

**THE NEW SOUTH AFRICAN SHIP REGISTRATION ACT<sup>1</sup>**  
**NEW INVESTMENT OPPORTUNITIES BUT OLD INHIBITORS**

By

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**Abstract**

*This paper examines briefly the historical roots of the current registration of ships in South Africa. It traces early English legal, commercial and political roots, and then looks at the protective system that applied in South Africa from 1957 until 2003. A broad outline of the Ship Registration Act is given, in the light of which shipping investment opportunities presented by the new Act are explored. Particular focus is placed on empowerment options.*

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The registration of ships should be about providing a legal haven for the safe and efficient operation of ships. Usually it is not. Instead it is an uneasy alliance of bureaucracy, politics, economics, labour relations, and law.

In the South African context, one may now add 'history' to this list. Bureaucracy, politics, economics, labour and the law effectively strangled the South African ship register to the extent that today the registration of South African owned foreign-going blue water merchant ships on the local register is history.

Yet new history is in the making: the Ship Registration Act, passed by parliament in 1998, is at last poised to become law. Borne during the post-1994 maritime transport policy review, and driven by the aims of the White Paper of 1996, the Act was a crucial part of the streamlining of a shipping administration that had outgrown the demands of its time.

How did times change so much in shipping that the once-proud registers of the world's maritime states lost the bulk of their tonnage to convenience registers, leaving mainly the fishing fleets and service vessels on the national registers?<sup>3</sup> The answer is found in an understanding of history. And much of that history unfolded in the rise and fall of the English register of merchant ships.

**SHIP REGISTERS IN HISTORY**

It all turns on trade. Without healthy trade, inbound and export, no country will prosper. Raw materials need to get to manufacturers. Products need to find their markets. Globalisation is nothing new - only the horizons have expanded. And airfreight has scarcely dented maritime carriage, which still accounts for over 90% of

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<sup>1</sup> Act 58 of 1998, read with the Ship Registration Regulations. The Act is due to be published into law early in March 2003. For the full text of the Act and of the Regulations, see the UCT Shipping Law website at <http://www.uctshiplaw.com/>. The Regulations were published in GN R497 in Government Gazette 23345 of 26 April 2002, corrected by GN 893 published in Government Gazette 7397 on 28 June 2002.

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<sup>3</sup> The 2001 United Nations' annual Review of Maritime Transport reported that the developed market economy countries accounted for 25,2% of ships registered, and the major open registries 48,5%. Developing countries registered some 20% of the world's shipping.

all trade.<sup>4</sup> Shipping can be the barometer by which to measure the strength and weakness of a nation's economy. Maritime states have recognised over the centuries that if they can have some control over the ships owned or operated by their nationals, revenues can be generated for the state coffers. In times of war, state needs can be addressed by requisition. And the *quid pro quo* for revenues generated by shipping and for having a fleet available to serve the state's wartime interests is to provide protection to that fleet in a way that allows ships to trade without hindrance by other states or persons. This protection can take two forms - first is the political protection that flying a flag gives to the ship and to all who sail on her. And second is the possibility of economic protection of vessels of the national flag. Politics and economics.

Economic protection has interesting and complex roots. Although the registration of ships can be found even in Roman times and was common in the city-states of mediaeval Italy,<sup>5</sup> it was Britain that pioneered flag discrimination. In 17<sup>th</sup> century Britain, King Richard II set the protectionist ball rolling with the start of what was to be nearly 500 years of 'Navigation Laws'.<sup>6</sup> At their most extreme, these laws sought to protect British ships against all foreign competition. Carriage of goods into England was reserved to tonnage wholly owned by Englishmen, built in England, and manned by an English master and at least  $\frac{3}{4}$  English crew. And these criteria were entrenched in the Ship's Register in 1786 when the Registration Act<sup>7</sup> decreed that only such 'English' vessels could be registered on the English register. The main short-term aim was to knock the maritime domination of the Dutch. To that end, the Navigation Acts and sundry barbaric wars were undoubtedly successful.<sup>8</sup>

With the state firmly behind them, English ships flourished both in number and tonnage. But the state is not in the business of ship owning. Business cannot successfully operate in the long term in a protective cocoon. Protection leads to inefficiency and dulls the edge of endeavour and competition. That competition came to the English from the emerging US markets after the American War of independence. Hit by increasingly draconian Navigation Laws designed to keep the America out of both the transatlantic trade and trade to the British dependencies, the US retaliated with its own navigation laws. The English reserved east-bound trade inwards to British ships. The Americans reserved their own inward trade westbound to American ships. Both sides then had an expensive ballast voyage back to their own markets - which encouraged the Americans to develop their own manufacturing and lessen their dependence on English products. The English were the ultimate losers. Their fleet dulled into disarray to the extent that a petition was presented to Parliament in 1844 calling for the repeal of the Navigation Acts to 'save those who sought to live by shipping from utter ruin'.<sup>9</sup>

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<sup>4</sup> The same UN review recorded sea-borne trade for the 2001 year as some 5,88 billion tonnes. There were then merchant vessels lifting some 808 million tonnes dwt.

<sup>5</sup> *Ready Ship Registration*, 2<sup>nd</sup> Ed (LLP), p 2.

<sup>6</sup> For a discussion of the Navigation Laws and of their effect on British and American shipping, see Hare *op cit* p 116 – 120, and Davies *Belief in the Sea* Lloyds, 1992. A fascinating account of the Navigation Laws is given by the historic text of Ricardo *The Anatomy of the Navigation Laws*, 1847.

<sup>7</sup> 26 Geo III c 60

<sup>8</sup> The Dutch, when the registration of ships in England became compulsory towards the end of the 17<sup>th</sup> century, were reputed to be operating between 15 000 and 16 000 ships. British vessels numbered only a few thousand. By the end of the Navigation Acts, legislation and wars had reversed the numbers. See for example Schama *The Embarrassment of Riches – An Interpretation of Dutch Culture in the Golden Age*, 1987, at p 234. The belligerence of both British and Dutch was well illustrated by the spice wars. The English emerged in history as the victors, because in 1667 the Dutch agreed to hand over the island of Manhattan in exchange for the English handing back to them the island of Run - see Milton *Nataniel's Nutmeg*, Sceptre, 1999 p 363.

<sup>9</sup> See Hare *op cit* Chapter 12 'The Business of Carriage of Goods by Sea' at p 436. The revival of British shipping can thereafter be attributed to the repeal of the Navigation Acts and also to the boom

What has this to do with the current South African ship register? The lessons of history give valuable insight. The English Navigation Laws were finally repealed only in 1850.<sup>10</sup> Only one generation later, the English Merchant Shipping Act of 1894 was drafted. And that Act was the blueprint for the establishment of the South African Merchant Shipping Act of 1951.<sup>11</sup>

The 1951 regime of registration was a relic from colonial times. From times when England enjoyed unchallenged maritime dominance and when trading opportunities were cushioned by largely captive colonial markets. Although the primary purpose of trade domination was removed from the ships register,<sup>12</sup> it remained a regime that said “If you are an Englishman, your ship must fly the Red Ensign”. And correspondingly, “Unless you and all your business partners owning or operating the ship are Englishmen, you are not welcome on the flag”. The regime was at once mandatory, and exclusive. Mandatory because the Crown recognised the value of a merchant fleet in times of war,<sup>13</sup> and exclusive because the flag did not suffer foreign business participation. And this was the system inherited by South Africa in 1951.

It was a system that suited the establishment of our first fully-fledged locally owned shipping line in the same year. When Sir Arthur Harris announced to the press in June 1946 that a new South African shipping company was to be formed, he stated:

*The ships belonging to the South African Marine Corporation would be registered in Cape Town and would sail under the South African flag. As soon as possible, they would be manned by South Africans and thus would provide opportunities for young South Africans to follow a sea-going career.*<sup>14</sup>

‘Bomber’ Harris’ dream was partly fulfilled. But the choice of a flag was perhaps the most difficult issue that Safmarine had to deal with during its half century of trading in a world increasingly hostile to the amoral politics of its home country. And the reality was that the inflexibility imposed by the nationality provisions of the 1951 Merchant Shipping Act necessitated that the South African fleet slip away to registers more expedient. Convenient, even.

Even without the artificiality of apartheid, the system was too tight and inflexible to adapt to the metamorphosis of world economics and politics in the latter half of the

brought by the newly discovered guano trade.

<sup>10</sup> By the Repeal Act, 1849, 12 & 13 Vict c 29.

<sup>11</sup> The registration provisions of the SA Merchant Shipping Act, sections 11 – 13 were almost identical to those of the 1894 Act. The 1951 Act came into effect in 1960.

<sup>12</sup> *Maclachlan on Merchant Shipping*, 7<sup>th</sup> Ed p 56.

<sup>13</sup> Requisition of ships flying the flag of a belligerent state remains a significant factor in making registration mandatory. Without sufficient ships on the national flag, states at war have to charter in their needs. Foreign owners can demand high rates for vessels that are to be sent into a war zone, and foreign crews often refuse to serve. The current crisis in Iraq has seen both the US and British governments enter the charter market in search of merchant ships needed for support roles in the event of an invasion of Iraq. Both Britain and the US are experiencing difficulty in persuading Middle Eastern states to commit to logistical support. A war in Iraq would be a long-distance logistical challenge greater than the Crimea, the Anglo Boer War, the Korean War and the war in Vietnam. Fleet Auxiliary vessels would need supplementing by both product tankers and ro-ro’s. This will surely drive rates up as foreign owners offer unemployed ships or war service. “*During the Gulf War only eight of the 143 vessels chartered by the ministry flew the Red Ensign. As a result foreign ship owners were able to take full advantage of their market power. Western governments sometimes ended up paying three times the market rate for ro-ros. Meanwhile, a number of Indian crews had to be replaced at the last minute and there were reports of seafarers from non-allied nations refusing to serve.*” See the August 2002 report of *The Weekly Union Newspaper of the Sea* at <http://home.earthlink.net/~araplans/08182002.html>

<sup>14</sup> Extract from the Cape Times of 26 June 1946 re-printed in Ingpen *Safmarine, 50 Years* Fernwood Press.

20<sup>th</sup> century. By the closing decade of the 20<sup>th</sup> century there were only 4 blue water ships on the South African flag.<sup>15</sup>

In 1994 South Africa changed. The newly elected democratic government commissioned a full policy enquiry, and set its ideals in The White Paper for Transport. The White Paper recognised the need for change:

*South Africa needs a modern ship's register which is efficient, which balances the interests of the nation, ship owners and seafarers in an internationally acceptable manner, and which accords with principles of international law relating to the necessity of a "genuine link" between the state of registry and the ship owner. The register should be attractive to both local and foreign investors, but in no way a "flag of convenience".*

How far has the Ship Registration Act gone in meeting these aims? Will the new register be attractive to foreign investors? Is this attractive sheep merely concealing the convenient wolf? Let us examine the new regime by means of questions & answers.

#### **THE NEW SOUTH AFRICAN REGISTRATION REGIME THE BASIC QUESTIONS ANSWERED (SHIP REGISTRATION FAQ'S)**

##### ***What form will the new SA Ships Register take, and where will it be kept?***

The SRA establishes the SA Ships Register 'in which must be entered all matters required or permitted' by the Act and the Regulations.<sup>16</sup> The Register is computerised, and can be accessed from all SAMSA offices.

##### ***Who will administer the register?***

SAMSA will administer the register through its port offices, each of which will still have a Registrar of Ships.

##### ***Will existing ships' registries and registered mortgages be affected?***

The SRA enacts transitional provisions as Schedule 3. Item 3 deems all existing entries in the register to have been made in the new register in terms of the SRA at the time of their initial entry.<sup>17</sup> The registrar may recall deemed registries if they do not now comply with the SRA.<sup>18</sup>

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<sup>15</sup> Against an estimated foreign-going fleet of about 100 ships that were beneficially owned in South Africa.

<sup>16</sup> SRA s 33(1).

<sup>17</sup> SRA s 61 read with Item 3 of the Transitional Provisions of Schedule 3.

<sup>18</sup> SRA Item 6 of Schedule 3. This would include registries considered 'inappropriate' in terms of s 43.

### ***Will there still be ports of registry?***

The present ports of registry are retained as the designated home port<sup>19</sup> of the ship to be registered, although there will be no individual port registers. Search on the central register will be categorised by port and vessel type.

### ***Will there still be Official Numbers and 'Carving & Marking Notes'?***

The register will allocate each ship an official number. Ship's particulars will still be required to be etched into their main beam,<sup>20</sup> evidenced by a Carving & Marking Note.

### ***What is a 'registered agent'?***

Each ship on the register must have a 'registered agent' entered on the register. This is the managing owner, or an agent appointed 'in respect of a ship or a person managing the ship'.

Whilst this provision surely seeks to provide an accountable face to the register, its object seems to be defeated by the ability to appoint a juristic person care of its 'principal place of business' as the registered agent.<sup>21</sup>

### ***What tonnage will be used for the Register?***

Tonnage measurement is still done under the Merchant Shipping Act that in turn incorporates the Tonnage Convention.<sup>22</sup>

### ***What gives a ship SA nationality?***

'South African ships' are ships *entitled to be registered*, whether actually registered or not.<sup>23</sup> A ship entitled to be on the South African register is one which is majority owned by South Africans or bareboat chartered to South Africans for more than 5 years.<sup>24</sup>

### ***Who may own a South African ship?***

Any person, natural or juristic, may own a South African ship or share in a ship. But South African nationals, including companies, close corporations and trusts, must own the majority of the 64 shares of the ship.<sup>25</sup>

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<sup>19</sup> Regulation 2(1)(b) read with Regulation 45 which lists all the existing ports of registry.

<sup>20</sup> SRA s 20(1).

<sup>21</sup> SRA s 40(4)(b).

<sup>22</sup> Defined in the Merchant Shipping Act s 2(1) as the 'International Convention on Tonnage Measurement of Ships done at London on 23 June 1969, as modified by any amendment made under Article 18 of that Convention that has entered into force for the Republic'.

<sup>23</sup> SRA s 3.

<sup>24</sup> Also small non-fishing vessels owned and operated by South African residents – SRA s 16.. Commercial fishing vessels are

<sup>25</sup> Or must jointly own more than 50% of the total ownership interest of a maximum of 5 owners of each 64<sup>th</sup> share in the ship.

***Will allowing minority foreign ownership make the new South African register a flag of convenience?*<sup>26</sup>**

Flags of convenience, even in the eyes of the ITF, are such because of a number of factors, collectively painting a picture of a lack of administrative control, of responsibility and of accountability. International law requires a 'genuine link' between the flag and the ship owner. In South Africa, this link can be tenuous, requiring no more than that the owner be a registered company with a place of business in South Africa.<sup>27</sup> The South African flag administration is committed to a register well regulated according to international standards. It should not be regarded as an 'FOC'. If its administration slips below industry norms, and if unscrupulous ship owners hide behind that lassitude, convenience status would both justified and deserved.

***Must a South African ship be registered?***

Registration is only required if a mortgage is to be registered, or if the vessel is foreign going.<sup>28</sup> Hence coasters may remain unregistered. They are still categorised as South African ships and are subject to the same administrative controls as they would be if registered.

Regulation 43 exempts from registration ships that ply exclusively in the internal waters, territorial sea and exclusive economic zone of the Republic. This would not seem to extend the latitude already extended to non-foreign going ships.

***Are any ships prohibited by law from being on the SA Register?***

Ships under 3m loa, wooden ships 'of primitive build'<sup>29</sup> and ships already on another register, unless sold in execution by order of the High Court in Admiralty, or bareboat chartered in to a South African national, in which event evidence of the charterparty and of the consent of the primary register is required.<sup>30</sup>

***May the registrar refuse to register a ship?***

Only where the Registrar of ships is satisfied that it is 'inappropriate' for the ship to be on the register having regard to her condition as it has bearing on safety, health and welfare of crew, risk of pollution and the 'interests of the Republic or international merchant shipping'.<sup>31</sup>

***What do you do if you are to build a new SA ship?***

Form 1 is a notice of intention to apply for registration. This form may be sued for both new buildings and acquisitions.

There are Regulations specific to newbuildings.<sup>32</sup>

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<sup>26</sup> On flags of convenience and the genuine link requirement, see Hare *op cit* p 131- 134.

<sup>27</sup> Rather than the more common requirement of a 'principal place of business'.

<sup>28</sup> SRA s 44 and 45. If she sails for a foreign port she is stripped of 'any benefit, privilege, advantage or protection usually enjoyed by a foreign ship. See Hare *op cit* p 143.

<sup>29</sup> Regulation 12.

<sup>30</sup> SRA s 19.

<sup>31</sup> Where the ship complies with her safety convention requirements, the Registrar would have to make a reasoned ruling as to the grounds for refusal. Such a ruling would be subject to review. See Hare *op cit* p 429.

<sup>32</sup> The Merchant Shipping (Notification of Building of Vessels) Regulations, 2002, published under the Merchant Shipping Act aas R498 on 26 April 2002, and come into operation on the date of

SAMSA is required to survey all ships being built or being brought onto the South African register.<sup>33</sup> A new building is required to have a Builder's Certificate giving full details of the ship's construction.<sup>34</sup> The owner must then submit a declaration of ownership, though there does not appear to be a prescribed form in the Annexure to the Regulations. The content of the declaration is however stipulated in Regulation 15.

***What do you do if you buy second hand tonnage and want to bring it onto the SA Register?***

Regulation 13 requires an application to be made for registration,<sup>35</sup> supported by documentation evidencing the nature of the ship, her condition and the details of her owners, supported by declaration of their nationality.<sup>36</sup> She is required to be inspected for safety purposes, and her tonnage certificates must be certified.<sup>37</sup>

***Does registration expire? How is it renewed?***

Registration is valid for 5 years after which it must be renewed. Registration of a chartered in ship is valid for 5 years or until the end of the charter period (whichever is the earlier).<sup>38</sup>

The Registrar must serve a renewal notice on the owner 3 months before the expiry of the registration. Renewal must be applied for during the 3 months before expiry. The application for renewal must be supported with a refreshed declaration of ownership and nationality.<sup>39</sup>

***May any ship be chartered into the SA Register?***

The Regulations prevent registering the following classes of chartered-in ships on the bareboat register

- fishing vessels
- ships less than 500 tonnes gross
- ships older than 15 years from building
- ships not mechanically propelled
- ships bareboat chartered for less than 5 years.<sup>40</sup>

***May you charter a South African ship out to a foreign charterer to be placed on a foreign second register, leaving the SA register as the primary registration?***

There is as yet no provision made for chartering out. The Minister is empowered to make regulations for both chartering in and out, but thus far the Regulations only provide for chartering in.

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commencement of the SRA.

<sup>33</sup> Regulation 16.

<sup>34</sup> Regulation 14.

<sup>35</sup> Form 1 annexed to the Regulations should be used.

<sup>36</sup> Regulation 15.

<sup>37</sup> Regulation 16.

<sup>38</sup> Regulation 18

<sup>39</sup> Regulation 20. This is presumably designed to cater for more frequent changes of co-owners, to ensure majority ownership remains South African.

<sup>40</sup> Regulation 3 read with SRA s 1(6)(b)

### ***What if a ship owner takes in foreign partners?***

The foreign partners may own up to 31 shares in the ship for the ship to stay on the South African register. Or the ship may be owned by a company which has any number of foreign shareholders, provided that the company is locally registered and has a 'place of business' in South Africa.

### ***Do you have to use the prescribed forms?***

The forms attached to the Regulations must be used, but 'substantial compliance' with those forms is all that is required.<sup>41</sup> Thus you may generate computerised versions of the forms, and, provided all the information is present, there would be no objections raised if the format of the forms differed somewhat from those prescribed. It would be preferable to stick to the layout of the forms as far as is possible.

### ***How do you register a mortgage over a South African ship?***

Regulation 32 provides that mortgages be on Form 6.<sup>42</sup> The mortgage is created not by the execution of the form, as was the case under the Merchant Shipping Act, but by the registration of the mortgage at the register. Priority between two or more mortgages follows the order of registration.<sup>43</sup> Form 6 will be used in conjunction with the underlying loan agreement secured by the mortgage. There is no requirement that the loan agreement be filed with the Registrar.

### ***May only the whole of a ship be mortgaged?***

Any one or more of the 64 shares in a registered ship may be mortgaged by its owner(s).<sup>44</sup> Form 6 requires a statement of the number of shares owned/mortgaged.

### ***Is there any minimum tonnage or monetary limit for SA ship mortgages?***

Any ship entitled to be registered may be the subject of a registered mortgage. Thus any ship over 3 m may be mortgaged.<sup>45</sup> There is no upper or lower limit for the amount of the loan secured by the mortgaged.

### ***How do you sell a South African ship to a SA buyer(s)?***

South African ships are sold by means of a Bill of Sale substantially in accord with Form 4.<sup>46</sup> The Bill of Sale records the number of shares being sold, the particulars of the ship, the purchase price and the details of the purchaser.

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<sup>41</sup> Regulation 2(2).

<sup>42</sup> Form 6 should be signed by the mortgagor ship owner. It is not necessary that it be signed by the mortgagee financier. The form as published provides for the signature of both mortgagee and mortgagor on the same line. The reference to 'mortgagee' is erroneous, though counter signature by the mortgagee would not affect the validity of the mortgage. It remains however a unilateral security, referring as it does to the underlying loan agreement. In the unlikely event that there is no underlying agreement, Form 6 could serve as the loan itself (and the instrument creating the security). Hence there is reference on the form to the essential details of amount, interest, and repayment.

<sup>43</sup> Item 9 of Schedule 1 to the SRA.

<sup>44</sup> *Ibid* – Item 9 states that a ship or a share in a ship may be mortgaged.

<sup>45</sup> This will correct the anomalous situation prior to the SRA in which SAMSA refused to register ships under 25 tonnes. Effectively therefore mortgages were only possible for ships over 25 tonnes.

<sup>46</sup> Previously called a 'Deed of Sale' - the change is to accord with international practice.

**How and when does ownership pass? Is the register conclusive proof of ownership or merely evidence?**

Item 3 of Schedule 1 of the SRA stipulates that a ship or a share in a ship is transferred 'by registration' of a Bill of Sale. The implication is that the register will therefore be proof of ownership. But it will be rebuttable, as there are circumstances in which ownership passes independent of registration of a Bill of Sale.<sup>47</sup>

**What happens if a ship is sold to a (majority of) foreign buyer(s)?**

The ship then loses its character as a ship entitled to be on the South African register. In that event, no Form 4 Bill of Sale is necessary - it is normal for the buyer's register's sale form to be used. Application must then be lodged in terms of Regulation 21 to delete the ship's records from the register. This is done by letter confirming the details of the foreign buyer(s). Deletion will not take place if there remains a registered mortgage in place. In that event s 42 of the Act requires the Registrar to give 60 days notice of the closure of the register.<sup>48</sup>

**What happens if a South African ship is scrapped or is lost?**

The registered owner(s) of a ship which is lost or scrapped must immediately give notice to the Registrar who then closes the register, noting reasons why.<sup>49</sup> Any registered mortgagees would again require 60 days notice of closure of the register, though a mortgage security is extinguished by the loss of the vessel. The ship's registration papers must be handed in to the Registrar within 30 days of the notice.<sup>50</sup>

**What happens if a South African ship is sold in execution by the High Court in Admiralty?**

The South African High Court in Admiralty has the power to sell any ship.<sup>51</sup> The effect of a High Court order is to sell the ship free of liens and encumbrances, including unsatisfied mortgages - whose mortgagees and other creditors are left then with recourse only against the proceeds of the sale, held in court as an admiralty fund. The SRA makes no specific mention of a sale in execution. In the High Court order, the Registrar should be required to register a transfer of ownership in pursuance of the High Court order. The registrar would be ordered to issue a certificate of deletion if the ship is sold to foreign interests.

A ship may also be sold in terms of the SRA following certain transgressions of the Act. Any such order given in terms of the SRA requires the court making the order to appoint a named person in whom rights to transfer the ship will vest.<sup>52</sup>

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<sup>47</sup> Such as transfer by 'transmission' - which occurs primarily where a ship or shares in a ship pass to an heir upon the death of the owner.; or as a legal consequence of marriage - Regulation 31(d); or sale by order of a competent court.

<sup>48</sup> SRA s 42(1)(b) and 42(4).

<sup>49</sup> *Ibid*, read with Regulation 42(1).

<sup>50</sup> Regulation 42.

<sup>51</sup> Section 9 of the Admiralty Jurisdiction Regulation Act, 1983.

<sup>52</sup> SRA Item 6 of Schedule 1.

By analogy, it would be wise for a High Court sale in execution order to authorise the Registrar of the High Court to sign the required sale documents - especially if the sale is to local interests and the ship is to stay on the local register.

### ***Is the registration of fishing vessels and other small craft different?***

Ships of all sizes over 3 metres may be registered.<sup>53</sup> Non-commercial recreational boats only require registration if they are to sail for a foreign port, or if they are to be mortgaged.<sup>54</sup>

Commercial vessels under 100 tonnes, not foreign-going, are required to be licenced in terms of the re-enacted s 68 of the Merchant Shipping Act.

Small vessels under 25 tonnes and longer than 3m, are covered by the Merchant Shipping (Small Vessel Safety) Regulations which will come into effect with the SRA.<sup>55</sup>

## ***EVER-PRESENT INHIBITORS***

### ***Administration***

Central to the keeping of a modern and efficient ships register is to have that register accessible, and then to have the administration of the register equally efficient. There is simply no point in maintaining a super-efficient computerised register, but then having not enough marine surveyors to undertake the administrative backup responsibilities which maintaining a register carries with it. SAMSA is under-funded and under-manned. If the register is to grow, SAMSA will need to grow with it. This means a review of SAMSA's charges, but it also means greater financial commitment from the central government coffers. SAMSA is performing a delegated government service: the administration of ship registration and the promotion and policing of safety at sea is not an option. It is an obligation with international law, as recognised by the Law of the Sea Convention to which South Africa is a party.<sup>56</sup> SAMSA cannot be expected to superintend the entire fishing fleet, pleasure boats, passenger craft, offshore oil industry supply vessels and play the extensive survey role expected of it in relation to new-buildings and purchased tonnage. How can 24 surveyors cover all our ports for registration and continuous survey purposes and then still be expected to inspect 35% of all vessels trading in and out of our ports. For that is the norm required by international Port State Control inspections. We fall far short, and we will all be the losers when the next maritime casualty hits our shores. We can only hope that lives are not lost. Pollution is simply the price we will have to pay for government shortsightedness in keeping SAMSA under funded. And it can be a frightening price.<sup>57</sup>

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<sup>53</sup> The intention was that commercial boats under 100 tonnes would need to be licensed rather than registered, unless they are foreign going. Licensing provisions have been retained in the Merchant Shipping Act, under which Licensing Regulations have been published.

<sup>54</sup> cf Hare *op cit* p 152, written in anticipation of the MSA licensing provisions being enacted in the SRA.

<sup>55</sup> 'Small vessels' are defined in s 1 of the SRA as being less than 25 gross tonnes and more than 3 m, but no further attention is given to this category in the Act or Regulations. Small Vessel Regulations were published in the Government Gazette R400 of 26 April 2001.

<sup>56</sup> Law of the Sea Convention, Art 91 and 94.

<sup>57</sup> The author has, since 1994, lobbied for adoption by South Africa of the current international conventions which increase oil pollution compensation limits 10-fold from those of the Marine Pollution (Control & Civil Liability) Act. The continuing delay in bringing in the 'Fund Convention' limits which spread pollution liabilities across ship and cargo is as inexplicable as it is folly.

But there are more inhibitors that may yet prevent foreign investors from committing to the South African shipping industry. Recognising that an attractive ships register involved a complex weave of reform designed to put South African ship owners on an equal footing with their international competition, the White Paper stated:

*Government will promote interdepartmental and private initiatives to ensure that administrative, fiscal and legal inhibitors to the development of the SA register and its ancillary services are removed.*

*Fiscal aspects affecting shipping will be reappraised on an interdepartmental basis with a view to initiating change where appropriate. These aspects include income tax paid by seamen, ship owners and operators, exchange controls, and duties, and a review of the ranking of claims under the Admiralty Jurisdiction Regulation Act in line with international practice and conventions.*

### **Fiscal bureaucracy & structure**

With the passing of the Ship Registration Act administration of the business of registering ships will hopefully be streamlined. But this is only part of the administrative burden with which ship owners are faced. There are many other bureaucratic processes - exchange control, import customs & excise levies, fuel taxes and levies, income tax on seamen's income earned on South African ships while on foreign trade, company tax paid by ship owning companies domiciled in South Africa for tax purposes and the like. All present bureaucratic burdens which can be enough of a deterrent to turn potential investors away. Yet all can be addressed. Even the vexed issue of shipping taxes has been discussed at many levels. And those involved in the discussions were pleasantly surprised at the amount of common ground. A tonnage tax for ship owners who would then be exempt from income tax is not impossible. It would come at little or no price: the present system has driven most if not all South African freight offshore. The reality is that clever structuring and accounting has meant that little or no tax has been paid by South African ship owners for half a century. The fiscus can only gain if a fiscal climate is created which attracts freight back to South Africa.

### **Ranking of claims**

The mention of the ranking anomalies in the Admiralty Jurisdiction Regulation Act<sup>58</sup> refers to perception rather than reality. The Act sets out a hierarchy of claims that rank against each other when a ship is sold in execution in South Africa. The anomaly of this ranking is that South Africa is the only country in the world which demotes the mortgagee who has financed the ship to be sold to a low ranking - behind the ship repairer and the supplier of necessities. The ranking applies not only to South African registered ships - it applies to all ships sold in execution in South Africa, whatever their flag. The fact that the ship is registered in South Africa and has a mortgage registered here does not affect the ranking at all. Yet the perception of foreign banks has been that they are more at risk having their mortgages registered in South Africa.

What the Ship Registration Act has done is to correct the further anomaly that put a mortgagee (local or foreign) at risk where the ship owner is declared bankrupt in a South African court before any admiralty writs have been issued against the mortgaged ship.<sup>59</sup> The South African Insolvency Act does not recognise the ship's mortgage as either a preferred or a secured creditor.<sup>60</sup> The Ship Registration Act

<sup>58</sup> Upon which see Hare *op cit* p 106 – 110.

<sup>59</sup> Hare *op cit* p 167.

<sup>60</sup> In terms of Uniform Rules of Court 45(1) and 46(14).

deems a registered ship's mortgage to be a special mortgage recognised by the Insolvency Act. In the unlikely event of a vessel being sold as part of an insolvent estate, the ranking of claims against the vessel and her owners would thus proceed as an insolvency rather than as an admiralty distribution. At least, with the amendment, the mortgagee would be protected.<sup>61</sup>

#### **INVESTMENT OPPORTUNITIES PRESENTED BY THE SHIP REGISTRATION ACT**

Let us now look to the positive. How can shipping ventures in the future be set up to attract investment into the country and into the industry?

First, assurance can be given to ship financiers that the register is an efficient and modern administrative structure. And especially, that their mortgages are protected in the unlikely event of the ship owner going bankrupt. Ranking in admiralty is more smoke than fire, and should not prejudice a mortgagee unless a ship is arrested and sold in admiralty in South Africa, in competition with repairers or necessaries men. Urgent attention should nevertheless be given to progressing the agreed compromise on ranking which has been stuck with the government law advisors for three years.<sup>62</sup>

#### **1. Co-owning ships**

- The 64 shares of a ship are owned individually by the investors in the venture.
- If there are foreign participants, up to 31 shares may be owned by foreign partners.<sup>63</sup>
- Any number of shares may be owned by (local) black empowerment partners.
- The owners of the ship's shares may have a management agreement which determines decision-making powers. In the absence of such an agreement, the majority view prevails.
- Earnings per share of the ship can be determined (and different) by agreement.
- Allows all co-owners individually to take advantage of tax incentives (present and future) as ship owners.

#### **2. Joint ownership**

- Each of the 64 shares of a ship may be owned by up to 5 joint owners.
- Each share is treated and speaks as a collective unit, notwithstanding multiple joint ownership.

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<sup>61</sup> Though there remain anomalies: the crew, for instance, would rank after the mortgagee in insolvency. This is profoundly different from the admiralty ranking which puts crew at the top of the ranking hierarchy, defeated only by court costs.

<sup>62</sup> This was a compromise sponsored by the SA Maritime Law Association. It ranks the suppliers of necessaries and the ship repairer ahead of the mortgagee only for a window period of three months after the repairs or necessaries were rendered.. Thereafter the mortgagee ranks ahead. For the proposed new ranking, see the UCT Shipping Law website at [www.uctshiplaw.com/shiple.htm](http://www.uctshiplaw.com/shiple.htm)

<sup>63</sup> As with the whole of this paper, this does not apply to fishing vessels. Ownership of fishing vessels is tighter, linked as it is to the allocation of fishing quotas under the Marine Living Resources Act. There is a looser requirement for foreign participation in non-commercial pleasure craft. See Hare *op cit* p 152.

- Up to 159 of the 320 joint owners may be foreign.
- Similarly, a management agreement may determine the decision-making powers, and earnings per joint-owned share and per collective 64<sup>th</sup> shares may be different.<sup>64</sup>
- May present difficulties for joint owners of a share of a ship to claim tax incentives as 'ship owners'.

### 3. **Chartering-in tonnage on demise - the bareboat register**

- A very useful structure to allow for seasonal and general trade swings.
- Allows for local operators experiencing a short or medium term shortage of tonnage to bring chartered tonnage onto the SA flag.
- Benefits are
  - flexibility in structure and planning of ship owning
  - most demise charters come with an option to purchase, allowing for a *try-before-you-buy* situation
  - convenience if the local demise charterer already has a fleet registered in SA - registration on one register is more convenient and economic.
- Allows for an efficient joint venture with a foreign ship owner to whom demise charter hire may be paid.
- May be beneficial for black empowerment as an option available to a BE company that wants to invest in shipping without making the capital purchase of a ship.

### 4. **Joint ventures**

- Allows for both local and foreign participation in shipping ventures
- Allows the JV partner to become co-owner, joint owner or to charter in ships to a majority of SA participants
- Allows all participants individually to take advantage of tax incentives
- Allows for flexible and tax efficient income flow to JV partners, local or foreign

### 5. **Ownership of shares in companies or trusts that own ships**

- The Act makes no change in the structures that allow a company or close corporation to own shares in a ship.
- Allowance is now made for shares of a ship to be owned by a trust.
- Foreign participation in a company may be subject to debt and other restrictions determined by the proportion of the foreign shareholding.

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<sup>64</sup> It is difficult to see why it was necessary to retain the concept of joint ownership. Common ownership allows a reasonable spread of owners without splitting the individual 64<sup>th</sup> shares between joint owners.

## THE FUTURE

The Ship Registration Act is a new regime for shipping. Though complex in its layout, its formulae for the efficient owning, registration and administration of ships is relatively simple. It follows current international norms and practices, and it is a more transparent, accessible register. It removes doubt about essential features such as the transfer of ownership and the creation of mortgages. It improves the position of the ship financier.

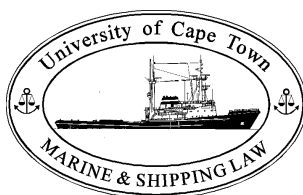
The Act sets up a relatively flexible format for owning and operating ships on the South African register. It presents ample opportunity to structure joint venture operations with foreign and black empowerment participation.

To that extent it is hopefully more 'attractive' than the colonial system it replaces. It is hopefully also far more 'convenient' - a term so feared by shipping lawyers concerned about ITF blacklisting and on-board malpractices. The South African register should be convenient, but never a flag of convenience. And 'FOC' is convenient in the pejorative sense of the word not because of the absence of 'genuine links' as required by international law, not because of brass plate companies pretending to own South African ships, but because of bad (or, worse, non-existent) flag administration and opportunistic unscrupulous ship owners hiding behind those bad flags.

The South African register is not a flag of convenience because there is a strong commitment of both government and the shipping industry that South African ships will be 'fit, staunch and strong'. And that South African crews will be fairly paid, well treated,<sup>65</sup> and above all will serve in a safe environment. To superintend and guarantee such an environment is the awesome responsibility that is given to SAMSA by the Ship Registration Act. And it is a responsibility that the South African government, and all who claim to be South African ship owners, are bound by law and morality to underwrite fully.

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<sup>65</sup> This paper has not touched on the application of South Africa's progressive labour law regime, most of which applies to ships flying the South African flag. See further Hare *op cit* Chapter 5 at p 195 *et seq.*