convention stipulates that a satisfactory part of a registry's complement, consisting of officers and crew of vessels flying its flag, should be nationals or persons who are permanently domiciled in the flag State. See articles 8 and 9 of UNCCORS 1986.

[76] UNCTAD, *Economic Consequences of the Existence of Lack of a Genuine Link between Vessel and Flag of Registry*, Geneva, 1977, TD/B/c.4/168, pp. 20-21

[77] For similar argument on the issue, see: J. Zheng, Q. Meng, Z. Sun, *Impact Analysis of Maritime Cabotage Legislations on Liner Hub-and-Spoke Shipping Network Design*, in *European Journal of Operational Research*, 2014, 234(3), pp. 874-884.

the other requirements of maritime cabotage. Even in countries where waivers are readily granted under maritime cabotage law, a waiver is rarely granted for the registration requirement.[78]

It has been established that shipowners would usually seek to register their vessels where there are incentives and multiple benefits such as low taxes, cheap labour, and a favourable regulatory environment. However, these benefits are not necessarily available when registering a vessel for maritime cabotage purposes. In fact, registering a vessel in a maritime cabotage register is often more expensive and rigorous for the shipowner.[79] Presently, this is a highly vexed issue in Australia because their revised maritime cabotage regulation has established the *Australian International Shipping Register (AISR)* as a second national register to revive Australia's maritime cabotage services.[80]

The last point for discussion on the ship registration feature in this work is the perceived poor safety standards that open registries have. Traditional registries often point to the poor regulatory standards in most of the open ship registries as the fundamental cause of major maritime disasters.[81] It is generally accepted that countries with open registries are beneficiaries of the revenues generated from luring shipowners to their registries. However, traditional maritime countries are more likely to suffer the impact of any maritime disaster caused by vessels with poor safety standards that are registered in many of these open registries.[82] The immediate impacts of these maritime disasters are usually damage to aquatic life, the marine environment, and economic livelihood of local persons and businesses.[83]

It is a fact that several maritime disasters have been caused by vessels registered in open registries.[84] These incidents usually occur far away from their ports of registries and nearer the coasts of countries with higher regulatory standards than what is obtainable in open registries.[85] Therefore, one can understand the demand that open registries adopt higher regulatory standards to minimise possible maritime disasters. For instance, maritime incidents such as the *Torrey Canyon, Amoco Cadiz, Odyssey tanker, MT Haven, the Erika*, and *the Prestige*, involved vessels registered in open registries. The author suggests that it tells a lot that all of these maritime incidents occurred near the coasts of traditional registries.[86] This goes a long

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[78] See the Nigerian Cabotage Act 2003 – where there is a waiver provision for all the features of maritime cabotage except the registration feature. See the section on Nigeria in chapter three of this thesis.

[79] Shipowners who register their vessels in the United States of America, to comply with the Merchant Shipping Act of 1920, accrue higher costs from building vessels, repairing vessels and crew wages.

[80] For a deeper analysis of the legal and economic implications of the new reforms in Australia's coastal shipping and the new AISR, see: J. PORTER, *Australian Coastal Shipping: Navigating Regulatory Reform*, in *Australian and New Zealand Maritime Law Journal*, 2015, 29(1), pp. 8-17.

[81] C. KONTOVAS, H. PSARAFTIS, N. VENTIKOS, *An Empirical Analysis of IOPCF Oil Spill Cost Data*, in *Marine Pollution Bulletin,* 2010, 60(1), pp. 1455-1466.

[82] M. LOUREIRO, J. LOOMIS, M. VÁZQUEZ, *Economic Valuation of Environmental Damages Due to the Prestige Oil Spill in Spain*, in *Environmental and Resource Economics,* 2009, 44(4), pp. 537-553.

[83] S. CHANG, J. STONE, K. DEMES, M. PISCITELLI, *Consequences of Oil Spills: A Review and Framework for Informing Planning*, in *Ecology and Society*, 2014, 19(2): 26, pp. 1–25. See also: R. LAW, C. KELLY, *The Impact of the "Sea Empress" Oil Spill*, in *Aquatic Living Resources*, 2004, 17(1), pp. 389-394.

[84] D. BELLAMY, et al., *Effects of Pollution from the Torrey Canyon on Littoral and Sub-Littoral Ecosystems*, in *Nature Geoscience*, 1967, 216(1), pp. 1170-1173.

[85] R. JACOBS, *Effects of the 'Amoco Cadiz' Oil Spill on the Seagrass Community at Roscoff with Special Reference to the Benthic Infauna*, in *Marine Ecology Progress Series*, 1980, 2(1), pp. 207-212.

[86] The Torrey Canyon (1967), registered in Liberia, caused oil pollution near the coast of Cornwall, England; The Amoco Cadiz (1978), registered in Liberia, caused oil pollution near the coast of Brittany, France; The Odyssey oil tanker (1988), registered in Liberia, caused oil pollution near the coast of Nova Scotia, Canada; The MT Haven (1991), registered in

way to bolster the general perception that open registries are poor on safety and maintenance standards.

However, the *Exxon Valdez* incident in 1989 is evidence that poor standards are not the exclusive practice of open registries.[87] The *Exxon Valdez* was built and registered in the United States at the time of the incident, and had a crew that was mostly citizens of the United States.[88] Furthermore, the Gulf of Mexico deep-water horizon oil spill is a true index that disasters in the maritime environment are not endemic to open registries.[89] Moreover, many of the open registries were actually set up with the support and stake from the traditional ship registries.[90]

Whatever criticisms are levelled against open registries; it is argued that ship registries set up for the purpose of maritime cabotage have a stake in ensuring vessels comply with high regulatory standards. This is because, in the event of a maritime disaster during maritime cabotage operations, all the damage would occur in the coastal waters of the host cabotage country.[91] The author disagrees with the generalisation of open registries as a surety for poor standards as purported by Lord Donaldson in his *'inquiry into the prevention of pollution from merchant shipping'*.[92] In what is otherwise an accurate synopsis of the nature of flag States, Lord Donaldson appears to suggest erroneously that all foreign-flagged vessels in the territorial waters of the United Kingdom should be targeted discriminatorily for inspection, arrest and detention. The author contends that ship registries set up mainly for maritime cabotage purposes are more likely to stipulate and enforce stringent regulatory standards upon their shipowners. The objective is to ensure fair labour, safety of persons, and safeguard of the environment within their territorial waters. Open registries such as Hong Kong and Singapore, whose regulatory standards compare to the best traditional registries, amply demonstrate this point. After all, it is the prerogative of the flag State to have the desire to uphold high regulatory standards.

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Cyprus, caused oil pollution near the coast of Italy; The Erika (1999), registered in Malta, caused oil pollution near the coast of Brittany, France; and The Prestige (2002), registered in Liberia and Bahamas, caused oil pollution near the Spanish, French and Portuguese coasts.

[87] H. LI, M. BOUFADEL, *Long Term Persistence of Oil from the Exxon Valdez Spill in Two Layer Beaches*, in *Nature Geoscience*, 2010, 3(1), pp. 96-99. The Exxon Valdez incident led to the enactment of the Oil Pollution Act 1990.

[88] R. CARSON, et al., *Contingent Valuation and Lost Passive Use: Damages from the Exxon Valdez Oil Spill*, in *Environmental and Resource Economics,* 2003, 25(1), pp. 257-286.

[89] A. MASCARELLI, *Deepwater Horizon: After the Oil*, in *Nature Geoscience*, 2010, 467(1), pp. 22-24. See also: E. KUJAWINSKI, M. SOULE, D. VALENTINE, A. BOYSEN, K. LONGNECKER, M. REDMOND, *Fate of Dispersants Associated with the Deepwater Horizon Oil Spill*, in *Environmental Science and Technology*, 2011, 45(1), pp. 1298-1306.

[90] The Liberian open registry was established by Edward Stettinius, who was Secretary of State of the United States during World War II. The Panama and Marshall Island ship registries were also established with the help of similar influences.

[91] E. DeSOMBRE, *Flagging Standards: Globalization and Environmental, Safety, and Labor Regulations at Sea*, Massachusetts, 2006.

[92] See: DEPARTMENT OF TRANSPORT, J. DONALDSON, *Safer ships, cleaner seas: Report of Lord Donaldson's Inquiry into the Prevention of Pollution from Merchant Shipping*, in *HMSO Command Paper*, 1994, CM2560.

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