



Legal Issues Concerning the UN Convention on the Conditions for Registration of Ships (1986)

K. Lapa¹, E. Xhelilaj²

ARTICLE INFO

Article history:

Received 22 September 2017;
in revised form 23 October 2017;
accepted 24 November 2017.

Keywords:

UNCCROS (1986), Maritime Law,
Ship Registration, Open Registries,
Genuine Link .

ABSTRACT

UN Convention on the Condition for Registration of Ships (1986) reflects differing aims and interests, and has as its salient feature coastal state? responsibility for ships registered in that state. As a result, a requirement for registration is a genuine link between a particular territory and ship. In the Convention obligations are enforced on coastal states to implement legislation for the shipping industry to make sure that ship within the jurisdiction of each member state obligate genuine link with that state and to safeguard states adversely impacted by the control of the state of registration. Nevertheless, this instrument reflects many legal issues as well as political disagreements which have brought a situation where many states have rejected to ratify the Convention and therefore, blocked its entry into force. In this respect, this paper's purpose is to identify the relevant legal issues which made impossible the ratification of this Convention. The authors' opinion is that the genuine link and dual registration issue as well as other legal concerns have been the main causes of disagreement between states which subsequently prevented the Convention to entry into force.

© SEECMAR | All rights reserved

1. Introduction

On recommendation of the Trade and Development Board, the UN General Assembly decided in 1982 to convene a plenipotentiary conference to consider the adoption of an international agreement concerning the conditions under which vessels should be accepted on national shipping registers. After several efforts expressed in meetings and international conferences, the UN Convention on the Conditions for Registration of Ships (UNCROS) was finally adopted in 1986.

The purpose of the Convention is ensuring or strengthening the genuine link between a state and ships flying its flag, and to exercise effectively its jurisdiction and control over such ships with regard to identification and accountability of ship-owners and operators as well as with regard to administrative, technical, economic and social matters.

Considered an important international legal instrument which promotes relevant legislative standards regarding safe and secure shipping on uncontaminated maritime environment, the Convention per se has reflected several legislative and political issues representing thus a complex and unpleasant situation within the maritime industry.

Consequently, a further analysis and discussion of the main issues of this convention which have mirrored legal deficiencies may assist the international maritime community as well as maritime organizations to have a better and comprehensive understanding of its legislative problems, particularly on the genuine link requirement, aiming thus at a possible entry into force or a potential revision of the Convention with the purpose of making efficient its legal standards. In light of these considerations, this paper will analyze the legal issues concerning UNCROS (1986) by discussing first its main objectives, then analyzing the legitimization of its status quo, continuing subsequently with the issue of dual registration vs. encumbrances as well as considering the genuine link matter in the context of the possible failure of this important convention.

¹Professor of Naval Architecture and Marine Engineering, Department of Maritime Sciences, University "Ismail Qemali" Vlore, Albania. Tel. (+355) 692076065. E-mail Address: kristofor.lapa@univlora.edu.al

²Professor of the Law of the Sea, Department of Nautical Sciences, University "Ismail Qemali" Vlore, Albania. Tel. (+355) 692506549. E-mail Address: ermal.xhelilaj@univlora.edu.al

2. Main objectives of the Convention

The Convention (1986) mirrors as its fundamental feature state's responsibility for ships registered in that state and as a consequence, a prerequisite for ship registration is considered a genuine link between sovereign territory and ship flying its flag. According to the Convention there is recognition that a ship may be registered not only because of the connection through ownership but also that of bareboat-charter. One of the main objectives of the Convention is expressed to be that of ensuring or, as the case may be, strengthening the genuine link between a State and ships flying its flags (Article 1). In addition, the Convention introduces the notion of economic link, providing for the participation by nationals of the flag State in the ownership, manning and management of ships (Coles, 2009).

UNCROS is considered a public law convention in the sense that responsibilities are imposed on member states to adopt a framework for the shipping industry to ensure that ships within the control of each state have genuine link with that state and to protect states adversely affected by the control of the state of registration. The Convention sets out the basic structure for linking registration in a state with ownership or nationality and the right to fly the flag of the state of nationality. Under its provisions, each member state is required to have a national maritime administration supervising and coordinating the administration of shipping and the implementation of international rules concerning shipping (Article 5.1). The Convention introduces for the first time in international treaty law a distinction between the Flag State, meaning the a state whose flag a ship flies and is entitled to fly, and the State of registration, meaning the State in whose register of ships a ship has been entered (Article 2).

The Convention applies to all ship used for international trade and for the first time provided detailed provisions regulating bareboat chartering (Article 11-12). Its provisions contain measures to protect the interests of labor supplying countries and to minimize adverse economic effects that might occur within developing countries consequent upon its implementation (Article 14-15). Article 1 reaffirms the broad requirement of a genuine link, and Article 4 the same, including that ships have nationality of the State whose flag are entitled to fly and that ships should fly under the flag of one state.

One significant innovation found in Article 2 and 5 is the requirement that each flag state have a national maritime administration. The Convention allows flexibility for flag states to meet national manning or ownership tests for their ships (Article 7-9). Moreover, the Convention offers a solution when the developed states accepted a proposal of the developing states in Article 7 to allow a country to opt either for a provision on manning or on ownership, or both, thus allowing the open registries states to move toward complete control in gradual manner (Sohn & Noyes, 2014).

Article 7 allows states an option; either they may comply with the ownership requirement in Article 8, or the manning requirement in Article 9; they may however comply with both. However it seems that the wording of the Article 8 concerning ownership and Article 9 regarding manning contain some indeterminate language stipulating that national laws should have

provisions for participation of that State or its national as owners of ship registered in the state, and for the level of participation of the crew and officers that should be sufficient to permit the flag state to exercise effectively its jurisdiction and control over ships flying its flag (Sohn & Noyes, 2014).

Article 10 sets out the role of the flag state in respect of the management of ship, owning companies and ships on its national register. Before entering a ship in its register, the State of registration shall ensure that the ship owning company and/or a subsidiary ship owning company is established or has its principal place of business within its territory in accordance with its national laws and regulations. However, where these circumstances do not exist the requirement may be satisfied by the appointment of a representative or another management person who should be national of the flag state or domicile therein (Coles, 2009).

3. Legitimization of the *status quo*

During 1950-60 pressure from a number of close registry states as well as several traditional maritime powers was exerted on the international community with the sole purpose to restrict open registry practice through strict national requirements or the adoption of international maritime standards. This legal approach however appeared unsuccessful at the Geneva Conference, where the obvious legal issue of infringement on state sovereignty and the accepted right to grant nationality came to the forefront. Consequently, the *status quo* prevailed: registration was synonymous with nationality and the requirements of genuine link or economic link were of no consequence as were considerations of the beneficial and true ownership (Odeke, 1998).

Be that as it may, the Convention of 1986 laid down important new standards related to the conditions for registration of ships, including the controversial genuine link requirement. Accordingly, it gives the impression that the *status quo* issue was finally solved by the adoption of the innovative legal norms reflected in the main provisions of the Convention. Nevertheless, the wording of many provisions found in the new convention appear to laid down legal aspects which per se legitimized further on the *status quo* already present in maritime industry for many decades. Thus, although expressed in mandatory terms, the articles relating to ownership, manning and management leave so much of their detail implementation and interpretation to the flag state that their effect may largely be negated. Viewed in this regard, the provisions can be seen as little more than statements of principle.

Accordingly, Article 8 leaves the decision as to the level of national participation of the ownership of a vessel to the flag State. The only requirement is that the relevant laws must be sufficient to permit the flag state to effectively exercise its jurisdiction and control over ships flying its flag.

Another legal issue which legitimizes the *status quo* of the main provisions found in the Convention, creating thus further problems in terms of ambiguity and confusion, is the content of Article 9. With regard to manning matter laid down in this provision, the determination of what is 'satisfactory' level of crewing by nationals is again left to the flag State, taken into

consideration the: 1) the availability of qualified seafarers with the state of registration, and, 2) the sound and economically viable operation of its ship. Presumably, therefore, if the flag state determines, for instance, that the high level of its national wages precludes the economically viable operation of its ship, the Convention would not prevent the whole of the complement of the officers and crew being non-nationals (Coles 2009). Likewise, the procedures in Article 10 allowing for the appointment of a representative or manager as an alternative to national management, largely negates the object of the provision; ship-owners seeking to register their ships under open registration system would have little difficulty in locating a nominee in the flag State (Ready, 1998).

4. Dual registration vs. encumbrances

The UNCROS (1986) presents the first international legal instrument which makes the distinction between Flag State and State of Registration, but it fails to address the question of how mortgages and liens are affected by dual registration. In this respect, the convention fails to address the matter under which law the mortgagees will be subject to in a case of a dispute, primary registration State legislation, or the Flag State legislation. Cyprus, Panama Vanuatu and Philippines have different approaches on this issue. For instance, Cyprus parallel registration provisions provide that in a case a vessel temporarily entered in the Cyprus Ship Register on the basis of bareboat charter, the registration in the original registry should be suspended, save as regards transfer of ownership and the creation and registration of mortgages or other encumbrances on the ship (Ready, 1998, p.46).

In addition, the Convention was the first international legal instrument which expressly approved the basic concept of bareboat-charter, which is defined as a contract for the lease of a ship for a stipulated period of time, by virtue of which the lessee has complete possession and control of the ship, including the right to appoint the master and crew of the ship, for the duration of the lease. The provisions enabling bareboat registration are contained in Articles 11 and 12. The provisions presupposes not merely the grant of the right to fly the flag of the State where the vessel is bare boated-in, but a grant of registration; accordingly, particulars of any mortgages or other similar charges upon the ship should be recorded (Article 11 (2) i). This wording brings ambiguity and lead to confusion since in many civil law countries like Spain, due to the fact that national law in such countries does not allow the de-registration of the vessel's mortgages and liens from the Commercial Registry.

In the provisions of the Article 11 (1), (2) h, is stipulated that the ship might be entered in the register of the Flagging-in State either in the name of the owner, or, where national laws and regulations so provide, the bareboat charterer. In any event, the name address, and nationality of the bareboat charterer must be recorded. These provision might lead to a certain legal issues in the international law, within which is not allowed for a ship to claim two nationalities, otherwise it might be classified as a stateless ship and be seized by different jurisdictions. In the case *United States v. Gonzalez*, (1987) the vessel was judged to

be stateless, apparently because it sailed under authority of two nations and made false claim of nationality and flag.

The same conclusion was found by the court in the case *United States v. Matute* (1985), underlining the ruling that the ship was assimilated to one without nationality because she was sailing under hybrid Colombian/Venezuelan flag. Another issue is reflected in the Article 11 (5). Thus, in the case of a ship bareboat-chartered in, a State should assure itself that the right to fly the flag of the former State is suspended. As mentioned in the above analysis again nothing is mentioned about de-registering the ship from the former State Registry, which probably led to the conclusions that the ship might be registered in two different States.

On the other hand, according to Article 12 (4) a state should ensure that a ship bareboat-chartered in and flying its flag will be subject to its full control and possession. The charterer according to the Convention, Article 12(3), will be considered the owner, but the Convention does not provide for ownership rights in the chartered ship other than those stipulated in the contract (Ready, 1998). Another legal deficiency of the Convention is that is ambiguous regarding the harmonization of national laws and practices to minimize opportunities for fraud and to protect the rights of ship mortgages to the greatest extent possible in view of the still evolving system of bareboat-charter (Odeke, 1998).

5. Genuine link requirement

The introduction of genuine link had occurred at a period of time when open registries were beginning to become very widespread preference for ship-owners. The genuine link concept was seen from maritime powers and close registry states as a mean against open registries since introduced strict legal requirement pertaining to ownership and manning of ships. Accordingly, the implementation of this strategy gave rise to the argument that since open registries countries were not in position to exercise the genuine link element, effective jurisdiction and control over vessels under their flag, no genuine link could be established, hence the practice could be described antithetical to international maritime law. Nevertheless, the exact meaning of effective jurisdiction and control concept in this respect according to many scholars and maritime law experts is considered far from clear and quite ambiguous (Pamborides 1999).

The concept of genuine link, as it emerged from the *Nottebohm Case*, was quickly adopted by International Law Commission which included the concept in its 1955 draft Geneva Convention. The genuine link requirement was an attempted solution by International Law to avoid the abuse or misuse of the flag and requires a legal link between the registry and the vessel where there is no economic link (Odeke, 1998). However, the concept was not included in the final draft since was considered not to be practicable. The 1958 Geneva Convention was faced with two different principles regarding the nationality of ships; one was the general principle of international law which allowed each state to fix the conditions according to which a ship could fly its flag, as discussed in *Muscat Dhows case*, and the other to adopt the newly emerged genuine link

principle established by *Nottebohm Case* (Pamborides, 1999). Nevertheless, the conference incorporated both principles in Article 5.

By 1958 this principle applied to the nationality of merchant vessels was enshrined in the international treaty law. However, so ambiguous this concept remains, that the genuine link has had little apparent effect in stemming the flow of ships to open registries. In the 1958 Geneva Convention is not stipulated or described what is meant by genuine link in terms of preconditions for the grant of nationality; nor is there any sanction indicated in the case of the absence of genuine link, whatsoever that expression may mean. Rather the link seems to arise *ex post facto*, being expressed in terms of jurisdiction and control exercised by the flag State after the ship has been registered in that State. The socio-economic and political aims behind the introduction of the requirement of connecting factors are, however, thereby defeated. The concept of genuine link was dealt a further blow in 1960 when ISJ was requested to deliver an advisory opinion to MSC of IMO (Ready, 1998 p.12).

Despite the global debate for genuine link both as to what it means and as to how it should be implemented, and despite the fact that it created ambiguity and uncertainty instead of clarifying the issue of ship registration the UNCLOS (1982) incorporated in its article 91 which seems to be reproduction of Article 5 in the Geneva Convention. The removal of the phrase in particular to the genuine link in the text of Geneva Convention and that the requirement for the existence of genuine as it appears in Article 91 of UNCLOS (1982) is not linked in any way with the requirements of Article 94 entitled Duties of the Flag State indicates that the phrase genuine link is subject to even more liberal interpretation than those witnesses under Geneva Convention. Nevertheless, the lack of clarity and vagueness introduced by Geneva Convention was still preserved in UNCLOS 1982 (Pamborides, 1999). Be that as it may, many in the shipping industry as well as scholars take the view that in both the Geneva Convention (1958) and UN Convention on the Law of the Sea (1982) the genuine link concept is applied to merchant vessels probably as a challenge to the practice of flags of convenience or open registries (Odeke, 1998).

With regard to international customary law, Churchill and Lowe (1991) argue that genuine link requirement laid down in the aforementioned conventions does not represent customary international law, contrary to the statement included in the preamble, which describes the provisions of the UNCROS (1986) as being generally declaratory of established principles of international law. The LOS Tribunal must apply the LOS Convention and other rules of international law not incompatible with this Convention (Art 293, Annex vi, Art 23). But when international law leaves to each state to fix the condition for granting nationality to ships and for registering ships, the Tribunal must take account of national laws. This legal concept is applied by the court to the ruling of the judgment *St. Vincent and the Grenade v. Guinea* as well as in the legal case *Belize v. France* (2001).

The debate about the meaning of genuine link concept was to continue with further implications in the comprehensive global debate for the abolishment of the international system of open

registries, led to the circumstances wherein UNCTAD was somehow obligated to convene an important international conference in order to address this essential matter and attempt to promote a long-lasting solution to the problem (Pamborides, 1999).

The *ad hoc* Intergovernmental Working Group established under the auspices of UNCTAD, on the economic consequences of the existence or lack of genuine link between vessel and flag of registry concluded in its Report that the following elements are normally relevant when establishing whether a genuine link exists between a vessel and its country of registry, that is, the merchant fleet contributes to the national economy of the country, revenues and expenditures of shipping, as well as purchases and sales vessels, are treated in the national balance-of-payments of the vessel, the employments of nationals on vessel and, the beneficial ownership of the vessel (Ready, 1998 p.18-19).

6. Reasons behind the possible failure

The objective of UNCROS was to abolish the open registries, therefore since the beginning this was probably a failed objective. Moreover, the Convention circumvented most controversial aspects of ship registration, although attempted to provide the first blueprint on conditions for providing nationality to ships (Pamborides, 1999). Under the Convention, the state of bareboat-charter must notify the state of original registration when the bareboat-charter terminates, but this procedure raises many questions. First, if the charterer disputes the owner's right to terminate the charter, there might be considerable difficulty in determining where such vessel is properly registered, particularly if the bareboat-charter state has a deletion procedure. There should be a balance between public and private law in this regard. When a vessel exchanges a flag during bareboat-charter-out, national laws are currently not adequate to deal with the problem of where the mortgages covering that vessel should be recorded whether in the underlying registry or bareboat-charter registry (Odeke, 1998).

In the Articles 11 and 12 is underlying the granting of the right to fly the flag of the country where the ship is bareboat-charter-in without closing the register in the original state of registry (suspended). Panama and Germany are two countries that engage in this practice. Although, in the instance, the vessel is not flying two flags at the same time, however, as a bareboat-charter it remains a Parallel or Dual Registry. In fact it was the Convention which codified parallel or Dual Registry practice of bareboat charterers. It was the finance, commodity, merchant and ship owning interests that lobbied for this at the Conference (Sohn & Noyes, 2014). To achieve the goal of compliance and for the purpose of applying the requirements of this Convention in the case of a ship so bareboat chartered-in the charterer will be considered to be the owner. This Convention, however, does not have the effect of providing for any ownership rights in the chartered ship other than those stipulated in the particular bareboat charter contract.

The State where the bareboat chartered-in ship is registered shall ensure that the former flag State is notified of the deletion of the registration of the bareboat chartered ship. First is not

clear from the first sentence of paragraph 3 whether the charterer shall be considered the owner, but it is assumed that the charterer is considered to be the owner of the ship, so bareboat charter-in (this leads to a legal issue because the register of ship is *prima facie* title of ownership). Second it is not clear from paragraph 5 when the state where the ship is bareboat chartered?in must notify the former flag state of the registration of the bareboat chartered vessel.

The later omission may be serious as a state may neglect for some considerable time to inform the former flag state, hence creating uncertainty as to what flag the vessel is entitled to fly. This can create a classic case of a ship flying two flags concurrently and be penalized under the article 6 of Geneva Convention and article 92 of UNCLOS 1982. In the event which is by no means certain, that the Convention does ultimately enter into force, the question arises whether, given its greater explicitness in seeking to address the problems of genuine link, one can expect to see the abandonment of open registries or flags of convenience and a return of the traditional maritime nations. The answer would seem to be no (Coles, 2009, p 12).

Conclusions

Consequently, over four decades after genuine link concept was first put forward as a means of undermining the growth of the open registries, and notwithstanding the efforts of on the part of international community, little progress has been made in establishing this norm as an effective principle of international maritime law. The same difficulty has encountered even the Convention *per se* which reflects the genuine link requirement in its provisions, that is, UNCLOS (1986).

The Convention as discussed in this analysis reflects many legal issues as well as has been in the focus of criticism by many coastal states in terms of political settlements. The most prominent issue has been the intolerance that many traditional maritime powers, which implement close registries, have shown towards the wording and essence of the genuine link requirement, an important provision leaning in favor of open registry system. In support of this argument, open registration system has been criticized by close registry countries for implementing lax safety policies resulting therefore in substandard shipping as well as security and safety issues.

Moreover, other legal issues such as bareboat-charter requirements and its ambiguous wording regarding the encumbrances, the possible failure of dual registration concept and problems which its function has created, as well as the potential status quo of the main legal elements and some of the important provisions of the Convention which somehow has been legitimized during the last decades, has made very difficult the ratification and entry into force of this crucial legal instrument.

Accordingly, the opinion of these authors is that UNCLOS should undergo essential legal amendments, mainly aiming to improve the concept of genuine link and bareboat-charter registration in order to make it more acceptable for coastal states which continue to refuse the ratification of the Convention; taken into consideration of course the interests of open registry countries. One efficient proposal regarding this issue might probably be discussing and possibly introducing into the Convention the legal concept of international registry, a *sui generis* notion, which interrelate both close and open registry legal elements and at the same time maintaining appropriate safety and security levels.

References

- Coles, R. M. E (2009). *Ship Registration Law and Practice*, First Edition, Informa Law - Routledge, London.
- Churchill, R.R & Lowe, A (1999). *Law of the Sea*, 3rd ed, Manchester University Press, London.
- Grand Prince Cases Belize v. France, Case No. 8 (ITLOS, 2001), http://www.itlos.org/start2_en.html.
- M/V Saiga (no 2) Case, St. Vincent and the Grenade v. Guinea (ITLOS).
- Odeke, A (1998). *Bareboat Charter ship Registration*, Kluwer Law International, The Hague/London/Boston.
- Ready N.P. (1998). *Ship Registration*. 3rd. ed. London, LLP Reference Publishing.
- Sohn, L. B & Noyes, J. E (2014), *Cases and Materials on the Law of the Sea*, Transnational Publishers, University of California, USA.
- Sturmeijer, S.G. (1983). *The Open Registry Controversy and the Development Issue*, 8 vols. Bremen: Institute of Shipping Economics
- Pamborides, G.P (1999). *International Shipping Law: Legislation and Enforcement*, Kluwer Law International. The Hague/London/Boston. Ant. N. Publishers, Athens.
- UN (1986). *United Nations Convention on the Conditions for Registration of Ships*, 1986.
- UN (1985). *Report of the United Nations Conference on Conditions for Registration of Ships on its Third Part*, Doc. TD/RS/CONF/19/Add.1
- UN (1982). *United Nations Convention on the Law of the Sea*, 1982, UN Publications, London.
- United States v. Gonzalez (810 F.2d 1538, 1541-42, 11th Cir. 1987).
- United States v. Matute, (767 F.2d 1511, 1512-13 (11th Cir. 1985)
- United Nations Convention on the High Seas 1958.