

2007

An analysis of flag state responsibility from an historical perspective: delegation or derogation?

John Norman Keith Mansell
University of Wollongong

Recommended Citation

Mansell, John Norman Keith, *An analysis of flag state responsibility from an historical perspective: delegation or derogation?* PhD thesis, Centre for Maritime Policy, University of Wollongong, 2007. <http://ro.uow.edu.au/theses/742>

NOTE

This online version of the thesis may have different page formatting and pagination from the paper copy held in the University of Wollongong Library.

UNIVERSITY OF WOLLONGONG

COPYRIGHT WARNING

You may print or download ONE copy of this document for the purpose of your own research or study. The University does not authorise you to copy, communicate or otherwise make available electronically to any other person any copyright material contained on this site. You are reminded of the following:

Copyright owners are entitled to take legal action against persons who infringe their copyright. A reproduction of material that is protected by copyright may be a copyright infringement. A court may impose penalties and award damages in relation to offences and infringements relating to copyright material. Higher penalties may apply, and higher damages may be awarded, for offences and infringements involving the conversion of material into digital or electronic form.

**An Analysis of Flag State Responsibility
from an Historical Perspective: delegation
or derogation?**

**A thesis submitted in fulfilment of the requirements
for award of the degree**

Doctor of Philosophy

from

UNIVERSITY OF WOLLONGONG

By

**John Norman Keith Mansell
Master of Maritime Studies (Distinction)
University of Wollongong**

**Centre for Maritime Policy
Faculty of Law
University of Wollongong**

2007

Certification

I, John Norman Keith Mansell, declare that this thesis, submitted in fulfilment of the requirements for the award of Doctor of Philosophy, in the Centre for Maritime Policy, University of Wollongong, is wholly my own work unless otherwise referenced or acknowledged. The document has not been submitted for qualifications at any other academic institution.

John Norman Keith Mansell

14 July 2007

Abstract

The starting point for this analysis of flag State responsibilities is to recall the historical development of the extant regulatory regime for jurisdiction and control of ships; from the genesis of ship registration in the thirteenth century, through to the development of the nation State and concept of the flag State, on to the gradual evolution of national law for control of ships, and eventual codification of this law into international law in the twentieth century. The United Nations Convention on the Law of the Sea (LOSC) provides for a State to grant its nationality to ships, to fix the conditions for the grant of its nationality, to register ships in its territory, and for those ships to fly its flag. With these rights come flag State responsibilities. The flag State has a duty to effectively exercise its jurisdiction and control in administrative, technical, social and environmental protection matters over ships flying its flag. The flag State can undertake these duties or has the ability to entrust them to private organizations. A regulatory framework in international maritime law has been established that allows delegation of flag State responsibilities and recognizes the customary role of Classification Societies in inspection, survey and certification of ships. The LOSC also requires that a ship be surveyed before registration. As the flag State has the right to fix the conditions for the grant of its nationality it can choose to not require this survey for reasons of expediency and easy entry of ships onto its register. The regulatory framework for jurisdiction and control of ships provides opportunities for the establishment of regulatory inefficient flag States who have the right in law to delegate, or derogate, all of their statutory functions to equally inefficient private organizations. Such flag States are attractive to shipowners seeking minimum compliance costs and regulatory oversight. Issues of flag State responsibility and performance are analysed in depth to test the hypothesis that the extant regulatory framework is adequate in law but, due to inadequate implementation, monitoring and enforcement, does not deliver the intent of the LOSC that flag States exercise effective jurisdiction and control over ships flying their flag. For the purpose of analysis in this thesis flag States are categorized into National, Quasi-National, International and Pseudo-National according to their degree of regulatory efficiency. It is concluded that the regulatory framework is fundamentally sound but that it requires effective implementation and enforcement through strengthening in law, supported by sanctions upon recalcitrant flag States, and a greater degree of global oversight and monitoring of flag State performance by the International Maritime Organization.

In an ideal world flag States, whose flags are worn by the world's shipping, would lay down, and enforce upon their shipowners, standards of design, maintenance and operation which would ensure a very high standard of safety at sea. Coastal States, along whose coasts shipping passes, and Port States, at whose ports or anchorages shipping calls, would have no cause to concern themselves with the maintenance of such standards. The present system of Flag State Control falls well short of this ideal...Regrettably it is beyond argument that not all flag States live up to their responsibilities.

Lord Donaldson, *Safer Ships, Cleaner Seas*, 1994

Acknowledgements

My late developing interest in the law of the sea was fostered by participation in a LLM course delivered by Joanna Mossop of Victoria University, Wellington, in 2003 and I thank Joanna for that introduction to the law of the sea and her ongoing moral support. An inspirational address at the first evening of that course by Bill Mansfield, who represented New Zealand at the Third United Nations Conference on the Law of the Sea, revealed the range, diversity and topicality of the United Nations Convention on the Law of the Sea; a very small part of which I have focussed upon in the course of undertaking this thesis.

I am very grateful to have then discovered, quite by accident, the wonderfully versatile arrangements offered by the University of Wollongong for study of the law of the sea that effectively enabled me to stumble into a Masters degree, components of which form the nucleus for this thesis. I am more than pleased to be able to record my heartfelt thanks to Professor Martin Tsamenyi, whom I'm pleased to acknowledge as a personal friend as well as a sage and very understanding supervisor. I am also very grateful to Martin for his ongoing support in allowing me to demonstrate my newfound knowledge of law of the sea through lectures on behalf of the University of Wollongong. My sincere thanks also to Myree Mitchell and Dr. Chris Rahman, from the Centre for Maritime Policy, Faculty of Law, of the University of Wollongong, for their friendship and generous administrative support.

I have been very fortunate in that my daily professional involvement in flag and port State control matters at a national, regional and international level has given me opportunities to influence the development of international standards for regulation of ships. I express my sincere appreciation to my employer, Maritime New Zealand, for these ongoing opportunities, for their unquestioning support, and for their generous provision of study leave.

It has proven difficult from a small country at the end of the world, even in this day of electronic communication, to obtain the statistics necessary for analysis of flag State performance. I must express my sincere thanks to Tim Roxby, of Lloyds Maritime Intelligence Unit, for his generous help in this area. My sincere thanks also to Heather Mills for her meticulous proofreading of this thesis.

Finally, I could not have undertaken this intensive and time consuming period of study without the total support and understanding of my beloved wife Christina, my teenage daughters Anna, Lena and Sophia, and my grown sons James and Matthew. I apologise to them all for the many evenings and weekends when I have deprived them of my company and disappeared “down below” to the Study. I thank them from the bottom of my heart for their love, understanding and support during the many times of doubt and anxiety over my ability to carry out and complete the task; their collective confidence in me never wavered. I hope that, in some small way, my undertaking of this thesis will demonstrate to them all that learning is a lifelong process and it is never too late.

Table Of Contents

Certification	i
Abstract	ii
Acknowledgments	iv
Table of Contents	vi
List of Tables	ix
Table of Cases	xi
Acronyms and Abbreviations	xii
Chapter One - Introduction	1
1.1 Shipping as a global industry	1
1.2 Flag State responsibility	2
1.3 The extant international regulatory regime and associated issues	4
1.4 Effective flag State control	6
1.5 Problem definition	8
1.6 Research, background and sources	8
1.7 Existing literature	10
1.8 Structure of the thesis	10
1.9 Contribution of the thesis	16
Chapter Two - The Concept Of The Flag State	17
2.1 Introduction	17
2.2 The flag as a symbol of nationality	17
2.3 Development of the nation State	21
2.4 The Concept of the flag State	25
2.5 Flag States and sovereignty	27
2.6 Landlocked States as flag States	29
2.7 Conclusion	31
Chapter Three - Registration Of Ships	32
3.1 Introduction	32
3.2 "Tonnage" and registration: historical development	32
3.3 Registration in international law	36
3.4 Registration and survey: the missing link	39
3.5 Dual nationality	43
3.6 Transfer of registration	44
3.7 Conclusion	47
Chapter Four - The Development Of English National Law For Flag State Jurisdiction	49
4.1 Introduction	49
4.2 Master under God	49
4.3 The sail to steam revolution	51
4.4 Sailing packets to steam power	53
4.5 Drivers for jurisdiction and control of ships	54
4.6 The Merchant Shipping Act 1894	68
4.7 Conclusion	69

Chapter Five - Development Of International Law For The Control Of Ships	70
5.1 Introduction.....	70
5.2 Development of flag State control in international law	70
5.3 UNCLOS I and the High Seas Convention	75
5.4 UNCLOS I to UNCLOS III: Drivers for change.....	79
5.5 UNCLOS III and flag State responsibility	81
5.6 Prevention, reduction and control of marine pollution	91
5.7 Conclusion.....	93
Chapter Six - The Changing World Map Of Flag States.....	95
6.1 Introduction.....	95
6.2 The very best of times	96
6.3 The shipping industry; 1958.....	98
6.4 Flags of discrimination and flags of convenience.....	101
6.5 The Second Shipping Revolution.....	103
6.6 The shipping industry: 1982.....	109
6.7 Further developments in the shipping industry	113
6.8 Ongoing development of the world fleet	118
6.9 Conclusion.....	120
Chapter Seven - Choice Of Flag State.....	122
7.1 Introduction.....	122
7.2 Flagging out.....	122
7.3 Flags of Convenience.....	127
7.4 Beneficial Ownership.....	133
7.5 Definitions of flag States.....	136
7.6 Recognised Organizations	150
7.7 Conclusion.....	
Chapter Eight - The Regulatory Regime For Discharge Of Flag State Duties: The Role Of Classification Societies.....	154
8.1 Introduction.....	154
8.2 United Nations, International Maritime Organization, and International Labour Organization Member States	155
8.3 The International Maritime Organization.....	159
8.4 A matter of Class.....	166
8.5 Issues of flag State compliance	179
8.6 Delegation of flag State responsibilities	181
8.7 Recognized Organizations.....	184
8.8 Delegation or derogation of flag State responsibilities	187
8.9 Assistance to flag States	188
8.10 Issues of effective implementation of IMO instruments.....	191
8.11 Port State control as a response to ineffective flag State control.....	197
8.12 Conclusion.....	200

Chapter Nine - Measures Of Flag State Administrative And Social Performance	202
9.1 Introduction.....	202
9.2 Measures of performance of flag State administrative duties	202
9.3 Mandatory reporting to IMO.....	205
9.4 Performance measures for flag State social duties.....	213
9.5 ILO Instruments.....	213
9.6 International Transport Workers' Federation	220
9.8 Port State control as a measure of performance for flag State social duties.....	222
9.8 Academic and industry based measures of flag State performance	227
9.9 Conclusion.....	235
Chapter Ten - Measures Of Flag State Technical Performance	237
10.1 Introduction.....	237
10.2 Flag State technical duties	237
10.3 Port State control as a measure of flag State technical performance	239
10.4 Performance of recognized organizations	252
10.5 Combined performance of flag States and recognized organizations	253
10.6 Ship age, tonnage, and detention rates per flag State.....	255
10.7 Correlation between general cargo ships, detentions and flag States	264
10.8 Casualties as a measure of flag State performance	266
10.9 Conclusion.....	285
Chapter Eleven - Conclusion	287
11.1 Introduction.....	287
11.2 An alternate model for global governance of ships	288
11.3 Global oversight, analysis and measurement of flag State performance	290
11.4 Issues of delegation, or derogation, of flag State responsibilities	292
11.5 Issues of global oversight of flag State implementation of IMO instruments	296
11.6 Registration and survey.....	303
11.7 Issues of sanctions against substandard ships.....	304
11.8 Issues of coastal State control of substandard ships	305
11.9 Issues of the status of Port State control in international law.....	311
11.10 Summary of conclusions.....	313

List Of Tables

Table	Content	Chap	Page
I	Relationship between the LOSC and IMO and ILO instruments	Five	90
II	Development of the world shipping fleet: 1922 – 1958	Six	99
III	Development of the world shipping fleet: 1958 – 1982	Six	110
IV	Principal merchant fleets: 1958 and 1982	Six	111
V	Growth of newly emergent fleets: 1958 - 1982	Six	112
VI	Changes in distribution of tonnage between flag States: 1958 – 2005	Six	Appendix I
VII	Development of the world merchant fleet: 1982 – 2005	Six	118
VIII	True nationality of ownership of the world's major fleets	Seven	Appendix I
IX	National flag States	Seven	139
X	Recognized Organizations on the IMO GISIS database	Nine	Appendix 1
XI	Member States of IMO and ILO and ratification of ILO instruments: National flag States	Nine	Appendix 1
XII	Member States of IMO and ILO and ratification of maritime labour standards: International flag States	Nine	219
XIII	Member States of IMO and ILO and ratification of maritime labour standards: Pseudo-National flag States	Nine	220
XIV	Percentage of working and living deficiencies, Paris MOU, 1997 – 2005	Nine	224
XV	Percentage of working and living conditions, Tokyo MOU, 1997 – 2005	Nine	226
XVI	Grouped FLASCI scores and characteristics of these groups	Nine	229
XVII	Grouped flag State rankings	Nine	229
XVIII	Paris MOU average detention rates, 1999 - 2005	Ten	Appendix I
XIX	Tokyo MOU average detention rates, 1999 - 2005	Ten	Appendix I
XX	Detentions of ships with class related detainable deficiencies per flag State	Ten	Appendix I
XXI	Aggregated tonnage and age by flag State category	Ten	256
XXII	Number of ships, total tonnage and average age of fleets below world average age	Ten	257
XXIII	Number of ships, total tonnage and average age of fleets with highest average age	Ten	258

XXIV	Detention percentages against age and tonnage: Tokyo MOU 2004	Ten	260
XXV	Average tonnage and age of National flag States with highest detention rates; Paris MOU: 1999 – 2005	Ten	261
XXVI	Average tonnage and age of National flag States with highest detention rates; Tokyo MOU: 1999 – 2005	Ten	262
XXVII	Average tonnage and age of Pseudo-National flag States with highest detention rates; Paris and Tokyo MOU combined: 1999 – 2005	Ten	264
XXVIII	General Cargo Ships, Detentions and Flag States: 2004	Ten	Appendix I
XXIX	Detentions of ships with RO related detainable deficiencies per Recognized Organization	Ten	Appendix 1
XXX	Rank-ordered average serious and non-serious casualty rates for flag States: 1997 – 1999	Ten	271
XXXI	Rank-ordered average serious and non-serious casualty rates for Flag State categories: 2000 – 2002	Ten	272
XXXII	Statistics on total losses of ships 100 GT and above and losses of lives as a consequence to the total loss: 1989 – 2004	Ten	273
XXXIII	Ships, Tonnage and Lives lost: 1999 - 2004	Ten	275
XXXIV	Ships subject to IMO Instruments lost; ratio of ships lost; lives lost : 2000 – 2005	Ten	276
XXXV	Types of incident leading to total loss; 2004	Ten	278
XXXVI	Reported world total losses by age at time of loss, and tonnage: 2000 – 2004	Ten	279
XXXVII	Reported world total losses by age at time of loss: 1996 – 2004	Ten	Appendix I
XXXVIII	Loss rates for ship types per 1,000 ships at risk: 1999 – 2004	Ten	281
XXXIX	Rank-ordered average total loss rates for flag States: 1998 – 2002	Ten	284

Table Of Cases

Case	Citation	Chapt.
<i>Molvan vs. Attorney General of Palenstine, 1948</i>	(1948) A.C. 351, at 369-370	5.5.2
<i>United States vs. Mario-Gracia, (1982)</i>	679 F.2d 1373 (1982) at 1382, paras. [18] and [19]	5.5.2
<i>Muscat Dhows Case; France vs Great Britain</i>	http://www.pca-cpa.org/upload/files/Muscat%20Dhows%20English%20Award.pdf	7.2
<i>Lauritzen vs Larsen</i>	345 U.S. 571 (1953)	7.2

Acronyms and Abbreviations

ABS	American Bureau of Shipping
BV	Bureau Veritas
CIC	Concentrated Inspection Campaign
Class	Classification Society
COLREG	International Regulations for the Prevention of Collisions at Sea, 1972
CSD	United Nations Commission on Sustainable Development
DIS	Danish International Ship Register
DNV	Det Norske Veritas
DWT	Deadweight tonnage
EC	European Commission
EU	European Union
FAO	(United Nations) Food and Agriculture Organization
FIR	French International Ship Register
FLASCI	Flag State Conformance Index
FOC	Flag of convenience
FSC	Flag State control
FSI	Sub-committee on Flag State Implementation (IMO)
GATT	General Agreement on Tariffs and Trade
GIS	German International Ship Register
GISIS	Global Integrated Shipping Information System
GMDSS	Global Marine Distress and Safety System
HSC	Convention on the High Seas, 1958
IACS	International Association of Classification Societies
IALA	International Association of Lighthouse Authorities
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
IHO	International Hydrographic Organization
IIS	International Italian Ship Register
ILO	International Labour Organization
IMCO	Intergovernmental Maritime Consultative Organization

IMO	International Maritime Organization
ISM	International Safety Management Code
ISPS	International Ship and Port Facility Security Code
ITF	International Transport Workers' Federation
ITOPF	The International Tanker Owners' Pollution Federation Ltd
LOAD LINE	International Convention on Load lines, 1966
LOSC	United Nations Convention on the Law of the Sea, 1982
MARPOL	International Convention for the Prevention of Pollution from Ships, 1973/1978
MEPC	Marine Environment Protection Committee (IMO)
MSC	Maritime Safety Committee (IMO)
MTA	Maritime Transport Act, 1994 (New Zealand)
MSA	Maritime Safety Authority (New Zealand)
MNZ	Maritime New Zealand
MOU	Memorandum of Understanding
NIS	Norwegian International Ship Register
NGO	Non-Governmental Organization
OECD	Organization for Economic Co-operation and Development
OEEC	Organization for European Economic Co-operation
OILPOL	International Convention for the Prevention of Pollution of the Sea by Oil, 1954
OPA 90	Oil Pollution Act, 1994
Paris MOU	Paris Memorandum of Understanding on Port State Control
P&I	Protection and Indemnity Club
PSC	Port State Control
PSCO	Port State Control Officer
Qualship 21	Quality Shipping for the 21 st Century Program (USCG)
REB	Registro Especial Brasierio
RO	Recognized Organization
SAF	Self Assessment Form
SOAP	Universal Safety Oversight Programme
SOP	Voluntary Safety Oversight programme
SOLAS	International Convention for the Safety of Life at Sea, 1974
SRA	Ship Registration Act, 1992 (New Zealand)

STCW	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978/1995
STUFT	Ship taken up from trade
TAAF	Terres Antartiques et Anstrales Francaises
TONNAGE	International Convention on Tonnage Measurement of Ships, 1969
TOKYO MOU	Memorandum of Understanding on Port State Control in the Asia/Pacific Region
UK	United Kingdom
UN	United Nations
ULCC	Ultra Large Crude (Oil) Carrier
UNCLOS I	First United Nations Conference on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
USCG	United States Coast Guard
VIMSAS	Voluntary IMO Member State Audit Scheme
VLCC	Very Large Crude (Oil) Carrier
WTO	World Trade Organization