

INTERNATIONAL MARITIME COMMITTEE

International Subcommittee

on

**REGISTRATION OF SHIPS UNDER
CONSTRUCTION**

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REGISTRATION OF SHIPS UNDER CONSTRUCTION

REPORT

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1. The International Bar Association IBA has in two Conferences — in Oslo in 1956 and in Cologne in 1958 — discussed legal problems relating to security in ships under construction.

Rapporteur to the Oslo Conference was professor Brækhus. His rapport was later published by IBA in a book under the title « *International Shipbuilding Contracts*, Particularly legal problems in connection with finance and security », which also contained papers submitted to the Conference by E. Behrendt-Poulsen, Denmark, H. B. Lawson and J. E. Norton, England, James P. Govare, France, W. G. Wieringa, Netherlands and F. H. F. Oldewelt, Netherlands, Eskil Weibull, Sweden, and Churchill Rodgers, U.S.A.

Professor Brækhus concluded his report with the observation that « this state of affairs » — meaning the variation in national laws relating to security in ships under construction — « creates difficulties and uncertainty for the lawyers and the business world ». He suggested that these legal difficulties should be set right. « It would be a great advantage », he said, « for the international shipbuilding community, for bankers and shipbuilders, if a certain degree of uniformity could be achieved. »

The Council of the International Bar Association saw this suggestion as a challenge to renewed activity and appointed a Committee on International Shipbuilding Contracts « to the end that uniform rules may be promulgated which, it is hoped, will be of assistance to all interested in this field ». The Committee was set up with members from 14 countries and with M. Per Brunsvig, Norway, as Chairman. Mr. Brunsvig presented a printed report to the IBA Conference in Cologne under the title « *International Shipbuilding Contracts*, Unification of national laws relating to registration of ships under construction ». Annexed to the report was a Preliminary Draft Convention.

The Draft Convention was approved by the Cologne Conference and the IBA Council decided to forward the Reports and the Draft Convention to the Comité Maritime International, the Inter-Governmental Maritime Consultative Organization in London and the International Law Commission, United Nations.

II. Great values are involved in the modern shipbuilding industry. A single contract may run into millions in any currency and a multitude of contracts are in existence in the greater shipbuilding countries. The builder may finance the building out of his own funds, but more often he will receive from the purchaser the greater part of the purchase-money concurrent with the stage by stage completion of the contract. On his side the purchaser may finance the contract out of his disposable funds, by selling other tonnage, or by loans from banks, insurance companies or other sources. As security for loans the purchaser may i. a. put up his other ships, the newbuilding — as far as this procedure is possible — and his expected freight earnings under long term charter-parties. In some countries the state as well takes an active part in the financing of shipbuilding contracts.

When completed, the ship will be governed by marine law, which to a large extent is international in character. But while the ship is under construction the law takes little or no heed of the fact that shipbuilding nowadays is an important factor in world trade. Ships are very often built for foreign purchasers. To-day a ship may often be built in one country for the account of a foreign purchaser, who borrows money from bankers in a third country. Further this loan may be based on a time-charter party with a charterer who is a national of a fourth country.

In such situation it would of course be a benefit to all parties if they could base their transactions on a uniform system of legal rules. On the other hand, the great international trade which we have had in this field during the last decade may support the observation that the variations in national laws do not present too great an obstacle to the international community of builders, shipowners and financiers.

Contracts for the building of modern ships may easily run into millions. Even a slight degree of legal uncertainty will be an evil when such large amounts of money are involved, and if such uncertainty is due to the inadequacy of the law, this may have a bearing not on one, but on many shipbuilding contracts.

It does somehow seem irrational that in all civilized countries we find a well organized system for the registration of rights and security in real estate, however small, while a similar system for the registration of ships under construction — with the enormous values involved — is lacking or at best somewhat deficient in many countries.

This may partly be due to the very fact that in most countries

shipbuilding contracts are classified as contracts for the sale of goods. And chattels cannot normally be registered in any country. But a modern newbuilding and the materials and equipment specified for its construction are unique in relation to most other chattels. It might perhaps be said that even on the stocks the newbuilding is more closely related to a commissioned ship than to all sorts of raw-materials and ready-made commodities of every kind which are the chief domain of the law of sale. But for commissioned ships it is now a well established legal tradition in most countries that ships trading are to be treated on a line with real property as far as the registration laws are concerned.

The newbuilding and all materials and equipment for its construction are specified in detail in the building contract. Once the work has been started the structure is a somewhat ponderous immovable on the stocks until the time of its launching. At least from the time when constructional work has been commenced in a place from which the ship is supposed to be launched, it should be possible to treat the ship under construction as far as registration laws are concerned on a line with commissioned ships and real estate.

Economically a registration of ships under construction may open an opportunity for the parties to use the fabric itself (and materials and equipment appropriated to the building contract) as security for the financing of the constructional work. In this way the proposed reform may to some extent ease the purchaser's financial problems and thereby facilitate the acquisition of new contracts by shipbuilders.

Another point in this connection may be that basically the proposed form is of a legal-technical nature. No state could reasonably object to the proposed Draft Convention on political or competitive grounds.

However, the difficulties in accomplishing a reform of this complexity through international cooperation cannot be underestimated. Revision and unification of national laws relative to security in ships under construction is a tall order. The first question to be discussed is whether it does exist a need for such a reform which will justify the efforts which no doubt will be necessary in a great many quarters if such a complex reform is finally to be achieved.

By its very nature the question avoids an exact answer. It asks for an evaluation to be based on many rather uncertain considerations, and the answer is of course a relative one. The need may be more felt in some countries — or by foreigners dealing with certain countries — than by others with a different experience. There should be no doubt, however, that the question is an important one and that the possibilities of giving the international community of shipbuilders, shipowners and their lenders better legal tools to work with, should be further explored. The annexed Draft Convention has been prepared as as basis and a starting point for such a discussion.

III. The annexed preliminary Draft Convention is based on the following principles which are considered fundamental to the contemplated reform :

1. That all contracting States shall permit registration in a register established by or under the control of the State, of ships under construction for foreign purchasers at yards within their territory.

2. That such registration shall be permitted at the latest when the fabric is so far advanced that the ship may be satisfactorily identified.

3. That no discriminatory rules or practices shall be applied against nationals of other contracting States, in so far as registration of rights in or charges on the vessel is concerned.

4. That registered rights or charges shall have legal priority from the time of registration.

5. That such registration shall be recognized as valid in all contracting States.

6. That on transfer of the ship to another contracting State, all registered rights and charges shall remain in force retaining the order of priority of the original registration.

IV. The purpose of the proposed legislation is to regulate priorities — not to interfere with the parties' contractual relationship. The aim is to make it possible for the parties to obtain in a fairly simple and legally safe way protection for the arrangement which they have agreed upon in the contract.

When a system of registration for ships under construction is established, the registry may constitute recognized evidence of a title to the newbuilding. Security in the vessel may be obtained by entries in the register of transfer of title or of a mortgage deed relating to the vessel. In this way legal protection may be acquired against the parties' general creditors and in relation to later disposals of the newbuilding.

The opportunity for an early registration may greatly enhance the practical value of the reform to purchasers and their lenders and thereby also to the builder.

Most countries new permitting registration of ships under construction stipulate physical identification of the newbuilding as a prerequisite for registration. In Germany the keel must have been laid, and in France and the Netherlands « something » must have been placed on the stocks. In Denmark the work must have been carried so far, that the vessel may be satisfactorily identified according to its specified building measures.

In Italy and Canada, on the other hand, registration of the ship-building contract is possible.

In our opinion it should be recommended that all States should agree to accept registration of shipbuilding contracts — with the exception of pure option agreement. A registered mortgage on a piece of land may, according to the terms of the mortgage deed, also apply (under Norwegian law) to a house subsequently to be built on the site. Likewise it should be possible to obtain by way of registration priority for property or security in a vessel to be built subsequently. Physically the object of such rights will first materialize when the specified articles are procured or constructed by the shipbuilder, but for the purchaser and his lender it may be a considerable advantage to have established priority for their right in the vessel to be built already from the time when the first payment is made to the builder. The newbuilding may be properly identified by the names of the parties, the yard's building number and the detailed specifications of the ship stipulated in the contract.

As basis for discussion the Draft Convention, Article 3, contains three alternative provisions for at what stage of the execution of the building contract registration shall be permissible.

The point has been made that it should only be permissible to enter so-called rights in rem on the register. In Germany only instruments relating to a title or mortgage on the vessel may be registered, while under the new Danish Statute it is possible to register any instrument which establishes, creates, amends or annuls a title, mortgage, right of use, or right limiting the owner's competence to dispose of or deal with the vessel in one or several specified respects. Under this provision it is e.g. possible to enter charter parties or bare-boat agreements on the register.

The registration of the shipbuilding contract as such is recommended, but otherwise the Draft Convention suggests that it should be left to the individual State to decide whether registration of instruments relating to rights in personam should be allowed.

Another question of great importance to purchasers and their bankers is whether registered rights or claims on a newbuilding as a point of law shall comprise materials and equipment for its construction, provided the items have been properly marked as intended for the building of the ship in question.

The bulk of the purchase-price for a modern ship goes to pay for materials and equipment. At the builder's yard the materials will arrive as loose plates, beams, profiles, etc., and undergo a gradual transition into sections and constructional units which are finally turned into the completed ship ready for delivery.

The purchaser may have paid part of the purchase-money years before the ship is completed. A considerable time may elapse from the first payment to the day when the builder starts actual work on the

ship on the stocks. Usually the structure will not provide sufficient security for the purchase money which the purchaser has advanced to the builder until the last part of the construction period on the stocks, or even not before the main engine has been installed after launching.

It would, therefore, be of great practical importance if security could also be obtained in the materials and equipment procured for the construction of the vessel.

The Draft Convention does not include a provision to the effect that the contracting States should bind themselves to provide that registered rights in or claims on a newbuilding as a point of law should comprise properly identified materials and equipment for the construction of the vessel, provided nothing to the contrary has been agreed upon by the parties. It should be clear, however, that a provision to this effect would considerably enhance the practical value of the suggested reform.

In so far as the materials and equipment have been paid for by the purchaser, the builder's anterior general creditors should have no reason to object to an arrangement giving the purchaser a title to or security in these articles. Anyone subsequently contemplating extending credit to the builder would get sufficient notice of the arrangement by looking up the register-book before any credit is granted.

The two last Articles of the Draft Convention deal with the international recognition of registered rights and claims.

If registration is to give foreign purchasers and their financial backers the protection intended, registration undertaken in one country must be recognized as valid by all contracting States. On transfer of the vessel, on completion or otherwise, to a new country registration there should only be possible on the basis of a certificate from the registrar in the former country, setting out alle registered particulars relating to the vessel. On registration in the new country all rights and charges in force when the ship was transferred, shall be entered in the ship's new register and shall remain as rights in or claims on the vessel, retaining the priority they have according to the original registration.

This provision may be one of the cardinal points, if the suggested reform is to furnish the international community of shipbuilders, purchasers and lenders with a practical and reasonably safe instrument for the money advanced to pay for the construction of the vessel.

QUESTIONNAIRE

Note : The questionnaire is based on the annexed :

- 1) Preliminary draft of a Report to the Stockholm Conference.
- 2) Draft of an International Convention for the unification of certain rules of law relating to registration of ships under construction.

The Draft Report and Draft Convention are of a tentative nature only. A final Report and Draft Convention will be based on the answers to this questionnaire and the forthcoming discussions of the International Sub-Committee.

I. Present legal situation in your country

1. Is registration of ships under construction in an official register permissible in your country ?
2. If so, at what stage of the construction process is registration of the newbuilding or of the shipbuilding contract permissible ?
3. What kind of instruments relating to a ship under construction may be registered (title, other property rights, security, contracts of affreightment, etc.) ?
4. Is registration of any instrument mandatory or is it left to the discretion of the interested parties whether they will apply for registration or not ? If mandatory, what is the legal consequence of non-registration ?
5. Does registered rights or charges comprise
 - a) the newbuilding,
 - b) materials and/or equipment as a matter of law or according to agreement between the parties,
 - c) if the question under litera b is answered in the affirmative : what further condition, if any, are required (that the materials are situated on the precincts of the yard, especially marked, that an inventory has been registered, etc.) ?
6. Is the register organized locally — with entries made to a registrar in the district where the yard is situated — or in a central register for the entire state ?

II. Desirability of a Convention on security in ships under construction

1. Do you think there is a need in your country for a reform substantially on the line suggested in the Draft Convention ?

2. Do you know of cases where the risk involved in advancing money to the yard has raised problems for the financing of new ship-building contracts or resulted in loss for the purchaser or his financiers ?

3. Is it usual in your country that purchasers get a bank guarantee from the yard for money advanced as instalments under a building contract ? If so, what is the cost of such bank guarantees ?

III. Who may apply for registration ?

Provided the principle of registration of ships under construction be accepted in your country, who shall have the right to apply for such registration :

- a) the yard only,
- b) the purchaser if the title according to the building contract has been transferred to the purchaser,
- c) jointly by the yard and the purchaser ?
- d) Should registration of ships under construction be permitted irrespective of the nationality of the purchaser (the owner) of the newbuilding (Cf. the Draft Convention, Art. 2) ?

IV. When shall registration be permissible ?

Provided the principle of registration of ships under construction be accepted, at what stage of the construction process should registration be permissible (Cf. Draft Convention, Art. 3) :

- a) When the shipbuilding contract has been duly executed ?
- b) When materials intended for the newbuilding has been received at the yard and has been properly marked ?
- c) When the constructional work has been commenced in a place from which the newbuilding is supposed to be launched ?
- d) When the keel has been laid ?
- e) When the hull has been framed ?
- f. When the newbuilding has been launched ?

(Please state your reasons for the standpoint you have taken.)

V. What instruments may be registered ?

Provided the principle of registration of ships under construction be accepted, what instruments related to such ships should be registered (Cf. Draft Convention, Art. 4) ?

1. The shipbuilding contract ?
2. Property rights, as e.g. :
 - a) Declaration of ownership to the newbuilding.
 - b) Reservation of title, e.g. by subcontractor selling equipment to the shipbuilder.
 - c) Transfer of title.
3. Security rights.
 - a) Shipbuilder's reservation of right to detain the ship and materials for it until the entire purchase price has been paid (possessory lien) ?
 - b) Mortgages on the newbuilding.
 - c) Seizure and acts of execution.
4. Contracts of affreightment.
 - a) Bareboat, time, consecutive voyage or other form of charter-party on the newbuilding ?
 - b) Assignment of the charterparty or freight due thereunder ?
5. Should the parties be required by law to register any of the aforesaid transactions, e.g. transfer of title to the newbuilding, or should the question of registration be left entirely to the discretion of the parties ?

VI. Materials and equipment

To which extent should registered rights or charges on a ship under construction comprise materials and equipment intended for, but not yet incorporated in the newbuilding (Cf. the Draft Convention, Art. 8 and 9) :

1. Should registered rights and charges comprise materials and equipment,
 - a) as a matter of law,
 - b) when the parties expressly have agreed thereupon and the agreement has been registered ?
2. What further conditions should be stipulated ?
 - a) That the materials and equipment are located in the builder's yard ?
 - b) That they are intended for the newbuilding and marked as such ?
 - c) That they are owned by the shipbuilder or the purchaser ?
 - d) That an inventory of the materials and equipment has been registered ?
3. Should entries in the register be allowed for rights and charges referring only to certain types of materials and equipment (as e.g. radio equipment) ?

4. Should legal protection acquired by registration of special rights in materials or equipment lapse, when :

- a) the object is sold to a third party who is not and ought not to have been cognizant of the registered right and the objects are moved from the yard's precincts,
- b) the object is incorporated in the newbuilding,
- c) on delivery of the completed vessel.

VII. Legal consequence of registration

Provided the principle of registration of ships under construction be accepted, what would in your law be the legal consequences of such registration :

1. Any consequences to the relations between the parties ?
2. Priority for rights and charges registered on the newbuilding in relation to :
 - a) the yard's ordinary creditors,
 - b) the yard's possessory lien for the unpaid part of the contract price,
 - c) the yard's trustee in bankruptcy ?
3. Should the registered instruments obtain such priority from the day and hour when they were :
 - a) produced to the registrar,
 - b) registered by him.
4. Is the wording of the Draft Convention Art. 5 sufficient to provide the protection which registration in your opinion ought to give the interested party ?
5. Should the registration only give protection for a right acquired by contract if the acquirer was in good faith at the time when the contract was made ? (Cf. Draft Convention, Art. 6.)

VIII. Transfer of the newbuilding to another State

In the event of the completed ship being transferred to another state :

Do you consider the wording of Art. 10 and 11 of the Draft Convention sufficient to establish protection on an international basis for all parties who have acquired legitimate registered interests in the ship during the construction period ?

PRELIMINARY DRAFT, AUGUST 1962

OF AN

INTERNATIONAL CONVENTION
FOR THE UNIFICATION
OF CERTAIN RULES OF LAW RELATING TO

REGISTRATION OF SHIPS
UNDER CONSTRUCTION

Article 1.

The High Contracting Parties undertake to introduce in their national law regulations necessary to permit registration in an official register established by or under control of the State of ships under construction within the State's territory.

The registration of ships under construction may be restricted to such ship, which the competent registrar is satisfied will be of the nature and size required by the national law to be registered in the national ship register when completed.

Article 2.

The High Contracting Parties may restrict registration of ships under construction to ships ordered by a foreign purchaser. The Contracting Parties agree to allow registration of instruments relating to ships under construction without discriminating against any applicant who is a national of one of the contracting States. Such registration shall not affect any restrictions imposed by national law on the acquisition of such rights by aliens, neither does the registration give a foreign owner of the ship the right to let the ship fly the colours of the registering country.

Article 3.

Registration of instruments relating to a ship under construction shall be permitted :

Alternative A :

— when a contract for the building of a properly specified ship has been executed.

Alternative B :

— when the constructional work has been commenced in the place from which the newbuilding is supposed to be launched.

The national law may, however, permit registration at an earlier stage, or permit registration of a contract for the building of a properly specified ship also before any work is commenced.

Alternative C :

— when the constructional work has proceeded so far that the ship may be satisfactorily identified.

The national law may, however, permit registration at an earlier stage, or permit registration of a contract for the building of a properly specified ship also before any work is commenced.

Article 4.

Instrument relating to property or security in a registered ship shall on application be entered in the register. The national law may allow registration of other instruments relating to a ship under construction.

Article 5.

Registered instruments shall have legal priority, one before another, in the same order as the application for registration was produced to the registrar, and shall take precedence over unregistered rights in or charges on the newbuilding.

Article 6.

Notwithstanding the provisions of Article 5 the national law may provide that a previously acquired right shall take precedence over a subsequently acquired right regardless of registration, if the latter has been acquired by contract and the acquirer was or ought to have been cognizant of the former right at the time, when the contract was executed.

Article 7.

The national law may further provide that maritime liens, the shipbuilder's right to detain the ship until payment of the purchase-money has been made, or statutory rights protecting the interests of the workers, shall take precedence over registered rights or charges regardless of the provisions of Article 5.

Article 8.

The national law may also provide that registered rights in or charges on a ship under construction shall comprise materials, machinery and equipment that are located in the builder's yard and distinctly marked as intended for the construction of the ship.

Article 9.

If rights in or charges on machinery, special equipment or other separate parts of the newbuilding have been registered according to the national law, the legal protection acquired by such registration shall cease on delivery of the ship to a foreign purchaser for all objects or component parts which are built into the ship and for all appurtenances necessary for its navigation.

Article 10.

Rights or charges registered pursuant to the provisions of this Convention and lawfully executed according to the pertinent laws of the State where the registration has taken place shall be recognized as valid in all the contracting States.

Article 11.

When on completion the owners wishes to register the completed ship in another State, which is a party to this convention, such registration shall only be allowed by the State to which an application is made on presentation of a certificate from the competent registrar in the State where the newbuilding has been registered, setting out all registered particulars relating to rights in or charges on the vessel and their order of priority and further stating that no more particulars will be registered on the ship after the issue of the certificate. Said particulars shall be entered in the register of the State to which the ship is transferred, and all rights and charges shall remain as before, including their mutual order of priority.