



FACULTY OF LAW
University of Lund

Cornelia Larsson

Rules governing nationality,
registration and air-
seaworthiness of aircraft and
ship – A comparison

Master thesis
20 points

Lars-Göran Malmberg

Air – and Maritime Law

Autumn Semester 2001

Contents

PREFACE	1
ABBREVIATIONS	2
1 INTRODUCTION	3
1.1 Choice of Subject	3
1.2 Outline of the Thesis	3
1.3 Public International Law	4
1.4 Air Law and Maritime Law	4
2 INTRODUCTION TO AIR LAW	5
2.1 The Development of Air Law	5
2.2 International Conventions	6
2.3 International Organisations	8
2.3.1 The International Civil Aviation Organisation	8
2.3.2 The European Civil Aviation Conference	9
2.3.3 The Joint Aviation Authorities	9
2.4 National Aviation Authorities	10
3 NATIONALITY AND REGISTRATION OF AIRCRAFT	11
3.1 The Chicago Convention and Nationality and Registration	11
3.2 The European Union and Nationality and Registration	13
3.3 Swedish Legislation on Nationality and Registration	14
4 CERTIFICATE OF AIRWORTHINESS & SAFETY IN THE AIR	16
4.1 The Chicago Convention and Airworthiness Certificates	16
4.2 European and JAA Legislation	17
4.3 Swedish Legislation	18
5 INTRODUCTION TO MARITIME LAW	22
5.1 International Conventions	23
5.1.1 UNCLOS	23

5.1.2	MARPOL	24
5.1.3	SOLAS	24
5.1.4	STCW-Convention	25
5.2	International Organisations	25
5.2.1	IMO	26
5.2.2	IACS	27
5.3	The Swedish Maritime Administration	27
6	NATIONALITY AND REGISTRATION OF SHIPS	29
6.1	UNCLOS and Nationality and Registration	29
6.2	The European Union and Nationality and Registration	31
6.2.1	EUROS	32
6.2.2	Council Regulation 613/91 on the Transfer of Ships from one Register to another within the Community	32
6.3	Swedish Legislation on Nationality and Registration	33
7	CERTIFICATE OF SEAWORTHINESS AND SAFETY AT SEA	35
7.1	UNCLOS and Seaworthiness and Safety at Sea	35
7.1.1	Introductory Notes	35
7.1.2	IMO and Self-assessment of Flag State Performance	36
7.2	European Legislation and Seaworthiness	37
7.2	and Safety at Sea	37
7.3	Swedish Legislation and Seaworthiness	37
8	AIRCRAFT AND SHIPS – A COMPARISON	40
8.1	Introduction to Air- and Maritime Law	40
8.2	Nationality and Registration of Aircraft and Ships	40
8.3	Air- and Seaworthiness	41
9	CONCLUSION	43
	SUPPLEMENT A	45
	SUPPLEMENT B	46
	BIBLIOGRAPHY	47
	TABLE OF CASES	51

Preface

In the spring semester 2000 I made the choice to study Air Law and Maritime Law. I must confess that I had my worries before the classes started, would I be able to keep up in class as it would be taught in English and would it prove at all useful to study the subjects? I loved every minute of those classes! I never enjoyed myself as much any other semester at the Faculty. You might actually say that when choosing the subject for my thesis I had little and to much choice!

As for the topic of this essay I have vacillated back and forth. When discussing this with Lars-Göran Malmberg we agreed on something and then as I have been working with it I have changed my mind over and over again. In the end I have chosen to work with both subjects and have a look at the nationality, meaning of registration and the two terms airworthiness and seaworthiness.

At times it has been difficult to keep the thesis within clear definitions. It has been tempting to read about other subjects and hard to exclude some bits. I hope that the readers will bare with me if I have wondered of the subject a little.

Abbreviations

CATE	Conference on Co-ordination of Air Transport in Europe
CINA	Commission Internationale de la Navigation Aérienne
CITEJA	Comité Internationale Technique d'Experts Juridiques Aériens
ECAC	European Civil Aviation Conference
ECSC	European Coal and Steel Community
FAA	Federal Aviation Administration
IACS	International Association of Classification Societies
IATA	International Air Transport Association
ICAN	International Commission for Air Navigation
ICAO	International Civil Aviation Organisation
JAA	Joint Aviation Authorities
JAR	Joint Aviation Requirement
IMO	International Maritime Organisation
LFV	Swedish Civil Aviation Administration
MARPOL	International Convention for the Prevention of Marine Pollution from Ships
OILPOL	International Convention for the Prevention of Pollution of the Sea by Oil
SAF	Flag State Performance Self-Assessment Form
SAFA	Safety Assessment of Foreign Aircraft
SMA	Swedish Maritime Administration
SOLAS	Convention on Safety of Life at Sea
STCW	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers
UN	United Nations

1 Introduction

1.1 Choice of Subject

This specific choice of subject, the comparison of rules governing nationality, registration and air- seaworthiness of aircraft and ship was made because here it is possible to write about both air- and maritime law. At first I was inclined to write only about one area, preferably maritime law but as both areas of law are similar I decided to compare the two subjects on a matter that has equal importance in both: the cause of nationality and aircraft airworthiness and ship seaworthiness. My aim is to broaden my insight to how the nationality is established, if it plays a role in the issuing of certificates of air- and seaworthiness and how, what air- and seaworthiness means and how it is supervised and by whom. This inevitably leads to the registration of both ships and aircraft and thus the rules governing this has had to be included in the thesis.

1.2 Outline of the Thesis

Each subject will be dealt with separately, starting with air law in chapter two. Chapter two covers international conventions and organisations, chapter three is devoted to nationality and registration as they are dealt with by the Chicago Convention¹ of 1944, the European Union (EU) and the Swedish legislation and chapter four deals with the term airworthiness and the certification of aircraft. Chapter five is the first chapter dealing with maritime law. As with the air law this first chapter deals with international conventions and organisations. The following chapter on maritime law, chapter six takes you through the rules on nationality and registration of ships, this is followed by the last chapter, chapter seven and this deals with seaworthiness and the certification of ships. The chapters on air- and maritime law is followed by chapter 8 which compares the two subjects. The thesis is finished with a conclusion in which I hope to answer my own questions.

In this introduction there will follow another three parts dealing with public international law and the implementation of conventions into national law, the European Union legislation and last but not least a small note on air and maritime law before I start on the main text.

I will not deal with Port State Control as a specific topic in this thesis but at times it will be mentioned in relation to other matters.

¹ Convention on International Civil Aviation, Chicago, December 7, 1944; hereinafter know as the Chicago Convention

1.3 Public International Law

Traditionally international law has been defined as the legal relationship between states. Although as the law has progressed, international organisations and other entities with an international legal personality have been included in the legal relationships covered by international law, it is well to remember that international law is made up and implemented almost exclusively by states.²

International law is made up of custom, treaties, general principles of law, judicial decisions and sometimes the works of eminent legal writers.³

Treaties have to be ratified by a state to become binding upon the state. As to custom it is the practice of states. The states have to feel bound by a sense of legal obligation for a practice to be a custom.⁴ I have chosen to base the thesis on two large international conventions: the United Nations Convention on the Law of the Sea, UNCLOS, when it comes to the maritime law and the Convention on International Civil Aviation, the Chicago Convention, when it comes to air law.

1.4 Air Law and Maritime Law

Air law and maritime are equal in the aspect that they are both international areas of law. Maritime law has developed through custom over centuries and this provides a distinction from air law which is a relatively new concept (when compared to the long development of maritime law). Maritime law is the law governing ships, safety at sea and the shipping of goods. The use of the air space is governed by the air law. One substantial similarity between the subjects is the fact that both aircraft and ships have a nationality. The notions of airworthiness and seaworthiness also provide a touching point for the two subjects.

I must stress that most of the translations made from the Swedish legislation into English for the purpose of this thesis, such as when I have translated an entire article or simply the names of the different codes and ordinances are my own translations and in any case of doubt the Swedish wording is the right one.

² Please read Malanczuk, Akehurst's Modern Introduction to International Law, chapter 1 for more information on the definition of international law.

³ Article 38 of the Statute for the International Court of Justice, annexed to the UN Charter, lists the sources of law they rely upon when they decide cases.

⁴ See Epps, International Law pp 5-16

2 Introduction to Air Law

2.1 The Development of Air Law

The international character distinguishes this particular field of law. The primary source of law is conventions.

The first international convention to enter into force was the “Convention Portant Réglementation de la Navigation Aérienne”. Commonly known as the Paris Convention of 1919.⁵

As early as the 18th Century the first national laws on flying were issued in France⁶ and a first attempt at an international convention was made at the Paris Conference of 1910. The Paris Conference of 1910 and the Paris Convention of 1919 both adopted the principle of sovereignty of the states over the airspace above⁷ them in contrast to the principle dominating maritime law, the principle of the freedom of the high seas.^{8 9} McNair believes that the first world war opened the eyes of states to the potential danger posed by aircraft if allowed to fly freely over the territory of whatever nation the pilot chose and this would be why the principle of sovereignty was adopted.¹⁰

There is a question in the legal world as to whether or not air law is to be regarded as a distinctive area of law, *sui generis* or if it is to be governed by the same rules as those governing the law of the sea. Diederiks-Verschoor express the opinion that air law is a distinctive area and should be governed by rules somewhere in between a totally specialised area and general law as it stands today.¹¹

The Paris Convention of 1919 and its successor the Chicago Convention provided a definition of aircraft: “Aircraft is any machine that can derive

⁵ Convention Portant Réglementation de la Navigation Aérienne, Paris, October 13, 1919; known hereinafter as the Paris Convention of 1919.

⁶ The Montgolfier Brothers had started flying with balloons and a national law was issued 1784. Diederiks-Verschoor, *An Introduction to Air Law*, p. 2

⁷ The principle was found in the first Article of the Paris Convention and reads as follows: “The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory. For the purpose of the present Convention the territory of a State shall be understood as including the national territory, both that of the Mother Country and of the Colonies, and the territorial waters adjacent thereto.” McNair, *The Law of the Air*, pp. 5-6

⁸ Article 87 United Nations Convention on the Law of the Sea, Montego Bay, December 10, 1982.

⁹ Article 1 of the 1967 Space Treaty establishes the rule of freedom in outer space. See Videla Escalada, *Aeronautical Law*, p. 49

¹⁰ McNair, *Ibid.*, p. 5

¹¹ Diederiks-Verschoor, *Ibid.*, p. 3

support in the atmosphere from the reactions of the air.”¹² This definition was changed 23 years later by the ICAO. The new definition reads: “Aircraft is any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth’s surface.”¹³

The Paris Convention was followed by the Ibero-American Convention of 1926¹⁴ and the Pan-American Convention of 1928¹⁵. In 1944 the Paris -, Ibero-American – and Pan-American Conventions were replaced by the 1944 Chicago Convention on International Civil Aviation.

2.2 International Conventions

International air law consists of a number of multilateral conventions and agreements. This is a list of some of the major conventions and agreements governing the world of aviation today.

- Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw, October 2, 1929; called the Warsaw Convention¹⁶
- Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft, Rome, May 29, 1933¹⁷
- Convention on International Civil Aviation, Chicago, December 7, 1944; called the Chicago Convention of 1944
- International Air Services Transit Agreement, Chicago, December 7, 1944; called the Transit Agreement
- International Air Transport agreement, Chicago, December 7, 1944; called the Transport Agreement

¹² Diederiks-Verschoor, *Ibid.*, p. 5

¹³ Diederiks-Verschoor, *Ibid.*, p. 5

¹⁴ Ibero-American Convention on Air Navigation, Madrid, November 1, 1926

¹⁵ Pan-American International Convention on Commercial Aviation, Havana, February 20, 1928

¹⁶ Amendments/additions to the Warsaw Convention

- Protocol to Amend the Convention for the Unification of Certain Rules for International Carriage by Air, The Hague, September 28, 1955; called the Hague Protocol
- Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, Guadalajara, September 18, 1961; called the Guadalajara Convention
- Protocol to Amend the Warsaw Convention, Guatemala City, March 8, 1971; called the Guatemala Protocol
- Additional Protocol No 1, 2, 3 and 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12th October 1929 (as amended by the Protocol[s] Done at the Hague on 28th September 1955 [and at the Guatemala City on 8 March 1971]), Montreal, September 25, 1975; called the Montreal Protocols or Montreal Protocol No. 1, 2, 3 or 4

¹⁷ Also known as the Convention on Precautionary Arrest of Aircraft.

- Convention on the International Recognition of Rights in Aircraft, Geneva, June 1, 1948; called the Geneva Convention
- Bermuda I Agreement¹⁸
- Convention on Damage Caused by Foreign Aircraft to third Parties on the Surface, Rome, October 7, 1952; called the 1952 Rome Convention¹⁹
- Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe, Paris, April 30, 1956; called the Paris Agreement
- Convention relating to Co-operation for the Safety of Air Navigation, Brussels, December 13, 1960: called the Eurocontrol
- Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, September 14, 1963; called the Tokyo Convention
- Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, December 16, 1970; called the Hague Convention
- Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Montreal, September 23, 1971; called the Montreal Convention²⁰

The Chicago Convention was signed 1944 by 50 states invited to a conference on civil aviation by the USA. To this day a number of annexes have been added.²¹ Part two of the Convention provides for the establishment of ICAO.

The Chicago Convention continues along the lines of the Paris Convention and states in Article 1 that the state has exclusive sovereignty over the airspace above its territory.²² The Transit²³ – and the Transport Agreement²⁴, concluded at the same time as the Chicago Convention, makes it possible for states to derogate from this principle and allow greater freedom in their airspace.

¹⁸ Provided a standard formula for bilateral transport agreements. Replaced by Bermuda II. Diederiks-Verschoor says on page 56 (An Introduction to Air Law) that “The era of bilateralism in aviation policy has come to an end, at least inasmuch the USA and Europe are concerned.”

¹⁹ Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Montreal, September 23, 1978; called the 1978 Montreal Protocol

²⁰ Also known as the Sabotage Convention

²¹ For an enumeration please see Diederiks-Verschoor, Ibid. pp. 10-11

²² The Principle of Sovereignty

²³ First Freedom: The right to fly over another country without landing. Second freedom: The right to make the technical landing for refuelling etc. without picking up or letting off revenue traffic.

²⁴ Third Freedom: The right to carry revenue traffic from Nation A to Nation B. Fourth Freedom: The right to carry revenue traffic from Nation B to Nation A. Fifth Freedom: The right to pick up or let off revenue traffic between two foreign nations.

Even though the Chicago Convention provides a few articles on airports and an annex dealing specifically with the matter²⁵ there are no uniform rules for airport management and each state has its own regulations.²⁶

As is stated in Article 3 of the Convention state aircraft are excluded from the Convention, state aircraft being defined as military, customs and police aircraft.

For the purpose of this thesis the Chicago Convention provides the basis for all regulation on nationality and registration of aircraft, as we will see in the following chapter.

2.3 International Organisations

International organisations with the purpose to develop and protect aviation and the rules governing the field were established as early as 1919. CINA, Commission Internationale de la Navigation Aérienne²⁷, was established by the Paris Convention of 1919. In 1925 CITEJA, Comité Internationale Technique d'Experts Juridiques Aériens,²⁸ was established. CITEJA studied different aspects of air law whilst CINA dealt with technical matters and their regulation. Both organisations were merged into ICAO, the International Civil Aviation Organisation.

IATA, the International Air Transport Association, was established 1919 by six private airline companies. To this day IATA is a private organisation. Almost every scheduled airline company in the world is a member and as a private organisation IATA has great influence on the aviation world today. The organisation works closely together with the member states respective governments and with the ICAO.

The European Organisation for the Safety of Air Navigation, EUROCONTROL was founded 1960 and one of its functions is to provide air traffic flow management within the area comprised of the member states.²⁹

2.3.1 The International Civil Aviation Organisation

The ICAO is an UN agency and was created 1947. The organisation deals with all aspects to do with aviation; legal, technical and financial. ICAO has an assembly where all 170 members are represented, a council with 33

²⁵ Annex 14

²⁶ Diederiks-Verschoor, Ibid. pp. 26-27

²⁷ In English ICAN: International Commission for Air Navigation

²⁸ In English: International Technical Committee of Legal Experts on Air Questions

²⁹ www.eurocontrol.be 25-05-01 09:34

representatives and numerous committees, one of which is the legal committee.

2.3.2 The European Civil Aviation Conference

In 1954 a conference,³⁰ constituted by an ICAO resolution, convened in Strasbourg the outcome of which was to establish a permanent European aeronautical authorities. ECAC, European Civil Aviation Conference held its inaugural session in 1955. Sweden was one of 19 founding states. Today ECAC has 38 member states and works in plenary session triennially. The Directors General of Civil Aviation for each member state meet regularly to discuss policy issues. The co-ordinating committee³¹ handles day to day issues and the secretariat, lead by an executive secretary comprises a multinational team of civil aviation experts. ECAC works with the ICAO, Council of Europe, the institutions of the EU, Eurocontrol, JAA and other organisations in the aviation field. The resolutions and recommendations of ECAC are brought into effect by the member states.³²

2.3.3 The Joint Aviation Authorities

JAA, Joint Aviation Authorities an associated body of ECAC dating back to 1970, has 33 members, 20 of which are full members with voting rights etc. The members have agreed to work for the development and implementation of common safety regulation standards and procedures. The intention is to provide consistent and high standards of safety.

Each member state has one representative in the JAA Committee. As from 2001 there will be some structural changes in the JAA. The Committee and the Board will be working together as the Governing Body. The Headquarters and its Secretary-General is now called the Executive and the Chief Executive. The committees that formerly worked for the Headquarters is renamed sectorial teams and are six to the number; certification, regulation, maintenance, operations, licensing and resources and development. The day to day work is still managed by the Executive Board whose six members are chosen from the JAA Committee. JAA co-operates with amongst others ICAO, the European Commission and the U.S. FAA, Federal Aviation Administration. The industry is represented in all committees developing the requirements and procedures issued by the JAA.

Two functions of the JAA are to develop and adopt JARs, Joint Aviation Requirements and to establish procedures for the certification of products and services. The fields to be covered by the JARs are design, manufacture

³⁰ Conference on Co-ordination of Air Transport in Europe (CATE)

³¹ The committee has five members: the president, the honorary president and three vice-presidents one of which is the Swedish Ingemar Skogo, head of environmental matters.

www.ecac-ceac.org/uk 24-05-01 18:30

³² www.ecac-ceac.org/uk/ 24-05-01 18:24

and maintenance of aircraft, the operation of aircraft and the licensing of aviation personnel. The task of certifying new aircraft and engines fall on a Joint Certification Team. When a product has been approved type certificates are issued by the member states. All the work done by the JAA is done with the use of staff from the member states national authorities. As of 1992 all JAA codes are referenced in the European Community Regulation on Harmonised Technical Standards. This mean that they become binding in all the EU member states.³³

2.4 National Aviation Authorities

The instructions for the Swedish Civil Aviation Administration is left in the Ordinance with Instructions for the Civil Aviation Administration³⁴. The first article states that the Administration shall deal with questions concerning the civil aviation and its main purposes are to further the development of civil aviation, run and develop the government's airports for civil aviation, to supervise the safety in civil aviation, protect the environment from pollution by aircraft etc.

The Civil Aviation Administration is divided into different units, one of these units being the Civil Aviation Inspection. This unit performs inspections and surveys the purpose of which is to make sure that the safety in civil aviation is maintained. It also perform investigations in the event of an aircraft accident. The Inspection sorts under both the Administration and the Department of Communication when it comes to organising matters.

Several articles in the Swedish Civil Aviation Code³⁵ and the Civil Aviation Ordinance³⁶ establish duties and rights for the Administration to perform inspections, to certify aircraft etc. The Administration issues its own regulations³⁷ in a statute-book³⁸

³³ www.jaa.nl 25-05-01 10:00

³⁴ Förordning (1988:78) med instruktion för Luftfartsverket

³⁵ Lagen (1957:297) om Luftfart

³⁶ Förordning (1986:171) om Luftfart

³⁷ Bestämmelser om Civil Luftfart – BCL, in English Regulations on Civil Aviation

³⁸ Luftfartsverkets författningssamling - Lfs

3 Nationality and Registration of Aircraft

Why does an aircraft need to have a nationality? This question can be answered in many different ways but to state the obvious, the nationality makes it possible to decide which state is liable to control the airworthiness and licences of the aircraft in question. The nationality also provides us with a means to determine the jurisdiction in cases such as births, deaths, criminal proceedings, liability claims etc. The nationality may be granted on the basis of the owner's nationality or perhaps by the place of construction. However the most common fact constituting nationality when it comes to aircraft is registration.

Apart from providing the aircraft with a nationality the registration is also an indication on the ownership of the aircraft and of the rights, attachments, information on leasing and precautionary measures that may be connected to an aircraft. The owner might have transferred his rights as operator of the aircraft and if so has happened the register will show it. This might be of importance in the eventuality of liability arising from the operation of an aircraft.³⁹

3.1 The Chicago Convention and Nationality and Registration

The Chicago Convention states that an aircraft has the nationality of the state in which it is registered, article 17:

“Aircraft have the nationality of the state in which it is registered.”

It is impossible for an aircraft to have two nationalities⁴⁰ and an aircraft that is operated by more than one state must be registered in a joint register. This was decided by the ICAO Legal Committee in 1967. The basis for the committee's decision is to be found in article 77 of the Convention.⁴¹ The committee further decided that the joint register must have one section for each country involved. Aircraft can only be registered under a particular section. This means that only one state is responsible for the carrying out of obligations established by the Chicago Convention. The aircraft shall have a

³⁹ Videla Escalada, Ibid. Pp. 133- 135 and p. 151

⁴⁰ Article 18

⁴¹ Article 77 reads: *Nothing in this Convention shall prevent two or more contracting States from constituting joint air transport operating organisations or international operating agencies... The Council shall determine in what manner the provisions of this Convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies.”*

communal marking instead of a national one.⁴² An aircraft may change its registration from one state to another⁴³, which would perhaps be needed should the aircraft be sold to an airline operating in another country. When aircraft are used for interchange between airlines of different states, the state of registration may transfer its functions to the state whose national the carrier using the aircraft is.⁴⁴

It becomes evident from article 20 of the Convention that each state may dictate its own laws and regulations as to whether or not nationality can be granted to a particular aircraft. The rules on the registration procedure is also to be determined by the country in question.

The Convention requires all states to send reports to the ICAO on the ownership and control of aircraft registered in their state. States must also give other states and the ICAO any information concerning a particular aircraft should such a request be made.⁴⁵

The aircraft must have a national marking, article 19:

“Every aircraft engaged in international air navigation shall bear its appropriate nationality and registration marks.”

The marks make it possible to distinguish one aircraft from another. A mark consists of two groups of letters, the first showing the nationality and the second identifies the particular aircraft.⁴⁶

Article 5 and 7 of the Convention establishes certain rights on the basis of nationality.⁴⁷ The first being the right for non-scheduled⁴⁸ aircraft to fly into or above the territory of a contracting state without prior permission being granted by the state. The aircraft may also make non-traffic stops. The second establishes the right for a state to allow only national aircraft to fly routes from one point to another in the state’s territory.⁴⁹

One must distinguish between the nationality of the aircraft and the rule of nationality. The latter being found in article 1, § 5 of the Transit Agreement and article 1, § 6 of the Transport Agreement. An airline must be substantially owned by a majority of citizens of the state of registration and the effective control must befall the same nationals. Havel says that this

⁴² For more information see Diederiks-Verschoor, Ibid. p. 24

⁴³ Article 18

⁴⁴ Article 83 bis

⁴⁵ Article 21

⁴⁶ Videla Escalada, Ibid. P. 120

⁴⁷ Videla Escalada, Ibid. Pp. 119-120

⁴⁸ When discussing air services one distinguishes between scheduled air services and non-scheduled services. Scheduled services being defined as services carried out accordingly to a published timetable. Non-scheduled services is carried out on an ad hoc basis. See Diederiks-Verschoor, Ibid. Pp 15-18 for further information on the definition.

⁴⁹ Cabotage Article 7

implicitly means that airlines from one country is forbidden to acquisition airlines from other states. Nor are two airlines from different states allowed to merger.⁵⁰

3.2 The European Union and Nationality and Registration

The Treaty of Amsterdam states in its fifth title⁵¹ (articles 70-80) that the Council by qualified majority shall be able to decide to issue common legislation in the field of sea and air transport.

The Council has made use of this provision and has issued a number of packages with the aim to liberalise the Community aviation market. A high degree of liberalisation has been achieved though the third and latest package. The union area is treated as a single market and a carrier from for example Spain may operate anywhere in the market without government authorisation.⁵²

In the “Nouvelles Frontières” case the European Court once and for all established that the general rules of competition in the Rome Treaty were applicable on Community air transport.⁵³

Council Regulation 2407/92 on licensing of air carriers⁵⁴ was adopted by the council in 1992. This regulation provides, as becomes apparent from the title, rules on the operating licenses that an air carrier must obtain to be allowed to fly on the Community market. But more important for this chapter is the rules provided in article 8. According to this article a member state can require that aircraft operated by an air carrier licensed by the member state shall be registered in the member states national register or with some other member of the Community.

Subject to applicable laws and regulations a member state must grant aircraft owned by nationals from other member states registration on their register. John Balfour seems to think that this means that member states no longer can apply the nationality rule in respect of aircraft owned by nationals of the Community.⁵⁵

⁵⁰ Havel, In Search of Open Skies, p. 102

⁵¹ The title that deals with transport issues.

⁵² The New Legal Framework for Aviation in the European Community, p. 10

⁵³ Diederiks-Verschoor, Ibid., pp. 46-47

⁵⁴ Council Regulation (EEC) 2407/92, OJ L240 24.8.92

⁵⁵ Balfour, European Community Air Law, p. 46

3.3 Swedish Legislation on Nationality and Registration

The Swedish legislation is found in the Civil Aviation Code⁵⁶, the Civil Aviation Ordinance⁵⁷, the Ordinance on the Aircraft Register⁵⁸ and the Ordinance with instructions to the Civil Aviation Administration⁵⁹. Chapter 2 of the Civil Aviation Code deals with nationality and registration. Chapter 2 article 12 states that all aircraft registered in the Swedish register shall have Swedish nationality and the Civil Aviation Administration⁶⁰ shall issue a nationality- and registration certificate. When a Swedish aircraft is used it must carry the nationality- and registration certificate with it, article 15. The same article states that foreign aircraft flying in Swedish territory must carry equivalent certificates issued by the state of registry.

An aircraft may be registered in the Swedish aircraft register if it is owned by Swedish authorities, nationals of the EU and companies or organisations based within the EU. The Civil Aviation Administration keeps an aircraft register and the authorities may grant registration to aircraft that does not fulfil these requirements, but only if such an aircraft is to be operated with the starting point in Sweden.⁶¹

Article 3 in Civil Aviation Code corresponds to article 18 on dual registration of the Chicago Convention. An aircraft that is registered in another country can not be registered in Sweden unless it is deregistered in the country in question. The circumstances under which an aircraft may be deregistered in Sweden is listed in article 8 in the Civil Aviation Code.

One requirement that must be fulfilled before registration can take place is that the aircraft must have a certificate of airworthiness, article 4 paragraph 1. The certificate must be issued or approved in Sweden, paragraph 2. However, the Administration's regulations on civil aviation, the BCL declares in BCL-M 1.1 section 5.2 that before an airworthiness certificate can issued a application for registration must be filed with the Administration.

Chapter 2 also contains provisions on the display of marks, article 16. Aircraft are required to display their nationality mark as well as their registration mark. The Civil Aviation Ordinance declares in article 8 that the mark for aircraft of Swedish nationality is SE. The registration mark contains three signs, be they numbers, letters or a combination of the two.

⁵⁶ Luftfartslagen (1957:297)

⁵⁷ Luftfartsförordningen 1986:171

⁵⁸ Förordning om Luftfartygsregistret 1986:172

⁵⁹ Förordning med instruktion för luftfartsverket 1988:78

⁶⁰ When I refer to the Administration in the following I mean the Swedish Civil Aviation Administration

⁶¹ Civil Aviation Code, chapter 2, § 2

The register shall contain the nationality and registration marks, the manufacturer and the year of manufacture, the aircraft class, the extent of the airworthiness certificate, all previous registrations of the aircraft, reasons if the aircraft has been deregistered, the occurrence of securities and the name of the owner as well as some other things, article 5 the Ordinance on the Aircraft Register. Should the aircraft change owner or should the owners nationality change or perhaps the aircraft be altered so as to be of importance to the identification of the aircraft the Administration must be notified immediately.⁶²

⁶² Article 15 the Ordinance on the Aircraft Register

4 Certificate of Airworthiness & Safety in the Air

Airworthiness means that an aircraft is fit to fly. Videla Escalada provides the following definition:

“The certificate granted to an aircraft after having been submitted to a detailed examination and it proves its capacity to provide fully safe air navigation services within the activity for which it is intended.”⁶³

The form of state control that the certification of aircraft is should according to Videla Escalada include supervision throughout the construction of an aircraft so as to make sure the techniques and material used when manufacturing is sufficient.⁶⁴

One of the reasons why the certification of airworthiness is so important is that the safety in the air and on the ground is dependant on it. Unfit aircraft could cause serious damage. One of the articles of the Chicago Convention gives the contracting states the right to search and inspect foreign aircraft.⁶⁵ This article provided the basis for SAFA, the Safety Assessment of Foreign Aircraft Programme developed by ECAC.

In the following chapter I will have a look at international regulation on the subject but the European Union legislation on the subject established through the JAA and the Swedish legislation will take up most of the chapter. The final section on national legislation will conclude the part on air law in the thesis.

4.1 The Chicago Convention and Airworthiness Certificates

The State of registration shall issue a certificate of airworthiness to be carried with the aircraft.⁶⁶ The Convention imposes an obligation, article 33, on the contracting states to approve certificates issued by other contracting states so far as they are equal or above the minimum standards required by the Convention.

The state of registry issues the certificate and states may choose to ratify a certificate issued by another entity instead of issuing a certificate

⁶³ Videla Escalada, Ibid., p. 263

⁶⁴ Videla Escalada, Ibid., p. 271-273

⁶⁵ Article 16 Chicago Convention

⁶⁶ Articles 29 and 31 Chicago Convention

themselves.⁶⁷ Article 83 bis provides the contracting states with the possibility of transferring the functions and duties bestowed upon them as the state of registry in articles 12, 30, 31 and 32(a)⁶⁸ to country X, provided that the aircraft is operated by someone other than the owner through lease, interchange or charter and that the other person or entity has his/their principal place of business or permanent residence in state X.

Certificates of airworthiness must be renewed if the duration has been made temporary. According to Wybo P. Heere the authorities should inspect the aircraft annually.⁶⁹

Aircraft that doesn't satisfy the standards at the time of certification must have an endorsement, listing the details in which it failed, attached to the certificate of airworthiness.⁷⁰ Such an endorsement doesn't prohibit the aircraft being used in international traffic but permission must be sought by all the states whose territories will be entered.⁷¹ The aim with the endorsement is to make it clear to all concerned of the fact that the certified aircraft is not fulfilling all the standards.⁷²

Assad Kotaite means that a contracting state of the Chicago Convention has the right to expect that aircraft from other contracting states are required by those states to follow established safety standards and procedures.⁷³

4.2 European and JAA Legislation

Council Regulation 3922/91 on Harmonised Technical Standards⁷⁴ requires EU member states to be members of JAA. The regulation applies to technical requirements and administrative procedures and as of 1 January 1992 all JAA codes already adopted are referenced in the regulation. As it is a regulation this means that the JAA codes become law in the EU states. New JARs, developed by the JAA must be notified to the EU Commission. The Commission then proposes to the Council that they adopt this and this JAR. Decision is taken in the Council by qualified majority.

JAA issues JARs on certification, maintenance, operations and licensing of aircraft personnel. One example of a JAR is JAR-25, code for the certification of large aeroplanes. Joint Type Certifications have been issued

⁶⁷ Videla Escalada, *Ibid.*, p. 263

⁶⁸ Article 12 – Rules of the air, article 30 – Aircraft radio equipment, article 31 – Certificates of airworthiness and article 32(a) – Licences of personnel.

⁶⁹ Heere, *Problems of jurisdiction in air and outer space*, *Air and Space Law*, p. 73

⁷⁰ Article 39(a)

⁷¹ Article 40

⁷² Videla Escalada, *Ibid.*, p. 263

⁷³ Kotaite, *Is there a Lessening of State Sovereignty or a Real Will to Co-operate Globally?* *Air and Space Law*, p. 289

⁷⁴ OJ L373 31.12.91

on a number of large aeroplanes and the progress of establishing more type certificates are continuing.⁷⁵

As aircraft can cover many different states in only one flight it has become increasingly important for all states around the world to be able to trust that the aircraft engaged in flight above or landing in or taking off from their territory is up to the task. ICAO started the Universal Safety Oversight Audit Programme in 1996. The objective is to determine the safety oversight capability of States. The same year, ECAC launched SAFA.⁷⁶

SAFA⁷⁷, the Safety Assessment of Foreign Aircraft Programme was established to complement the work done by ICAO. The assessment is to be performed through ramp inspections on aircraft from non-ECAC states as well as those from ECAC states. The EU is involved in SAFA by membership in the SAFA Steering Committee.

When a ramp inspection is performed the aircraft's documents, crew, the state of the aircraft and presence and condition of mandatory cabin equipment is checked. All inspections are carried out following a common procedure and in case of irregularity the operator and the appropriate authority are contacted so the problem can be rectified. The inspection is concluded in three parts, one of them being the flight deck inspection in which all certificates are checked. Deficiencies are labelled from one to three, with one meaning minor, two significant and three major. Should the irregularity be serious the state performing the inspection may ground the aircraft until the deficiency is taken care of.

The ramp inspections can not replace those inspections on aircraft airworthiness and safety that should be performed by the state of registry. This is because the assessment is done on the spot. A performed ramp inspection does not guarantee the airworthiness of the aircraft in question.

In 1999 the number of ramp inspections performed were 2801. Only 20 of ECAC's 38 member states were among the inspecting countries. Deficiencies were found in less than half of those aircraft.

4.3 Swedish Legislation

The Civil Aviation Code's third chapter is devoted to airworthiness, the first article states that aircraft must be airworthy when used for flying. The

⁷⁵ www.jaa.nl 25-05-01 at 10:00

⁷⁶ ECAC/JAA Programme for Safety Assessment of Foreign Aircraft, Report 1999, p. 3 www.ecac-ceac.org/uk/documents/SAFA 25-05-01 at 12:15

⁷⁷ For further information please read: ECAC/JAA Programme for Safety Assessment of Foreign Aircraft, Report 1999, www.ecac-ceac.org/uk/documents/SAFA

second paragraph of the same article provides a definition of when an aircraft shall be deemed airworthy.⁷⁸

Swedish aircraft's airworthiness shall be inspected and certified by the Civil Aviation Administration.⁷⁹ In the 18th article of the Civil Aviation Ordinance the government gives the Administration permission to issue further instructions on the construction, manufacture, testing, equipment and preservation of aircraft to keep the safety standards. The Administration has adopted a number of such instructions and they are published in Luftfartsverket Författningssamling.⁸⁰ BCL-M 1.7 contains the rules concerning the process of issuing a certificate of airworthiness.

Should the government prescribe it the Administration may appoint the task of certification and inspection to a competent expert, articles 2 and 3 Civil Aviation Code. Permission to do so is given the Administration through articles 16 and 19 of the Civil Aviation Ordinance. As was stated in chapter 2.2.4 above the task befalls the Civil Aviation Inspection.^{81 82}

Article 3 of the Code makes it possible for the Administration to make a certificate valid during a limited number of time only.⁸³ An expired airworthiness certificate give rise to a new inspection⁸⁴ after which a new certificate will be issued provided that the aircraft fulfil all requirements as they stand at the time of the new inspection.⁸⁵

Investigations and surveys of the aircraft will be carried out continuously by the Administration after the issuing of a certificate of airworthiness. Such investigations and surveys will be done at the convenience of the Administration, unless the owner or operator makes a request for one. To be able to grant a certificate the Administration might feel that it is necessary to perform test flights or other tests of the material in which case the personnel, fuel etc. needed shall be provided by the person for whom the tests are made.⁸⁶

In each case of the above stated duties of the Administration they are performed by the Inspection and the corresponding BCL are found in BCL-M 1.7 section 5.1.4 and 5.2.

⁷⁸ "Aircraft shall be deemed airworthy if it is constructed, built, equipped and kept in a way and has the necessary qualities for flying so that the safety requirements are complied with." This is my own translation.

⁷⁹ Article 2 Civil Aviation Code

⁸⁰ The Civil Aviation Administration's statute-book

⁸¹ Unless the aircraft at hand is a sailplane or a motor sailplane in which case the certification will be performed by KSAK, the Royal Swedish Aero Club. BCL-M 1.7 sections 4.1, 4.3, 5.1, 5.2 and 5.3

⁸² I will be calling the Civil Aviation Inspection the Inspection for the rest of this chapter.

⁸³ Civil Aviation Code article 3

⁸⁴ If the owner/operator apply for a new certificate.

⁸⁵ Article 3 paragraph 2 Civil Aviation Code

⁸⁶ Articles 14, 15 and 17 of the Civil Aviation Ordinance

The extent of a survey differ from case to case, it might be enough to control only selected parts of the aircraft. In other cases the surveyor might feel it necessary to inspect the entire aircraft. The Surveyor takes a decision about the extent after examining the status of all the technical material and all the airworthiness documentation provided, BCL-M 1.7 section 5.4. After the conclusion of an approved survey the Inspection issues the Certificate of Airworthiness, the meaning of which is that the owner/operator may use the aircraft for the activities named in the certificate.⁸⁷

Airworthiness Directives are directives issued by the state of manufacture to all states having an aircraft of the type concerned by the directive on their register. The Directive should contain all commonly applicable information of the aircraft that the state of manufacture has found necessary to guarantee the aircraft's continued airworthiness and safe flying. The state receiving the information should make the appropriate arrangements for aircraft on their register.⁸⁸ The Civil Aviation Administration issues airworthiness directives for aircraft on the Swedish register or for aircraft manufactured in Sweden. The directives are published in the Administrations statute-book.⁸⁹ It is the duty of any owner/operator of a Swedish aircraft to follow the directives.

The Civil Aviation Ordinance's 13th article states that Administration issues type certificates after examining and testing the construction and material in a particular type of aircraft. In the third paragraph it is made clear that type certificates issued by other states may be approved by Administration in which case the administration issues a type acceptance certificate.

A Swedish aircraft must according to article 4 of the Civil Aviation Code have a Swedish certificate of airworthiness when flying. However, it is possible for the Administration to approve a foreign certificate of airworthiness. Foreign aircraft flying in Swedish territory must have a certificate of airworthiness. A certificate issued in another state will be recognised in Sweden subject to an agreement with the foreign state and Sweden.

Anything that might have an effect on the airworthiness, like alterations in the equipment or damage to the aircraft can cause the certificate to become invalid. Such a certificate should be handed in to the Administration if they request it.⁹⁰

The task of keeping the aircraft airworthy befalls the owner or in a case where the owner and operator are two different persons, the operator. Article 7 of the Civil Aviation Code poses a duty on the owner/operator to inform

⁸⁷ BCL-M 1.7 section 6

⁸⁸ BCL-M 1.11

⁸⁹ Luftfartsverkets författningssamling.

⁹⁰ Article 5 paragraph 3 of the Civil Aviation Code and Article 19 paragraph 4 of the Civil Aviation Ordinance

the Administration of anything that might effect the airworthiness of the aircraft.

The Administration can grant permission to fly for aircraft that does not fulfil the requirements in the Civil Aviation Code on airworthiness if it is necessary to test the aircraft's capabilities, article 9 of the Civil Aviation Code and article 23 of the Civil Aviation Ordinance.

Foreign aircraft used in Sweden may be made subject to inspection and surveillance in Sweden to approve the certificate of airworthiness, to issue a Swedish certificate or to grant the aircraft leave to engaged in traffic in Sweden. An inspection caused by the question of the airworthiness is always allowed but the former three may only be performed if it is absolutely necessary.⁹¹

A contracting state of the Chicago Convention who's aircraft the Administration wants to ground on the purpose of it being damaged and thus not fulfilling the standards of airworthiness must be informed of the grounding. It is then up to that state to make a decision as to whether or not the aircraft is airworthy. Should that state consider the aircraft to be airworthy the Administration must allow the aircraft to leave Swedish territory.⁹²

⁹¹ Article 24 of the Civil Aviation Ordinance

⁹² Article 25 of the Civil Aviation Ordinance

5 Introduction to Maritime Law

This area of international law has developed over centuries, not so much in international treaties as in custom. The first multilateral treaties⁹³ were established in the twentieth century and today there are numerous conventions most of which are adopted by the majority of the maritime countries.

One of the most important customary principles is the Principle of Freedom on the High Seas. The principle was firmly established before the decolonisation era after World War II and maybe as early as the beginning of the nineteenth century.⁹⁴ Today as the states around the world gradually have extended their territorial sea and have added concepts such as the exclusive economic zone the principle plays a big part, together with for example the right of innocent passage and the right of transit passage in keeping the sea and its resources available to all states.

A coastal state enjoys the same sovereignty over its internal- and territorial waters⁹⁵ as over their land territory. The territorial sea extends to twelve nautical miles and the adjacent waters, the contiguous zone stretches another twelve nautical miles. Although the coastal state has sovereignty over the territorial sea they must allow ships to pass through the territorial sea, i.e. the right of innocent passage.⁹⁶ The coastal state may for the purpose of preventing the violation, in their territory or territorial waters, of their laws and regulations on customs, fiscal, immigration or sanitary matters exercise control in the contiguous zone⁹⁷. Control may also be used to make it possible to punish violations of the same laws and regulations in the territory or territorial waters of the coastal state. The waters adjacent to the contiguous zone is the exclusive economic zone. These waters may extend 200 nautical miles from the baseline. Beyond the exclusive economic zone starts the high seas. The duties and rights of the coastal state in the exclusive zone are listed in article 56 of the United Nations Convention on the Law of the Sea.

⁹³ The 1958 Geneva Conventions on the Law of the Sea

⁹⁴ Brown, *The International Law of the Sea*; volume I, p. 8

⁹⁵ The territorial sea limit of twelve miles is decided based on points of the coast called the baseline. As is stated in article 8 of the United Nations Convention on the Law of the Sea: "Waters on the landward side of the baseline form part of the internal waters."

⁹⁶ Brown, *Ibid.*, pp. 37-38

⁹⁷ The contiguous zone starts after the territorial sea and may extend another 12 nautical miles beyond the territorial sea. See Article 33 of UNCLOS

5.1 International Conventions

In 1958 the United Nations held the first conference on the law of the sea in Geneva. The conference⁹⁸ produced four conventions. The preamble declared the conventions to be declaratory of established principles. However the conventions also produced some new rules.⁹⁹ The first was the Convention on the Territorial Sea and the Contiguous Zone and the second was the Convention on the High Seas. The third and fourth were the Convention on Fishing and Conservation of the Living Resources of the High Seas and the Convention on the Continental Shelf. The four conventions are called the Geneva Conventions on the Law of the Sea. Due to different opinions on different questions a second conference was held 1960. As with the first UNCLOS conference the second could not come to an agreement on the question of the territorial sea.

5.1.1 UNCLOS

Thirteen years after the second UNCLOS conference 144 countries and 8 specialised agencies convened for UNCLOS III. After almost a decade of meetings the United Nations Convention on the Law of the Sea was adopted in 1982¹⁰⁰. Most of the rules in the convention were acceptable almost universally.¹⁰¹

Despite having been part of the negotiations before the adoptance of the Convention a large number of the western states refused to sign or ratify UNCLOS. The problem being some articles in Part XI of the Convention. This particular part of UNCLOS established a regime for deep seabed mining. After realising that this threatened the concept of an universal convention the Secretary-General of the UN initiated deliberations on the possibilities to modify this particular part of the convention so the western states could sign and ratify the convention.¹⁰² The deliberations lasted four years and produced the Agreement relating to the implementation of part XI of the United Nations Convention on the Law of the Sea, 28th July 1994.¹⁰³

New rules of customary law has emerged based on some of the 320 Articles of UNCLOS and these as wells as the Convention itself has superseded the Geneva Conventions on the Law of the Sea.¹⁰⁴

⁹⁸ The conference goes under the name of UNCLOS I.

⁹⁹ Brown, *Ibid.*, p 9

¹⁰⁰ United Nations Convention on the Law of the Sea, 10th December, 1982; for the purpose of this thesis hereinafter called UNCLOS.

¹⁰¹ Brown, *Ibid.*, p. 11

¹⁰² Epps, *Ibid.*, pp. 143-144

¹⁰³ The so called New York Agreement.

¹⁰⁴ Brown, *Ibid.*, p. 3

UNCLOS contains provisions on the territorial sea, the contiguous zone, straits used for international navigation, the exclusive economic zone, the continental shelf, the high seas, right of access of landlocked states to and from the sea, deep sea bed mining, the protection and preservation of the marine environment, the settlement of disputes and much more. As for the settlement of disputes Annex VI of the UNCLOS establishes the International Tribunal for the Law of the Sea. One could say that UNCLOS covers almost all aspects of the law of the sea.¹⁰⁵

UNCLOS entered into force on 16 November 1994 after ratification/accession by 60 states.^{106 107}

5.1.2 MARPOL

Apart from UNCLOS several other conventions have been adopted on the law of the sea. One of them being OILPOL, the International Convention for the Prevention of Pollution of the Sea by Oil, adopted 1954. OILPOL was superseded by MARPOL¹⁰⁸ in 1973. In 1978 a protocol was added and today the instruments are referred to as the International Convention for the Prevention of Marine Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto.^{109 110} The amended convention entered into force in October 1983. MARPOL covers all aspects of pollution and has five annexes¹¹¹ attached to it. Each annex deals with a particular form of pollution and the prevention of it. Annex one deals with the prevention of pollution by oil. Should the provisions of the convention be violated jurisdiction befalls the party in whose territory the violation took place or the flag state.

5.1.3 SOLAS

Another important convention is SOLAS, the Convention of Safety of Life at Sea¹¹². Already 1914 the first version of SOLAS was adopted after the Titanic catastrophe the same year. New conventions were adopted 1929, 1948 and 1960. The 1960 version of SOLAS were replaced 1974, mostly due to the fact that a new amendment procedure were needed as the existing system made it impossible for amendments to enter into force within a reasonable period of time.¹¹³ This making the amendments out of date even

¹⁰⁵ Brown, *Ibid.*, p. 10

¹⁰⁶ Brown, *Ibid.*, p. 14

¹⁰⁷ Article 308 of the convention.

¹⁰⁸ International Convention for the Prevention of Pollution from Ships, November 2d, 1973 hereinafter called MARPOL 73

¹⁰⁹ MARPOL 73/78

¹¹⁰ www.imo.org/conventions 10-06-01 at 14:30

¹¹¹ Six annexes, the last adopted by the 1997 Protocol. Annex six deals with the Prevention of Air Pollution from Ships and has not yet entered into force.

¹¹² Convention of Safety of Life at Sea, 1974; hereinafter called SOLAS.

¹¹³ www.imo.org/conventions 10-06-01 at 13:12

before entering. Today the tacit acceptance procedure is used when amending the convention.¹¹⁴

Several amendments have entered into force after 1974 and the convention is now referred to as SOLAS, 1974, as amended.

As is obvious from the name of SOLAS the convention deals primarily with safety standards. Things such as construction, equipment and operation of ships are regulated in the standards. Flag states have an obligation to ensure that ships flying their flag comply with the standards and that they have all the proscribed certificates. Port state control means that port states party to the convention have a right to inspect foreign ships if and when there are “clear grounds for believing that the ship and its equipment do not substantially comply with the requirements of the Convention”¹¹⁵. Amongst other important things SOLAS makes the International Safety Management Code (ISM Code) mandatory. The code was adopted by IMO in November 1993.¹¹⁶ The shipowner or the person responsible for the operation of the ship must, according to the code, establish a safety management system. The system should be implemented and then documented in a safety management manual.

5.1.4 STCW-Convention

The 1978 STCW Convention, International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, established international requirements where before each government had established their own with a very varied result. The convention was revised in 1995. The standards listed in the convention must be met or exceeded and they apply to ships of non-party states when visiting a port of a member state as well as ships from member states. This may be why the convention has as many parties as 135, representing over 90 percent of the world shipping tonnage. After a session by the IMO’s Maritime Safety Committee in December 2000 the organisation published a “White List” listing the countries that followed the regulations in STCW 95. On IMO’s website it is stated that ships flying the flag of states not included on the White List are expected to be targeted more by port state control officers than ships flying the flag of countries that are on the list in question.¹¹⁷

5.2 International Organisations

The maritime world has developed over centuries as opposed to the less than 100 years the aviation world has existed. Even so the world of aviation

¹¹⁴ The tacit acceptance procedure means that an amendment enters into force on a specific date unless objections are received from an agreed number of parties prior to the specific date. www.imo.org/conventions 2001-06-10 at 13:12

¹¹⁵ www.imo.org/conventions/solas/technicalprovisions 10-06-01 at 13:12

¹¹⁶ Assembly resolution A.741(18).

¹¹⁷ www.imo.org/conventions/stcw 10-06-01 at 14:00

developed several international organisations before any major organisations appeared in the maritime world.

5.2.1 IMO

The most important maritime organisation is IMO, the International Maritime Organisation.¹¹⁸ The organisation was established by a convention adopted 1948 at an international conference in Geneva. Several propositions on the subject of starting an international organisation, the aim of which should be to promote safety at sea had been made before this time but with the founding of the UN the organisation was realised. After a decade the convention entered into force and IMO saw the light of day a year later.

IMO is a specialised agency within the UN and has its seat in London. The organisation has 158 members and consists of an assembly, a council and four main committees.¹¹⁹ Each member state has a representative in the Assembly. The Assembly is the highest governing body of IMO and one of its functions is to elect the Council. The Council is the executive body and has 32 members elected for a period of two years. The Assembly is not free to elect the members of the council in any way they want. Certain criteria must be followed one of which is that eight of the members “shall be States with the largest interest in providing international shipping services” and another “eight shall be other states with the largest interest in international seaborne trade”¹²⁰. The other members shall have interest in shipping but must also represent all areas of the world. IMO co-operate with more than 30 intergovernmental organisations. Some 50 non-government organisations such as have been given consultative status and thus aid the IMO with advice, information and documentation.

The four main committees are; the Maritime Safety Committee (MSC), the Marine Environment Protection Committee (MEPC), the Legal Committee and the Technical Co-operation Committee. All member states may participate in the committees. The Marine Safety Committee deals with all the technical aspects of the maritime world i.e. the construction and equipment of ships, maritime safety procedures and much more.¹²¹

The list of objectives for IMO is long but one task is to promote co-operation between governments in shipping matters and another is to promote and facilitate the adoption of standards concerning i.e. safety and pollution at sea. Conventions like SOLAS, MARPOL 73/78 and STCW

¹¹⁸ Originally the organisation was called IMCO, the Inter-Governmental Maritime Organisation. The name was changed to IMO in 1982. www.imo.org 10-06-01 at 14:34 p.m.

¹¹⁹ As well as sub-committees and the facilitation committee which is a subsidiary committee of the council.

¹²⁰ www.imo.org under the headline: ABOUT IMO at 08:30 20-07-01

¹²¹ For a complete list of all the committee’s functions please see under About IMO – Maritime Safety Committee at www.imo.org

have been either developed or reworked by IMO. The 1960 version of SOLAS was the first completed task by organisation.¹²² Apart from conventions IMO also adopts protocols and recommendations. These recommendations may be codes, guidelines or recommended practices. The recommendations are not binding on member states but most governments follow them and in some cases they are incorporated into national legislation.¹²³

5.2.2 IACS

IACS is the International Association of Classification Societies and was established 1968.¹²⁴ The association works closely together with IMO to promote the highest standards in safety and pollution prevention. IACS is one of the 50 non-government organisations that enjoy a consultative status within the IMO. It is also the only of these 50 organisations that is allowed to develop rules.

IACS work to develop and research safety standards and the organisation has amongst other things developed a uniform system for classification so as to make sure that the highest possible standards are kept.

IACS has ten members that work with amongst other things the classification/certification of ships. These companies work on behalf of more than a hundred governments¹²⁵ and certificates are issued when national and international regulations are complied with.

5.3 The Swedish Maritime Administration

The Swedish Maritime Administration,¹²⁶ SMA has existed in one form or another for centuries. In the early days the organisation sorted under the king and the navy. Today it is a public service within the transport sector and it is situated in Norrköping.

The Ordinance with Instructions for the Swedish Maritime Administration¹²⁷ states in article 3 that within the administration there shall

¹²² www.imo.org 10-06-01 at 14:34

¹²³ IMO works with the tacit acceptance amendment system. This means that proposed amendments will enter into force at a specific date unless a number of rejections have been made before that date.

¹²⁴ The information about IACS comes from the organisations website www.iacs.org.uk 09-08-01 at 10:44.

¹²⁵ The governments are thus delegating their flagstate responsibilities.

¹²⁶ All information about SMA has been gathered at www.sjofartsverket.se 20-07-01 at 08:58.

¹²⁷ Förordning (1995:589) med instruktioner för Sjöfartsverket

be a Maritime Safety Inspectorate.¹²⁸ Other than that it is up to the administration itself to decide what units are needed. The Inspectorate works with the safety at sea and part of their work is to issue standards for ship- and environment safety. New ships are surveyed by the Inspectorate and old ships are inspected. Another part of the Inspectorate's work is to investigate accidents at sea.

According to article 1 paragraph 3 of the ordinance one of the administration's main tasks is to supervise the safety at sea. The SMA issues its own regulations and these are published in a statute-book.¹²⁹

¹²⁸ I will hereinafter call the ordinance the instruction ordinance.

¹²⁹ Sjöfartsverkets författningssamling SJÖFS

6 Nationality and Registration of Ships

Why does a ship need to have a nationality? Just as with aircraft¹³⁰ nationality is a means of determining jurisdiction in civil as well as criminal proceedings. The Flag State of a ship has responsibilities when it comes to certification and control of seaworthiness of ships flying their flag.

As for the registration it is a means to determine the ownership of the ship as well as numerous other things like the possibility of the ship being mortgaged and so on. The registration is a much debated subject as many shipping companies chose to register their ships in so called open registries in countries other than their own. The phenomena is called flagging out. For instance a Danish ship may be registered in Panama. This means on the one hand that the Danish Maritime Authorities does not have any flagstate responsibilities but on the other hand that they may carry out port state control.

Some parts of the Swedish Maritime Code¹³¹ will change on the first of December this year and as it saves space I have chosen to treat the new wordings of the articles affected as already in force. Affected articles that are of importance to this work are; articles 2, 6 and 8 of chapter 1 and articles 1-3, 5-7, 13, 15, 19, 24-25 and 28-29 of chapter 2. Some new articles have been added as well; chapter 1 article 2 a and chapter 2 articles 15 a, 19 a and 19 b.¹³²

6.1 UNCLOS and Nationality and Registration

Part VII of UNCLOS is devoted to the High Seas and it is here we find the article that declares the establishment of nationality for ships. Article 91 paragraph 1 reads;

“Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly.”

Just as in international air law it is left to the state to decide how and when to grant the right to register a ship in the state and thus establish nationality.

In a report 1956 to the General Assembly of the UN the International Law Commission declared that in order to prevent chaos on the High Seas ships

¹³⁰ See above on page 14.

¹³¹ Sjölag 1994:1009

¹³² All the articles have been changed through SFS 2001:384

must have a nationality and be subject to the jurisdiction of the state whose flag they fly.¹³³

The meaning of nationality is that the flag state provides the ship with its protection and in return the ship comply with the national legislation of the flag state. The national legislation in turn give effect to the rules and regulations of international law and custom. If a ship were allowed to fly more than one flag, i.e. change flag as it is convenient the purpose with nationality would be defeated and thus ships are only allowed to have one nationality. A ship must sail under one flag only. Article 92 paragraph 2 of UNCLOS reads:

“Ships shall sail under the flag of one state only... A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.”

A ship that sails under more than one flag can not claim any of those nationalities, such a ship may be regarded as stateless. This is established in article 92 (2). A ship may be stateless for other reasons as well like if it is not registered in a state or maybe flying the flag of a state not recognised by the international community.¹³⁴ Should a ship have become a pirate ship¹³⁵ the flag state decides in its national law whether or not this is ground for losing the nationality, article 104.

A stateless ship has no right of navigation on the High Seas as this right belongs to states and other entities which are subjects of international law.¹³⁶ Nor can such a ship claim right of access to a foreign port.¹³⁷

A flag state must, according to article 94 (2a), keep a register of all ships flying their flag. Today apart from national registries there also exists so called open registries where shipowners register their ships, usually to lower their taxes and costs for crewing etc.¹³⁸ This practice mean that the ship will fly a flag of convenience.

The existence of these open registries have been and are still questioned. Attempts have been made to define international minimum requirements that has to be fulfilled before a ship can be considered to have a certain nationality.¹³⁹ The International Law Commission has looked into the question at different times and in UNCLOS it is stated that there must exist

¹³³ Brown, Ibid. p. 287

¹³⁴ Brown, Ibid., p. 291

¹³⁵ A definition of a pirate ship can be found in article 103 of UNCLOS.

¹³⁶ This right is then bestowed upon ships by the state whose flag they are flying.

¹³⁷ Brown, Ibid., pp. 286-292

¹³⁸ In EC Shipping Law by Vincent Powers four different types of registry are listed; traditional home registries, traditional open registries, offshore registries and international registries. See pp.165-167

¹³⁹ Falkanger, Introduction to Maritime Law, pp.51-54

a genuine link between the ship and the state, article 91 (1). Exactly what this mean is not clear. There is a UN Convention dealing with the registration of ships but it has yet to enter into force.¹⁴⁰

Article 4 of Registration Convention provides general provisions among which it is stated that a ship has the nationality of the flag its flying and that no ship has the right to be entered in the registers of more than one state at a time. Article 7-10 provide that nationals of the flag state must participate in the management of the ship and it is up to the flag state to decide whether or not to require that either the ownership or the manning of the ship is to be fulfilled by nationals. It is also possible for the state to require that all three criterions be filled instead of the mandatory two, management - ownership or management - manning. The Convention will not enter into force until 40 states representing 25 per cent of the world tonnage have ratified it.

6.2 The European Union and Nationality and Registration

As I mentioned above in chapter 3.2 on page 14 the Treaty of Amsterdam contains articles on transport in its fifth title. The Council decides by qualified majority if they should issue provisions on sea transport, article 80. According to Vincent Powers, the author of *EC Shipping Law* the Union does not seem to have uniform and comprehensive policy on shipping but the aim seems to be to keep the shipping market open and free.¹⁴¹ However one must remember that all the general provisions of the Amsterdam Treaty, like the rules on competition and the freedom of establishment applies to shipping.¹⁴²

The first attempt to establish a common policy on shipping was made in March 1985 when the Commission made a number of proposals to the Council of Ministers. Again in 1989 the Commission made proposals to the Council of Ministers. The proposals included the establishment of an EC Shipping Register.¹⁴³

Most national registries in The EU discriminate against foreigners, including other EU members. Restrictions that discriminate between a state's nationals and nationals of another EU country. Three articles, 8-10 of the UN Convention on the Registration of Ships does not comply with the EEC Treaty (now Amsterdam Treaty) regarding the provisions on the freedom of establishment, the free movement of capital, the free movement of workers and no discrimination on grounds of nationality. Therefor none of the EU

¹⁴⁰ The UN Convention on Conditions for Registration of Ships, Geneva, 7th February 1986. Hereinafter called UN Registration Convention.

¹⁴¹ Powers, *Ibid.*, pp. 6-8

¹⁴² Powers, *Ibid.*, pp. 99-100

¹⁴³ Powers, *Ibid.*, pp. 148-156

states are allowed to sign and ratify the convention until such a time as the states can obtain an exception rendering the convention compatible with the EEC Treaty.^{144 145}

6.2.1 EUROS

In 1989 the Commission proposed to establish a community register.¹⁴⁶ This register, EUROS would be a supplement to the national registers and as such it would be voluntary for community ships to register on it. Any ship registered on EUROS would also continue to be registered in the member states. Just as in national law a number of requirements should be met before registry on EUROS could take place. One such requirement is that a shipowner wishing to have his ship registered on EUROS must already have his ship registered in a national register.¹⁴⁷

6.2.2 Council Regulation 613/91 on the Transfer of Ships from one Register to another within the Community¹⁴⁸

This regulation was adopted 1991 and the purpose was to make it easier to transfer a ship registered on one Community register to another. The national requirements to be fulfilled before registration can take place differ from one member state to another which means that it may become difficult to transfer a ship. A shipowner may have to have his ship tested and surveyed. It is also possible that some equipment that is required by one state must be changed to another to fulfil the new state of registry's requirements.

The Commission uttered that this was not in accordance with the Single Market as it hampered the shipping industry. The commission also thought that by facilitating the transfer of ships the Community shipping industry would benefit from better operating conditions and competitiveness.¹⁴⁹

The Commission has stressed that the regulation shall not prevent the member states from following rules and obligations established by international conventions.¹⁵⁰

¹⁴⁴ Should the member states make a reservation they are welcome to become parties to the UN Convention on the Registration of Ships. If a state should become a party to the convention without making such a reservation the state would be in violation of Community Law.

¹⁴⁵ Powers, *Ibid.*, pp. 170-176

¹⁴⁶ Proposal for a Council Regulation Establishing a Community Ship Register and providing for the Flying of the Community Flag by Sea-Going Vessels COM(89)266 final, 3.8.89

¹⁴⁷ Powers, *Ibid.*, pp.176-184

¹⁴⁸ Council Regulation 613/91 (EEC), OJ L68/1, 15.3.91

¹⁴⁹ Powers, *Ibid.*, p. 185

¹⁵⁰ Powers, *Ibid.*, p. 188

According to article 2 of the regulation it only applies to cargo ships not to passenger ships. Article 3 (1) puts an obligation on member states to register a ship that is being transferred from another member state's register. However, the fourth paragraph of the same article provides the receiving state with the opportunity to inspect the ship so as to make sure that the condition of the ship and the equipment corresponds with the certificates the ship carry.¹⁵¹

6.3 Swedish Legislation on Nationality and Registration

The Swedish legislation is found in the Maritime Code¹⁵², the Ordinance on the Ships Register¹⁵³ and the Ordinance with instructions for the Shipping Registry¹⁵⁴.

The first article of the first chapter of the Maritime Code declares that a ship shall be deemed to be Swedish and thus allowed to fly the Swedish flag if the ship is owned by more than half by Swedish nationals or Swedish legal persons. The following article 1 states that under other circumstances than those given in article 1 a ship is to be regarded as Swedish if it is registered in either the ship register or boat register. The government is authorised to grant Swedish nationality to other ships than those accounted for in articles 1 and 1 a but only if the management stands under considerable Swedish influence or if the owner is domiciled in Sweden, article 1 b the first paragraph of the Maritime Code.

The government may, according to the second paragraph of article 1 b issue rules on nationality documents for Swedish ships. This has been done in the sixth chapter of the Ordinance with Instructions on the Ships Register. The nationality document shall always be on board the ship. The document is issued by the Registration Authority¹⁵⁵ after registration. The document shall among other things include information on the name of the ship, the registration indication and port of registry.¹⁵⁶

A ship is a ship and not a boat if the largest length of the hull is a minimum of 12 metres and the largest breadth is a minimum of 4 metres, chapter 1 article 2 of the Maritime Code. The same article continues to state that Swedish ships, boats and ships under construction shall be registered in the

¹⁵¹ Just as with aircraft certificates issued for a ship must be renewed at some point. Article 4 prohibits the receiving state from imposing additional requirements at such a time.

¹⁵² Sjölag 1994:1009

¹⁵³ Fartygsregisterförordning (1975:927)

¹⁵⁴ Förordning (1979:593) med instruktion för sjöfartsregistret

¹⁵⁵ A specific unit at Stockholm's District Court forms the registration authority i.e. the shipping registry, chapter 1 article 1 of the Ordinance on the Ship Register. See also Ordinance (1979:593) with instructions for the Shipping Registry.

¹⁵⁶ Chapter 6 articles 1 and 2 of the Ordinance on the Ship Register

same ships register but under different sections. Before certain boats would be registered in a separate boat register and ships being built in Sweden would be registered in the Shipbuilding Register.

The entire chapter 2 of the Maritime Code deals with registration. The first article makes it mandatory for those ships, that according to articles 1 and 1 b of chapter 1 are Swedish to be registered in the ship part of the ships register. Article 2 contains some time limits within which a ship must be registered, for example: a new built ship must be registered within six months of the launch. The purchase of a ship is entered on the basis of registration, article 3.

Just as an aircraft a ship can be deregistered. The conditions for this is listed in article 6 of chapter 2 the Maritime Code. One reason for deregistration is if a Swedish ship has been sold to an owner outside of the EU, i.e. the grounds for the ship to be granted Swedish nationality no longer exist. A foreign ship that has become Swedish through for example purchase may not be registered in the Swedish ship register until it has been proved that the ship is no longer registered in another country, article 25.

The Ordinance on the Ship Register provides further rules on the registration of ships in Sweden, specifically in chapter 2. The register shall contain information on the name, owner, identification number, port of registry, year of construction, material used, tonnage and much more.¹⁵⁷ Articles 12-16 provides information on specifics of the registration procedure.

A Swedish ship must have a name and a Swedish port of registry, both are to be decided by the owner. A ship must also have a distinctive identification signal, a call sign. The call sign must be marked on the ship.¹⁵⁸ For a ship this sign exists of signal letters and for boats the sign is made of both letters and numbers.¹⁵⁹ When a ship is registered in Sweden the ship is registered under its call sign, chapter 2 article 1 the last paragraph of the Maritime Code.¹⁶⁰

¹⁵⁷ For a complete list read articles 3-11 chapter 2 of the Ordinance on the Ship Register.

¹⁵⁸ The ship must also have an IMO identification number. See Falkanger, *Ibid.*, p. 48

¹⁵⁹ Articles 6-8 of the 1 Chapter of the Maritime Code.

¹⁶⁰ This registration identification may not be changed, article 1 chapter 2 the Maritime Code.

7 Certificate of Seaworthiness and Safety at Sea

The meaning of the term seaworthiness in the maritime world is equivalent to the meaning of airworthiness in the aviation world; the ship is fit to make the intended voyage.

This chapter will deal with international, European and Swedish legislation on seaworthiness and in doing so will also look a little on safety at sea as the certification of seaworthiness is a means of making sure that safety is maintained.

Apart from the duties of the flag state to control seaworthiness and issue certificates which one may call flag state control there is something called port state control. This has nothing to do with the national ships of a state. Instead it is a form of control performed by a state on foreign ships visiting its ports. However, it is one way of controlling the seaworthiness of ships. I have chosen to omit port state control in this thesis as it would make the thesis too big. I will therefore not deal with the subject any further except so as to say that those wishing to read more on this subject should read about the Paris Memorandum of Understanding on Port State Control, the Paris MOU.

7.1 UNCLOS and Seaworthiness and Safety at Sea

7.1.1 Introductory Notes

Article 94 of UNCLOS lists a number of duties imposed on the flag state. The first paragraph states that all flag states shall control and exercise their jurisdiction over all ships flying their flag. This means among other things that the flag state shall control technical matters dealing with ships.

One duty of the flag state is to make sure that ships flying their flag are seaworthy, article 94 3(a). It is also the duty of the flag state to make the ship safe at sea by controlling the manning of the ship, the labour conditions, the maintenance of communications and much more.¹⁶¹

A ship shall be inspected and surveyed before registration by the flag state or a qualified surveyor. The inspections should be renewed after a number of years.¹⁶²

¹⁶¹ Article 94 paragraph 3 of UNCLOS

¹⁶² Article 94 paragraph 4 of UNCLOS

In chapter 6.1 of this thesis I wrote about the genuine link between the flag state and a ship flying its flag. It is believed that the effective control by a national maritime administration shows proof of this so called genuine link whose existence is believed to be necessary before a ship can be considered to have certain nationality.¹⁶³ It is not possible for another state to intervene when there seems to be no real jurisdiction over a ship. The only thing another state can do is to report to the flag state and wait for the flag state to investigate the matter and remedy it.¹⁶⁴ Another duty of the flag state is to hold enquiries when a ship has been involved in an accident at sea. This is stated in article 94 paragraph 7 of UNCLOS.

Part XII of UNCLOS deals with the protection and preservation of the marine environment. Article 217 of UNCLOS clearly states that it is the flag states responsibility to make sure that vessels flying their flag comply with all international rules and regulations concerning the prevention, reduction and control of pollution of the marine environment. States shall make sure that all ships flying their flag carry all certificates issued according to international rules on this subject. The state must also make inspections on the ships to make sure that ship is in conformity with the certificates.

7.1.2 IMO and Self-assessment of Flag State Performance¹⁶⁵

Two of IMO's committees, the Maritime Safety Committee and the Marine Environment Protection Committee have approved a Flag State Performance Self-Assessment Form, the SAF. The form is supposed to be a help to the governments of the member states when they check how well their own Maritime Administrations are working. It is not mandatory for the member states to either use or submit the completed form to IMO.

The form lists a number of criteria for determining the flag state performance. Under paragraph 3 it is stated that a flag state has a responsibility to issue national rules and regulations that render effect to all international instruments that the state is a party to. Paragraph 4 declares that a flag state shall take the necessary measures to ensure safety at sea for ships flying their flag with regard to amongst other things construction, equipment and management. It is also a flag state's responsibility to have rules permitting and facilitate the inspection of ships flying their flag.

¹⁶³ Brown, *Ibid.*, pp 294-295

¹⁶⁴ Article 94 paragraph 6 of UNCLOS

¹⁶⁵ www.imo.org under safety 10-06-01 at 14:17

7.2 European Legislation and Seaworthiness and Safety at Sea

The European Union recommended in Council Recommendation 78/584/EEC that all member states should ratify and accede to a number of international conventions dealing with safety at sea.

In 1990 the Council of Ministers adopted a Resolution on the Prevention of Accidents Causing Marine Pollution.¹⁶⁶ The resolution states that IMO is the major international organisation when it comes to the prevention of the pollution of the marine environment. The first article provides that all members should have a maritime administration capable of ensuring the ships flying their flag comply with all technical rules on safety at sea in accordance with the rules and regulations of international conventions such as SOLAS.

The resolution further require the member states to ensure that they carry out port state control inspections on foreign ships so that these ships do not pose a threat to the safety at sea and the marine environment.¹⁶⁷

On June the 19th 1995 the Council Directive Concerning the Enforcement, in respect of Shipping using Community Ports and Sailing in the Waters under the Jurisdiction of the Member States, of International Standards for Ship Safety, Pollution Prevention and Shipboard Living and Working Conditions (port state control) was adopted.¹⁶⁸ The purpose of the directive is to bring about a reduction in the number of unseaworthy ships sailing the territorial waters of the Union's member states.¹⁶⁹

7.3 Swedish Legislation and Seaworthiness

According to article 9 of the Maritime Code chapter 1 a ship must be seaworthy when it is in operation and this means that the ship must have all necessary equipment to prevent accidents. The ship must have the right crew and may not be loaded in a way that endangers the safety.

The Ship Safety Code¹⁷⁰ and the Ship Safety Ordinance¹⁷¹ both contain further rules on seaworthiness as well as rules on ship safety and certification. The rules in the code is applicable to all ships, Swedish as well

¹⁶⁶ Powers, *Ibid.*, p. 417

¹⁶⁷ Powers, *Ibid.*, pp. 417-419

¹⁶⁸ Council directive 95/21/EC EGT L157/95

¹⁶⁹ For more information on the directive please read it.

¹⁷⁰ Fartygssäkerhetslag 1988:49

¹⁷¹ Fartygssäkerhetsförordning 1988:594

as foreign used for shipping within the Swedish sea territory and to Swedish ships outside the Swedish sea territory.¹⁷²

The Ship Safety Code contains a definition of seaworthy in its article 1 of the second chapter:

*“A ship is seaworthy only if it is constructed, built, equipped and maintained so that it with regard to its purpose and the trade it is used or intended to be used for offers an adequate security against accidents at sea.”*¹⁷³

A ship shall have all the certificates mentioned in the Ship safety Code. The purpose of the certificates are to show that the ship at the time of the survey fulfilled all standards in the relevant laws and regulations. The certificates may give certain conditions that must be kept in order for the certificate to remain valid.¹⁷⁴

According to article 5 of chapter 1 it is the Swedish Maritime Administration that issues the relevant documents and certificates. However, the Swedish Government or the Swedish Maritime Administration, if authorised by the government may instruct certain organisations to issue and renew certificates, if an agreement has been made between the Government and the organisation in question, article 6, chapter 1 of the Ship Safety Code. In chapter 1 article 4 of the Ship Safety Ordinance the government authorises SMA to instruct certain classification societies to issue and renew Swedish certificates. The Swedish Maritime Administration has instructed the following classification societies to issue Swedish certificates; the American Bureau of Shipping, Bureau Veritas, Det Norske Veritas, Germanischer Lloyd and Lloyd’s Register of Shipping.¹⁷⁵

Chapter 2 of the Ship Safety Code deals with the seaworthiness of a ship. When a classification society has performed the relevant inspection and if it has found that the ship is seaworthy a class certificate is issued for the ship. The class certificate is a proof of the fact that the ship has been found seaworthy.¹⁷⁶ A class certificate may be declared invalid for any number of reasons, the most likely perhaps being that due to some circumstance or another the ship no longer fulfils the requirements needed for it to be deemed seaworthy, article 4. The 5th paragraph states that the government or an authority appointed by the government may issue regulations on the how a ship shall be constructed, built, equipped and maintained for it to be

¹⁷² Chapter 1 article 1.

¹⁷³ This is my own translation and the Swedish wording is: “Ett fartyg är sjövärdigt bara om det är så konstruerat, byggt, utrustat och hållet i stånd att det med hänsyn till sitt ändamål och den fart som det används i eller avses att användas i erbjuder betryggande säkerhet mot sjöolycker.”

¹⁷⁴ Article 4 chapter 1 of the Ship Safety Code.

¹⁷⁵ Sjöfs 1994:32

¹⁷⁶ Article 2

deemed seaworthy in accordance with article 1 of this chapter.¹⁷⁷ The Swedish Maritime Administration has made use of this provision and several rules and regulations on seaworthiness has been issued in the Administration's statute-book.

The Swedish Maritime Administration and the appointed classification societies survey ships and shipping companies continually at agreed times except if there is a specific reason to make a survey. First and foremost the survey is done to control the seaworthiness of the ship. A ship built in Sweden must be surveyed before it is used in shipping. If a ship that has already been certified has suffered damage that can affect the seaworthiness it must be surveyed again. The same is true if the ship has been repaired or perhaps rebuilt in such a way that it affects the seaworthiness.¹⁷⁸

A foreign ship must carry a certificate issued by a foreign Administration when sailing in Swedish territory if the Government or the SMA decides it, article 8 chapter 1 of the Ship safety Code. The 6th article of the 1st Chapter of the Ship Safety Ordinance states that the Swedish Maritime Administration may decide which certificates a foreign ship shall carry. The SMA has declared that foreign ships on Swedish territory must carry certificates or equivalent documents in the extension prescribed in SOLAS - 74, MARPOL 73/78, ICLL (loadlines) -66 and STCW.¹⁷⁹ Inspections on foreign ships is foremost an inspection of the certificates. Only if there are clear grounds to suspect that the ship deviates from the information in the certificates may the port state control officer performing the inspection make a deeper and bigger inspection.¹⁸⁰

A ship that has been deemed to be unseaworthy can be forbidden to leave port until such a time as the faults have been fixed. A ship may also be detained if it or the shipping company is missing a certificate.¹⁸¹ The decision to detain a ship is made by the Swedish Maritime Administration or another authority prescribed by the Government.¹⁸² It is the duty of the shipowner to report to the SMA if his ship has ceased to be certified by a classification society.¹⁸³

¹⁷⁷ The authorisation for SMA to issue regulations is also given in article 4 chapter 2 of the Ship Safety Ordinance.

¹⁷⁸ Chapter 10 of the Ship Safety Code

¹⁷⁹ Sjöfs 1997:7

¹⁸⁰ Article 9 chapter 10 of the Ship Safety Code

¹⁸¹ For a listing of all the reasons why a ship may be detained please read the first article of chapter 11 of the Ship Safety Code.

¹⁸² Chapter 11 articles 1-2 of the Ship safety Code.

¹⁸³ Article 7 chapter 7 of the Ship Safety Ordinance.

8 Aircraft and Ships – A Comparison

Just as I have divided the thesis before I will divide this comparison in three parts, the first covering chapters 2 and 5 – Introduction to Air – and Maritime Law, the second dealing with chapters 3 and 6 and the Nationality and Registration of Aircraft and Ships and the third will deal with Air- and Seaworthiness, chapters 4 and 7.

8.1 Introduction to Air- and Maritime Law

Both areas of law have a distinctive international character, the difference being that air law has developed in international conventions for only about a century whilst maritime law has developed over centuries in mostly custom.

Today both areas are covered by world spanning conventions like the Chicago Convention 1944 and Warsaw Convention 1929 in the air field and UNCLOS, SOLAS and MARPOL 73/78 in the maritime field. The conventions play an equally important part in both areas of law as they provide the base on which most national legislation is founded.

Although the maritime world has existed far longer than the world of aviation it was in the latter that the first major international organisations developed in the early 20th Century, organisations like CINA and CITEJA. Today there are international organisations operating in both areas of law. The IMO and the ICAO, in maritime- respectively the air field. Both organisations are agencies within the United Nations and both have been around since the late 1940's. In the maritime world IACS plays an important part as it provides states with uniform standards for safety. IACS enjoys consultative status with the IMO. In the European Joint Aviation Authorities (JAA) IACS has some sort of equivalent. JAA provides safety standards for aircraft but these are only valid in the members states of JAA and thus confined to Europe.

The Swedish Civil Aviation Administration handles everything that has to do with aircraft and airspace. Its counterpart in the maritime world is the Swedish Maritime Administration. Both administrations have been given the right to issue their own instructions on for example the construction of aircraft and of ships. The administrations have made use of this and publishes statute books.

8.2 Nationality and Registration of Aircraft and

Ships

I begin by asking why an aircraft and a ship must have nationality. It would seem that the answer is the same in both cases. When it comes to aircraft it is a means of determining which state that is responsible for the control of airworthiness and the issuing of a certificate of airworthiness. In the maritime world the nationality decides which state is the flag state and thus which state has the duties listed in article 94 of UNCLOS. In both fields the nationality is used as a means of determining jurisdiction over the aircraft and the ship respectively.

The Chicago Convention article 17 states that an aircraft have the nationality of the state in which it is registered. In article 12, chapter 2 of the Swedish Civil Aviation Code it is stated that aircraft registered in the Swedish aircraft register shall have Swedish nationality. According to article 91 paragraph 1 of UNCLOS ships shall have the nationality of the state whose flag they are entitled to fly. The Swedish Maritime Code declares that ship shall have Swedish nationality if it is owned by more than half by Swedish nationals or Swedish legal persons.¹⁸⁴ Further the code states that all Swedish ships shall be registered on the Swedish Ships Register, article 2 of chapter 1. Here it seems that it is the opposite way around in air-respectively maritime law. In order for an aircraft to have a Swedish nationality it must be registered in Sweden and in order for a ship to be allowed to register on the Swedish register the ship must have Swedish nationality. Registration thus have the meaning of granting nationality to aircraft.

It is established in both internationally and in Swedish law that aircraft as well as ship shall show identification marks. Whereas the mark in the case of aircraft may consist of both letters and numbers the mark of a ship must consist only of letters.¹⁸⁵

In reality there are no EU legislation that deals specifically with the nationality and registration of aircraft. As for the nationality and registration of ships a Council Regulation 613/91 on the Transfer of Ships from one Register to another within the Community was adopted in 1991. There has also been a proposal from the Council on the establishing of a Community Register, EUROS.

8.3 Air- and Seaworthiness

Airworthiness means that a ship is fit to fly and seaworthiness means that the ship is fit to make the intended voyage.

¹⁸⁴ Chapter 1 article 1 of the Maritime Code

¹⁸⁵ Article 19 of the Chicago Convention, chapter 2 article 16 of Civil Aviation Code and chapter 1 articles 6-8 of the Maritime Code

On the international level of air law it is established in articles 29 and 31 of the Chicago Convention that an aircraft must have a certificate of airworthiness and the aircraft must carry this certificate onboard when in flight. It is the state of registry that shall inspect the airworthiness and issue the certificate of airworthiness. The Convention goes on to declare that contacting states must approve certificates issued in other contacting states, article 33.

Article 94 3(a) of UNCLOS states that it is the duty of the flag state to make sure that the ship is seaworthy.

When it comes to maritime law the EU has recommended its member states to accede to a number of conventions dealing with amongst other things safety at sea. This was done in Council Recommendation 78/584. In 1990 the Council adopted a resolution requiring the member states to ensure that they can carry out port state control. As for the world of aviation the EU has required that all its members shall be members of the JAA, Joint Aviation Authorities. The codes adopted by the JAA before 1992 has been made part of the EC legislation through Council Regulation 3922/91. JAA codes adopted after this point shall be approved by the Commission of the Union and adopted by the Council. It would seem that the EC legislation on air law is more extensive than it is on maritime law.

The Swedish Civil Aviation Code and the Swedish Ship Safety Code contain definitions on respectively airworthiness and seaworthiness.¹⁸⁶ The terms mean that an aircraft/ship is fit to make the intended journey.

The certificate of airworthiness is issued by the Civil Aviation Inspection if the aircraft has been found airworthy during a survey. In the maritime world this function to inspect and issue certificates of seaworthiness has been given to certain expert organisations, the classification societies through laws and ordinances.

The Swedish Maritime Administration and the Civil Aviation Administration both have been authorised to issued regulations on respectively air- and seaworthiness in their statute books.¹⁸⁷

¹⁸⁶ Chapter 3 article 1 of the Civil Aviation Code and chapter 2 article 1 of the Ship Safety Code.

¹⁸⁷ Chapter 2 article 4 of the Ship Safety Code and article 18 of the Civil Aviation Ordinance

9 Conclusion

I began this work with great expectations on the subject and it has yet to fail me. Perhaps that is one of the reasons why this thesis hasn't been finished as quickly as it could have been. In chapter 1.1 I stated my object with the thesis which was; to find out how nationality of aircraft and ships is established, to find out if the nationality plays any part in the issuing of respectively air- and seaworthiness certificates, how the certificates are issued, what air- and seaworthiness means and finally how and whom is supervising the air- respectively the seaworthiness.

As for the first question; how nationality is established, the question has been answered several times. On the one hand the aircraft has the nationality of the state of registry. This means that the nationality is granted to the aircraft through the registration. A ship on the other hand receives the nationality by account of its owners. If more than half of the owners are Swedish national or Swedish legal persons the ship is Swedish. Only Swedish ships may be registered on the Swedish Ships Register.

The role the nationality plays as regards air- respectively seaworthiness is this: it is the duty of the state of registry and the flag state to inspect and make sure that aircraft and ships flying their flag are airworthy respectively seaworthy. It is these states that shall issue the certificates of airworthiness and seaworthiness. Certificates are issued in both cases after inspection. In the case of aircraft the inspection is carried out by the Civil Aviation Inspection and in the case of ships the Swedish Maritime Organisation may appoint the task to classification societies. Two of the classification societies appointed by the Swedish authorities are Lloyd's Register of Shipping and Det Norske Veritas.

The meaning of airworthiness is this, the ship is fit to fly. The meaning of seaworthiness is that the ship is fit to make the intended voyage.

With this I seem to have answered my questions. I must add however that I think it would be a better idea for the European Union to regulate these two areas of law more closely than they have done so far. The shipping market and the aviation market are after all very international markets and more common regulations on for example safety, pollution prevention and security would make both markets better. The European Union is a single market and the better the safety and security is the more people would use the aircraft and ship as a means of transportation thus benefiting the market.

The International Conventions covering these two areas of law are numerous. Still there is room for improvement. I am positive that as a result of the terrorist attacks in the US on the 11th of September this year, when a number of aircraft were hijacked and then crashed into the twin towers of the World Trade Centre in New York and the Pentagon in Washington, a

number of new conventions will be adopted so as to try and prevent the same thing from happening again. I believe it is important not to forget the maritime world when such new conventions or actions is discussed. It would be possible for terrorist to cause a enormous amount of damage to the world if they were to capture for example an oil tanker.

These reflections does not really have anything to do with this thesis but I think they are important to remember, always. As far as this thesis goes I will again stress that I think the best way of ensuring that aircraft and ships are air- and seaworthy and thus safe is to regulate these two areas on a community level i.e. within the European Union. Of course it is not enough to regulate this on a community level but it would be a start and perhaps a more detailed international regulation could come out of it. It is important that the entire world co-operates in these questions as accidents caused by aircraft or ships of one nationality can harm many other states, perhaps the entire world.

Supplement A

<TEXT>

Supplement B

<TEXT>

Bibliography

Literature

Books

Balfour, John, *European Community Air Law*, 1995, Butterworths, London-Dublin-Edinburgh, ISBN 0-406-05217-4

Brown, E.D., *The International Law of the Sea: Volume I Introductory Manual*, 1994, Dartmouth Publishing Company Ltd, Aldershot, England

Brown, E.D. *The International Law of the Sea: Volume II Documents, Cases and Tables*, 1994, Dartmouth Publishing Company Ltd, Aldershot, England

Craig, Paul and De Búrca, Gráinne, *EU Law: Text, Cases and Materials*, second edition 1998, Oxford University Press, Oxford, Great Britain, ISBN 0-19-876509-6

Diederiks-Verschoor, I.H.Ph; *An Introduction to Air Law*, Sixth Revised Edition 1997, Kluwer Law International, The Hague-London-Boston, ISBN 90-411-0408-9

Epps, Valerie, *International Law*, 1998, Carolina Academic Press, Durham, North Carolina, U.S., ISBN 0-89089-757-3

Falkanger, Thor, Bull, Hans Jacob and Brautaset, Lasse, *Introduction to Maritime Law*, 1998, Nils Olsens Trykkeri AS

Giemulla/Schmid, *European Air Law*, 1999, Kluwer Law International, The Hague,

Havel, Brian F. *In Search of the Open Skies: Law and Policy for a New Era in International Aviation*, 1997, Kluwer Law International, The Hague, ISBN 90-41103538

Haxthow, Viktor, *Sjölovene*, 25th Edition 1997, Universitetsforlaget, Oslo, ISBN 88-00-22707-3

Kean, Arnold (editor), *Essays in Air Law*, 1982, Martinus Nijhoff Publishers, The Hague, ISBN 90-247-2543-7

Malanczuk, Peter, *Akehurst's Modern Introduction to International Law*, Seventh Revised Edition 1997, Routledge, London, ISBN 0-415-11120-X

McNair, Lord; *The Law of the Air*, Third edition 1964, Stevens and Sons, London

Powers, Vincent, *EC Shipping Law*, 1992, Lloyd's of London Press Ltd, London

The New Legal Framework for Aviation in the European Community (Böckstiegel, Karl-Heinz editor), 1993, ICC Publishing and Institute of Air and Space Law, ISBN 92-842-1166-2

Videla Escalada, Federico N., *Aeronautical Law*, 1979, Sijthoff & Noordhoff, The Netherlands

Articles

Heere, Wybo P., Problems of jurisdiction in air and outer space, *Air and Space Law*, Vol. XXIV 1999, Kluwer Law International

Kotaite, Assad, Is there a Lessening of State Sovereignty or a Real Will to Co-operate Globally?, *Air and Space Law*, Vol. XX 1995, Kluwer Law International

Sources

International Conventions

Convention on International Civil Aviation, Chicago, December 7, 1944

Geneva Convention on the Law of the Sea, Geneva, 1958

MARPOL 73/78, International Convention for the Prevention of Marine Pollution from Ships 1973 as modified by the Protocol of 1978 relating thereto

SOLAS, Convention of Safety of Life at Sea, 1974

Statute of the International Court of Justice, San Francisco, June 26, 1945

STCW, International Convention on standards of Training, Certification and Watchkeeping for Seafarers, 1978

United Nations Convention on Conditions for Registration of Ships, Geneva, February 7, 1986

United Nations Convention on the Law of the Sea, Montego Bay, December 10, 1982

EC Legislation

Treaty

- Treaty of the European Union

Council Regulations

- Council Regulation 613/91 on the Transfer of Ships from one Register to another within the Community
- Council Regulation 3922/91 on Harmonised Technical Standards
- Council Regulation 2407/92 on Licensing of Air Carriers

Directive

- Council Directive 95/21 concerning the enforcement, in respect of shipping using Community Ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port state control)

Proposal

- Proposal for a Council Regulation Establishing a Community Ship Register and providing for the Flying of the Community Flag by Sea-Going Vessels COM(89) 266 final

Swedish Legislation

SFS 1957:297 Lag om Luftfart

SFS 1975:927 Förordning om Fartygsregister

SFS 1979:593 Förordning med Instruktioner för Sjöfartsregistret

SFS 1986:171 Förordning om Luftfart

SFS 1986:172 Förordning om Luftfartygsregistret

SFS 1988:49 Lag om Fartygssäkerhet

SFS 1988:78 Förordning med Instruktion för Luftfartsverket

SFS 1988:594 Förordning om Fartygssäkerhet

SFS 1994:1009 Sjölag

SFS 1995:589 Förordning med Instruktioner för Sjöfartsverket

SFS 2001:384 Ändringar av Sjölagen

Luftfartsverkets författningssamling BCL-M 1.7 and 1.11

Sjöfartsverkets författningssamling

- Sjöfs 1994:32

- Sjöfs 1997:7

Websites

www.ecac-ceac.org/uk 24-05-01 at 18:20 and 18:24 and 25-05-01 at 12:15

www.eurocontrol.be 25-05-01 at 09:34

www.iacs.org.uk 09-08-01 at 10:44

www.imo.org 10-06-01 at 13:12, 14:00, 14:17, 14:30 and 14:34 and 20-07-01 at 08:30

www.jaa.nl 25-05-01 at 10:00

www.sjofartsverket.se 20-07-01 at 08:58

Table of Cases

<Case>

< Case>