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Gens de mer : un marché international du travail

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Patrick Chaumette
(Coordinator)

**Seafarers: an international
labour market in perspective**
**Gens de mer : un marché
international du travail**






UNIVERSITÉ DE NANTES



European Research Council
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Université de Nantes
Gomylex





**SEAFARERS: AN
INTERNATIONAL LABOUR
MARKET IN PERSPECTIVE**

**GENS DE MER : UN MARCHÉ
INTERNATIONAL DU TRAVAIL**

Coordinator

Patrick Chaumette

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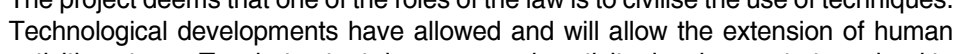


Overview

Professor **Patrick CHAUMETTE**
Director of the Maritime and Oceanic Law Centre
University of Nantes
ERC 2013 Advanced Grant no. 340770 Human Sea – FP7
<http://www.humansea.univ-nantes.fr>

The Human Sea Project was adopted by the European Research Council in August 2013. It is an Advanced Grant 2013, No. 340770 within the Seventh Framework Programme (or FP7). This research program is planned over 5 years from 2014 till 2019.

Making the sea more human.



The project deems that one of the roles of the law is to civilise the use of techniques. Technological developments have allowed and will allow the extension of human activities at sea. To what extent does economic activity development at sea lead to the transformation of Maritime Law and the Law of the Sea? Extraction activities on the continental shelf were considered in the 1958 Geneva Convention and again considered in the 1982 United Nations Convention on the Law of the Sea in order to protect coastal States. However, they do not always fall under international conventions regarding pollution prevention, liabilities or status of workers, non-seafarers.

The same 1982 Convention signed in Montego Bay, created exclusive economic zones and sought to provide a framework for fishing efforts and protect fishing resources. However, Maritime Law still only governs ships and does not govern new marine vessels and workers. The development of illegal activities at sea tests the competence of States as well as their cooperation, especially within the regional sphere.

The International Seabed Authority is an autonomous international organisation established under the 1982 United Nations Convention on the Law of the Sea and the 1994 New York Agreement related to the implementation of Part XI of the United Nations Convention on the Law of the Sea. The Authority is the organisation through which States Parties to the Convention shall, in accordance with the regime of the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction (the Area) established in Part XI and the Agreement, organize and control activities in the Area, particularly for the purpose of administering its resources. The 1982

Convention does not consider biological resources.

This European program has focused on piracy during an international conference organized within the framework of Scientific Days of the University of Nantes, on June 5 and 6, 2014, *Piracy: From the Sea to Cyberspace*, and then on June 11 and 12, 2015, *New Maritime Routes*. An international symposium was held on October 5 and 6, 2015 *Maritime Areas: Control and Prevention of Illegal Traffics at Sea*. It welcomed academic and operational specialists in order to determine which mechanisms were needed to combat drug trafficking, illegal fishing, human trafficking, piracy and the use of armed guards on board ships and marine pollution prevention and surveillance. A reference book will be published on October 2016. The Human Sea program will organize another international symposium, joined with the 5th symposium Marisk, on October 3rd and 4th. 2016. The main thematic include maritime and port security, risks related to sea-based renewable energy, gas and oil hubs, large vessels, ocean liners and container ships. Following additional research, the final symposium will be held on October 2018 and it will provide an overview of the evolution of the Law of the Sea and Maritime Law as well as an overview of the tensions between economical and technological developments and marine environmental protection requirements.

This type of program could not ignore traditional maritime activities such as maritime transport and fishing, vessels and seafarers (in particular sailors), and the establishment of an international sectorial law between the International Maritime Organization (IMO) and the International Labour Organization (ILO). The ILO adopted an innovative maritime labour convention in 2006 regarding the merchant navy. It also adopted Convention No. 188 in 2007 regarding work in the fishing sector¹.

Maritime transport was a globalization test-bed in the 1970's as a result of open vessel registry. The relationship between a vessel and the flag it flies is determined by the control systems put in place by port States and the development of a minimal international law, established by ILO and the IMO, through agreements such as SOLAS, MARPOL, STCW, *Search and especially Rescue SAR*. The internationalization of maritime labour therefore has allowed for a patchwork of national regulations, which results in poorly managed competition and a flexible legal system.

1) FOTINOPOULOU BASURKO O. (2006), *Aspectos generales del Convenio refundido sobre el trabajo marítimo*, Gobierno Vasco, Departamento de Transportes y Obras públicas, Vitoria-Gasteiz - Mc CONNELL M., DEVLIN D. & DOUMBIA-HENRY Cl. (2011), *The Maritime Labour Convention*, Martinus Nijhoff Publishers – AAVV (2009), *Derecho Social Internacional y Comunitario*, Revista del Ministerio de Trabajo e Inmigración, Madrid, No. 82 - CHARBONNEAU A., PROUTIERE-MAULION Gw. and CHAUMETTE P. (2010), "Les Conventions OIT sur le travail maritime de 2006 et 188 sur le travail à la pêche de 2007", Scritti in onore di Francesco BERLINGIERI, No. sp. *Il Diritto Marittimo*, Genova, 2010, pp. 337-360- LAVELLE J. (2014), *The Maritime Labour Convention 2006 – International Labour Law Redefined*, Informa Law, Routledge.

But beyond the vessels, sailors and seafarers, the status of exploration and production offshore facilities, which is based on mining law, provides a large area of uncertainty in regards to the status of its workers, which coastal States cannot cover because of the diversity of operators and owners who can freely choose where to located their headquarters and the law applicable to work contracts. The distinction between offshore workers and seafarers, whether seafaring 'crew' or not, is an important issue.

State of the art - Global Seafarers

International maritime transport

7 billion tonnes of merchandise was transported in 2005, that being one billion more than in 2000. Between 1995 and 2000, exchanges had increased by 1.4 billion tonnes. The Bremen Institute of Shipping Economics and Logistics estimates that maritime transport would reach 9.5 billion tonnes by 2012. Maritime transport plays a key role in international trade and globalization of economies and enterprises. These numbers are both linked to the demand of raw material from emerging economies and the rise in the production of consumer goods. International trade had gone down by 10% in 2009 but grew by 10% in 2010. Since then, recovery has been slow and the overcapacity of the fleet is long term². Shipping companies are seeking to provide regular transport services (as per requested by shippers and final consumers) which would be pooled and present lower costs. Containerization of goods transported has revolutionized transport and enables the continued search of gigantism³. 80% of goods are containerized in the U.S.A., 75% in Europe and only 50% in India or China because containers do not concern raw materials but manufactured products. Containers move from east to west and vice versa, but often empty, raw materials flow from south to north.

The growth in trade led to an increase in the size of the world's shipping fleet. The first wave took place between 1950 and 1980; it involved oil tankers and bulk carriers. The second wave took place during the 1980's and involved container ships. The world's shipping fleet reached 960 million tonnes at deadweight (DWT, the mass of a ship is carrying) in 2006 compared to 158 million DWT in 1960, 366 DWT in 1970, 691 in 1980, 668 in 1990 and 802 in 2000. Growth ranged between 1 and 3% per year between 1990 and 2003, followed by a growth of 6 to 7% per year onwards. It encompassed 47,000 merchant vessels for a total of 1.63 million DWT at the end of

2) *L'Atlas 2015 des enjeux maritimes* (2014), Le Marin, Infomer, Rennes, octobre.

3) BAUCHET, P. (1998), *Les transports mondiaux, instruments de domination*, Economica, Paris – GUILLOTREAU, P. dir. (2008), *Mare economicum – Enjeux et avenir de la France maritime et littorale*, PUR, coll. Économie et société, Rennes.

2012. The size of the vessels is increasing significantly more rapidly than the number of vessels.

In 2008, during a period of blind optimism, the high demand of vessels from Korean and Chinese shipyards created a speculation bubble which resulted in 50% of the orders being cancelled. It resulted in the overcapacity of transport supply and the demolition of 1,000 vessels in 2009. Several vessels were stored away in the Black Sea and in different bays around the world. Vessels have reduced the speed at which they travel as a result of high crude oil and diesel prices. This overcapacity has pushed freight rates, the price of transport, notably as regards containers. The maritime carriers' financial solvency was put to the test, even if very few filed for bankruptcy. Since then, cost slashing started again and especially affected crews.

Open vessel registration

Maritime transport is a mobile activity, and often international. The ship, a floating and mobile machine, traveling from port to port and crossing the high seas, which does not belong to any State, various territorial waters. Ships are registered in a State which grants it its flag. The attachment of a ship to a flag State ensures the legal nature of the law at high sea. In territorial waters, it must reconcile the sphere of the law of the flag and that of the coastal State or Port State⁴. All vessels must only register under one flag. "*The ship is a legal entity*". The 1958 Geneva Convention on the High Seas and the 1892 United Nations Convention on the Law of the Sea, signed in Montego Bay, stipulate that there must exist a genuine link between the vessel and the State-of-registration and/or the flag State, other than an administrative connection. But this connection is not accurately defined and it thus makes it very challenging to sanction complacent States that do not respect their international obligations⁵. Article 94 of the Convention on the Law of the Sea stipulates the duties of the flag State. Every state is to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag by conducting regular inspections. The solution is simple: the flag State should conduct inspection itself. "A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation" (Article 94-6).

Open registration and the international division of labour allowed poorly-managed state-owned companies in developing countries to disappear. 60% of vessels sail

4) BEURIER, J.P. dir., (2014), *Droits Maritimes*, Dalloz Action, Paris, 3rd ed.

5) ASSONITIS, G., (1991) *Réglementation internationale des transports maritimes dans le cadre de la Cnuccd*, PUF, Paris - ADEMUNI-ODEKE (1997), "Evolution and Development of Ship registration", *Il Diritto Marittimo*, Genoa, no. 3, p. 631. – TETLEY, W., (1994) *International conflict of laws, Common, Civil and Maritime*, International Shipping Publications, Montréal.

with a flag different from its owner's nationality. This corresponds to 75% in regards to deadweight tonnage. Open flag registry (Panama, Liberia, Marshall Islands, Bahamas, Malta, Cyprus, Antigua, Barbados, Bermuda, Saint Vincent, the Grenadines and the Cayman Islands) represents 55.7% of the world fleet in volume and one third of the total number of vessels. Panama, Liberia and the Marshall Islands represent 43.4% of deadweight tonnage. 46% of the fleets registered in Panama are Japanese. A considerable number of Chinese and American vessels are registered in Panama. The flag flying on a vessel does not reflect the economic controls because vessel registration is simply about fiscal and social management. The following countries top the list of controlled fleets: Greece, Japan, Germany, China, South Korea, Norway, Hong Kong, the U.S.A., Denmark, the United Kingdom, Singapore and Taiwan⁶.

The total number of European-member fleets represents 298 million DWT which is only 19.4% of the world tonnage. This proportion is steadily declining (21.8% in 2010). However, the economic interests of the European Union control 35% of the world fleet even if registered vessels in Member States only represent 21%. A fourth of the fleet registered in Liberia represents German interests. An important part of the Greek fleet is registered in Cyprus and Malta, countries that became Member States of the European Union. Greece, Japan, China and Germany control half of the world's fleet. China has surpassed Germany.

Seafarers

Almost 1.4 million sailors work in the world of trade according to the surveys conducted by the International Chamber of Shipping (ICS) and the Baltic and Maritime International Council (BIMCO), even if it could potentially be 1.71 million. This number includes 624,000 officers and 747,000 operators. China is the number one supplier of manpower with 142,000 sailors (11%). They most sail under their national flag in the light of domestic needs. Turkey supplies around 87,800 sailors; Philippines provides 81,000 sailors but a bit more than 57,000 officers. There are currently almost as many Chinese merchant officers. The Philippine Government summoned 529,000 sailors, which is a significant number, even if the unemployment rate is 50%; statistics can be fragile; the number of sailors (200,000) accounts for 400 manning agencies. These agencies fall under the jurisdiction of the Philippines Overseas Employment Administration (POEA)⁷. There are about 183,000 officers from Western and Eastern Europe, North America which is still high. Operators who work in international transport come from developing countries. The issue of social costs is a decisive factor. Officers sail an

6) CARBALLO PIÑEIRO L. (2015), *International Maritime Labour Law*, International Max Planck Research School for Maritime Affairs at the University of Hamburg, no. 34, Springer.

7) AMANTE M.S.V. (2003), *"Philippine Global Seafarers: A Profile"*, SIRC, Cardiff University; (2004), "Industrial Democracy in the Rough Seas: The Case of Philippine Seafarers", IRRA 56th Annual meeting of Industrial Relations Research Association – ZHAO, M. & AMANTE, M.S.V. (2005), "Chinese and

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average of 7 to 15 years before taking on onshore jobs. The term re-orientation is simply inadequate⁸.

Our economist colleagues, Corinne BAGOULLA and, Patrice GUILLOTREAU, from LEMNA (French acronym for: Laboratoire d'économie et de management de Nantes) of the University of Nantes, provide an overview of maritime transport regarding: "*Shortage and labor productivity on the global seafaring market*"

Sailors are part of a job market which is largely open to the world. They are involved in a global sector and recruited on vessels bearing foreign flags (or controlled by foreign interests). Their chapter addresses the main trends that affected the seafaring job market in the previous decades (technological developments, open vessel registration, etc.) and explains the structure of the current market. It also provides some explanations behind the pay gaps in this job market.

Rosa Mary de la CAMPA PORTELA from the University of A Coruña, Spain, and María Encarnación GIL PÉREZ from the University of Castilla y la Mancha, are interested in the work conditions of seafarers and especially in the psycho-social risks they are exposed to: "*Psychosocial risks of Seafarers*".

It is not easy to define psycho-social risks of a workplace; to consider criteria, indicators and judicial recognition within this social reality. Aboard ships, the principle of prevention, risk assessment, training and information and health surveillance are required, including on psychosocial risks. Its impact on maritime safety and working safety cannot be overlooked, including tiredness watch on the bridge. Numerous analyzes of collisions, incidents and shipwrecks emphasize the "human factor" highlighting poor training, insufficient number of personnel, tired seafarers if they are not exhausted. Propulsion and bridge's automation requires reinforced surveillance; work intensification takes place onboard just as on land. The captain and the officers experience several constraints and are subject to excessive responsibilities. The living conditions on board and the employment conditions require the inclusion of seafarers onboard and seafarers calling at the ports. This ancient concept is highly modern. It is affected by several factors and can lead to disjointed measures being implemented. The following are basic elements that would help in improving the social quality among

Filipino seafarers: A race to the top or the bottom?", *Modern Asian Studies*, Vol. 39, No. 3, pp. 535-557 - NIKOLAEVA DIMITROVA D., (2010) *Seafarers' Rights in the Globalized Maritime Industry*, BLANPAIN R. Ed., Bulletin of Comparative Labour Relations, no. 75, Wolters Kluwer, Kluwer Law International – COUPER A. (2012), "Perceptions and attitudes of seafarers towards maritime regulations: An historical perspective", in *The regulation of international shipping: International and comparative perspectives: Essays in honour of Edgar Gold*, eds. A. CHIRCOP, et al., Martinus Nijhoff Publishers, Leiden, Netherlands, pp. 429-442.

8) CHAUMETTE, P. (2012), "Recrutements, formations et carrières dans la marine marchande en Europe", *Annuaire de Droit Maritime et Océanique*, ADMO, université de Nantes, t. XXX, pp. 287-318.

seafarers: providing officers with management training, ensuring multicultural diversity among crews, limiting exceedingly long embarkations, respecting rest periods on board and holidays⁹.

Hélène MAULION and Gwenaële PROUTIERE-MAULION, from the University of Nantes, are interested in the condition of seafarer women: "*Women Seafarers*".

The representation of women in the maritime sector is still relatively minor and changes only slowly over the past decade. Indeed, globally, of the current 1.25 million seafarers, only 1-2% are women and only 7% would access to functions of officers compared to 42% of men. The symbolic space and marine imaginary is structured around two main areas: firstly by reference to the tradition of seafarers and secondly in the fantasmatic relationship to land and family. The recent FEMMAR study, conducted in France, shows that with the exception of the Navy for which the implementation of a process of feminization is the result of a political will, the arrival of women in the merchant navy, fishing and marine aquaculture has occurred naturally without claim movement and without any change of the legal framework, with the exception of maternity leave provisions. The fight against sexual and psychological harassment can be effective, with the participation of all actors involved in the texts, employers, representative bodies and the occupational medicine. Through the acquisition of a culture of the sea leading to a common language, a common technical mastery, sharing life on board, and responsiveness in a situation of danger, women, especially those occupying the most valued functions that are regarded as the most technical, build a seafarer's identity that the sea outweighs the sexual identity they tend to want to indent. It is possible to ask whether the appropriation of social codes on board a ship requires a travesty of the female body, a "professionalization". Thus, it appears that the woman status gives way to the seafarer.

In her thesis of sociology, presented in December 2013 at the *Université de Paris Ouest Nanterre*, Angèle GRÖVEL discusses access, socialization and careers of future merchant marine's officers in a context of deregulation of the labor market and reconfiguration of training. In the first part, she provides updates on the emerging and institutionalized training conditions affecting officers, and the impact it has on the dynamic of an occupational group from the time seafaring training was put in place by the previous regime to when marine titles were recognized as equivalent to engineering titles at the beginning of the 21st century. This social history of Officer's schools highlights the structural nature of the group's "crisis" and allows the study of their developed rhetoric and mobilized resources to ensure their "survival". Based on the results obtained from surveys and interviews conducted with future seafarers and also former seafarers, she wondered to what extent the transformations of training, changes in

9) SAMPSON H. (2015), *International seafarers and transnationalism in the twenty-first*, New Ethnographies, Manchester University Press.

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the labour market and labour trends facing the traditional frameworks of socialization and career. After conducting socio-genesis of the social provisions for access to the profession, the research describes and analyses the socialization mechanisms within institutions and on board of merchant ships. The article ends by studying the professional career paths of former and future Officers. This address to release the career stages before focusing on the factors that explain the outputs of the profession¹⁰.

In another thesis of sociology, held in 2014 at the University of Stockholm, "*On Board the Global Workplace: Coordination and Uncertainty on Merchant Ships*", Carl SANDBERG brings to light the tensions that exist among multicultural and linguistically-diverse crews¹¹.

The purpose of this thesis is to analyze how work and social life are coordinated on board merchant ships. The merchant ship is a global workplace where people from different nationalities come together to work and live for an extended period of time. The study is based on ethnographic field work conducted onboard merchant ships. The core of the study is field work on two Swedish-flagged RoRo-ships with ethnically mixed crews coming from Sweden, the Philippines and Eastern Europe. Participant observation and interviews are the two methods that have been used to generate the material. The empirical material shows that although the ships have a formal organization, the ships with mixed ethnic crews are in a disorderly state, a state of dissonance. The dissonance is due to a conflict between two evaluative principles. One principle refers to the Swedes' way of doing things, which involves a flattened hierarchy and autonomous workers. The other principle refers to the Filipinos' way of doing things, a formalized relationship between officers and crew and respect for the chain of command. These two principles sometimes come into conflict in the coordination of work tasks. The analysis also shows that social life on board is coordinated by ethnic networks, i.e. the seafarers spend their free time segregated by ethnicity. Furthermore, the results show that these two evaluative principles have a hierarchical relationship. They form a hierarchy of worth, where the Swedes' way of doing things is seen as superior.

Jonathan RUILLE, LEMNA PhD at the University of Nantes, Marie-Thérèse NEUILLY and Xavier MICHEL, from the RESECUM firm, address the following: "The evolution of the Law and the impact it has on ship crews and other stakeholder's safety".

Maritime safety developments regularly provide feedback on maritime accidents. These catastrophes intersperse the construction of maritime law because technical aspects

10) A. GRÖVEL, *Les Officiers de la Marine Marchande : un groupe professionnel dans la tempête ? Accès au métier, socialisations et carrières des élèves des écoles supérieures maritimes au début du XXIème siècle*, Thèse Sociologie, Université Paris Ouest Nanterre-La Défense, December 2013.

11) C. SANDBERG, *On Board the Global Workplace: Coordination and Uncertainty on Merchant Ships*, Stockholm University, Faculty of Social Sciences, Department of Sociology, 2014.

are the first to be addressed. Human factors have progressively been integrated into the "safe approach" until it became a key factor in 1978 when the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW)¹² was adopted. We have observed that the evolution of the services, economies, technologies, Medias and social expectations have increased the number of regulations and laws that frame company operations. It is thus necessary to understand how crews follow and live with these requirements and how they ensure improved safety on passenger ships.

Global Seafarers and norms

The international rights of seafarers

ILO Conventions and the 2006 consolidated convention

The 2006 MLC stipulates the minimum requirements that govern seafarer work and lives. It specially establishes standards for the following: minimum age, work conditions, length of shifts, rest hours, accommodations, recreational facilities, food and catering, health protection, medical attention, welfare and social security. It was designed as a single and coherent instrument that would gather a large number of governments, shipowners and seafarers to adopt decent work condition standards. The objective of the Convention is to put in place a system that would ensure the world respects the rights of seafarers while allowing government authorities the necessary leeway in regards to how they choose to ensure these rights. It is important to reiterate that the Convention was adopted in 2006 after almost five years of intense international tripartite negotiations.

The Convention strives to ensure that all seafarers, in addition to their fundamental labour rights, have access to: safe work environments that comply with current safety regulations; fair employment conditions; decent work and life-on-board conditions; health protection; medical attention and welfare and social security.

Dr. Cléopatra DOUMBIA-HENRY, Director of the International Labour Standards Department of the International Labour Office, said: "This anniversary marks the occasion to highlight that the 2006 MLC entered a new phase a year ago. The ideas put forth by shipowners and seafarers as well as the ideals that inspired them—and that are the basis of this instrument—are currently being tested." Since August 2013, not only has the number of countries that have ratified the Convention increased but its innovating control system on-board ships, especially ships subject to inspections,

¹²) *Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW).*

certifications and port state governmental controls, including detaining ships in foreign ports, when applicable, came into affect.

The first anniversary of the adoption of the 2006 Maritime Labour Convention (MLC) coincided with a sharp increase in the number of ratifications and a quicker dynamic. These factors lead to an effective implementation of the above mentioned convention. The convention entered into force on August 20, 2013 and had registered no less than 45 ratifications of countries, which represented over 70 per cent of the world tonnage of ships. There are currently 64 countries bearing the responsibility of the working and life conditions of seafarers. 80 per cent of the world fleet have ratified this convention.

On August 20, 2012, the Philippines deposited their instrument of ratification of the convention with the International Labour Organization. This ratification meant that the strict condition of entry into force of this Convention (ratification by at least 30 countries representing at least 33 per cent of the world gross tonnage) was acquired and, through this, the entry into force of the 2006 MLC, long-awaited, became a reality. Indeed, 12 months later, on August 20, 2013, the 2006 MLC came into force.

The first 30 countries to ratify the Convention must submit their report in 2014. The ILO Committee of Experts looks forward to take cognizance of this report, given the diversity of issues covered by the 2006 MLC, the multiplicity of new approaches that it authorizes and the challenge they may present to their implementation in the legal systems of different countries¹³.

In April 2014, several amendments were adopted during the first meeting held by the special tripartite commission. These amendments affected the code (standards and guidelines) and were adopted as to provide better solutions to address the abandonment of seafarers and the responsibility of shipowners in terms of compensation for seafarers or their successors in the event of long-term disability or death. These amendments were approved by the International Labour Convention in June 2014 and will enter into force 18th January 2017¹⁴.

13) CHARBONNEAU, A. dir. (2013), "La mise en œuvre de la Convention du Travail Maritime de l'OIT : Espoirs et défis", *Revue de Droit Comparé du Travail et de la Sécurité Sociale*, COMPTRASEC, (Bordeaux) 2013/2, *English Electronic Edition*, 2013/3, "The Ratification of the MLC, 2006: Hopes and Challenges", <http://comptrasec.u-bordeaux4.fr/revue/english-electronic-edition-0>

14) CHARBONNEAU, A. & CHAUMETTE, P. (2014), "Premiers amendements à la convention du travail maritime de l'OIT de 2006", *Droit Social*, n° 10, pp. 802-810, Paris - NIFONTOV D. (2014), "Seafarer Abandonment Insurance: A System of Financial Security for Seafarers", LAVELLE J. (2014), *The Maritime Labour Convention 2006 – International Labour Law Redefined*, Informa Law, Routledge, pp. 117-134.

15) See, FOTINOPOULOU BASURKO O., "El Control y Certificación del Cumplimiento del Convenio

Dr. Moira L. McCONNELL, Professor Emerita, Schulich School of Law, Honorary Fellow, Marine & Environmental Law Institute, Dalhousie University, Halifax, Canada, examines the implementation of the Maritime Labour Convention, adopted by the ILO in 2006. She also puts forward the idea of a "revitalisation" of the role of the flag State: *"A delicate balance: The seafarers' employment agreement, the system of the Maritime Labour Convention, 2006 and the role of flag States"*.

Primarily written from a public international law perspective, this Chapter serves to highlight the tensions with the shared field with private international law in the context of employment relationships in the increasingly globalized maritime sector. This Chapter argues that the seafarers' employment agreement (SEA) requirement of the MLC, 2006 can be understood as a strategic and pragmatic solution to the significant structural and legal changes that have occurred in, and are still occurring, for ships and seafarers engaged in international voyages. The MLC, 2006 is now increasingly the central, perhaps the only, site of certainty in an industry with multijurisdictional, mobile, often short term, workers, employers and workplaces. It also argues that the MLC, 2006 requirement for the SEA provides a pragmatic solution that is largely based on flag State responsibility but still allows for the possibility of party autonomy on matters of choice of law and forum, subject to recognition of the flag State's overriding interest.

Alexandre CHARBONNEAU, lecturer at the University of Bordeaux, member of COMPTRASEC (Centre of Comparative Labour and Social Security Law) at the University of Bordeaux, considers the implementation of the Maritime Labour Convention: *"Fostering and monitoring the implementation of the 2006 Maritime Labour Convention - Feedback on the missions conducting in Western and Central French-speaking Africa"*.

This consolidated Convention is complex and the International Labour Standards Department of the International Labour Office to organize sensitization workshops for stakeholders in West and Central Africa. The application concerns the States which have ratified the Convention. The West and Central Africa is home to regional organizations may take initiatives in this area. This raises the question of the relationship between these regional initiatives and obligations of Member States because of ratification. The first observations of the Expert Committee on the Application of Conventions and Recommendations (CEACR) ILO were published and sent to the States. They provide clarification and priority elements in the implementation of the Convention. Because of its scope, the Convention required an innovative national report form that presents some challenges and questions. It should clarify the relationship between the fundamental rights at work as forced labour, and the implementation of the Maritime Labour Convention.

The Maritime Labour Convention has particularly broken ground by implementing the social certification of ships. Emmanuel CORNÉE, Head of the Maritime and Safety and Security Department at ENSM (the National Maritime College of France) Le

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Havre and Awa SAM LEFEBVRE, with a PhD in law, researched at the Nantes ENSM, and member of the CDMO (Centre of the Law of the Sea) at the University of Nantes analyzes this novelty: " *Social certification on board merchant ships, security for seafarers' rights?* "

The effective character of the adopted work standards challenges each society which wishes to give a direction and life to legal requirements on which it took positions. In the scheme of an effective application, Maritime Labour Convention, 2006 (MLC, 2006) integrated in its provisions the principle of the social certification of the ships whose finality is to be a tool facilitating the measurement of its effectiveness while making it possible to reduce the existing differences between the flags and ship-owners having good practices and all the others. Under this angle, certification brings more rationality and harshness to the ship-owners practices and is thus presented in the form of an innovating device for the respect of the seafarers' rights. This major achievement for the seafarers' rights should not occult the reality of some ship-owners practices being very reprehensive. The competitive environment in which fits maritime work does not make everything justifiable. These repetitive practices point out the need for a continuous improvement of any international requirement of certification whose finality is to enforce the legal protections created to the seafarers's benefit¹⁵.

François MANDIN, member of the CDMO at the University of Nantes, addresses the figure of the Ship Master, the commanding officer, the navigation officer and the security officer: "*The Ship Master and the Maritime Labour Convention*". The Convention clearly designated the shipmaster as a seafarer, which was not the case before¹⁶.

The Maritime Labour Convention which entered into force on August 20, 2013, applies to all seafarers working on commercial vessels flying the flag of States having ratified it. The Ship Master occupies a single position. As a seafarer, he is entitled to the Convention. As a master, he needs to ensure its implementation. This social function, transpires from reading the convention, is not expressly stated. It complements the nautical, commercial and public functions of the master. She maybe draws a substantive change in the responsibilities of the master.

Our colleague Olga FOTINOPOULOU BASURKO, professor at the University of the Basque Country, sought to explain the role of manning agencies in the maritime labour market and the evolution of the co-related legal practices and issues: "*The role*

de Trabajo Marítimo 2006 de la OIT: Aspectos Críticos del RD 357/2015", *Revista de Derecho del Trabajo y de la Seguridad Social*, Madrid, no. 41, 2015.

16) CARTNER J. AC (2014), "The Ship master and the Maritime Labour Convention 2006", in LAVELLE J., *The Maritime Labour Convention 2006 – International Labour Law Redefined*, Informa Law, Routledge, pp. 47-68.

17) CHAUMETTE P., "Le rapatriement des gens de mer", *Un droit pour des hommes libres*, Études en

of manning agencies or the seafarer's recruitment in the maritime employment market".

As part of the outbreak of the shipowning function, manning agencies involved in the management of the maritime labor work, to provide crew, managing seafarer employment agreements and, even at times, managing seafarers directly. Manning agencies sometimes act as ship managers and operators. The Baltic and International Maritime Conference (BIMCO) offers two types of contracts: SHIPMAN (Standard Ship Management Agreement) and CREWMAN. The later focuses on crew and differentiates between Crewman A (Cost plus fee) for the ship operator's account and Crewman B (lump sum) in its own name. Manning agencies control oscillates between adopting international and national approaches. The Maritime Labour Convention 2006, is a consolidated and universal agreement, that provides a substantial minimal basis. The European Union has so far been unable to adopt guidelines regarding the obligations of nations supplying manpower linked to the Maritime Labour Convention. Spain was the first Member State to ratify the Maritime Labour Convention in 2010. Manning agencies based in Spain were certified following a formal administrative procedure that was not linked to the Maritime Labour Convention. The 2014 Law on maritime navigation stipulates the responsibility falls upon Spain-based shipowners and manning agencies that recruit third-party national or resident seafarers for ships flying under foreign flags. It is thus an evident challenge to implement effective controls of manning agencies within an international job market.

Alexandre CHARBONNEAU, lecturer at the University of Bordeaux, and member of the COMPTRASEC (Centre for Comparative Labour Law and Social Security), studies international trade union actions: "*The results and future of an international and collective negotiation –ITF policies in maritime transport*". Under the tripartite framework that characterizes ILO, The International Transport Worker's Federation (ITF) participated in the adoption of the Maritime Labour Convention in 2006, conveying a universal and consolidated convention by compromising with shipowners with universal scope. Substantially, progress is limited to the process of preventing harm to health and to safety of seafarers. However, international trade union actions are not limited to the ILO convention. Collective agreements supported by the ITF [Standard Agreement, Total Crew Cost (TCC) Agreement, or International Bargaining Forum (IBF) Agreement], complements the ILO Convention, especially in terms of remuneration.

The adoption and implementation of the Convention Labour ILO 2006 Maritime, developed as part of tripartite, led to redefine international trade union action. The agreement does not solve the issue of remuneration of seafarers, neither really the social protection. Collective agreements supported by ITF (Standard Agreement, Total Crew Cost (TCC) Agreement or International Bargaining Forum (IBF) Agreement) complete the ILO Convention. Social certification of ships as established by the flag States with the support of competent companies is in line with the minimum provisions of the Convention. Controlled by the port States, does such a certification allow a true intervention of the trade union inspectors despite complaints procedures on board

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and onshore? International maritime transport, largely open to free registration of vessels, under pressure from the International Federation, is now framed by international and national standards. Since 2003, the evolution of the International Bargaining Forum agreement (IBF) anticipates this transformation in the social dialogue with the Joint Negotiating Group (JNG). The negotiation and dispute settlement proceedings bind the social partners, so that Union inspectors may target ships that are not covered by the IBF agreement.

Dr. Moira L. McCONNELL, Professor Emerita, Schulich School of Law, Honorary Fellow, Marine & Environmental Law Institute, Dalhousie University, Halifax, Canada, evaluates the potential of implementing the 185 ILO Convention, adopted by ILO in 2003: "*Identity papers of the seafarers, Convention 185 and land transit of the seafarers*".

Seafarers' identity documents (SIDs) have been accepted for decades as a result of the international aspect of maritime transportation¹⁷. No matter where they come from, seafarers often have to pass through other countries to either board or leave ship. They may even be brought to go ashore during a journey in order to receive social and/or medical services or contact their family. These concerns are equally taken into consideration in the 1965 FAL Convention adopted in London by the International Maritime Organization (OMI) and aim to facilitate maritime traffic. Most maritime nations understand how vital it is for international maritime transport that seafarers can move quickly from country to the next. However, the safety concerns that arose as a result of the September 11, 2001, have affected the situation. In December 2002, the IMO adopted the ISPS code that was integrated in the SOLAS Convention. This convention addresses maritime and port security. ISPS code entered into force July 1, 2004. Convention 185 was adopted in Geneva on June 19, 2003 by governments, shipowner representatives and seafarers before the ILO to respond to border-security concerns. It seeks to improve security when identifying seafarers by providing better physical descriptions on identity documents. This measure helps prevent fraud and identify the bearer. It is important to note that the identify document issued in accordance with the 188 convention contains biometric data. It also reflects the will to enforce security requirements based on an innovating approach that ensures quick communication among countries to confirm identify document validity.

The new Seafarers' Identity Document is only issued by the seafarer's country of citizenship or where she/he is registered as a permanent resident. The SID (Seafarers' Identity Document) must contain the items listed in Annex 1, be SID-machine readable,

l'honneur du professeur Alain FENET, Litec, Paris, LexisNexis, 2008, pp. 51-70 - THOMAS FI, "Réflexions sur la descente à terre des gens de mer (escale et transit) dans l'Union européenne", Neptunus, revue électronique, Centre de Droit Maritime et Océanique, Université de Nantes, Vol. 19, 2013/1 <http://www.cdmo.univ-nantes.fr>

18) CHAUMETTE P., "Pièces d'identité des gens de mer", Neptunus, revue électronique, Centre de

and have a digital photograph and a biometric template, containing the digital fingerprints in a bar code. Seafarers' identity documents are not passports and must be accompanied with a passport when going ashore. Its aim is to facilitate shore leaves and transits of seafarers who are without visas¹⁸. The convention 185 only received 30 ratifications, even if it went into force February 9, 2005. The Maldives ratified it January 5, 2015 and it went into force July 5, 2015. The European Union Council voted on April 14, 2005 to authorize Member States to ratify this international convention in the best interest of the European Union within the framework of the common visa policies¹⁹. France ratified the convention with Law No. 2004-146 on February 16, 2004. The issue is less with the production of Seafarers' Identity Documents than their control in ports and airports, and avoids these documents from being falsified.

During the ILO tripartite meeting, experts assessed the cost and advantages of several solutions set forth to address concerns and provided recommendations to favour the effective acceptance and use of issued SIDs in accordance with convention 185. This meeting also had the purpose of facilitating the exchange of experiences, cooperation and the creation of networks among national and international experts. Digital-print SID reading poses several practical issues. The Russian Federation that uses the technology adopted by convention 185, offered free technical support without necessarily ensuring SID readings in ports were being generated. Since 2003, the International Civil Aviation Organization (the ICAO) regulations require biometric, facial-image templates, equipped with a contactless chips²⁰ and not a digital fingerprint registered in two-dimensional bar code. The governing body of the International Labour Office took note the general conclusion and the recommendations provided by the experts of the tripartite meeting regarding convention 185 and they decided to form an *ad hoc* maritime tripartite commission— subject to the adoption of the necessary financial provisions— and convene a meeting in 2016 to amend convention 185. It was also decided to develop amendment proposals for the annexes of convention 185, based on the recommendations presented by the experts so as to present for adoption at the International Labour Conference, in accordance with Paragraph 1, Article 8 of Convention No. 185²¹.

Droit Maritime et Océanique, Université de Nantes, Vol. 14, 2008/1 <http://www.cdmo.univ-nantes.fr/centre-droit-maritime-oceanique/cdmo>

19) Décision 2005/367 du Conseil, *JOUE* n° L 136, 30-5-2005 p. 1 ; le Royaume-Uni et l'Irlande ne font pas partie de cette politique commune des visas; le Danemark, en dépit des réserves émises quant aux règlements communautaires de droit international privé, est destinataire de cette décision

20) "Documents de voyage lisibles à la machine", Doc. 9303, 2006, http://www.icao.int/publications/Documents/9303_p1_v1_cons_fr.pdf

21) CHAUMETTE P, *Actualité internationale de la Pièce d'Identité des Gens de Mer (PIM)*, 2015, <http://humansa.hypotheses.org/250>

International Law on Social Security.

The search of decent work conditions is not enough in itself. Workers must also be protected from the risks of disability. This is the aim of social protection and social security regimes. The ILO Constitution and the 1945 Philadelphia Declaration took into consideration social risk protection. The 1953 Convention No. 102 is dedicated to a staged generalization social security approach²². In 2014, a work group coordinated by Professor Alain SUPIOT and under the auspices of the International Labour Office, endeavoured to create a new social protection dynamic²³. The draft framework agreement between BIT and the State was envisaged to accompany the gradual extension of social security and foster the ratification of international conventions in this industry. In 2011, the work group's report, chaired by Michèle BACHELET, envisaged a "social protection floor for a just and inclusive globalisation". It would allow individuals to benefit from basic income security that would give them enough to live and guaranteed by cash or in-kind transfers such as social pensions for elderly or handicapped individuals, family allowances, income support schemes and/or job guarantees, and benefits for the unemployed and working poor²⁴. Even if the need for social protection is widely recognized, the fundamental right of every individual to social security is far from being true for most of the world population. Only 27% of the world population has access to complete social security systems, while 73% do not benefit from partial coverage or are not covered in any way. ILO Recommendation No. 202 regarding 2012 social protection floors represents a consensus to extend social security protection. It was adopted by the governments and worker organizations of 185 countries throughout the entire development process. When unemployment benefits are available to individuals, it constitutes an excellent measure to ensure income security for workers and their family members in the event of temporary unemployment. It also contributes to fitting poverty, supports economic structural reforms and represents a bulwark against informalization. It also stabilises world demand and accelerates economic recovery in the event of a crisis. Only 28% of workers have access to this type of protection and they are not without enormous regional gaps. While numerous high-income countries are cutting down on the scope of their social security systems, many developing countries are extending the scope

22) SERVAIS, J.M. (2004), *Normes internationale du travail*, LGDJ, Paris – (2012) "The new ILO recommendation on social security", *E-Journal of International and Comparative Labour Studies*, vol. 1(3-4), octobre, pp. 1-26 - "Droits de la personne humaine et protection sociale. Une vision renouvelée à l'OIT", Ch. MESTRE, C. SACHS-DURAND, M. STORCK dir. (2014), "Le travail humain au carrefour du droit et de la sociologie", *Hommage en l'honneur du Professeur Nikitas ALIPRANTIS*, PUS, Strasbourg, pp. 747-758.

23) SUPIOT, A., (2006) "The position of social security in the system of international labor standards", *Comparative Labor Law & Policy Journal*, vol. 27, n° 2, 2006, pp.113-121. "The outlines of a framework agreement on the extension of social protection", *Comparative Labor Law & Policy Journal*, vol. 27, no. 2, 2006, pp. 273-296.

24) BIT (2011), *Piso de Protección Social para una Globalización Equitativa e Inclusiva* (2011).

of their social security systems. Social protection, in particular social protection floors, are vital to ensure recovery, inclusive development and social justice. This universal approach must include mobile workers.

Seafarers are somewhat distant from the industrial worker model, except for craftsmen and traditional fishermen, close to the informal economy. However, they are also torn between their country of residence, the location of manning agencies, the state where their ships are registered and the location of large shipping companies. How is the principle of equality or equivalence regarding shore-workers be implemented in seafarer-supplying states?

International Maritime Labour and Social Security.

During a meeting organized in the city of Bilbao, at the University of the Basque Country on November 8, 2013, by the Professor Olga FOTINOPOULOU BASURKO, on "El Convenio de Trabajo Marítimo – OIT 2006", our colleague Professor Xosé Manuel CARRIL VÁZQUEZ had discussed seafarers' social protection challenges. He specially addressed social security regime affiliations when these institutions exist in a ship's country of registration or in seafarers' country of residence²⁵.

The 2006 ILO convention sought to align the maritime sector on the 1954 Convention No. 102. No progress was made in the consolidated convention itself in regards to previous maritime conventions and seafarer social protection²⁶. The following conventions presumed progress was being made regarding seafarers' social security by countries who had ratified, but in fact, it was not true because there wasn't enough ratifications: The ILO 1946 Convention No. 70 regarding seafarers' social security, the 1946 Convention No. 71 regarding seafarers' pensions, and the 1987 Convention No. 165 regarding seafarers' social security²⁷. Only Conventions No. 71 and 187 went into force with the necessary ratifications. As a result, the 2006 Maritime Labour Organization's regulation A.4.5 may seem to represent previous conventions or eventually more realistic. Regulation 4.5.3 stipulates that each Member State shall ensure that the dependants of seafarers, subject to its social security laws and the measures prescribed by national laws, benefit from social security protection. This protection should not be less favourable than that enjoyed by shore-workers. The 2007 Work in Fishing Convention has a similar component.

25) CHAUMETTE, P. (2014), "El Convenio de Trabajo Marítimo – OIT 2006", *Droit Maritime Français*, no. 754, pp. 60-69, Paris.

26) McCONNELL, M., DEVLIN, D. & Cl. DOUMBIA-HENRY, Cl. (2011), *The Maritime Labour Convention*, Martinus Nijhoff Publishers – FOTINOPOULOU BASURKO, O. (2006), *Aspectos generales del Convenio refundido sobre el trabajo marítimo*, Gobierno Vasco, Departamento de Transportes y Obras públicas, Vitoria-Gasteiz.

27) Convention No. 70 received 7 ratifications; Convention No. 71 received 13; Convention No. 165 only received 3 ratifications.

Seafarer attachment is complex because of the international nature of maritime labour. Seafarers are first attached to the nation where they have their family residence. (Regulation A4.5.3) Bilateral or multilateral agreements as well as regional arrangements can determine other attachments (Regulation A4.5.4). The responsibilities of flag states is limited to Regulations 4.1 and 4.2 in the convention (i.e onboard and shore medical attention; shipowner financial responsibilities regarding illnesses, accidents or deaths resulting from the execution of a task. European Regulation 883/004 concerning the national social security scheme coordination, attaches seafarers to the Flag State's social security schemes²⁸.

When seafarers are subject to more than one national social security laws, affected Member States shall cooperate to reach a mutual agreement on applicable laws by taking into account which level of protection is more favourable for the affected seafarers as well as their preferences (Guiding principle B4.5.3). Galician seafarers have sailed for over 20 years on Norwegian-registered vessels without ever having a family residence in Norway. As such, they would not receive any retirement benefits in Norway, because they were not residents there, and nor in Spain because they were not onboard a Spanish-flagging vessel. That is the subject of the research being presented. The regionalization of social protection in Autonomous Regions in Spain makes any possible harmonization more challenging. Unemployment following a shipwreck seems to be poorly covered currently. Shipwrecks are considered force majeure in all cases and compensation is limited to twenty (20) days. Non-Spanish seafarers onboard ships registered in the Canary Islands (REBECA) are subject to very vague regulations. Since 1998, Spain has been regularly criticized by experts of the ILO committee in regards to ratified international conventions²⁹. The study is not insignificant which shows the detailed research conducted by Xosé Manuel CARRIL VÁZQUEZ.

Bilateral social security conventions can be reached in order to facilitate the situation of migrant workers, especially border situations. These conventions allow preventing dual affiliations, overlapping financing as well as overlapping benefits. It does not always close loopholes and the lack of principals of territoriality. The scope is small in regards to seafarers³⁰.

28) CARRIL VÁZQUEZ, X.M. (2014), "La Seguridad de la Gente de Mar en el Convenio sobre el Trabajo Marítimo de 2006", *Revista General de Derecho del Trabajo y de la Seguridad Social*, Madrid, 36.

29) Convenio nº 147, sobre la marina mercante (normas mínimas) de 1976, que fue adoptado en 1998. www.ilo.org/dyn/normlex/es/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2174707

Convenio nº 165, sobre la seguridad social de la gente de mar (revisado) de 1987, que fue adoptado en 2011. www.ilo.org/dyn/normlex/es/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2700444

CARRIL VÁZQUEZ, X.M. (2014), "La Seguridad de la Gente de Mar en el Convenio sobre el Trabajo Marítimo de 2006", *Revista General de Derecho del Trabajo y de la Seguridad Social*, Madrid, 36.

30) CHAUMETTE, P. (2002), "Dimensión internacional de la seguridad social marítima", *La protección*

The European Approach

The European Dimension

European Member State International Registers

In order to compete internationally and limit reflagging, the Member States of the European Union have developed, since 1986, offshore registries subject to autonomous legal systems. They have also developed national international registries which are presented as *flags of necessity*³¹. Where France created French Southern and Antarctic registrations, Norway created an international register. If these vessels are subject to ILO and IMO international conventions and properly monitored by administrations in those states where they are registered, they are manned by European and non-European officers and sailors, who are subjected to the "internalization" of contracts and social protection³². The common law onboard withers, the principle of "equal work, equal pay" is lost at sea. What does dominate is the individual contract, the personnel status of seafarers, which is sometimes linked to their family residence³³. These second or economic registers have allowed Member States of the European Union or the European Economic Area to slow the exodus of vessels thanks to the aid put in place by the government. This includes tax relief on the tonnage and not on profits and as a result of the social savings of non-European seafarer treatment, especially in the absence of a social system affiliation.

In 1993, The European Court of Justice deemed the discrimination that existed between EU seafarers and third-party national seafarers who do not have a home or a permanent address in the EU, which did not constitute State aid within the meaning of Article 92 of the EC treaty, nor an infringement of Article 117 of the EC treaty that aimed to harmonize national legislation from the top down in order to improve the prospect of full employment. It is a conflict-of-laws rule of private international law³⁴. The Flag State can redirect work contracts of seafarers who do not reside on their territory to

social de los trabajadores del mar, Ministerio de Trabajo y Asuntos Sociales, Colección seguridad social, No. 23, Madrid, pp. 17-34.

31) BEURIER, J.P. dir. (2014), *Droits Maritimes*, 3rd Ed., Dalloz Action, Paris, No. 212-21 et 212.31 and s.

32) CHARBONNEAU, A. (2009), *Marché international du travail maritime – Un cadre juridique en formation*, PUAM, coll. Berthold GOLDMAN, Aix-en-Provence, 2009, p. 89.

33) CHAUMETTE P. (1995), "Loi du pavillon ou statut personnel. Du navire comme lieu habituel de travail ?", *Droit Social*, Paris, p. 997 ; (2005) "Le registre international français des navires (RIF). Le particularisme maritime régénéré?", *Droit Maritime Français*, p. 476 et s., Paris; (2013), "Le marin entre le navire, le port et sa résidence. Les rattachements du travail maritime international", *Mélanges en l'honneur de Christian SCAPEL*, C. BLOCH (dir.), PUAM, pp. 119-144, Aix-en-Provence.

34) CJCE 17 mars 1993, No. 72/91, No. 73/91, Sloman Neptun Schiffarhts AG, *Rec. CJCE*, I-887; *JCP E* 1993, 458; *DMF* 1993, 421, obs. P. CHAUMETTE.

another law, which is selected by the contractor and thus imposed by manning agencies.

French Law No. 2005-412, May 3, 2005 concerning the creation of a French International Registry, attempted to clarify shipboard working arrangements arising from the registration of vessels in overseas territories³⁵. Seafarers residing in France, the European Union or the European Economic Area (EEA) are subjected to traditional French legislation, based on the principle of equal treatment. This includes the Labour Code, the Transport Code, collective national agreements, National Institution of Disabled Mariners and the Social Security Scheme for Seafarers³⁶. Seafarers residing outside of France, EU and EEA benefit from the hard core of the French law of the flag as it stipulate onboard regimes; defines occupational health and safety protection, freedom of association, the right to strike and the right to collective bargaining. The law of the flag governs the length of the employment contract and the length of the work; it defines the minimum international French maritime salary and the minimum social security within a framework of treatment differentiation nonetheless. The only contract the legislator considers is fixed-term employment contracts³⁷. Otherwise, work contracts are determined by the seafarers' employment agreement since the law of autonomy could differ from the law of the flag state. The legislator can thus adapt the rights of seafarers not residing in Europe to the needs of international competitiveness in what seems to have become the essential purpose of social law in a global economy³⁸.

Onboard differentiation and legal attachment.

The International German Registry was subject to a German Federal Constitutional Court, *Bundesverfassungsgerichts*, ordered control. On January 10, 1995, The Court declared the registry was essentially in line with the Constitutional Law, March 23, 1989 regarding the international German registration of vessels, while declaring a provision was unconstitutional and reminding fundamental rights recognized in Germany were to be respected. The registry enables German or EU shipowners to

35) Law No. 2005-412, May 3, 2005, *JORF* May 4, 2005, p. 7697 and s. - C. Transports, Art. L. 5611-1 to L 5642-2.

36) The Constitutional Council April 28, 2005, No. 2005-514 DC, regarding the International French Registry, *JORF* May 4, 2005, p. 7702, *DMF* 2005, pp. 514-528, note P. BONASSIES - P. CHAUMETTE (2005), "Le registre international français des navires (RIF)", *DMF* 2005, pp. 467-500 et (2006) "Le marin entre le navire et sa résidence - Le registre international français des navires (RIF)", *RCDIP*, Dalloz, Paris, 2006, No. 2, pp. 275-299.

37) CHAUMETTE, P., "Accord collectif européen et CDD des gens de mer", CJUE, Chapter 3, July 3, 2014, aff. C-362/13, C-363/13 and C-407/13, *Fiamingo and a.*, *DMF* 2014, No. 761, pp. 706-713.

38) RIGAUX, M., BUELLENS, J. & LATINNE, A. dir. (2014), *From Labour Law to Social Competition Law?*, Intersentia, Cambridge - . SUPLOT, A. and CHAUMETTE P. (1999), "Les répercussions de l'espace marchand sur les politiques sociales des Etats", in *Ordres juridiques et espaces marchands*, Colloques Ottawa-Nantes, Wilson & Lafleur Itée, Montréal, La collection bleue, pp. 167-195.

contract foreign or non-EU seafarers, at non-German conditions; which affect social protection, employment contracts, and salaries are subject to their country of residence's legislation. The dispute was directly brought forth to the Constitutional Court by the ÖTV transport employees' trade union and the Senate of the Free and Hanseatic City of Bremen and the *Land* of Schleswig-Holstein. Allegations regarding the infringement of freedom of association, professional freedom and the principle of equality were made.

The Constitutional Court provides a very realist analysis of the freedom of association and professional freedom. The German legislator is faced with two choices in light of international competition: do nothing and allow German shipowners to register their vessels abroad and avoid being subject to German law or create a second registry for vessels engaged in international transport. The overall pros and cons of these choices do not entirely contradict constitutional principles. Qualified jobs need to be accounted for within the German legal framework. However, in regards to the freedom of association, the German trade union must be able to negotiate on behalf of its members, even for members who do not reside in Germany. In this regards, the law contradicts the Constitution and will have to be amended.

The Constitutional Court appears to have recognized the rights of foreign seafarers working on vessels operating under German flags and adherence to the German trade union, even if seafarers reside abroad as well as the trade union's right to negotiate work conditions and pay for these seafarers. The Constitutional Court reminded those present of the German judge's jurisdiction, especially in regards to foreign seafarers, when enforcing foreign law on seafarers' employment contract, while respecting German labour law. As regards to the principle of equality, the Constitutional Court deems that only identical situation can be treated equally. In this case, the situations are different because seafarers reside in different locations, the cost of life is different, and thus the purchasing power³⁹.

The French Constitutional Court validated this difference of treatment where the vessel is not part of the national territory; where the residence of a seafarer establishes the economic and social conditions based on the country where their material and moral interests lie. On one hand, the judicial nature of a vessel and its attachment to the flag of the state it sails under allows the basic principles to be adapted: onboard work can be addressed specifically and differently from shore work on the territory of the state. The principle "equal work, equal treatment" can be consistently applied to maritime labour law. On the other hand, if seafarer employment is subjected to the law of the flag state, it can in turn attach them to their moral and material interest centre of gravity—their permanent residence. Seafarers are thus torn between their permanent

39) *Bundesverfassungsgerichts*, 10 janvier 1995, G. AUCHTER, "Chronique de droit maritime allemand", *Droit Maritime Français* 1998, 53.

residence and their regular place of employment. It is surprising to see that this reasoning is applied to how seafarers are remunerated, as if seafarers worked at their permanent address. This was the reasoning of the French Constitutional Court. It seemed logical that this reasoning affects the social protection of seafarers, because in the event of extended illness, it is at their place of residence that they will need access to healthcare and it is where they will perform shore-based operations⁴⁰.

Xosé Manuel CARRIL VÁZQUEZ proved very clearly the complexity of residential attachment that firstly, pits seafarers against themselves and then, incites the exploitation of national loopholes. Seafarers residing in countries without social security schemes or in countries that only affiliate workers, who work or reside in the national territory, become interesting candidates for shipowners and manning agencies. These seafarers fall through the cracks of social protection and only represent a workforce without any durable protection. Before 1994, Norway could not ensure the right of Spanish seafarers sailing under a Norwegian flag and residing in Norway. However, as of 1994 and the creation of Europe Economic Area, Norway could no longer enforce this regulation and was obliged to grant affiliation based on residency, attachment to the flag state of the vessel, as required by Regulation 1408/71⁴¹.

In this publication, Sandrine DRAPIER of the University of Mans addresses the wide range of registered vessels in EU Member States⁴² that began in 1986 when international competition and free vessel registration were adopted: "*Social norms onboard vessels flying European Union flags: the return to coastal states?*".

The choice of the flag guides the applicable legislation applicable on board ships. The requirement for a genuine link between the ship and the Flag State is the only mean to fight against law shopping, which is used by shipowners to benefit from the less restrictive social, tax and environmental legislations offered by flags of convenience. To level the playing field, traditional maritime powers have created second registers. Competition between these European second registers now prevails, whatever the shipping lines, goods or cruises, cabotage or not. To limit the social dumping in Europe, the principle of social responsibility may be imposed on board second-register vessels, through the application of the social legislation of the Port State, leaving control to States that are the more diligent for social issues.

40) CHAUMETTE, P. (2010), "Du statut du navire. En mer, comme nulle part ailleurs?", in MOREAU, M.A., MUIR-WATT, H. & RODIERE P. (dir.), *Justice et mondialisation en droit du travail. Du rôle du juge aux conflits alternatifs*, Dalloz, Paris, coll. "Thèmes & commentaires", pp. 293-310.

41) CARRIL VÁZQUEZ X.M. (2015), *Una Cuestión de Derechos Humanos: La Protección de Seguridad Social de nuestros Trabajadores del Mar Emigrantes en Noruega*, Aranzadi, Cizur Menor, Navarra.

42) CARBALLO PIÑEIRO L. (2015), *International Maritime Labour Law*, "Capitulation: International Registries and Second Registries", pp. 20-22- DRAPIER S. (2008), "Les pavillons de complaisance concurrencés : la promotion du pavillon bis français!", *Droit Maritime Français*, No. 688, pp. 3-14.

Sophie GAMBARDELLA, PhD in law from the University of Aix Marseille presents: "*The European Union and the international rights of seafarers*".

The European Union has continuously worked with the International Labour Organization (ILO) and it has actively contributed to the development of the international rights of seafarers, within the organization, even if it is not an ILO member. Within this framework, the study conducted on the role of the European Union's in the adaptation of the Maritime Labour Convention and the Work in Fishing Convention revealed the existence of a legal limbo. The study also shed light on the European Union's external actions. The fact that the social partners received the ILO standards before they were introduced in the EU Law allowed for a smooth introduction of standards from one judicial system to another⁴³.

Our colleague Sylvain MERCOLI from the University of Angers, addresses the management of crews and the rise of manning agencies: "*Maritime labour suppliers and European Union law*".

To optimize their operating costs, many shipowners resort to manning agencies, intermediaries between them and the cosmopolitan crew of their ships, sailing, usually on the open registers advocating "absolute minimum" in social matters. This economic model based on the search for a lowering of the social cost on board ships must now reckon with the entry into force of the 2006 Maritime Labour Convention ("MLC 2006"), which requires Member States to respect new obligations as to control of companies subleasing employees. Partly incorporated in the Community system, this new international social regulation nevertheless illustrates the difficulties of the European Union to develop a common response to widespread international practice of social dumping at sea. If the principle of social responsibility of States with regard to manning agencies is enshrined in the MLC 2006, the absence of Community regulation of this activity leaves the control of maritime labour companies to the sole discretion of the more diligent States in social matters.

Olga FOTINOPOULOU BASURKO from the University of the Basque Country takes stock of European social law in regards to seafarers. It is a regional labour job market, built on the free movement of workers and equal treatment of EU citizens. Regional social law is partially linked to the harmonization of national social legislation which is partly extended to seafarers when they are not subject to specific regulations: "*European social law of seafarers: between common market and substance law*".

Community law built this unique European market based on economic freedoms and

43) ABEL A. (2014), "The Maritime Labour Convention 2006 in the European Union", in LAVELLE J., *The Maritime Labour Convention 2006 – International Labour Law Redefined*, Informa Law, Routledge, pp. 1-17.

the non-discrimination of EU citizens. It also sometimes sought to harmonize national legislations to improve the performance of the European market and of full-employment policies. The freedom of establishing undertakings transformed the conditions by which vessels were registered, the freedom to provide services applicable to maritime transportation and the free movement of seafarers. In view of the international scope of maritime activities, it is necessary to strike a balance between competitiveness and maritime safety. European law incorporates IMO and ILO conventions in regards to ships and seafarers by following a sector-based approach. European social law is sometimes applied to operators of maritime transport, like any business, by following a common approach. The European Union seems to be still searching for maritime policy that works in a global economy.

Gwenaële PROUTIÈRE-MAULION from the University of Nantes introduces international private European law. It was born from the harmonization of solutions arising from conflicts of jurisdictions and law, within the framework of European law⁴⁴. The harmonisation affects international employment contracts, mobile workers and seafarers. "*The jurisprudential construction of maritime social law based on the usual place of employment*".

The international dimension of maritime activity and the high seas status justified the connection of the crew to the law of the vessel's flag state; the law of the flag state is in principle the applicable law on board. The link between the ship and the flag state is not always "genuine". The Court of Justice of the European Union has sought to define more real connections between the seafarer and his employer within the scope of private international law. The search for the usual place of work of the sailor, yet mobile worker, strives to ensure access to justice and to labour laws that have real links with maritime employment relationship. This usual place of work of the seafarer may be identified through the port of the actual operation of the vessel. The result is a territorialisation of maritime labour relationship. It is hoped that this European judicial construction may be internationally extended.

The relation between ILO conventions and European social law is complex, especially in regards to the social protection seafarers. It becomes even more complex when it involves the management and control of manning agencies.

44) FOTINOPOULOU BASURKO O. (2008), *El contrato de trabajo de la gente de mar. Estudio del problema de la determinación de la ley rectora al contrato de embarque en el contexto de los registros abiertos*. Comares, Granada – (2013) "What law for the international maritime employment contracts? Between flexibility and reasonableness". *Il Diritto Marittimo* vol. 115, pp. 287–303 – LAVELLE J. (2014), "How to Determine Jurisdiction and Governing Law in Disputes arising out of a Seafarer's Employment Agreement", LAVELLE J., *The Maritime Labour Convention 2006 – International Labour Law Redefined*, Informa Law, Routledge, pp. 181-215 - CARBALLO PIÑEIRO L. (2015), *International Maritime Labour Law*, International Max Planck Research School for Maritime Affairs at the University of Hamburg, No. 34, Springer.

Principles of social security system coordination in the European area.

Social security systems fall within the national framework; their scope is territorial, which is important to underline when referring to seafarers who fall under the category of mobile workers. Article 51 of the Treaty authorized the Council to unanimously adopt social security measures to allow workers to move freely, especially migrant workers. The objective was to maintain acquired rights and export social security benefits. This was the objective of the 1959 Regulations No. 3 and 4. The Court of Justice rendered Regulation 1408/71 of June 14, 1971 applicable to seafarers. It addresses social security system coordination. Council Regulation No. 118/97 of December 2, 1996 updated Regulation No. 1408/71 by incorporating judicial interpretations and clarifications. Regulation No. 883/2004 of April 29, 2004 repeals and replaces Regulation No. 1408/71. It was complemented by the European Parliament and Council Regulation No. 987/2009 of September 16, 2009 which lays down the procedure for implementing Regulation No. 883/2004 on the coordination of social security systems⁴⁵. If attachment is generally the usual place of employment, there are exceptions (Art. 13 and 14 ter). The coordination of national social security systems is based on four principles: equal treatment, a single applicable legislation, the maintenance of rights in the processing of being acquired, the maintenance of acquired rights, known as the exportation of benefits.

European seafarer attachment to the law of the flag state.

Article 13-2-c of Regulation 1408/71 of June 14, 1971 refers to the flag criterion of a vessel whatever may be the applicable law to seafarers' employment contract. Seafarers, in theory, fall under the law of the flag state and the vessel is treated as a place of work and characterized with a nationality. It is irrelevant that the vessel performs port activities, sails in territorial waters, high seas, and offshore to conduct long trade navigation. The law of the flag of a vessel is associated to the usual place of work of seafarers. It attaches seafarers to a state sovereignty and a social legislation, without it being necessary to implement the principle of territoriality, as it could be a potential source of confusion. The Court of Justice had the opportunity to confirm the later on September 27, 1989 by applying Regulation No. 1612/68 of October 15, 1968 regarding the free movement of workers, to Portuguese seafarers who was working aboard a Dutch seagoing vessel⁴⁶. Eligible seafarers, who reside on a territory other than a Member State, are treated as if they were residents in the country of the affiliated scheme. The periods of affiliation to a national system must be taken into consideration

45) Regulation No. 883/2004 of April 29, 2004, *JOUE* L 166, April 30, 2004, 1, complemented by Regulation No. 987/2009, the European Parliament and Council of September 16, 2009 lays down the procedure for implementing Regulation No. 883/2004 regarding the coordination of social security systems, *JOUE* L 284, 30 oct. 2009, 1.

46) CJCE September 27, 1989, No. 8/88, Lopes da Veiga, *Rec. CJCE* 2989.

regardless of the Member State affected by this affiliation.

Article 13-2-c of Council Regulation No. 1408/71 of June 14, 1971, amended by Council Regulation No. 307/1999 of February 8, 1999, must be interpreted as meaning it precludes a legislative measure of a Member State excluding social security affiliation to individuals who 1) have the nationality of said Member State but who do not reside there, 2) are employed on a vessel sailing under the Member State's flag and operating outside the European Union. The Dutch social security system is based on the permanent residence in Holland and it reproached Dutch seafarers who had their permanent residency set up in Spain. However, seafarers are attached to the flag state of the vessel, even if dredging operations are conducted in territories belonging to China or the United Arab Emirates⁴⁷. The attachment of seafarers to the social security system of the flag state of the vessel is addressed in Article 11-4 of Regulation 883/2004 of April 29, 2004. The attachment to the law of the flag state significantly reduces the scope of European mechanisms because Member State international or economic registers that send non-EU national seafarers to their home country or their country of permanent residency are fleets that are managed by European shipowners who sail under flags of convenience. These vessels are not subject to European law coordination.

Law No. 2005-412 of May 3, 2005 adopted the creation of a French international registry⁴⁸ and made the Community regulation applicable to all seafarers residing in one of the EU Member States or within the European Economic Area (Art. 25). It defines social protection floor owed to other seafarers (Art. 26). The Constitutional Council validated this distinction of treatment when the seafarer's permanent address determines the economic and social conditions where their moral and material centre is located⁴⁹.

How should the attachment of a vessel to the flag state be coordinated? They are currently stipulated by the European regulations regarding the coordination of social security systems for seafarers and the attachment of seafarers to the country where their permanent residence is located, provided for in the two ILO Conventions. How can maritime or international specificities be articulated? Or even the principles of community or regional social law? The 1987 ILO Convention 165, regarding the social security of seafarers, provided two options: the attachment of seafarers to the law of the flag under which a vessel sailed or the attachment of seafarers to their country of permanent residency (Art. 17). This convention went into force July 2, 1992 but only

47) CJUE June 7, 2012, No. C-106/11, Bakker, *DMF* 2012, No. 739, p. 700-710, obs. P. CHAUMETTE, *RJS* 2012, p. 584-585 n. J.Ph. LHERNOULD, *Europe*, 2012, No. 8-9, Comm. 319, p. 29-30 n. L. DRIGUEZ.

48) L. No. 2005-412, May 3, 2005, creation of the French International Registry, *JORF* May 4, 2005, p. 7697.

49) Conseil Const. April 28, 2005, No. 2005-514 DC, *JORF* May 4, 7702; *DMF* 2005, p. 514, obs. P. BONASSIES ; *RGDIP* 2005, p. 739, note JACOB ; *RFDC* 2005, pp. 751-754, note CAPETANI-BESSON.

received three ratifications. It is clear that its complexity at solving conflicts of law regarding social protection that brought on developments to the 2006 convention, which are not necessarily simpler.

The EU Court of Justice has just recently opened a new avenue for expatriated European seafarers who sail under third-party flags, on a "controlled" fleet⁵⁰: If there is sufficiently close attachment to the EU territory, Regulations No.1408/71 and 883/2004 are applicable by taking into account the company's headquarters and the seafarer's permanent address. *"Employed workers who are EU nationals, or who reside or pay taxes in a Member State, and work on pipe-laying ships that sail under a flag of a third-party nation and sail all around the world, especially along the continental shelf adjacent to specific Member States, and who were previously employed by a company registered in their Member State of residence, and henceforth employed by a company registered in Switzerland, while continuing to reside in the same Member State and sailing on the same vessel, comes within the scope Regulation No. 1408/71" (point 45).*

The report issued by the Committee of Experts (CEACR) to Denmark, the Philippines and Switzerland requests that their governments justify in 2016 how seafarers who reside in Denmark, the Philippines or Switzerland are covered by social security systems. The committee also requested that these countries report on concluded bilateral agreements⁵¹.

State competency development in maritime areas that are further removed from the coast was taken into account by the European Court of Human Rights⁵². The State exercises its jurisdiction on vessels sailing under their flag even in regards to open sea interventions such as the seizure of a Panamanian vessel transporting cocaine on high seas by a Spanish military vessel⁵³. Likewise, the European Convention is applicable in the territorial waters of Member States⁵⁴. Are all these measures sufficient

50) CJUE, Chap. 5, March 19, 2015, aff. C-266/13, Kik, "De l'affiliation sociale des gens de mer en droit européen : extension vers les marins ressortissants européens, expatriés sous pavillon tiers ?", *Droit Maritime Français* 2015, No. 769, pp. 401-416 – FOTINOPOULOU BASURKO O., *Revista española de seguridad social*, Madrid, 2015, Pending publicación.

51) CHAUMETTE P. (2015), "Convention du travail maritime OIT de 2006 : Déclaration de conformité et rapports nationaux", *Neptunus, e.revue*, Centre de Droit Maritime et Océanique, Université de Nantes, vol. 21, 2015/2, www.cdmo.univ-nantes.fr

52) TAVERNIER, P. (2003), "La Cour européenne des Droits de l'Homme et la mer", *La Mer et son droit*, Mélanges offerts à LUCCHINI, L. et QUÉNEUDEC, J.P., Pédone, Paris, pp. 575-589 - CHAUMETTE, P., (2008) "L'accès délicat des marins abandonnés à la Cour Européenne des Droits de l'Homme : l'Olga J", *DMF*, 2008, No. 697, pp. 883-891.

53) Commission EDH, 16 avril 1998, Angelos Rigopoulos c/ Espagne, req. No. 37388/97.

54) MONTAS A., "La lutte contre la criminalité en mer à l'épreuve de la Cour européenne des Droits de l'Homme", in E.D. PAPASTRAVRIDIS & K.N. TRAPP, *La criminalité en mer – Crimes at Sea*, Hague Academy of International Law, 2014, pp. 457-481.

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to build a coherent, international job market, both in terms of decent employee protection and fair economic competition?

"From a wider international law perspective, the (Maritime Labour) Convention is of interest because it is one of the growing cadre of conventions that are responding to the search for 'effectiveness of international law' and reaches beyond the 'face' the State sovereignty to directly affect the behaviour of private actors. Even more unusually, The MLC, 2006 contains provisions that seek to apply its requirements to non-ratifying States? IN that sense it can be described as a convention that is 'universal' in its reach"⁵⁵. "Does this Convention and the way in which it was developed present model of workable process whereby international conventional law can be designed to be (more) effective and, in particular, in such a way as to affect the behaviour of non-State actors directly, while at the same time operating primarily at the level of State responsibility?"⁵⁶.

55) McCONNELL M.L., DEVLIN D. & DOUMBIA-HENRY Cl., *The Maritime Labour Convention, 2006 – A Legal Primer to an Emerging International Regime*, Martinus Nijhoff Publ., 2011, pp. 32-33.


56) McCONNELL M.L., DEVLIN D. & DOUMBIA-HENRY Cl., p. 569.




CHAPTER 1

Shortage and labour productivity on the global seafaring market

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Résumé : *Impliqués dans un secteur à dimension internationale et recrutés sur des navires battant pavillon étranger (ou contrôlés par des intérêts étrangers), les marins s'inscrivent dans un marché du travail très largement ouvert sur le monde. Ce chapitre revient sur les principales tendances ayant marqué le marché du travail des gens de mer au cours des dernières décennies (évolutions technologiques, libre immatriculation des navires, etc.) et pouvant expliquer la structure actuelle du marché. Il propose également quelques justifications aux disparités de salaires observées sur ce marché.*



Les études statistiques (BIMCO/ISF, Drewry, etc.) soulignent à la fois la part croissante des travailleurs en provenance d'Asie et d'Europe de l'Est et l'existence d'une pénurie de travailleurs, notamment aux postes d'officiers. Cependant, le salaire moyen des gens de mer ne reflète que partiellement cette tension sur le marché du travail tant les disparités salariales sont importantes. Le niveau de qualification des équipages semble ainsi plus pertinent pour expliquer ces disparités salariales que le nombre de travailleurs présents sur le marché au regard de la demande de marins. Le salaire ne reflète pas pour autant parfaitement la productivité du travail car il dépend de nombreux autres facteurs tels que le niveau de vie dans le pays d'origine des marins, la taille des navires ou encore les stratégies de réduction des coûts proposées par les compagnies de gestion de la flotte et des équipages. Ainsi, bien qu'international, le marché du travail des gens de mer apparaît très segmenté et en proie à de nombreuses pratiques de discrimination. En ce sens, il ne saurait être qualifié de global et de totalement intégré.



Introduction

The key role of seafarers in shipping activities is well known. Increasing flows of cargo have to be delivered from origin to destination rapidly and safely, thus requiring highly skilled workers. The maritime industry is international and so is the seafaring market. Seafarers represent a unique occupational group. They can be employed on vessels under various flags, owned and operated by people from different countries. In that sense, the seafarer labour market is much more open than any other economic sector in the world.

This chapter examines the seafaring market, its composition and the main trends that have influenced the market during the last century (section 1). We pay particular attention to the well-known seafaring shortage (section 2), which is far from being reflected in the evolution of international wages, showing that this shortage is perhaps over-estimated and may concern only part of the market and not the whole of it. The relationship between labour costs and productivity is discussed to illustrate the role of technical change and economies of scale in the apparent productivity of labour (section 3).

1. Trends and structure of the Global Labour Market for Seafarers

Many authors have studied labour market imbalances and the evolution of maritime labour system. Alderton et al. (2002)¹ underline the impact of the "Flags of Convenience" (FoC) on the seafarer's working life. They show that working conditions for seafarers from developing countries working aboard FoC vessels have worsened. Cottam and Roe (2004)² analyzed the restructuring of maritime transport that has deeply transformed the fleets of the Central and Eastern European countries at the end of the eighties. Wu (2004, 2005, 2006)³ and Rodríguez-Martos (2006)⁴ investigate the issue of crews' nationalities. Wu (2005) focuses on the integration of Chinese

1) Alderton T, Winchester N. (2002), Globalization and de-regulation in the maritime industry, *Maritime Policy & Management*, 26(1), p. 35–43.

2) Cottam H, Roe M. (2004), The impact of transitional changes on maritime transport in Central and Eastern Europe, *Maritime Policy and Management*, 31(4), p. 287–308.

3) Wu B. (2004), Participation in the global labour market: experience and responses of Chinese seafarers, *Maritime Policy and Management*, 31(1), p. 69–82.

Wu B, Lai K-H, Cheng TC-E. (2006), Emergence of 'new professionalism' among Chinese seafarers: empirical evidence and policy implications, *Maritime, Policy and Management*, 33(1), p. 35–48.

Wu B, Winchester N. (2005), Crew study of seafarers: a methodological approach to the global labour market for seafarers, *Marine Policy*, 29(4), p.323–30.

4) Rodríguez-Martos R. (2006), The composition of the crews of the vessels entering Barcelona harbour. Barcelona: Universidad Politècnica de Catalunya.

seafarers in the international labour market. Two types of seafarer employment are reported: seafarers within state-owned enterprises (SOE) and the so-called 'non-state-owned' (NSO) seafarers, who work both on the domestic and global labour market. Wu (2005) stresses the rising flow of workers shifting from SOE to NSO employment and thus, the increasing recruitment of Chinese seafarers on foreign fleets.

The seafaring market has undergone many changes resulting from technological evolution and economic globalization during the 20th century. The transformation of maritime business into internationalized activity began after the end of Second World War with the birth of open registry.⁵ In parallel, national and regional legal systems (the Port State Control; PSC) were established in order to provide a general framework for the development of the maritime activity. The main objective of international regulations is to seek solutions to the detection of substandard vessels in order to prevent any risk of pollution and to ensure safety on board. Labour issues, though very sensitive to economic globalization, are not the primary target of the regulation (Leggate McLaughlin, 2012).⁶

The twentieth century was a turbulent time for the shipping industry. Largely labour-intensive and nation-focused at the beginning of the century, this sector became increasingly capitalistic to the detriment of human factors.⁷ In addition, the steady recession in the world economy in the early eighties has generated a decline in the world seaborne trade. In 1980, the volume of total world seaborne trade fell by 2.8 per cent (UNCTAD, 1981)⁸, the first decrease recorded since 1975. The steady fall in oil consumption and imports also largely contributed to the decline in world seaborne trade. In 1981, the volume of oil imports by the OECD countries fell by 10 per cent. This was due to the combined effects of recession, energy saving policies and the operation of several oil pipelines.

Following the crisis of the 1980s, shipowners either abandoned the maritime business or opted for flagging their vessels in Open Registries. They are frequently used as a tool by shipowners to outsource labour and circumvent safety regulations. By doing so, companies attempt to keep the cost of shipping goods as low as possible. In 1998, the global fleet became majority-flagged in open registries for the first time, with 51.3% of vessels around the globe flying the flag of an open registry. According

5) The "open register system" refers to the flag registry of states that accept the registration of ships owned by nationals from other states with no restrictions.

6) Leggate McLaughlin H. (2012), *Seafarers and seafaring*, in *The Blackwell Companion to Maritime Economics*, First Edition. Edited by Wayne K. Talley. p. 321–332.

7) In the 1960s, container ships have replaced conventional liners and general-cargo ships on many routes.

8) UNCTAD (1981), *Review of maritime transport 2014*, United Nation Publication.

I. Shortage and labor productivity on the global seafaring market

to UNCTAD (2014)⁹, nearly 73% of the world fleet is foreign-flagged. When shipowners decide to "flag out", they can obtain lower labour costs and reduce the living, working and safety standards on board. This race for the lowest operational cost is now central to shipping economics and has led to the development of agencies specialized in the management of vessels and crews (Leggate McLaughlin, 2012). These changes in transportation management have had important implications for the seafaring market.

Another decisive event has been the privatization of the East European and Russian fleets at the end of the 1980s. Fleets of Eastern countries responded differently to the collapse of the former USSR. Romanian and Georgian fleets, made up of very old and inefficient vessels, went bankrupt. Others (e.g. fleets from former Yugoslavia, Poland or former East Germany) have experienced serious difficulties. Some Eastern fleets (Ukrainian, Russian) had to find a way to both refinance and restructure themselves. As a result, many seamen originating from Eastern countries found their jobs on vessels flagged or operated by other countries.

In order to contain the downward trend in the supply of officers from developed countries, many European governments have created tonnage tax legislation.¹⁰ However, it seems that the tax has been successful in attracting tonnage but much less so in attracting large numbers of vessels (Leggate McLaughlin, 2012). European governments are therefore striving to draw the link tighter between the flag and the tonnage tax. All these technological, political and economic factors explain much of the current characteristics of the seafaring market.

Many international organizations and consultants provide data about global supply and demand of merchant seafarers: Drewry shipping consultants (Drewry), European Communities Shipowners Association (ECSA), the Baltic and International Maritime Council (BIMCO), the International Labour Organization (ILO), etc.¹¹ The BIMCO/ISF study¹² is probably the most comprehensive and the most cited one. It estimated the worldwide supply of seafarers in 2010 to be 1,371,000 (624,000 officers and 747,000 ratings), whereas the worldwide demand was 1,384,000 (637,000 officers and 747,000 ratings). The shortage of officers is further discussed in the next section. However, it is worth noting that the supply of labour force is highly concentrated in a few countries: 81% of the crews originate mainly from three regions of the world:

9) UNCTAD (2014), "Review of maritime transport 2014", United Nation Publication.

10) The tonnage tax provides an attractive tax regime aimed at encouraging shipping companies to base their shipping operations in their own country.

11) The methodology differs between studies, they are therefore not directly comparable.

12) Baltic and International Maritime Council & International Shipping Federation (2010), BIMCO/ISF manpower 2010 update: the worldwide demand for and supply of seafarers, main report (London: BIMCO/ISF).

East Europe, Far East Asia and Southeast Asia (Silos et al., 2012).¹⁵ One third of the total workforce is from Far East and Southeast Asia (29.5 % of the officers and 36,7% of the ratings). Two nationalities are particularly represented in the seafaring labour market: Filipino and Chinese. Filipinos, representing the largest nationality group in the industry, have a long tradition of working abroad or at sea to support their families because they earn more than by working ashore in their country.

Complementing this supply mainly in the officer market, some 18.5 % of the total workforce comes from European countries¹³ (23% of the officers and 15% of the ratings). Within the EU seafarers, 57.5% come from Western Europe and 42.5% from Eastern Europe¹⁴ (European Commission, 2011). Even though Western European countries (like other OECD countries) remain an important source of seafarers (and officers), seamen from developed countries are less and less numerous. Because of remoteness and hard working conditions, they are reluctant to join the shipping industry. In the coming years, an increasing number of officers from developing countries is expected to offset this decline. As a consequence, the multiculturalism of crews increases significantly. In 2002, less than 35% of the vessels were crewed by seamen sharing the same nationality (Silos *et al.*, 2012).

Despite the growing globalization of the seafaring labour market, the latter remains segmented and faces discriminatory practices. Many barriers hinder the free mobility of labour, i.e. the employment of seafarers of any nationality on any flag register. Some particular flags merely deny employment to foreign seafarers. Cultural differences also limit indirectly the free movement of labour and separate markets. For example, linguistic ability in English is often cited as a reason for restricting the employment of foreign seafarers (Wu *et al.* 2006; Leggate McLaughlin, 2012). Workers in the seafaring market are therefore distinguished by nationality and jurisdiction, opening the door to discriminatory practices. Such practices occur even though qualifications, certificates and licenses comply with international standards. Shipowner's preferences for certain categories of seamen are not always based on training and skills (Silos *et al.*, 2012). Ziarati *et al.* (2013)¹⁶ have conducted a survey near of some representatives of the maritime community (such as schools, charter companies, skippers) to find out their views about the lack of mutual recognition of

13) Plus Norway.

14) Bulgaria, Romania and Norway cumulate the highest number of seamen with respectively 33,269, 24,343 and 23,382 officers and ratings. Romania and Poland have the highest number of officers in Europe and Bulgaria provides the highest number of ratings (European Commission, 2011).

European Commission (2011), Study on EU seafarers employment, Final report.

15) Silos J.M., Piniella F., Monedero J., Walliser J. (2012), Trends in the global market for crews: a case study, *Marine Policy*, 36, p. 845-858.

16) Ziarati M., Ziarati R., Acar U. (2013), Removing barriers to mobility of seafarers, IMLA21 Conference, St John's Newfoundland and Labrador, Canada, October 9th-12th 2013, 7 p.

seamen's qualifications between countries. This survey reveals that the lack of recognition mainly results from the protectionism of national authorities and misinformation. According to Tsamourgelis (2009),¹⁷ seamen from developed countries are mainly employed in senior positions on board because they are considered more efficient and loyal. For less qualified positions on board, the cost of employment is the prevailing driver. As a result, both wages and the performance differential between national and non-national seafarers determine the employment of nationals.

2. Shortage, what shortage?

The global seafaring labour market is usually characterized by a supply coming from the seafarers and a demand expressed by shipowners and ship managers. The labour supply is far from being homogenous, with different education levels, skills, specializations and languages, raising complex issues to adjust the manpower to the fluctuating demand in real time. Some authors advocate for a better international mobility of seafarers by homogenizing the training syllabi across flags and countries (Ziarati *et al.*, 2013). The labour demand itself is a derived demand resulting from the need for shipping services, which is further induced by the international trade of products and services, dependent in turn on worldwide economic growth.¹⁸ One can therefore easily understand the booms and busts or lagged effects on the labour market due to the cyclical pattern of the world economy. Seaborne traffic can obviously over-respond to an increasing worldwide output because of the international division of labour and supply chains: e.g. for any additional personal computer designed in the USA or Taiwan and assembled in Malaysia, a network of shipping services for intermediate inputs will trickle down to many other places of the world to generate additional demand for transport (memory card in Germany, hard drive in Singapore, microprocessor in Costa Rica, power adaptor in Thailand, etc.), and conversely the same demand of seafarers will proportionately disappear for any percent decline of trade. Consequently, the seafarer demand forecast takes usually the following form (figure 1):

17) Tsamourgelis I. (2009), Selective replacement of national by non - national seafarers in OECD countries and the employment function in the maritime sector, *Maritime Policy and Management*, 36 (5), p. 457 - 68.

18) Leggate McLaughlin H. (2012), Seafarers and seafaring, in W.K. Talley, *The Blackwell Companion to Maritime Economics*, Blackwell Publishing Ltd, Chapter 16: 321-332.

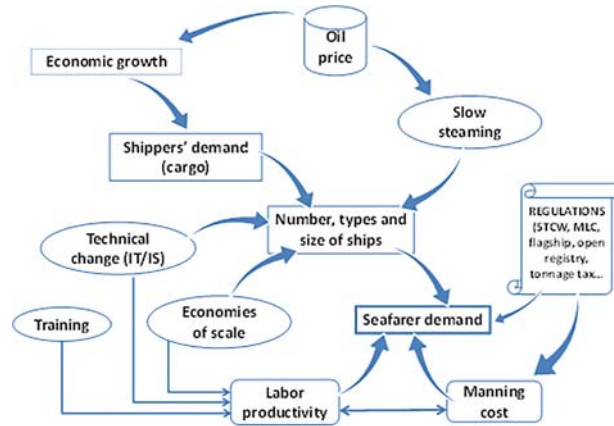


Figure 1. The drivers of demand on the seafaring global market

Source: Prepared by the labour authors from various references cited in the text

The BIMCO/ISF forecasted a demand of 1,523,440 officers and ratings in 2015 against a supply of just 1,454,199, hence a shortage of 69,241 (of which nearly half are officers and half ratings) due to excess demand, falling to 37,917 in 2020 (of which 7,917 are officers). The seafarer shortage is usually explained by the relatively early age of retirement and the difficulty in recruiting highly experienced and qualified seafarers. The BIMCO/ISF estimations are based on assumptions of annual growth rate both for labour supply (+1.3% between 2011 and 2020) and demand (+1.8%), the latter depending on the size, number, ship type and age composition of the world fleet. The estimations are nonetheless challenged by other authors considering explicitly the market conditions underpinning the demand for seafarers. The Drewry Shipping Consultants (2009)¹⁹ estimated the shortfall of officers to be 33,000 in 2009, rising to 42,700 in 2013. The Japanese Maritime Center²⁰ also revisited the forecast made by BIMCO/ISF to reduce the shortage to less than 4,612 in 2015 and 13,867 in 2020 for both officers and ratings. In most cases, authors consider that the BIMCO/ISF study tends to under-estimate supply and over-estimate demand for seafarers.

An econometric estimation of the labour demand function (i.e. seafarer demand = number of ships x average manning level) is proposed by Li and Wonham (1999),²¹

19) Drewry Shipping Consultants (2009), *Manning 2009*, London: Drewry Publishing.

20) Japan Maritime Centre (2013), *Seafarers demand forecast considering economic indicators*, http://www.jpmac.or.jp/img/en/outline/Summary_Eng.pdf

21) Li K.X. and Wonham J. (1999), *A method for estimating world maritime employment*, *Transportation Research Part E* 35: 183-189.

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where the Average Manning Level (AML) is estimated by: $AML = 675.81 + 0.336 * Year + 0.00095 * Size$, where AML depends both on the year of estimation and the average size of the fleet, all coefficients being significant at the 1% level. The year variable is included to account for technological change which allows fewer crew members to operate a ship over time. The average manning level for a general cargo ship was 60% smaller in 2002 than in 1970.²² Another example is given by the average fleet size of the Panamanian fleet (13,453 GT), the average crew size in 1996 being thus estimated at 17. This figure may well decrease to 14 or 12 within ten or fifteen years. The demand forecast is then extrapolated from the expected growth of the worldwide fleet which can follow a single annual rate for each flag state (e.g. 1.5%), like in the BIMCO/ISF study, or an actual rate according to the fleet segments and flags. The most recent conclusions of Li and Wonham confirm the over-estimation of the officer shortfall²³. Beyond the incomplete dataset and the difficulty to obtain accurate data from China, one of the reasons lies in the variety of definitions used for the concept of seafarers: (1) Seafarers at work, i.e. actually working onboard at a given time; (2) Number of posts, i.e. minimum personnel to operate a ship safely according to international standards; (3) Employed seafarers, i.e. having an employment contract with shipping companies or operators, including seamen at shore because of illness or holiday; (4) Active seafarers, i.e. qualified seamen currently employed or seeking work onboard; (5) Qualified seafarers who have an appropriate certificate of competency but who are not necessarily looking for a job onboard ships. The BIMCO/ISF survey refers to the last definition although the number of active seafarers would be certainly more appropriate because of the significant proportion (up to 10% in some European countries) of qualified seamen who are turning to alternative jobs ashore and no longer want to return to sea.

Whatever the shortage amount, it should be reflected by higher wage levels on the global market for seafarers. The International Transport Workers Federation (ITF)²⁴ classifies the monthly salaries of seamen in three groups: (1) Low salary (from \$300 to \$499); (2) Medium (from \$500 to \$2,999); (3) High (\$3000 and above). According to the International Labour Organization (ILO),²⁵ in 2006, 18% of seamen were found in the first group, 75% in the second one and 7% only in the third one. The minimum monthly salary in maritime work reported by the ILO has increased fivefold between 1970 and 2006, thanks to the increasing standards set both by ILO and ITF (Silos *et al.*, 2012). However, disparities are still very significant (in 1995, the salary of a

22) Silos J.M., Piniella F., Monedero J., Walliser J. (2012), Trends in the global market for crews: a case study, *Marine Policy* 36: 845-858.

23) Li K.X. and J. Wonham (2014), Who mans the world fleet? A follow-up to the BIMCO/ISF manpower survey, *Maritime Policy & Management* 26(3): 295-303.

24) www.itfglobal.org/en/transport-sectors/seafarers/

25) ILO (2006), *Seafarers wages and hours of works and the manning of ships recommendation*. Geneva: Joint Maritime Commission, International Labour Organization (Pub: SJMC/2006/1); 2006

Japanese seaman was 41 times higher than that of a Bangladeshi seaman, against a factor of 19 between the highest and lowest three years earlier), and the average monthly salary fell by a quarter in 2009 with respect to 1992 (*Ibid.*). Consequently, it becomes hard to consider a general shortfall that would concern uniformly all flags and types of fleet.

The recurrent shortage observed in the seamen labour market can also stem from transaction costs, i.e. the costs of matching the demand and supply of seafarers in real time (search costs, contract negotiation, uncertainty about regulation changes, available skills on the market, training periods, illness...). Ship management companies employ thousands of seafarers from different nationalities, skills, ranks, with varying terms and conditions of employment, making adjustments between posts and seamen always more complex.²⁶ Administrative productivity matters as much as seafarer productivity onboard and new IT tools are designed to manage the workforce more efficiently, contributing to increase productivity both ashore and on board (Menelaou A., 2012).

3. Labour productivity of seafarers and economies of scale

In a theoretical economy where factor mobility is perfect, seamen are expected to be rewarded with regard to their marginal productivity, i.e. the incremental amount of service output obtained with an additional unit of labour. In the shipping industry, due to the overall use of international manning, the unit labour cost also depends on the standards of living in the country where the seafarer lives, leading seamen to "accept pay and conditions that may be worse than current international standards but much better than what they could obtain in their places of origin" (Silos *et al.*, 2012). In that respect, we cannot expect wage differentials between seafarers on an international level to correspond to productivity differences. Several other factors affect the relationship between labour costs and productivity.

The apparent productivity of labour is indirectly improved by the tremendous economies of scale and technical change cumulated by the shipping industry over the past decades (Fig. 1). It is well known that capital costs and bunker costs are important sources of economies of scale in the shipping industry,²⁷ but the case of manning costs is more rarely put forward, in spite of its important weight in the

26) Menelaou A. (2012), Enhancement of productivity through an integrated crew management system, skills and work, Higher Education, *Skills and Work-Based Learning* 2(2): 201 – 215.

27) Cullinane K. and Khanna M. (1999) Economies of scale in large containerhips: optimal size and geographical implications, *Journal of Transport Geography* 8: 181-195. See also on this issue Stopford M. (2009), *Maritime Economics*, Routledge, 3rd edition, pp. 545-546.

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operating costs. According to Drewry (2013),²⁸ manning costs represent 39% of total operating costs for a 2-3,000 TEU containership, but only 29% of a 10-12,000 TEU ship; the same costs represent 43.6% of a 30-35,000 dwt handymax oil tanker, 37.3% of a 170-180,000 dwt Suezmax, and only 34.6% of a 300-320,000 dwt ULCC. In other words, by increasing the capacity by 77% from a Suezmax to a ULCC, the manning cost would only increase by 8.5% (from 3,760 to 4,080 USD per day) or when the capacity of a containership increases by 340%, the labour costs rise by just 40%. The ratio between the two percent changes gives a proxy of the cost-elasticity to output capacity, which is an inverse measurement of returns to scale, i.e. the ratio of average cost over marginal cost. Whenever this ratio is greater than 1, the industry faces increasing returns to scale. In the present case, the values are estimated around 8.5 or 9, well above the unitary value, demonstrating the strong presence of economies of scale.

Interestingly, the growth rates of manning costs between 2008 and 2013 have been higher for the largest categories of ships. On average, the increase has been around +1.73% annually, but when it comes to the LNG carriers of more than 150,000 cbm, the average growth rate over the period has been around 3%, even reaching +6 to 8% in 2012 and 2013 (against 1% for the other types of gas carriers). And the same goes for the other types of ships: the larger the ship, the higher the growth of manning costs. The demand for highly qualified seafarers, with better salaries, may well be directed to these large categories of ships. Because the size of crew does not augment proportionately to the carrier capacity and due to the greater responsibility of the cargo operated by the crew, the most qualified seafarers are attracted at greater expense by the shipowners, hence a greater shortfall for experienced officers in this specific market segment. But the unit manning cost per dwt still remains much lower for the largest size of ships. When manning costs fetch around 0.10 USD per day and per unit of capacity for a handymax oil tanker, it costs 0.013 for a ULCC tanker (i.e. 8 times cheaper in the latter case). The unit manning cost per day for a 10-12,000 TEU containership is also three times smaller than for a 2-3,000 TEU ship.

But the shipping labour cost can also be influenced by recent coping strategies of shipowners responding to external shocks such as an increase in oil prices. We saw that an important factor in the seafarer demand forecast was the expected number of ships. Several authors have shown that the number of ships used in a rotation cycle had increased significantly with the development of slow steaming strategies, raising this number for example from 8 to 10 per round trip on the Far East Asia-Europe routes between 2008 and 2011²⁹. The oil price falling in 2015 means, slow

28) Drewry Maritime Research (2012), Ship operating costs – annual review and forecast, Annual Report 2013/14, 164 p.

29) Notteboom T., Cariou P. (2013), Slow steaming in container liner shipping: is there any impact on fuel surcharge practices?, *The International Journal of Logistics Management* 24(1): 73-86; see also

steaming is perhaps no longer at the top of the shipowners' agenda, but a new oil shock, by increasing the number of ships per trip, would tend to sustain the demand for seafarers, hence putting pressure on the global market of seafarers.

Conclusion

The global seafaring market has been intensively transformed throughout the twentieth century, and still raises challenges for the new century. Technological change, legal issues and economic booms and busts have substantially affected the development of the maritime industry, hence the derived demand for seafarers. Shipping companies have always competed fiercely to survive and have looked for solutions to cut their production costs. Workers represent an adjusting variable (among others) to cope with such a changing environment.

The seafaring labour market is one of the most globalized among all industries. Seafarers are educated and trained in their home countries, where they also live in most cases, and they join international networks of agencies and management companies to work on board. Many cultural and legal barriers related to flagship conditions and the lack of recognition of training programmes still create important barriers to the mobility of seafarers. The crew structure by nationality of the controlled capital is different from the structure by flag. For example, Wu and Winchester (2005) show that 60% of the Chinese seafarers work onboard nationally controlled vessels, compared with only 20% on nationally flagged vessels. The same result goes for seafarers working on ships controlled by developed countries, where the officers are nationals while ratings originate from foreign countries. The supply labour force is therefore heterogeneous and the market is largely segmented. Consequently, the labour supply cannot easily match demand on a worldwide level. The global labour market for seafarers relies less on the quantitative number of available seamen than on the quality of the workforce. Labour productivity matters as much as, if not more than, the average salary.

The seafarers' wages reflect partially their marginal productivity. Many factors can explain the gap between wages and productivity levels. Productivity first depends on the size of the vessels operating at sea. Labour cost, like capital and energy, represents an important source of scale economies, explaining why unit labour costs (per dwt or teu) are far lower for larger ships than for smaller ones, even though the standards of qualification required on larger vessels and manning costs are higher. In addition, even if the slow steaming strategy helps to sustain the demand for seafarers, ship management companies keep the market under pressure by maintaining labour costs as low as possible, playing on the differences between

figures of Drewry Container Forecaster, <http://www.drewry.co.uk/publications/>.



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national living standards. Each worker is evaluated by his job performance and a common ground for personal comparison across nationalities already exists. But in this market, seafarers performing equally for the same job may earn a different wage according to their nationality.

For all these reasons, it can be concluded that the seafarer labour market may be open and international but cannot be fully seen as a "global" market yet. More investigation is certainly needed to look at this incomplete achievement of a global market for seafarers and the international policies to promote it.





CHAPTER 2



Psychosocial risks of the seafarers

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Résumé : *Il n'est pas aisé de définir la notion de risques psycho-sociaux au travail, d'envisager des critères, des indicateurs, la reconnaissance juridique de cette réalité sociale. À bord des navires, le principe de prévention, l'évaluation des risques, la formation et l'information, la surveillance de la santé, s'imposent, y compris concernant les risques psychosociaux. Leur incidence sur la sécurité maritime et la sécurité du travail ne peut être négligée, notamment la fatigue en matière de veille à la passerelle. Beaucoup d'analyses des abordages, incidents et naufrages mettent l'accent sur le « facteur humain », mettant en lumière des formations insuffisantes, des effectifs réduits, des gens de mer fatigués, s'ils ne sont pas épuisés. L'automatisation des passerelles et de la propulsion nécessite une vigilance renforcée ; l'intensification du travail se développe à bord, comme à terre. Le capitaine et les officiers sont soumis à des contraintes multiples et à des responsabilités pesantes. Les conditions de vie à bord et les conditions d'emploi nécessitent la prise en compte des gens de mer en escale et à bord. Ce concept ancien est d'une grande modernité. De nombreux facteurs interviennent et peuvent donner lieu à des mesures parcellaires ; la formation des officiers au management, la limitation de la multiculturalité des équipages, la limitation de la durée des embarquements trop longs, le respect des repos à bord et des congés sont des éléments fondamentaux, pouvant relever d'une gestion sociale de qualité de la part des principaux armements.*



1. DEFINITION OF PSYCHOSOCIAL RISK

Psychosocial risks are an increasingly visible reality at work and arise directly from the conditions in which it is carried out, whether of environmental origin, that is, relating to physical, chemical or biological agents, or related to the undertaking of tasks, organisation, methods, procedures, work contents and interpersonal relationships. These risks may negatively affect the worker's physical and mental health and the undertaking of his or her work with the risks this implies, not only for the worker but also for those directly or indirectly affected by the activity carried out.

Following this same line and as well as the above conditions, the Joint ILO-WHO Committee (1984) referred to the workers' properties, their culture, needs and personal situations outside work¹. These elements are very important considerations for seafarers because of the special features of their work and the conditions in which it is carried out.

This chapter covers the on-board psychosocial risks from two different, but at the same time complementary, perspectives. Firstly, we study how these questions are regulated in Spanish and international legislation from a theoretical and legal point of view. Secondly we offer a more practical or field view of the matter by analysing how the various psychosocial risk parameters affect crews' on-board life, health and safety.

2. ON-BOARD PSYCHOSOCIAL RISK IN SPANISH AND INTERNATIONAL LEGISLATION

2.1. PREVENTIVE PRINCIPLE

In assessing occupational risks, it is necessary to "prepare and apply, as relevant, practical directives for researching the human factor in maritime accidents and incidents"² to adopt the necessary preventive measures so that potential risks do not appear and result in an occupational accident.

The various occupational tasks on a ship involve specific risks arising from life on board. On-board work involves shift work interrupted by the arrival at or departure

1) Joint ILO-WHO Committee on occupational medicine, Geneva, 1984 and Technical prevention standard number 926, on psychosocial factors: Assessment method. INSHT (National Occupational Health and Safety Institute).

2) International Maritime Organisation (1999): Resolution A.884 (21) Amendments to the Code for the investigation of maritime casualties and incidents (Resolution A.849 (20)).

from port or by the nature of the activities undertaken there as well as long periods on board, which over time can have harmful consequences for the health of the workers in this sector/field.

A constant in studies on prevention matters in general and on the maritime sector/field in particular is that the references and research have been centred on occupational safety with the consequent study, above all technical, of the design of the ship's machinery, technical innovations, projects, construction, maintenance, operations and equipment³.

However, as is clear in research into maritime accidents in the last 30 years, reality shows us that the human factor is one of the causes or at least is present in them and, therefore, is a reality that must not be forgotten⁴.

2.2. RISKS ASSESSMENT

Risks assessment is a basic part of prevention and an obligation of employers precisely to detect all the risks that may appear in a specific occupational activity (article. 16 LPRL)⁵.

All risks in an occupational sector must be assessed with an initial assessment to declare the opening or start of a health and safety action programme, taking into account the nature of the activity as well as the special risks to which certain workers may be subjected, as is the case here.

The assessment must be updated when there are modifications to the working conditions and an incidental assessment made when accidents or harm to health have occurred. This type of assessment is necessary because if its result makes it so advisable, the employer must carry out periodic controls of the working conditions to detect potentially dangerous situations. If the results show that there are risks with a probability of occurring, the employer must adopt the necessary corrective measures to achieve a higher level of protection.

It is important to note there is a certain principle of free choice in the specific assessment method or procedure for undertaking the assessment. This is very important from the moment at which the production activity has special features and

3) International Maritime Organisation (IMO) (1993): Resolution A.742 (18) Procedures for the control of operational requirements related to the safety of ships and pollution prevention.

4) Smith, A. (2007): *Adequate crewing and seafarers' fatigue: The international perspective*, Centre for Occupational and Health Psychology, Cardiff University.

5) Law 31/1995, on the prevention of occupational risks, 8 November 1995, transposing Council Framework Directive 89/391/CEE of 12 June 1989, relating to workers' occupational health and safety.

therefore a specific control of risks, specifically, of how to prevent and assess them, as understood by the Supreme Court at the time⁶.

The risks assessment set by the system based on the general principle of prevention is carried out to detect any risks to prevent instead of repair them. In this sense, questions relating to the human factor have gained in importance, such that this has become a priority for its leading role in the prevention of maritime casualties.

In this sense, the International Maritime Organisation has pronounced on and requested the Maritime Safety Committee and the Marine Environment Protection Committee to pay special attention to the psychosocial risks that may arise from activities at sea such as fatigue, communication, culture, experience, health, understanding of the situation, tension, conditions and work organisation⁷.

With regard to the subject under study, the parameters for assessing the risks arising from the human factor involve a series of multidisciplinary questions because of the complex activity that affects maritime safety, maritime protection and the protection of the marine environment. The group directly affected will be the ships' crews, those responsible for management ashore, the regulatory organisations, the recognised organisations, the shipyards, the legislators and other interested parties because they all form part of a series of activities which in some way will affect the human activities in this sector.

There is a series of recommendations that must be followed when preparing the assessment of occupational risks. In accordance with article 16 LPRL, the risks arising from the production activity being assessed must be highlighted. For this purpose the opinion of the seafarers must be taken into account, among other questions, when organising the activities arising from their work as well as determining clearly the functional organisation rules, which must be simple, clear, specific and concise.

To be able to assess the risks, they must first be made visible and the potential problems in the working environment specified in order to prepare the relevant preventive measures. For this it is necessary to determine the decisions to be taken, the dangerous conditions, the factors and the possible safety problems and propose the relevant and necessary measures.

With regard to the psychosocial factors, the human element has an essential role as the central component of any worker and that integrates the aptitudes and limitations,

6) STS, 12-5-99, Ar. 48420.

7) International Maritime Organisation (IMO) (2003): Resolution A.947 (23) Human element vision, principles and goals for the organisation.

whether physical, physiological, psychological or psychosocial. These elements must be taken into account when organising the management, supervision and interactions between the crew and the communications.

Other elements peripheral to the human factor are the physical and environmental conditions, the relationships with health and safety which, if not well assessed and therefore determined, may directly affect the psychosocial variables. The same address with the organisational factors such as unsuitable rules and procedures, insufficient training of the workers or their supervisors, excessive workload and haste⁸, among others.

2.3. TRAINING AND INFORMATION

To this the duty of training and information must be added through effective mechanisms. It is a primordial obligation of the employer in complying with the general protection duty to guarantee that each worker receives sufficient and suitable theoretical and practical training on joining, when there is a change of functions, due to the incorporation of new technologies, as a consequence of changes in the working equipment and during the working day. Training may be given by in-house or external means, free and, above all, must be focused specifically on the work post or function of each worker (19.1 LPRL), generic, abstract and indiscriminate training being insufficient⁹. At the same time, information must be given on the risks found once the assessment has been made in each work centre for each post or function as well as the protection or prevention means to be adopted with respect to these risks or risk factors, the emergency measures planned for first aid, fire fighting and worker evacuation.

Worker consultation and participation is essential since there is no-one who better knows at first hand the risks involved in the work post. It is therefore a duty and obligation to consult workers on everything regarding prevention activity as well as allowing their participation and suggestions on questions that affect occupational health and safety, which must be aimed both at the employer and at the participation and representation organisations as per article 18 of the LPRL.

2.4. HEALTH MONITORING

Health monitoring is another of the basic pillars of prevention with various modes. Firstly, an initial monitoring on entering the company, an additional one due to symptoms of worsening or exposure to certain specific risks, a periodic one carried

⁸) International Maritime Organisation (IMO) (1999): Resolution A.884 (21) amendments to the Code for the investigation of maritime casualties and incidents Resolution A.849 (20).

⁹) SSTSJ in Extremadura, 11-2-98, Ar. 919.

out at a certain determined frequency and, finally, a post-occupational assessment that is made or must be made once the employment relationship ends.

Article 22 of the LPRL includes the duty of the employer to guarantee "the workers in its service the periodic monitoring of their health according to the risks inherent to the work", so that these tests or control procedures must detect all the risks in the work post, that is, those derived from safety, industrial health, ergonomics and psychology.

In this sense, it can be seen that a full monitoring of the workers' health according to the risks arising from the specific work post is carried out on very few occasions. It is well known that psychosocial risks are present in the work post but they are not always adequately catered for. On most occasions, health monitoring is reduced to mere physical check-ups without attending to personal, age or gender conditions or the work carried out, that is, to circumstances that must be taken into account to be able to carry out an integral control of health monitoring according to the risks inherent in the work, as required by the regulations.

Very rarely psychological tests are given to check whether workers have a health problem at the time or if there is the possibility of their suffering a work-related pathology in the future. These tests are necessary to detect illnesses such as depression which often appears as the last stage in a chain that begins with symptoms such as stress, anxiety, lack of motivation and other, accompanying, physical pathologies. These risks must not be reduced to the worker's purely private sphere but must be assumed, externalised and managed from the employment setting because they often come from and have their origin in work.

Therefore, the area of analysis must cover not only physical but also psychosocial health since there are types of work in which, because of their special nature and continuous contact with other persons, the psychosocial risk is the main one. If this is so, all necessary controls must be undertaken to detect certain pathologies that frequently arise from interpersonal relationships or from the organisation of work¹⁰.

This fact must be highlighted for an overall monitoring of health that covers the physical and psychological variables to be able to prevent risks that are invisible unless a specific assessment is made¹¹.

There are risks related directly to work which form emotional situations caused by

10) Technical note number 926 on Psychosocial factors: assessment method, INSHT.

11) Gil Pérez, ME. (2003) "Mujer y salud laboral", *Mujer y trabajo*, ed. Bomarzo.

Gil Pérez, ME. (2012) "Riesgos laborales ligados a la maternidad desde una perspectiva jurídica", *Tratado de Salud Laboral*, Volumen II Aranzadi, p. 565.

various employment conditions –organisation, interpersonal relationships– and that could be the origin of pathologies arising from the activity. These situations can cause from a reduction of work output to the development of an illness.

Royal Decree 568/2011, 20 April, sets the minimum conditions for protecting the health of and providing medical assistance to seafarers. Nevertheless, it refers to care treatment, given the properties of the specific activity. But from the prevention rather than from the repairing point of view, the monitoring must cover both physical and psychological health since, as already stated, the complexity of the activity at sea and the special situation of the workers in this sector make it advisable.

2.5. SPECIFIC RISKS

2.5.1. HUMAN FACTOR AND INTERPERSONAL RELATIONSHIPS

One of the consequences of the risks related with the human factor can be emotional distress, this being understood as the upsets that can directly affect a person's capacity to carry out the required activity normally. This upset may appear in a panic situation arising from fear that overcomes a worker. Anxiety is another of the symptoms that may be connected to these emotional upsets when there is a state of uncertainty regarding future work that does not allow concentration on the task in hand.

Another risk that could sometimes be the consequence of the pathologies described is the consumption of substances harmful to the worker's health such as, for example, alcohol, drugs and other substances that alter the worker's neuronal state and, as a consequence, the work carried out as well as the worker's behaviour with the rest of his or her companions.

All of this could cause a deterioration of mental health with the consequential reduction of intellectual capacity, directly affecting the activities to be carried out with the logical consequences of loss of attention and distraction. Lack of attention could cause physical injuries of any type such as crushing, cuts, falls and burns, among others. Psychosocial risks are increasingly more frequent and the consequences can be both physical and psychological. As well as psychotic behaviour, depression and hallucinations, it may be accompanied by a clear physical deterioration and by other disorders that are concentrated in specific pathologies such as migraines, fainting, colds, ulcers, cardiovascular disorders, digestive problems and nervous system problems. It also involves lack of attention, strength, speed, inability to react to any event, lack of coordination, decision taking and balance and even loss of visual acuity¹².

¹² International Maritime Organisation (IMO) (2003): Resolution A.947 (23) Human element vision, principles and goals for the organisation, pp 32, 33 and 34.

All of this is accompanied by a clear lack of motivation with the possible abandoning of functions, insubordination and sabotage. Lack of motivation involves a reduction of will and a lack of confidence or discipline. The causes of this demotivation may be varied but in most cases appears in interpersonal relationships ranging from problems of coexistence arising from the bad organisation of excessive work and, therefore, a deficient output to the reduction of the worker's physical and psychological capacity, problems of interpersonal relationships and cultural problems to bad work organisation. Moreover work at sea involves excessively long periods of service in ships, the multicultural variety of crews with the problems of coexistence that this involves and many problems arising from all of this¹³.

2.5.2. RISKS ARISING FROM SAFETY AND ENVIRONMENTAL CONDITIONS

Safety risks are related with the ship's activity itself and the elements in it such as noise, vibration, cooling, heating, ventilation, decks, stairs, ladders, dangerous working surfaces, protection devices, guard rails and unsuitable grips, deficient orientation of operations posts with respect to the ship's dynamics in general. Also on board risks are related with safety management because it may arise from a lack of technical knowledge by the crew or the current state of the ship, lack of coordination and communication between the crew and the management and command organisations, deficient knowledge of the ship's operations, of the rules and standards, of the on-board procedures, of the tasks or functions, even of linguistic knowledge since crews are often multi-racial with diverse cultural and religious origins, with the difficulties that arise from this situation¹⁴.

Because of all this, the persons responsible for organising and controlling the crew must be prepared to manage work and avoid any lack of discipline, failures in the exercising of command that involve erroneous orders, deficient supervision, lack of coordination and communication both between the management organisations and with the rest of the crew. Reality shows that a bad work organisation can cause many problems that result in occupational accidents.

As a consequence, the standards for functioning, the procedures to be carried out and the suitable practices must be established clearly and in detail so that they are effective. If these are not established precisely, there may be errors arising from a

¹³ International Maritime Organisation (IMO) (1999): Resolution A.884 (21) Amendments to the Code for the investigation of maritime casualties and incidents.

¹⁴ International Maritime Organisation (IMO) (1993): Resolution A.742 (18) Procedures for the control of operational requirements related to the safety of ships and pollution prevention.
International Maritime Organisation (IMO) (1997): Resolution A.849 (20) Code for the investigation of maritime casualties and incidents, approved on 27 November 1997.

lack of understanding of instructions and lack of knowledge of the situation which, in a given moment, could cause the failure to identify a potential risk.

Management involves not only human resources but also physical ones so that there must be a good practice with regard to the organisation, conservation and management of tools, installations, provisions and water with foresight so that these resources do not lack¹⁵.

2. 5.3. MARINE ENVIRONMENT

Likewise, it is necessary to add that the working environment is dangerous in itself since it is a natural medium that involves elements that are difficult to control such as waves, storms, currents, strong tides, sandbanks, ice, rocks, wind, fog, rain, snow and hail, among others. This can generate an added element of stress because of the uncertainty that these natural elements can cause¹⁶.

2.5.4. SPECIAL REFERENCE TO FATIGUE

Fatigue can be defined as the temporary alteration of the worker's functional, mental and physical deficiency¹⁷. Fatigue appears when the requirements of the daily task, such as the effort required, the working rhythm, the level of attention or the emotional tension exceeds the worker's ability to respond.

Fatigue can be both physical and mental and appears as various symptoms such as a sensation of tiredness, muscular pain, loss of vision or hearing, sleeping disorders, irritability and reduction of the capacity to respond in work¹⁸.

Fatigue has been started especially in the ambit of seafarers since it is a clear consequence of the risks arising from this activity. In this sense, the studies show that on some types of ships this risk appears due to a series of circumstances such as a minimum manning, the fast turnaround, bad weather, long working days, lack of rest, noise, vibration, extreme temperatures and workload, among others¹⁹.

15) International Maritime Organisation (IMO) (2003): Resolution A.947 (23) Human element vision, principles and goals for the organisation, p. 35 and ff.

16) International Maritime Organisation (IMO) (2003): Resolution A.947 (23) Human element vision, principles and goals for the organisation, p. 34.

17) NTP 445: Mental work load: fatigue, IHSHT.

18) In this sense, the purpose of Resolution A.772 (18) of the International Maritime Organisation (IMO), on fatigue factors in manning and safety, 4 November 1993, is to increase awareness of the complexity of fatigue and its taking into consideration by all parties involved in work on ships to take them into account when taking decisions to reduce maritime casualties and improve the workers' health and safety.

19) Smith, A. (2007): *Adequate crewing and seafarers' fatigue: The international perspective*, Centre

The various working conditions to which seafarers are exposed require their multidisciplinary management to prevent occupational fatigue with a series of strategies that are effective for the purpose. The management strategies must be specified through the contributions of the representatives of management and workers in each sector as well as the contributions resulting from investigations into accidents and casualties which often show the need for higher crewing levels, improved working environments and changes in the distribution of working hours both in the duration of service period and in the time for rest and recovery – that is, in better compliance with current regulations²⁰. To this must also be added the need for measures that help to promote a cultural change among ship owners and operators to guarantee that short-term commercial considerations do not affect the health and safety of seafarers²¹.

3. ON-BOARD PSYCHOSOCIAL RISKS AND THEIR EFFECT ON MARITIME SAFETY

3.1 The human factor as a cause of accidents in the maritime ambit

In the last 50 years, the maritime industry has focused on improving the structure of the ship and the reliability of the on-board systems and equipment to reduce the number of accidents and increase efficiency and productivity in the sector. Today,

for Occupational and Health Psychology, Cardiff University, pp 23 and ff.

Christodoulou-Varotsi, I. (2009): *Maritime Safety law and Policies of the European Union and the United States of America: Antagonism or Synergy?*, ed. Springer.

In this sense, the dispositions of ILO Convention number 188 on work in the fishing sector, approved on 30 May 2007, are aimed at guaranteeing that workers in this sector have improved occupational health and safety at medical care at sea, including care on land, as well as the necessary rest time to preserve their health and safety. Another objective is to guarantee that fishing vessels are built and maintained such that the workers have suitable living conditions for the long periods spent at sea.

20) Especially ILO Convention 180, 22 October 1996, on seafarers' hours of work and the manning of ships, obliges states to set a maximum for working hours and minimum rest periods on the vessels that fly their flag. And European Parliament and Council Directive 2003/88/CE, 4 November 2003, concerning certain aspects of the organisation of working time.

In this sense, the 2006 Convention on maritime work sets the minimum conditions for the work of seafarers on vessels with dispositions on the employment conditions, working time, accommodation, leisure installations, food and catering, health protection, medical care, well-being and social protection. In addition, articles 40 and 3.1 of Resolution A.890 (21), 25 November 1999, on the principles of safe manning and Resolution A.955 (23), 5 December 2003, on amendments to the principles of safe manning, respectively, cover the need to determine the minimum safe manning for a ship and to guarantee that there is sufficient personnel with the category or position required for operating the ship in safe conditions, its protection and the protection of the marine environment.

21) Smith, A. (2007): *Adequate crewing and seafarers' fatigue: The international perspective*, Centre for Occupational and Health Psychology, Cardiff University, p 38.

ships are highly advanced and reliable from the technology point of view but despite these technological advances and the implementation of wide regulations on safety, the percentage of maritime accidents remains very high. This is because the structure of the ship and the reliability of the technological systems are only part of the safety "equation", an "equation" in which the crew and their working conditions form the greatest part²².

Today it is commonly accepted and widely documented that approximately 80% of maritime accidents are due in part to human error²³. However, despite this consensus on accidents causes, the concept of human error is often confused in literature on the matter with the concepts of "human element" and "human factor" for which there are no clear and internationally accepted definitions²⁴.

To understand the difference between "human error" and "human factor" we must associate them with the concepts of "immediate cause" and "root cause".

Human error, that is failure, lack of care, violation of standards, etc, is the "immediate cause" of the accident as may also be the sudden failure in the equipment or technological system. Human error is the immediate cause of the accident: a crew member touches the wrong button and an accident occurs. Human error is defined as the deviation of a person or group of persons from the accepted or convenient practices the consequence of which is undesirable or unacceptable results²⁵.

The human factor –working conditions, ergonomics, work organisation, etc.–, is the "root cause", the point of departure of an unsuitable journey which takes us, according

22) Squire, D. (2004): "The importance of human element in shipping". Accessible at [<http://www.he-alert.org>].

Psarafitis, H.N., Caridis, P., Desypris, N., Panagakos, G. and Ventikos, N. (1998): "The human element as a factor in marine accidents". *IMLA-10 Conference*, Saint-Malo, France.

Ruthblum, A. (2003): *Human error and marine safety*. Accessible at [<http://www.uscg.mil>].

Talley, W. (1999): "The safety of sea transport: determinants of crew injuries". *Applied Economics*, 31(11): 1365-1372.

23) UK P&I (1997): *Analysis of major claims*. Accessible at [<http://www.ukpandi.com>].

Barnett, M. (2005): "Searching for the root causes of maritime casualties: individual competence or organizational culture". *WMU Journal of Maritime Affairs*, 4(2): 131-145.

Pomeroy, R.V. (2002): "The human element in engineering systems". *Seaways*, April 2002: 8-11.

Martínez de Osés, F.X. and Ventikos, N. (2003): "A critical assessment of human element regarding maritime safety: issues of planning, policy and practice". *Revista del Instituto de la Navegación de España*, 17(17): 68-80.

Ruthblum, A. (2003), *Human error and marine safety*, Accessible at [<http://www.uscg.mil>].

24) The Nautical Institute (ed) (2003): *The International Maritime Human Element Bulletin 1*. Accessible at [<http://www.he-alert.org>].

25) International Maritime Organisation (1999): Resolution 884(21) Amendments to the Code for the investigation of maritime casualties and incidents.

to the Swiss cheese theory of Reason²⁶, to error and, consequently, to an accident. Human factors are aspects that affect the behaviour of persons in their work and in their life²⁷. The human factor is defined as the set of parameters (organisation, equipment, environmental, ergonomic, etc.) that converge on and influence the work of persons. The human factor is defined in other settings as occupational psychosocial risk factors.

Half way between the human factor and human error there is, on the one hand, the human element, that is, the individual's own characteristics that determine the way in which he or she interacts with the medium, and on the other, a series of "propagating" factors that constantly degrade the ship's safety and the health of its crew: fatigue, stress, bad operating practices, etc. We define the human element as the set of the individual's own characteristics (aptitudes, attitudes, knowledge, values, expectations, etc) which, acting together with the human factors, determine the way in which individuals interact with other individuals, systems and equipment.

Figure 1, based on the SHEL model²⁸ for classifying human factors, shows the interaction between the various components of the human factor and the human element and how this interaction influences both the seafarers' professional performance and the ship's safety as well as personal health and safety itself. If the condition of the ship, work organisation, external environment, living conditions and interpersonal relationships are deficient, professional performance will deteriorate, resulting in, among other, lack of maintenance of the ship and bad operational practices. Equally, the worker's health will be compromised, with problems of fatigue, stress, burn-out, anxiety, depression, cardiovascular illnesses and other mental and physical illnesses appearing. In this situation, the ship's safety and that of its crew diminishes and the risk of an accident becomes clear.

The human factor - human element system is a complex one that is present in all phases of a ship's life from its design and building, operation and maintenance to its scrapping and involves all the "stakeholders" with interests and responsibilities in each of these processes, from the naval engineer to the ship owner, including the manager, the seafarer and the legislator. This system is also flexible and susceptible to change since all its components interact and can be modified, for better or for worse, by the wishes of the interested parties or by circumstances unconnected with those wishes.

26) Reason, J 1997: *Managing the risks of organizational accidents*. Ashgate. Aldershot, UK.

27) Gil de Egea, B., Calvo, P., García, C. and Cambor, M. (2003): *Guía de factores humanos para la investigación de accidentes marítimos*. Instituto de Investigación en Seguridad y Factores Humanos, Oviedo.

28) Hawkins, F.H. (1987): *Human factors in flight*. Ashgate. Aldershot, UK.

For its correct functioning, to guarantee the safety of the ship, its crew and the environment, it is necessary to seek a balance between the components in the system so that the shortcomings that cannot be corrected in one ambit can be compensated in others with special measures that are beneficial to the worker's health and safety.

People are fundamental and essential elements for efficient and safe maritime transport²⁹. To obtain a crew that is cohesive and motivated and a suitable work organisation for the ship and its commercial purpose, it is necessary to take into account the minimum number of crew needed to operate the ship in safe conditions, the formation of crews with cultural, social and linguistic cohesion, their training needs, the work and rest times as well as the social and labour conditions that the company must offer them. Thus, to understand and manage the human factor suitably, it is necessary to focus less on the human condition, although without neglecting it, and more on the seafarers' working conditions³⁰.

29) Squire, D. (2005): *The human element in shipping*. Accessible at [<http://www.he-alert.org>].

30) Macrae, C. (2009): "Human factors at sea: common patterns of error in groundings and collisions". *Maritime Policy and Management*, 36(1): 21-38.

Kovats, L. (2001): "Human factors on board". *Proceedings of International Symposium Human Factors on Board*, Bremen.

Schröder-Hinrichs, J.U., Hollnagel, E. and Baldauf, M. (2012): "From the Titanic to Costa Concordia - a century of lessons not learned". *WMU Journal of Maritime Affairs*, 11: 151-167.

Graveson, A. (2004): "Human factors and safety at sea". *Proceedings of Safety and the Seafarer Conference*, Greenwich.

Ruthblum, A. (2003): *Human error and marine safety*. Accessible at [<http://www.uscg.mil>].

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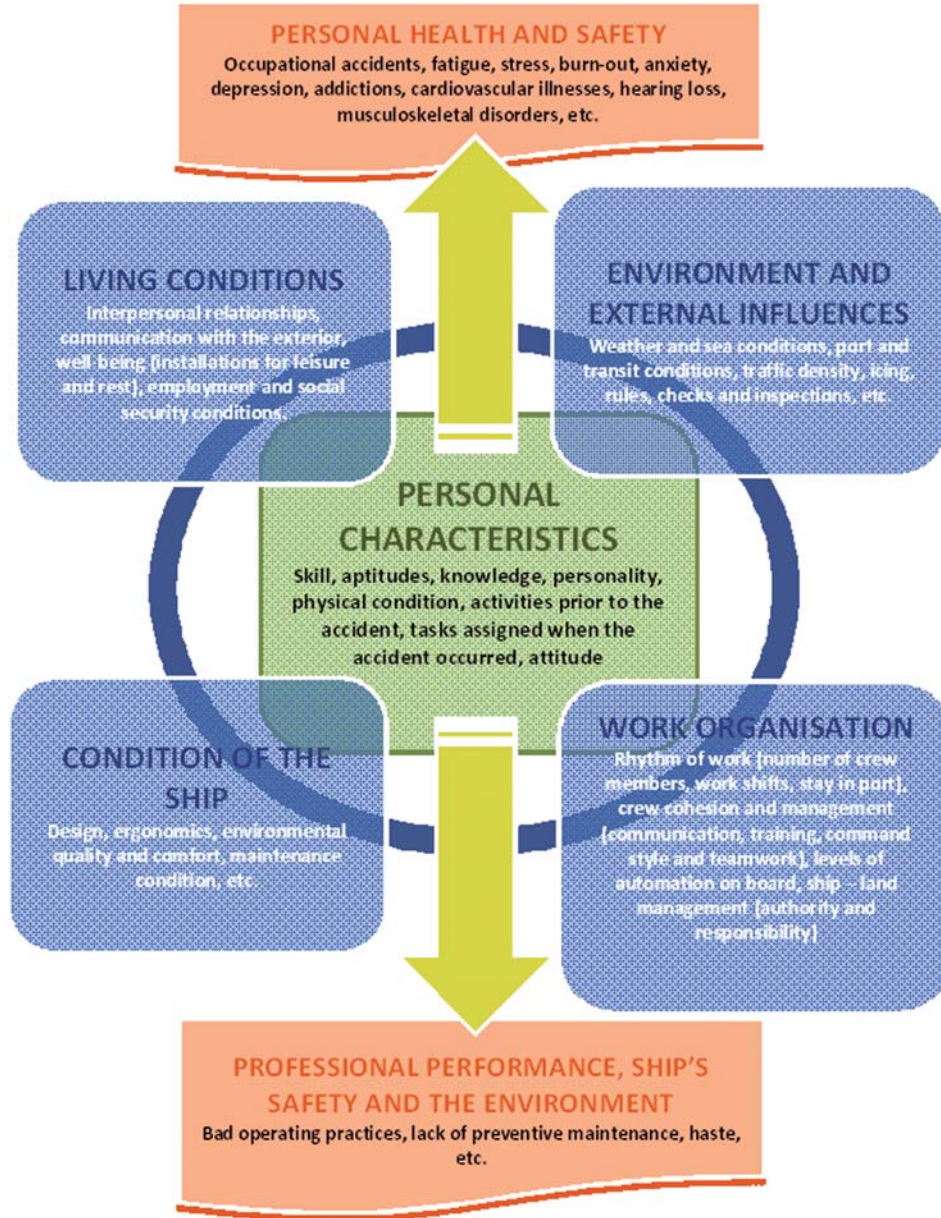


Figure 1: Human factor - human element system model

As can be seen in Figure 1, The quality of many human factor components depends on the management style undertaken by the shipping company ashore³¹, so that this must be aware of the role of its decisions on the ship's safety, since wrong decisions by the shore based management could lead to accidents on board³².

The following shows how these factors inter-relate and how they can negatively affect safety in the sector.

3.2. Work organisation on board

The main factors on which on-board work organisation depends are, according to Figure 1 above, the work rhythm, the crew's cohesion and management properties, the levels of automation on board and the relationship of the ship with its managers ashore.

Unfortunately, current maritime transport management displays a series of customary practices that are of little benefit to on-board work organisation and that have often endangered the safety of the ship and crew, such as excessively reduced manning, excessive on-board automation, the uncontrolled increase in bureaucratic tasks, the increased responsibility assumed by those in command together with a reduction in their authority, the formation of multilingual crews, the failure to comply with the minimum standards of training, the short periods in port and the time pressures imposed by the shipping company for commercial profits.

3.2.1 Shift work and reduced manning

Shift work is a normal practice in many occupational sectors. However, on-board work management requires taking into account the special features of this sector that give it an especially delicate character:

- Manning limitations: the number of crew members on a ship is invariable during the voyage.
- Rest periods: given the personnel limitations, an eventual excess in the workload cannot be compensated with more rest. A crew member working four-hour watches has a maximum of eight hours' continuous rest. As well as sleeping, eating and toileting in this period, he or she must carry out other work-related tasks that cannot be undertaken while on watch.

31) Seng Kong, L. (2012): *Human element in shipping accidents*. Accessible at [<http://www.itfglobal.org>].

32) Parvez, T. (2012): *Does the presence of human element in shipping companies contribute towards accidents on ships?* Greenwich Maritime Institute. Accessible at [<http://general.marine-files.net>].

Cahuvin, C. (2011): "Human factors and maritime safety". *Journal of Navigation*, 64(4): 625-632.

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- The "environmental" properties of the work place: the ship is subject to special environmental conditions of noise, vibration, temperature, humidity and lighting. These special "environmental" conditions can negatively affect both the work carried out on board and the quality of the crew's rest.

The reduction in manning is perhaps the factor with the greatest negative impact on operating the ship in safe conditions. Currently, approximately 40% of ships carrying cargoes on the seas and oceans world wide (those under 1000 GRT) are allowed to sail with a deck crew of just four members, a captain, an officer of the watch and two seamen³³. In this case, the watches are shared generally as six hours on watch and six hours' rest. In addition, these ships frequently sail on short and medium distance coastal voyages. This means that their sailing periods are short and often in areas with a very high traffic density, their visits to ports are very frequent and the activity during the short stays in ports is frenetic³⁴. The duration of the voyage has a great influence on manning requirements, as does the time in port, and on the ship's commercial activities such as cleanliness and maintenance. However, these factors are not taken into account by current regulations when setting the minimum safe manning³⁵.

Although best maritime practice is opposed to carrying out bureaucratic and administrative tasks not directly related to the navigation watch during that period, the overwork caused by the lack of personnel often leads the officer of the watch to take the risk of undertaking this type of task in those moments. Fatigue and stress caused by overwork also contribute to increasing the risk of accidents. Other risk factors during the navigation watch on a ship with a reduced crew are undertaking the navigation watch alone and distractions due to the need to fill in forms by the officer of the watch³⁶. It is obvious that two persons cannot fulfil the obligation of undertaking a safe navigation watch in a system of 6/6 watches, carry out management, administrative and maintenance tasks outside watch hours and also have time to rest, eat and wash suitably without putting the ship, its cargo and its crew at serious risk of accident³⁷.

It is therefore absolutely essential to revise the regulations referring to minimum safe manning and minimum rest times.

33) International Maritime Organisation (2010): *International Convention on Standards of Training, Certification and Watchkeeping*.

34) Lloyd, M. (2007): "The manning problem". *Seamanship international*, August 2007. Accessible at [<http://www.witherbyseamanship.com>].

35) Parker, C.J. (2001): "Shipping and the human factor". *Seaways*, November 2001: 4-8.

36) UK P&I (ed) (2006): "Distractions on the bridge". *Technical Bulletin*, 20.

37) Lloyd, M. (2007): "The manning problem". *Seamanship international*, August 2007. Accessible at [<http://www.witherbyseamanship.com>].

3.2.2 Commercial pressures

The traditional way to increase cargo movement – and therefore profit – in the maritime business has been to increase the size of ships, thus increasing the cargo capacity on each voyage.

However, an alternative and perhaps more flexible way to increase cargo capacity is to increase the number of voyages that a ship can make in a given period³⁸. For this, the ship must increase its cruising speed and that of cargo handling in ports. The modification of the parameters of navigation speed and speed of loading/unloading can be directly harmful to the ship's safety and that of its crew if additional measures are not taken both in the design and building of the ships and in the work organisation on board and the manning to allow and guarantee the undertaking of on-board activities in optimal conditions.

All regular coastal navigation lines have a common denominator – complying with the set schedule and number of voyages – which can give rise to errors due to haste and routine work. Any delay in port results in an accumulation of delays in the rest, prolonging the working day. Some of these lines operate high speed ships, a type that requires greater concentration due to the speed of its manoeuvres.

A study made in 2012³⁹ relates time pressures with fatigue and accidents in coastal navigation ships of regular lines, stating that time pressures arising from commercial pressures imposed by the company to meet schedules and prevent delays, among others, result in higher navigation and manoeuvring speeds up to dangerous values, as well as cutting safe navigation distances.

The erroneous decision to cut distances increases the risks to the safety of the ship which, in an emergency, will not have sufficient time and space for a manoeuvre that avoids disaster⁴⁰.

One example of this problem is the accident to the container ship *Rena*, which ran aground on the coast of New Zealand in October 2011 after making a series of "cuts" to the initial navigation plan to meet its scheduled port entry time.

38) Fuentes, P. and Couvillion, W. (2004): "The Economics of Increasing Speed in Sea Transportation: The Case for the Southern U.S., Mexico, Central America and the Caribbean". *Journal of Food Distribution Research*, 35(1): 93-99.

39) Bouzón, R., de la Campa, R., Costa, A. and Romero, J. (2012): "Fatigue and time constraints in regular-line short sea shipping: safety management code application and limitations". *Proceedings of Maritime Transport V*, 1188- 1200. Barcelona.

40) Schröder-Hinrichs, J.U., Hollnagel, E. and Baldauf, M. (2012): "From the Titanic to Costa Concordia - a century of lessons not learned". *WMU Journal of Maritime Affairs*, 11: 151-167.

Also the possibility of a shore visit while the ship is moored is important for maintaining seafarers' physical and mental well-being. Today, the periods in port have been reduced drastically, making this possibility difficult or impossible, with approximately 80% of ships remaining in port for less than 24 hours⁴¹.

As well as the short stays in port, the lack of transport to cities and the restrictions of the port authorities are two of the main reasons that prevent seafarers from enjoying shore leave⁴².

3.2.3 Training

Despite the minimum training standards set in the STCW Convention, crew members come from different cultures with different languages and different maritime traditions. This gives rise to differences in the interpretation of international directives and inconsistent standards of training and education so that there are still reports of crews with low training standards⁴³.

We must also remember that worker training must not be limited to that acquired in training centres before embarking but that it must be kept updated according to progress in technology. This continued training responsibility must be shared between the ship owner and the crew member, firstly for obvious safety questions and secondly for questions of professionalism.

3.2.4 Communication

The globalisation of maritime commerce involves contact between persons of very diverse nationalities with different languages and cultures who must work efficiently in a complex medium.

Communication is closely related to safety. There are broadly documented cases in which communication difficulties on board triggered an accident or helped to make later search and rescue operations difficult, such as happened during the fire on the ferry *Scandinavian Star* and the groundings of the *Royal Majestic* and the *Sea Empress*⁴⁴.

41) Von Dreele, J. (2008): "The human element in shipping: a maritime chaplain's perspective". *Proceedings of API Conference*, San Diego.

42) Kahveci, E. (2007): *Port based welfare services for seafarers*. Seafarers International Research Centre. Cardiff University.

43) Lloyd, M. (2006): "Why ships really collide". *Seaways*, October 2006: 10-12.

The Nautical Institute (ed) (2005): *The International Maritime Human Element Bulletin*, number 6. Accessible at [<http://www.he-alert.org>].

44) Pyne, R. (2006): "Investigating accidents in the maritime domain - the influence of crew interaction

Today, more than three quarters of ships are operated by mixed crews⁴⁵. This factor requires the setting up of a common working language to operate the ship safely, and all crew members must know this language and be able to use it.

Regarding interactions between ships all between these and shore services, English has become the communications medium at sea so that the entire operation of the international maritime industry, safety at sea and the protection of the environment depends in many aspects on the level of knowledge and use of that language.

But the barriers that make communication on board difficult are not only linguistic in the oral context but they are also found in the written context, cultural barriers, occupational barriers or those depending on the style of command on board and technical or technological barriers arising from the difficulties of using communications equipment, especially VHF.

One problem that is increasingly common on board is related to the way in which the technical manuals are prepared – unreliable translations that lack clarity of reading, do not cover the real needs of the end user, have an excessively generic content or simply are prepared in a language other than the working language of the crew⁴⁶.

Another problem that affects communication is the increasing use of technologically advanced communication systems such as the cell phone and e-mail. Although these allow a more fluid communication between the ship and its company on shore at minimal cost, they can also take up and overload the captain and other crew members responsible for these tasks if a rational use of them is not established⁴⁷.

and communication among mixed nationality crew on safety". *Proceedings of the Plymouth Business School of Sociology, Politics and Law Postgraduate Symposium*, Plymouth: 97-106.

Short, V. (2006): "Maritime English valuing a common language". *Nautical Briefing*. The Nautical Institute.
Rashed, S. and Kamal, A. (2010): "Maritime English holds a great stake in both the safety and security of merchant vessels". *Proceedings of International Maritime English Conference, IMEC 22*, Alexandria: 208-219.

Okon Joe, J. (2010): "Cross-cultural communication issues on board". *Proceedings of International Maritime English Conference, IMEC 22*, Alexandria: 248-261.

45) Squire, D. (2006): "The human element- the importance of effective communication". *Proceedings of Maritime Communications & Technology Conference*, London. Accessible at [<http://www.he-alert.org>].
Trenkner, P. (2007): "The IMO Standard Marine Communication Phrases- a communicative survival kit". *The International Maritime Human Element Bulletin*, 14:3.

46) Squire, D. (2006): "The human element - the importance of effective communication". *Proceedings of Maritime Communications & Technology Conference*, London. Accessible at [<http://www.he-alert.org>].
The Nautical Institute (ed) (2007): *The International Maritime Human Element Bulletin*, number 14. Accessible at [<http://www.he-alert.org>].

Rashed, S. and Kamal, A. (2010): "Maritime English holds a great stake in both the safety and security of merchant vessels". *Proceedings of International Maritime English Conference, IMEC 22*, Alexandria: 208-219.

47) Prasad, K. (2010): "Communication and Human Element in shipping commerce- notes from a

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In recent years, an increase has been seen in the need to understand the relationship between cultural aspects and communication to suitably manage these factors and reduce the safety problems of multicultural crews. Communication is without doubt an integral part of any culture so that understanding the concept of culture prepares seafarers for intercultural communication and cross-cultural management on board⁴⁸. Factors such as the distance of power and individualism/collectivism that are purely cultural factors, have an impact on the style of command and teamwork and thus communications between workers on different levels and even on the same level⁴⁹.

Some of the difficulties associated with cultural differences that degrade communication are the lack of knowledge of social customs of other nations, lack of understanding of intentions, attitudes and actions, erroneous interpretation of body language and the tendency to stereotype the other's behaviour according to their nationality⁵⁰. At the group level, this generates misunderstandings and conflicts that deteriorate the relationship between workers, leading to failure when carrying out tasks, lack of loyalty, teamwork problems, problems in the flow of information and failures in social interaction and, at the individual level, causing suspicion and social isolation⁵¹.

shipbroker". Accessible at [<http://www.he-alert.org>].

Squire, D. (2006): "The human element- the importance of effective communication". *Proceedings of Maritime Communications & Technology Conference*, London. Accessible at [<http://www.he-alert.org>].

48) Chirea-Ungureanu, C. and Georgescu, M. (2009): "Managing cultural diversity". *Proceedings of International Maritime English Conference, IMEC 21, Szczecin*: 49-56.

49) Oleneva, T. (2010): "The key role of values for communication in multilingual crews". *Proceedings of International Maritime English Conference, IMEC 22, Alexandria*: 262-273.

Sampson, H. and Zhao, M. (2003): "Multilingual crews: communication and the operation of ships". *World Englishes*, 22(1): 31-43.

Culic-Viskota, A. and Bielic, T. (2007): "Cultural and linguistic differences as factors of ineffective communication". *Proceedings of International Maritime English Conference, IMEC 19, Rotterdam*. Accessible at [<http://home.planet.nl>].

50) Wang, Y.Q. and Gu, P. (2005): "Reducing intercultural communication barriers between seafarers with different cultural backgrounds". *Proceedings of the 6th Annual General Assembly of the International Association of Maritime Universities*, Malmö: 121-124.

Wang, Y. and Shi, C. (2008): "Culture matters: how Chinese culture shapes and influences communication of shins seafarers". *International maritime English conference, IMEC 20, Shanghai*. Accessible at [<http://home.planet.nl>].

Chirea-Ungureanu, C. (2010): People interACT! On board intercultural communication: the must-have of education». In Vangehuchten, L., Van Parys, W. and Noble, A. (eds). *Communication for maritime purposes: an international and interdisciplinary issue*, 87-99.

Culic-Viskota, A. and Bielic, T. (2007): "Cultural and linguistic differences as factors of ineffective communication". *Proceedings of International Maritime English Conference, IMEC 19, Rotterdam*. Accessible at [<http://home.planet.nl>].

51) Wang, Y. and Fu, Y. (2007): "Language Barriers in Maritime Communication and Countermeasures in Teaching". *Proceedings of International Maritime English Conference, IMEC 19, Rotterdam*. Accessible at [<http://home.planet.nl>].

Wang, Y. and Shi, C. (2008): "Culture matters: how Chinese culture shapes and influences communication

However, it must not be forgotten that culture explains one part of individual behaviour and that communication problems can also be related to the position in the occupational hierarchy, age, personality and gender, among others⁵².

Finally, it should be noted that communication, linguistic and cultural problems have negative effects not only on the operation of the ship but also on the social life on board.

3.2.5 Command style and teamwork

The concepts of communication, leadership and teamwork are closely related and the way in which they are managed on board may depend on both cultural questions and the operational practices set by the company.

Safety in operations on board depends greatly on the leadership capability of senior officers⁵³. The behaviour of persons within an organisation is strongly influenced by the daily behaviour of the leaders more than by their verbal approaches.

On board, the role of leader falls undoubtedly to the captain who, as the direct representative of the shipping company, has the duty and responsibility to manage the ship as well as the authority to maintain order and discipline among the crew members. The captain's authority may be defined from two points of view⁵⁴. On the one hand there is the formal influence based on status on board and on the other, an influence based on knowledge, experience and ability to organise work. Putting authority into practice requires a command or management style and this in turn will depend on the ship's organisational structure and on the nationality of the crew members. The command style may vary from a rigid and authoritarian approach where the captain's criterion cannot be questioned to a flexible management style which takes into account the different cultures of the crew members and encourages collaboration and teamwork.

of shines seafarers". *International maritime English conference, IMEC 20*, Shanghai. Accessible at [<http://home.planet.nl>].

Rashed, S. and Kamal, A. (2010): "Maritime English holds a great stake in both the safety and security of merchant vessels". *Proceedings of International Maritime English Conference, IMEC 22*, Alexandria: 208-219.

52) Chirea-Ungureanu, C. (2010): "People interACT! On board intercultural communication: the must-have of education". In Vangehuchten, L., Van Parys, W. and Noble, A. (eds). *Communication for maritime purposes: an international and interdisciplinary issue*, 87-99.

53) Little, A. (2004): *Driving safety culture: identification of leadership qualities for effective safety management*. Maritime and Coastguard Agency.

54) Culic-Viskota, A. and Bielic, T. (2007): "Cultural and linguistic differences as factors of ineffective communication". *Proceedings of International Maritime English Conference, IMEC 19*, Rotterdam. Accessible at [<http://home.planet.nl>].

From practical and legal point of view, the captain must lead his team and ensure that the ship is seaworthy at all times⁵⁵. He must make sure that his officers navigate and operate the ship safely according to best maritime practice. This requires a series of skills that must be part of officers' training. In fact several authors demand the need for more extensive and complete training both in the development of leadership skills and teamwork and on board resources management⁵⁶.

3.2.6 Level of automation

It is obvious that we live in the era of technological revolution that provides maritime transport with new instruments offering more precise and complete information on the conditions in which it is carried out. However, the implementation on board of these new technology systems is a double-edged sword. The initial proposal of on-board automation is to reduce human error and workload and increase efficiency but its effects may be the opposite when its introduction obeys the wish of the ship owner to reduce costs and manning levels⁵⁷.

The introduction of new technology systems and automation has changed the form of human interaction with machines, resulting in the appearance of new risks to maritime safety which have repeatedly been the cause of major maritime accidents⁵⁸.

The negative effects introduced by automation on board are mainly⁵⁹ the change in

55) Wake, P. (2004): "The master's leadership role in the safety culture. A training need". *Proceedings of the UK MCA Human Factors Seminar*. Accessible at [<http://www.he-alert.org>].

56) Hetherington, C., Flin, R. and Mearns, K. (2006): "Safety in shipping: the human element". *Journal of Safety Research*, 37: 401-411.

Deboo, K.N. (2004): Bridge Resource Management. Accessible at [<http://www.he-alert.org>].

57) Lützhöft, M.H. and Dekker, W.A. (2002): "On your watch: automation on the bridge". *Journal of Navigation*, 55 (1). 83-96.

The Nautical Institute (ed) (2007): *The International Maritime Human Element Bulletin*, 15. Accessible at [<http://www.he-alert.org>].

59) Ziarati, R. and Ziarati, M. (2011): "Review of accidents with special references to vessels with automated systems – a way forward". Accessible at [<http://marifuture.info>]. Lützhöft, M.H. and Dekker, W.A. (2002): "On your watch: automation on the bridge". *Journal of Navigation*, 55 (1). 83-96.

Lützhöft, M.H. and Dekker, W.A. (2002): "On your watch: automation on the bridge". *Journal of Navigation*, 55 (1). 83-96.

Pomeroy, R.V. and Sherwood, B.M. (2002): "Managing the human element in modern ship design and operation". *Proceedings of Human Factors in Ship Design and Operation Conference*. Royal Institution of Naval Architects, London.

59) Schager, B. (2008): "When technology leads us astray: a broadened view of human error". *Journal of Navigation*, 61(1): 63-70.

The Nautical Institute (ed) (2007): *The International Maritime Human Element Bulletin*, 15. Accessible at [<http://www.he-alert.org>].

Sauer, J., Wastell, D., Robert, G., Hockey, J., Crawshaw, C., Ishak, M. and Downing, J. (2002): "Effects of display design on performance in a simulated ship navigation environment". *Ergonomics*, 45(5): 329-347

the role of the officer, who changes from being an operator to carrying out monitoring tasks, the distraction and confusion generated by an excess of alarms, excessive confidence given to the results shown by the systems and in the actions suggested by them, the polarising of the workload, the introduction of integrated electronic systems that increase workload and fatigue, a feeling of lack of control by the operator as well as a loss in the set of data obtained that is determined by the system itself.

The advantages and limitations of these systems must be clearly established through training on their functioning. Also it is necessary to understand that these are systems that help and complement the perception of the situation determined by the human eye and the application of best maritime practices and that in no case do they replace the capacity for decision based on knowledge and experience, that must remain with the officer of the watch⁶⁰.

3.2.7 Captain's authority and responsibility

The criminalization of seafarers is a trend that has increased in the last 30 years, due to the captain's increasing legal responsibility. Various recent examples can be mentioned in which coastal states have used their criminal laws to arrest and imprison seafarers involved in maritime accidents resulting in pollution such as the cases of the *Erika*, the *Prestige* and the *Tasman Spirit*. In many of these cases, the seafarers had no direct control over the accident management and appear to have been used as "scapegoats" for political or public opinion reasons⁶¹.

During this period, the structure of maritime commerce has changed drastically but, paradoxically, the person with the least ability to influence these changes has been the captain who has seen how the main features of his relationship with the ship's operator have become increasingly blurred⁶². The captain continues to have maximum responsibility for the safety of the ship, the crew and its cargo but without the necessary authority for management in matters relating to the ship's operation. Captains today can contact their ship owners or managers almost instantaneously but this is not necessary beneficial to them since the ship owners or managers thus acquire the opportunity to intervene in decisions on the ship's operation or safety, giving priority

Mills, S. (2006): "Integrated marine electronic systems-some user associated issues for the designer". *Journal of Navigation*, 59(3): 423-433.

Lützhöft, M.H. and Dekker, W.A. (2002): "On your watch: automation on the bridge". *Journal of Navigation*, 55(1). 83-96.

60) Schröder-Hinrichs, J.U., Hollnagel, E. and Baldauf, M. (2012): "From the Titanic to Costa Concordia-a century of lessons not learned". *WMU Journal of Maritime Affairs*, 11: 151-167.

61) Gold, E. (2005): "The fair treatment of seafarers". *WMU Journal of Maritime Affairs*, 4(2): 129-130.

62) International Maritime Organisation (2012): *Guidelines on fair treatment of seafarers in the event of a maritime accident*. Accessible at [<http://www.imo.org>].

to commercial interests, when these decisions must be taken genuinely by the captain⁶³.

Captains and officers assume immense responsibility for protecting the life of the crew, the cargo and the environment from the limitations imposed by the current system of maritime transport with reduced crews, short and frenetic work periods in port, overload of bureaucratic work, etc, which does not give them a complete and detailed review of the state of the ship nor guarantees of its seaworthiness and even less, in taking decisions giving priority to safety over economy. Because of this, the maritime industry and all the organisations interested in maritime commerce must take great care with how these seafarers are treated and with the image which, in a maritime accident, is offered of the persons who operate the ships. Only in this way can crews with the best standards of training and qualifications be recruited and retained on board⁶⁴.

3.3. The ship's condition

The ship's condition determines the features of the internal working place. Factors such as ergonomics, the state of maintenance and the environmental quality and comfort affect both the working performance of the seafarers and the quality of their rest.

3.3.1 Ergonomics

The design and building of ships must take into account that they contain a high number of very different working places (the bridge, the engine room, the holds, the galley, etc) but that at the same time, the ship is also a home for those working on board. Likewise, taking into account the close relationship between the human factor and maritime safety, it is to be expected that ships be designed and built using ergonomic principles and data. However, ergonomic considerations must be taken into account beyond the design and building of the ship and must be applied throughout its useful life⁶⁵, for example, when the activity for which it was designed changes, there are changes to the manning assigned to it or new systems or equipment are installed.

It must be accepted that both the ship owner and the builder consider the economic

63) Gold, E. (2004): "From Privilege to Peril: the shipmaster's current legal rights and responsibilities". *WMU Journal of Maritime Affairs*, 3(1): 51-66.

64) McDonald, R. (2005): "Criminalisation in shipping". *Seaways*, March (2005): 5-7.

65) Earthy, J.V. and Sherwood Jones, B.M. (2010): Design for the human factor. The move to goal-based rules. Accessible at [<http://www.he-alert.org>].

criterion to be primary when building a ship⁶⁶. However, economic criteria can be contemplated whenever minimum standards are met and the safety of the ship and its crew guaranteed. To obtain a safe ship that is operational and with a high degree of quality of habitability, it will be necessary to consider the opinions of everyone involved in its design, building and operation – naval architects, ship owner, operators and seafarers.

Naval architects must consider how to build a ship which is at the same time cheap, safe, comfortable, easy to maintain, easy to operate and environment-friendly⁶⁷. Unfortunately, ergonomic questions have not been regularly taken into account in the design of ships so that currently knowledge and appreciation of the implications of the human element on board are very limited among naval architects and inspectors⁶⁸.

The design and operation of the ship must be more focused on the end user⁶⁹, taking into account the complex and dynamic situation of the maritime industry where the operational context, the seafarer's profile and the design of the equipment are in constant change and it is not obvious that all these independent changes are compatible.

It must be remembered that a human operator working on a moving platform may find his or her capabilities degraded in many ways either at the physical level (difficulties to maintain a static posture, difficulties to walk and carry out operational and maintenance tasks that require physical movement) or at the cognitive level (difficulty with attention, perception, memory and decision making)⁷⁰. But also, in the case of ships and taking into account their function as a place of rest, poor ergonomic conditions may degrade the quality of the workers' rest, increasing their levels of fatigue and stress.

66) Tham, K.S. (2004): "The case for a decent design". *The International Maritime Human Element Bulletin*, 3: 3

67) Rasmussen, J. (2005): "Designing usable ships". *Proceedings of Human Factors in Ship Design and Operation*. Royal Institution of Naval Architects, London.

68) Walker, O. (2011): "The human element competency required for design appraisal". *Proceedings of Human factors in ship design and operation conference*. The Royal Institution of Naval Architects.

69) Earchy, J.V. and Sherwood Jones, B.M. (2010): Design for the human factor. The move to goal-based rules. Accessible at [<http://www.he-alert.org>].

70) Dobie, T. (2002): "The importance of the human element in ship design". *UNOLS Research Vessel Operators' Committee Meeting*. Accessible at [<http://www.unols.org>].

Osterman, C., Rose, L. and Osvalder, A.L. (2010): "Exploring maritime ergonomics from a bottom line perspective". *WMU Journal of Maritime Affairs*, 9(2): 153-168.

3.3.2 Environmental quality and comfort

The environmental quality and comfort on board are determined by factors such as temperature, humidity, vibration, noise, lighting and the presence of harmful particles in the air. The level that may be reached on board for each of these parameters will depend on the ship's design itself and on the particular working or living space. Thus engine rooms usually have the worst environmental conditions, normally with high levels of temperature and humidity, noise and vibration levels above those established as comfortable, poor lighting and air polluted with smoke and gases. The living spaces, on the other hand, are usually those with the best environmental quality and comfort since they are designed, among other things, for physical and mental recovery and rest.

Of all these factors, noise is perhaps the most problematic and also the most studied. Noise makes concentration and communication difficult, negatively affects monitoring and the performance of work, may cancel out or hide other noises relating to safety such as alarms and prevent suitable rest, favouring the appearance of fatigue⁷¹. Noise is also the main cause of hearing loss, a major occupational illness among engine room workers. On the other hand, rest periods on board are not sufficiently long to allow optimal hearing recovery since the rest areas are also affected by more or less important noise levels, depending on their location⁷².

Regarding the exposure of seafarers to vibration, its propagation through the decks and bulkheads exposes crew members to total body vibration. The effect of vibration on the health of the seafarer, which depends on the exposure time and their frequency, may range from simple discomfort to bone degeneration, passing through fainting, abdominal and digestive problems, cardiovascular, respiratory, metabolic, motor, posture and visual disorders, back problems and musculoskeletal damage⁷³. In the

71) International Maritime Organisation (1981): Res. A. 468 (XII) *Code on noise levels on board ships*.
Dobie, T. (2003): "Critical significance of human factors in ship design". *Proceedings of 2003 RVOV Meeting*. Accessible at [<http://www.unols.org>].

Picard, M., Girard, S., Simard, M. and Larocque, R. (2008): "Association of work-related accidents with noise exposure in the workplace and noise-induced hearing loss based on the experience of some 240,000 person-years of observation". *Accident Analysis and Prevention*, 40: 1644-1652

Kurt, R.E. and Turan, O. (2011): "Effect of noise on human performance on board ships". *Proceedings of Human Factors in Ship Design and Operation Conference*. The Royal Institution of Naval Architects.

72) Louro, J., de la Campa, R. and Vazquez, P. (2011): "Legal gaps relating to labour safety and health in the maritime transport sector in Spain". *International Maritime Health*, 62(2): 91-97.

Ellis, N. (2009): "Vessel design and the wellbeing of seafarers". *SIRC Symposium*, Cardiff University, 75-90.

73) Paschold, H. and Sergeev, A. (2009): "Whole-body vibration knowledge survey of U.S. occupational safety and health professionals". *Journal of Safety Research*, 40: 171-176.

Calhoun, S.R. (1999): Human factors in ship design: preventing and reducing shipboard operator fatigue. Accessible at [<http://www.ardujenski.com>].

work environment, exposure to vibrations can cause interruptions in undertaking tasks, decreased levels of work performance, visual problems and problems interpreting data, mainly on screens, fatigue and a tendency to accidents⁷⁴.

Exposure to extremely high temperatures is known as thermal stress. An unsuitable thermal atmosphere causes reduced physical and mental performance, irritability, increased aggressiveness, distractions and errors, variations in the cardiac rhythm and can sometimes end in death⁷⁵.

To date, there is little literature on the effects of lighting levels and the quality of interior air on seafarers' health and safety. It should be noted with regard to lighting levels that light maintains the rhythm of the human biological clock⁷⁶ which directly regulates the circadian rhythm. The human body needs exposure to natural light to maintain an appropriate circadian cycle and the questions of well-being and health. However, many crew members spend a large part of their working day, if not all of it, in artificial electrical light. An inadequate artificial lighting system contributes to high fatigue, increases error levels, reduces reaction times, reduces levels of alertness and deteriorates the frame of mind.

In the case of officers and sailors carrying out navigation watches on the bridge at night, adaptation to darkness is a factor of vital importance that depends on the level of lighting inside and outside the bridge and on atmospheric conditions, among others⁷⁷.

Other factors that also affect the well-being and behaviour of seafarers are aesthetics and confinement⁷⁸.

3.3.3 Preventive maintenance

Two of the main consequences arising from the current world financial crisis that affect maritime transport and that have a direct impact on the operational safety of

74) Dobie, T. (2003): "Critical significance of human factors in ship design". *Proceedings of 2003 RVOV Meeting*. Accessible at [<http://www.unols.org>].

75) Orosa, J.A., Santos, R. and Pérez, J.A. (2011): "A practical case study of the relationship between work risk prevention and fatigue at work in Spanish merchant ships". *Human factors and ergonomics in manufacturing & service industries*, 00(0):1-9.

76) Calhoun, S.R. (1999): Human factors in ship design: preventing and reducing shipboard operator fatigue. Accessible at [<http://www.ardujenski.com>].

77) Wynn, T., Howarth, P. and Kunze, B. (2012): "Night time lookout duty: the role of ambient light levels and dark adaptation". *Journal of Navigation*, 65(4): 589-602.

78) Ellis, N. (2009): "Vessel design and the wellbeing of seafarers". *SIRC Symposium*, Cardiff University, 75-90.

ships are the delaying of maintenance and repair programmes and the reduction in manning. The manning reduction also has a direct effect on the effective undertaking of maintenance programmes on board since a ship that sails with a reduced crew according to the minimum set by law must prioritise between keeping the ship operational or carrying out maintenance tasks which, although necessary, are not urgent⁷⁹.

Preventive maintenance plays a priority role in the management of a ship directly related to its safety and that of its crew and cargo. For example, a study by the Japan International Cooperation Agency⁸⁰ concludes that most fires on ships start in the engine room and are often caused by a lack of suitable maintenance. The lack of suitable maintenance is also one of the main causes of structural failure⁸¹. Likewise, a ship on which suitable and effective maintenance is not carried out will suffer deterioration to its hull and equipment in the short term that could lead to the collapse of its commercial viability.

The typical elements of maritime transport that harm the effective undertaking of preventive maintenance include coastal navigation with limited sailing times that make it difficult to plan and carry out maintenance tasks under way, short stays in port that do not allow time for carrying out complex maintenance tasks with the ship stopped and reduced crews with scarcely sufficient personnel for the proper operation of the ship and clearly insufficient for the effective undertaking of maintenance tasks.

3.4. Conditions of life on board and employment conditions

While in more traditional work posts the psychosocial risks are limited to the place and time of work, in the case of on-board work this concept must be enlarged since during sailing, seafarers work and live in the same confined space and therefore the amount and quality of their rest, this being understood as the time spent sleeping and at leisure, and the amount and quality of their interpersonal relationships at the social level affect their physical and psychological health and therefore affect their working performance.

The contracting conditions also have a great influence on seafarers' health and well-

79) De la Campa, R.; Bouza, MA.; Louro, J. and Vázquez, P. (2011): "La gestión del mantenimiento preventivo como herramienta para la mejora de la seguridad laboral a bordo: casos prácticos". *Medicina Marítima*, 11(2): 155-160.

80) Anderson, P. (ed.) (2007). Maintenance and ISM. *Report ISM*, n 6, p 5. Accessible at [<http://www.consultism.co.uk>].

81) Kim, T. (2005): "Human factors and regulatory regime in design and construction of safe and robust ships and maintaining them for their lifetime". *Proceedings of Human Factors in Ship Design and Operation*. Royal Institution of Naval Architects, London.

being. The duration of voyages and holiday periods, the payment level, the stability of employment and the social benefits offered by the shipping company partly determine the workers' level of satisfaction with work on board and loyalty to the employer.

3.4.1 Interpersonal relationships

The working organisation on board is based on a hierarchical distribution of tasks and responsibilities. This hierarchical structure exceeds the employment plane and also determines the relationships at the social level, greatly helped by the distribution of the communal and private spaces on board for leisure and rest⁸². Thus, generally, cabins and communal spaces for officers occupy the upper decks of the accommodation while the cabins and communal spaces for lower ranks occupy lower decks in that space. This separation of spaces according to levels of responsibility makes physical interaction between officers and lower ranks difficult, making social interaction between crew members of different ranks infrequent.

Today, interpersonal relationships at the social level are subject to two conditions typical of current maritime commerce, the reduction of manning and the formation of multilingual and multicultural crews.

Regarding the implications of language problems and social life, easy communication with other crew members is a necessity for the worker, comparable to matters such as having a place of rest and suitable food⁸³.

The International Maritime Organisation recognises this circumstance and places on-board communication as one of the factors present in the environment of a ship that could contribute to unfavourable psychological behaviour⁸⁴.

Unfortunately, the social side of on-board interaction is a topic frequently neglected by the institutions and organisations related to health and safety despite social interaction being critical to maintaining high morale on board, a factor related to the

82) Acejo, I. (2009): "Transnational crews and their ways of belongingness". *Proceeding of the International Conference on Migration, Citizenship and Intercultural Relations*, Burwood. Accessible at [<http://www.deakin.edu.au>].

Acejo, I. (2012): "Seafarers and Transnationalism: Ways of Belongingness Ashore and Aboard". *Journal of Intercultural Studies*, 33(1): 69-84.

Kahveci, E., Lane, T. and Sampson, H. (2001): *Transnational Seafarer Communities*. Seafarers International Research Centre. Cardiff University

83) Rodriguez-Martos, R. (2000): "The importance of special training in leadership for captains and officers for a safe navigation and preservation of the environment". *Proceedings of 2nd International Congress on Maritime Technological Innovations and Research*. Cádiz: 999-1006.

84) International Maritime Organisation (ed.) (2000): *Curso Modelo 1.14 Primeros Auxilios Sanitarios*

safety of the ship's operation⁸⁵.

The formation of multicultural crews is not a new phenomenon but has become a normal practice adopted by maritime managers to reduce the operating costs of their ships⁸⁶. One of the many obstacles that the 21st-century seafarer must face is the need to manage the different cultures on board⁸⁷. Cultural awareness implies not only understanding and accepting the more evident cultural differences such as customs of religion, clothing or food but also understanding certain cultural values that have a great influence on the behaviour of individuals such as individualism/collectivism, family values, the attitude towards time and interpersonal space⁸⁸.

Manning reduction increases working hours and means that crew members not on watch or working on transverse tasks are sleeping. Thus social relationships are few and group activities impossible. The trend for the continuous rotation of crews prevents the establishing and maintaining of friendship relationships on board. Given that social relationships are important for emotional and physical health, these recruiting practices lead to the social isolation of crew members and high levels of stress that have been associated with the high level of suicides on board⁸⁹.

3.4.2 Communication with the exterior

As well as possibilities for social communication on board, seafarers need the opportunity to communicate with their relatives⁹⁰. Regular contact with family and friends is fundamental for maintaining effective relationships and for not losing the connection with life ashore⁹¹. In delicate circumstances in life, the impossibility of communicating with the exterior aggravates the seafarer's isolation and may lead to great stress.

85) Kahveci, E. and Sampson, H. (2001): "Findings from the shipboard based study of mixed nationality crews". *SIRC Symposium*. Cardiff: Cardiff University: 39-60.

86) Progoulaki, M. and Roe, M. (2011): "Dealing with multicultural human resources in a socially responsible manner: focus on the maritime industry". *WMU Journal of Maritime Affairs*, 10: 7-23
Kahveci, E., Lane, T. and Sampson, H. (2001): *Transnational seafarer communities*. Seafarers International Research Centre. Cardiff University.

87) Benton, G. (2005): "Multicultural crews and the culture of globalisation". *Proceedings of the 6th Annual General Assembly of the International Association of Maritime Universities*, Malmö: 125-128.

88) Oleneva, T. (2010): "The key role of values for communication in multilingual crews". *Proceedings of International Maritime English Conference, IMEC 22, Alexandria*: 262-273.

89) Thomas, M. (2003): *Lost at sea and lost at home: the predicament of seafaring families*. Seafarers International Research Centre. Cardiff University.

90) Squire, D. (2006): "The human element- the importance of effective communication". *Proceedings of Maritime Communications & Technology Conference*, London. Accessible at [<http://www.he-alert.org>].

91) Lee, P.J., Shim, M.H. and Jeon, J.Y. (2010): "Effects of different noise combinations on sleep, as assessed by a general questionnaire". *Applied Acoustics*, 71: 870-875.

It is the task of the ship owner to provide appropriate means on board for communicating with the exterior and to guarantee the possibility that, once in port, the crew members have the opportunity to access communication means on shore that allow them to maintain contact with their family and friends.

Access to communications services on land is in turn limited by the time spent in port and the availability of transport means to travel to cities or centres with telephone boxes.

3.4.3 The well-being of seafarers: facilities for leisure and rest

Outside of watch hours, crew members have no possibility of taking a long walk, going shopping, taking a coffee in a nearby bar or going to the cinema or gym but must be content with the scarce activities they can carry out within their cabins or in the limited communal spaces such as the galley, the dayroom or the office. Some ships –the larger ones– may have small spaces equipped with some sports equipment or a small cinema; it is very infrequent that there is sufficient space to organise a football game or take a ride on a bicycle.

The size and comfort of the private and communal spaces for leisure and rest are therefore of vital importance and must offer seafarers the opportunity to relax, rest and have a social life that allows them to disconnect from work and enjoy a healthy lifestyle.

Giving ships a suitable comfortable living area as well as galleys, dayrooms and spaces for leisure, taking into account variations in size, shape and gender of seafarers and the various environmental stressors is important for maintaining suitable levels of physical and mental health among crew members, reducing the possibilities of the appearance of fatigue and human error and increasing morale, comfort and the general quality of life on board⁹².

Under this criterion, some classification societies such as ABS⁹³ have prepared and published guides for accommodation on ships, emphasising the negative effects of a bad design of accommodation spaces and the ship owner's responsibility for taking these aspects into account.

The design of the ship must avoid the sensation of confinement and claustrophobia

92) The Nautical Institute (eds) (2008): *The International Maritime Human Element Bulletin*, number 18. Accessible at [<http://www.he-alert.org>].

ABS (eds) (2012): *Guide for crew habitability on ships*. Accessible at [<http://www.eagle.org>].

93) Vázquez, P., de la Campa, R. and Bouza, M.A. (2010): "Efectos del estrés térmico por calor en la salud de los marinos". *Medicina Marítima* 10(1): 12-13.

to which today's ships tend, giving greater emphasis on providing spaces for work, leisure and rest on board with a more humanised design⁹⁴.

The classification society RINA has also introduced a voluntary notation that will help ship owners to comply with the new international standards for crew accommodation set in the 2006 ILO Maritime Labour Convention⁹⁵.

However, and despite the recognition of the importance of giving ships high-quality accommodation, standards vary considerably from ship to ship. Thus, for example, the ships managed by companies in northern Europe, Japan, the Republic of Korea and the United States tend to have higher accommodation standards⁹⁶. The age of the ship is not necessarily related to the quality of accommodation since cases have been noted of new ships with defects in soundproofing, built with less robust materials or that suffer continuous vibration. Ferries, cruise ships and bulk carriers usually have the worst standards of crew accommodation.

3.4.4 Employment conditions

Good employment conditions are crucial so that the maritime industry has a facility for recruiting and retaining competent and well-qualified seafarers. Spending several months on board has its disadvantages so that generous holidays and good payment and employment conditions provide a compensation that may encourage workers towards a career at sea.

In its publication *Guidelines on good employment practice*, the International Shipping Federation describes a series of conditions that are the responsibility of the shipping company or shipping managers who contract personnel, including:

- Establishing and complying with the employment contract within the conditions regulated internationally.
- Covering the costs of repatriating crew members at the end of the voyage.
- Ensuring that rest hours are complied with as legally established.
- Setting up complaint procedures for crew members.
- Setting company policies against discrimination and abuse.

94) Khodayari, S. (2012): Claustrophobia and new ship design. Accessible at [<http://general.marine-files.net>].

95) International Labour Organization (2006): *Maritime Labour Convention*.

96) Alderton, T., Bloor, M., Kahveci, E., Lane, T., Sampson, H., Thomas, M., Winchester, N., Wu, B. and Zhao, M. (2004): *The Global Seafarer: Living and working conditions in a globalized industry*. International Labour Office. Geneva.

- Ensuring the health, safety and well-being of crew members.
- Covering the costs arising from sudden illness or accident suffered during the voyage.
- Offering financial compensation in the case of death or disability arising during the voyage.
- Setting company accident prevention policies.
- Equipping the ship with installations for well-being and leisure as well as providing communications with the exterior and the possibility of visiting the shore while the ship is moored.

Many of these conditions are today subject to the nationality of the crew members.

3.5. Environment and external influences

Among the psychosocial factors, these are the most difficult to manage since in almost all of them, control escapes the possibilities of the maritime managers who can only set up measures designed to palliate their negative effects on the professional performance and health of the crew members.

3.5.1 Weather conditions

The ship is a floating platform and as such is subject to the conditions of the movement of the sea, the wind and the currents affecting it at any time. Although it is not feasible to control weather conditions to facilitate work on board, it is pertinent that, during the ship's design phase, all necessary measures are taken to give it the greatest possible stability in bad conditions⁹⁷ and even, to a certain point, take into account the usual weather conditions on the route to which the ship is destined to give it mechanisms that allow working and living on board in the most comfortable conditions as far as possible.

Despite all this, the ship moves and not everyone has the same physical and physiological tolerance to such movements. At the organisational level, the ship's movements limit the capacity of the crew members to carry out command, control, communication, navigation and maintenance activities⁹⁸. At the physical level, the ship's movements can generate a wide variety of inconveniences such as the increased energy needed to carry out work activities or increased levels of fatigue

97) Riola, J.M. and García de Arboleya, M. (2006): "Habitability and personal space in seakeeping behaviour". *Journal of Maritime Research*, 3(1): 41-54.

98) Stevens, S. and Parsons, M. (2002): "Effects of motion at sea on crew performance: a survey". *Marine Technology*, 39(1): 29-47.

and somnolence, the most common and well known effect being seasickness.

As well as feeling physically ill to a greater or lesser extent, crew members suffering from seasickness suffer from demotivation and apathy so that their capacity to work in safe conditions is reduced and their responsibilities must be assigned to other crew members who must face the work overload in physically adverse conditions.

The ship's movements may have other effects on the crew's capability to carry out their activities which are perhaps not so obvious as seasickness⁹⁹ such as, for example, the loss of posture control which could result in a fall and interference with fine motor abilities that makes the use of manual controls difficult (keyboard, mouse, touch screen, joystick, etc.), affecting the worker's motivation and causing fatigue.

3.5.2 Regulation and inspection

It is unquestionable that international regulation and the setting of minimum standards relating to maritime safety and environmental protection are strictly necessary for the good operation of this industry. The design and construction of ships, the operating procedures, the training of seafarers and the protection of their employment rights are key factors that require strict regulation and control.

In recent years, to improve maritime safety, legislators have set a very high number of new regulations which in turn involve greater control and an increased administrative workload on board¹⁰⁰.

Although, as just mentioned, these new regulations are designed to increase the safety of the maritime industry and of its workers, it seems that the effects achieved have not been as expected and the obligations imposed by these new regulations have not been well accepted by seafarers¹⁰¹.

99) Dobie, T. (2003): "Critical significance of human factors in ship design". *Proceedings of 2003 RVOV Meeting*. Accessible at [<http://www.unols.org>].

100) Knudsen, F. (2009): "Paperwork at the service of safety? Workers' reluctance against written procedures exemplified by the concept of seamanship". *Safety Science*, 47: 295-303. Van Hemmen, H. (2009): "Human factors analysis and the shipboard environmental department". *Marine Technology*, 46(4): 200-210.

101) The Nautical Institute (eds) (2004): *The International Maritime Human Element Bulletin*, number 2. Accessible at [<http://www.he-alert.org>].

The Nautical Institute (eds) (2006): *The International Maritime Human Element Bulletin*, number 10. Accessible at [<http://www.he-alert.org>].

Knudsen, F. (2009): "Paperwork at the service of safety? Workers' reluctance against written procedures exemplified by the concept of seamanship". *Safety Science*, 47: 295-303.

Van Hemmen, H. (2009): "Human factors analysis and the shipboard environmental department". *Marine Technology*, 46(4): 200-210.

Lloyd, M. (2006): "Why ships really collide". *Seaways*, October 2006: 10-12.

Among the reasons for this rejection, the increased paper work and on-board bureaucracy are the most critical, mainly taking into account that this increased workload has not involved a proportional increase in the manning level, significantly increasing seafarers' fatigue and leading them to carrying out unsafe operational practices.

3.5.3 Transit conditions: high traffic density

Navigation in areas with a high traffic density involves extra attention and vigilance by the officers of the watch, which entails an increase in workload and in the required level of alertness. Increased traffic density in turn involves an increased risk of collision and the decisions taken by the officer of the watch to prevent a collision depend on the officer's own personal characteristics¹⁰². Generally, the decision to be taken must be based on the International Regulations for Preventing Collisions at Sea, taking into account the state of the sea, the ship's condition, the traffic situation and the manoeuvring space available. However, there are other personal factors that affect the decision to be taken – lack of knowledge of the standards, perception errors, lack of attention, failure to appreciate the limits of the navigation equipment, navigation difficulties and fatigue are some of these factors¹⁰³. If the passage through highly transited waters, the possibilities of crossing traffic, concentration of fishing vessels and other usual circumstances are not planned or if there is no clear knowledge and full availability of the navigation aids, the stress level will rise dangerously. This situation is worsened in bad weather – fog, waves, wind and rain are factors that make transit through these waters exceedingly difficult.

The traffic density must also be taken into account when setting the number of persons on watch on the bridge since in these cases it is very probable that a single officer on the bridge, without the help of a look-out, cannot maintain efficient control over the traffic present at all times or be precisely aware of the presence of other dangers to navigation which could lead to taking erroneous decisions regarding the manoeuvres needed for safe navigation¹⁰⁴. The problem of the short stays in port also aggravates

Squire, D. (2005): "The human element in shipping". Accessible at [<http://www.he-alert.org>].

De la Campa, R., Salgado, A. and Iglesias, S. (2011): "El camino hacia la cultura de seguridad en el transporte marítimo a través de la aplicación del código IGS". *Régimen del Transporte en un Entorno Económico Inclerto*, Marcial Pons: Madrid.

Kahveci, E. (2007): *Port based welfare services for seafarers*. Seafarers International Research Centre. Cardiff University.

102) Lin, B (2006): "Behaviour of ship officers in manoeuvring to prevent a collision". *Journal of Marine Science and Technology*, 14 (4): 225-230

103) Squire, D. (2003): "The hazards of navigating the Dover Strait (Pas-de-Calais) Traffic Separation Scheme". *The Journal of Navigation*, 56: 195-210.

104) MAIB (2004): *Bridge watchkeeping safety study*. Accessible at [<http://www.maib.gov.uk>].

the dangers of navigation in congested waters¹⁰⁵ since an officer who has been frantically occupied in the work of loading and unloading during the stay in port, without the possibility of resting before going on watch in a high traffic density area, will have greater difficulties for being alert, being competent and taking safe decisions during navigation.

The technological systems for aiding navigation may be of great help for reducing the risk of collision in these waters¹⁰⁶, although it must be remembered that specific training on the use of these devices and knowledge of their limitations is necessary¹⁰⁷. It is equally important that the design of the bridge and the layout of the electronic equipment on it facilitates the officer's work so that he has a wide arc of visibility, can approach the bridge windows and access instruments without losing exterior visibility¹⁰⁸.

Equally, the setting up of traffic separation areas and the VTS systems allows ships to be monitored by separation devices, advising ships in difficulties during transit or manoeuvring and, therefore, reducing the risk of collision.

3.5.4 Transit conditions: piracy

Piracy is perhaps the most important blot that currently affects maritime transport as well as other sectors connected with the use and enjoyment of the seas and oceans, reaching a very worrying magnitude in certain areas such as the waters off the coast of Somalia and the Gulf of Guinea.

Considering that almost a thousand seafarers suffer the physical and psychological consequences of a pirate attack each year, piracy has become one of the major worries for seafarers who must transit the affected waters.

The consequences of a pirate attack on seafarers' health start long before the attack occurs; from the moment in which they are aware of the need to transit the affected areas, their levels of anxiety and stress increase¹⁰⁹. Physical deprivations regarding

105) Le Pla, R.N. (1978): "Problems of navigation in high density traffic". *Journal of Navigation*, 32(2): 310-319.

106) Gattuso, D., Napoli, S. and Meduri, A.G. (2009): "Safety of the navigation in congested maritime area. The case of the Messina strait". *European Transport*, 42: 83-101.

107) Squire, D. (2003): "The hazards of navigating the Dover Strait (Pas-de-Calais) Traffic Separation Scheme". *The Journal of Navigation*, 56: 195-210.

108) Le Pla, R.N. (1978): "Problems of navigation in high density traffic". *Journal of Navigation*, 32(2): 310-319.

109) Lyngø, M.L. (2012): "Sailor education and training: cutting the human cost". *2nd International Counter Piracy Conference Proceedings*. Accessible via [<http://www.counterpiracy.ae>].

food, sleep, movement, etc, and the psychological mistreatment suffered during captivity without doubt generate other physical and mental health problems such as malnutrition and post-traumatic stress that require later more or less prolonged medical attention, depending on the properties of the attack and of the victim.

Although considerable progress has been made in measures designed to prevent pirate attacks¹¹⁰, it is still necessary to progress in how to help both those seafarers who have suffered a pirate attack and those who are threatened with the fear of suffering one.

The scarce literature on the humanitarian response to maritime piracy notes training and information for seafarers as the main measure designed to minimise both the consequences to health of the transit through affected areas and those arising from a real attack.

The commitment of the company to the well-being of seafarers in these situations, shown in the information and the treatment received by their families in the case of kidnapping, the knowledge that the company is attending to their needs in some way and its concern to give them medical and psychological care at the end of captivity are measures that increase the workers' level of confidence with their employers, allowing them to face the situation or the possibility of this situation with lower stress levels.


4. CONCLUSIONS

On-board psychosocial risks cover a very wide range of circumstances and working conditions that interact and may be susceptible to change over time or according to the company's management model and commitment to the safety of its ships and crews.

The perception and influence of psychosocial factors on seafarers may also differ for each worker since this will depend on individual characteristics, motivations, expectations, attitudes and aptitudes as well as on their prior physical and mental condition.

Maritime Piracy- Humanitarian Response (2011): *Good Practice Guide for Shipping Companies and Manning Agents for the Humanitarian Support of Seafarers and Their Families*. Accessible via [<http://www.mphrp.org>].

110) Stevenson, D. B. (2012): "The Humanitarian Response: Seafarers Health and Welfare. Can we declare victory and go home?". *2nd International Counter Piracy Conference Proceedings*. Accessible via [<http://www.counterpiracy.ae>].




II. Psychosocial risks of the seafarers


It is therefore very complicated to assess the influence that these factors may have on each individual but knowledge of them and of the possible interactions with work performance and the health and safety of workers overall is of incalculable value to achieve as healthy and safe a working environment as possible.

To finalise, it is necessary to remember that a ship is above all a system of persons. It is managed and crewed by men and women with real working and social needs and expectations who must work and live with persons from other nationalities, cultures, languages and religions, in a confined space for long periods of time and in almost total isolation from relatives and friends, subjected to the working pressures imposed by the shipping companies, assuming civil and sometimes penal responsibilities that go beyond the legally, ethically or morally enforceable, sometimes even putting their own safety and that of the ship at risk to the benefit of the mercantile company.

Therefore, the efficient planning of the living and working conditions on board must take into account both the characteristics of the crew members and those of the ship as well as the possible results of the interaction between both.



Many partial solutions have been proposed to the problems arising from on-board psychosocial risk factors. However, we have seen that all these problems arise from bad customary practices connected today to maritime transport and to the form in which the managers understand the maritime business. Basic questions such as the lack of experienced officers and seamen, the difficulties associated with the formation of multicultural crews, excessively reduced crews, lack of training, language difficulties and the lack of appropriate maintenance are problematic areas which are still under-regulated. The solution to these problems almost invariably involves two measures proposed as really effective – the reduction of the workload and/or the increase in the number of crew members.



Unfortunately, few maritime managers are seriously willing to assume responsibility for increasing on-board safety by putting seafarers above commercial interests and short-term financial profits.





CHAPTER 3

The feminisation of maritime activities in France

Being a seafarer and a woman: gender, community and representations?

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A Florence Arthaud dont Eric Tabarly disait qu'elle n'était pas une femme mais un grand marin¹.

Résumé : *En France, les femmes marins représentent moins de 10% des effectifs. Le métier de marin est traditionnellement considéré comme un métier d'homme construit autour d'une division spatiale et d'une division sociale de différenciation des genres. Et pourtant, la féminisation des métiers maritimes n'a pas posé de réelles difficultés. Basé sur les résultats du projet Femmar, cet article présente dans un premier temps quelles sont les adaptations spécifiques mises en place pour les femmes marins en termes d'équipements et de prise en charge de la maternité et des situations de harcèlement. Hormis ces deux éléments, au nom du principe d'égalité homme-femme, la femme marin est au regard du cadre législatif un marin comme un autre. Dans un deuxième temps sera analysée la manière dont les femmes marins expérimentent la vie à bord et la manière dont elles se conçoivent en tant que femmes dans une communauté professionnelle à dominante masculine. Cela*

1) Florence Arthaud, surnommée par les médias « la petite fiancée de l'Atlantique », née le 28 octobre 1957 à Boulogne-Billancourt, est décédée le 9 mars 2015, lors d'un accident d'hélicoptères, près de Villa Castelli en Argentine; cette navigatrice française fut victorieuse de la « Route du Rhum » en 1990; en novembre 1986, elle s'était dévouée pour porter secours à Loïc Caradec, qui ne fut pas retrouvé; le 20 octobre 2011, elle chute de son bateau, de nuit au large du Cap Corse, elle sera récupérée un peu plus de 3 heures après l'appel de détresse qu'elle put donner à sa mère, grâce à un téléphone portable, et à sa géolocalisation.

révèle les stratégies d'adaptation des femmes au milieu clos du navire à travers la volonté de gommer leurs attributs féminins et de prouver leurs compétences. Les femmes se définissent d'abord par l'expérience commune de la vie à bord et par le fait d'être marin.

Abstract: *Although the feminisation of maritime activities began more than thirty years ago, women remain a minority in this sector and this has evolved slowly over the last ten years. This low representation of women is understandable to some extent, as the profession of sailor is traditionally considered a male profession. In reality, the recent Femmar study,² conducted in France, shows that except for the Navy, where feminization results from political will, the arrival of women in the maritime sector is taking place without any protest movement and without any modification of the legal framework, apart from measures for maternity leave. It seems now that in the name of gender equality, with regard to the legal framework, women can simply be sailors (without consideration of their gender), except for in the particular cases of maternity leave and the fight against harassment. However, this assertion deserves to be analyzed with regard to the sociological acceptance of women's arrival in the maritime sector and especially how these sailors consider themselves as women in a professional community dominated by men*

2) Femmar (2009-2011), L'évolution du rôle et du statut de la femme dans les activités maritimes (http://www.cdmo.univ-nantes.fr/87966570/0/fiche___pagelibre/&RH=1397064750995&RF=1362487936961)

III. The feminisation of maritime activities in France

The feminisation of maritime activities started more than 30 years ago, implementing the principle of equality between women and men. However, in this sector, women remain a minority. Indeed, among 1.25 million seafarers, 1 to 2% of them are women. Only 7% of women are officers while 42% of men are officers.³ In France, in 2008, women represented 4.48% of maritime registered workers, i.e. 5.92% of the Merchant Navy workforce and 3.4% of the fishing workforce (less than 2% worked for small-scale fisheries). 1,594⁴ women were registered as seafarers, among whom 899 worked in shipping (866 in 2005) and 695 in the fisheries sector (687 in 2005). In 1999, there were 1,396 women. In 2010, women in the French Navy represented 8% of the total onboard workforce,⁵ divided in 39 vessels among the fleet's one hundred ships. In 2014, 5.9% of active seafarers were women, 8.6% in shipping and 35% in fisheries.⁶ This shows a slight increase in the number of women among seafarers in France in the last 20 years.

The low presence of women can be partly explained by the traditional masculine domination of seafaring. The profession was historically constructed as a gender-related group.⁷ This was accentuated by the process of maritime registration of seafarers in France until 1965 that allowed only male seafarers to navigate, in the shipping and the fishing sectors. Any feminisation of the maritime sector would have been unthinkable, considering the social and cultural codes that governed the navigation activity.

Seafarers' symbolic spaces and imagination are structured by two axes: the connection to the professional traditions at sea and the relationship with the land and the family. Being at sea, between men, brought them to differentiate people living and working inland including their wives, who became synonymous with home, safety, and stability, from themselves, who are in a moving dynamic when at sea. Relationships with the socio-symbolic spaces of land and sea contributed to the construction of seamen's

3) Rapport du Directeur général sur l'évolution du secteur maritime, Conférence internationale du Travail, 94^e session (maritime) 2006, rapport II, BIT 2006; Belcher P et al (2003) Women seafarers: global employment policies and practices. International Labour Organization (ILO), Geneva; Brickman JP (2012) Recruitment and retention of women in the maritime industry. In: The 13th Annual General Assembly of the IAMU, St. John's, Canada, 15–17 October 2012. pp 193–205; Sulpice G (2011) Study on EU seafarers' employment: final report. European Commission, Directorate- General for Mobility and Transport, Directorate C - Maritime Transport.

4) ENIM. Rapport d'activité de l'ENIM pour 2008, p. 38.

5) France, Ministère de la défense. [Online]: <http://www.defense.gouv.fr/marine/dossiers/le-8-mars-journee-de-la-femme/le-nombre-de-batiment-a-equipages-mixte>

6) France, Ministère des affaires sociales, de la santé et des droits des femmes. [online]: www.femmes.gouv.fr

7) Grövel A., (2007), Dynamique professionnelle et transformation du genre: la féminisation des lycées professionnels maritimes, Mémoire M2, Paris X, p. 59; la présence des femmes y est même décrite comme une pollution; Thompson P., (1985) Women in the fishing: the roots of power between the sexes, *Comparatives studies in society and history*, vol 27, n° 1, p. 3.

identity and created a social division of gender roles simultaneously based on a symbolic division of spaces.⁸ However, the feminisation of the maritime sector has questioned the evolution of this gender model based on the sexual division of work and the assignation of women to the domestic sphere.⁹

The recent Femmar¹⁰ study, conducted in France, shows that, except for the Navy where a feminisation process was implemented due to a political decision, the presence of women in shipping, fishing or shell fisheries happened naturally without any protest and without changing the legislative framework (except for maternity leave provisions). The constraints, specific to feminine workers in terms of working rights (hygiene, security and maternity), do not appear to be a disincentive for recruitment.¹¹ The technological evolution and the automation of many work stations, added to the impact of ergonomic studies, have transformed the activity of seafarers. It requires less physical strength. The supposedly weaker bodies of women do not pose a problem. Also, the presence of women in maritime activities has not deeply modified the organisation of work, unlike in other sectors such as prison surveillance staff.¹² Sailor women are not regularly associated with psychological and physiological weakness by their male colleagues.

As in any professional sector, women's entry on ships has required and still requires the differentiation of equipment for men and women. The law requires the installation of women-only sanitary facilities, showers and cabins, as stipulated in the Maritime Labour Convention, 2006, by the International Labour Organisation (ILO).¹³ In general, these physical changes for hygiene and the improvements in terms of health and safety, due to the arrival of women aboard, also benefitted all the workers.

According to the principle of equality between men and women, it seems that women working at sea are seafarers, just like men, in the eyes of the law, except for in the particular cases of pregnancy and harassment (1). This assertion must however be

8) Trompette P., Saglio J., Dufoulon S., (1998), La différence perdue: la féminisation de l'équipage du Montcalm, les documents du C2SD, p. 108 et 109.

9) Daune R. (1986), Travail professionnel et travail domestique, Etude exploratoire sur le travail et ses représentations au sein des lignées féminines, Paris-Aix en Provence, Ministère du travail/ CEFUP, Université de Provence, cité in Grovel A., *op. cit.*

10) Interdisciplinary project conducted between 2009 and 2011, in the University of Nantes. Femmar (2009-2011), L'évolution du rôle et du statut de la femme dans les activités maritimes. [Online]: http://www.cdmu.univ-nantes.fr/87966570/0/fiche___pagelibre/&RH=1397064750995&RF=1362487936961

11) Tritarelli M. (2010), femme marin, une réalité de management, mémoire technique de fin d'études, ENMM Le Havre, 2010, p 18.

12) Malochet G., (2005) "Dans l'ombre des hommes, la féminisation du personnel de surveillance des prisons pour hommes" *Sociétés contemporaines* 3/2005 (n° 59-60) pp 199-220.

13) International Labour Organisation, (2006) Maritime Labour Convention, Titre 3, règle 3.1 Norme A 3.1 n° 9.

compared with the sociological acceptance of women within the maritime sector and the way they perceive themselves in a professional community that is mostly masculine (2).

1. The protection of women's working conditions on board

The *Code des Transports* does not mention any arrangement specific to gender, except, as is also stipulated in the *Code du Travail*, in relation to the protection of women as mothers. The protection of women working at sea, in the case of pregnancy, presents some specific issues compared to other professions. Although the legal framework dedicated to the fight against harassment is similar aboard or inland, the nature of the workplace, a boat, creates some specific difficulties in applying the law.

1.1. A framework limited to the protection of women as mothers

Inland, legislators have ruled several times to "protect maternity".¹⁴ Pregnant women are therefore protected against discrimination during the hiring process and benefit from a scheme suspending the employment contract, by which employers may not dismiss them for reasons linked to pregnancy.

During the period of medically-confirmed pregnancy and during the period of contract suspension, employers cannot terminate an employment contract, unless they can prove either serious misconduct or that, for a reason not linked to the pregnancy or the birth, it is impossible for the employer to uphold the contract. Any dismissal for other reasons is invalid and is sanctioned by the award of damages (although the dismissed employee's return to work is to be the normal consequence of invalidity), that correspond to the salary the woman should have earned during the period starting from the day of the dismissal to the end of the break plus 4 weeks (C. trav., art. L. 1225-4-1). But the protection of pregnant women goes beyond a simple suspension of contract for maternity leave (equivalent to a period of effective work). The protection against dismissal is absolute: no dismissal can take place or be pronounced during the period of suspension. The dismissal will be invalidated and the woman will get her job back.

Finally, during her pregnancy, a woman is also protected regarding in carrying out her work. An occupational doctor can certify if it is necessary for the pregnant employee to temporarily transfer to another function (C. trav., art. L. 1225-1). Also, the time spent for compulsory prenatal exams is considered as an effective period of work and

14) Pélissier J., Auzero G., Dockès E., *Droit du travail*, Dalloz 25^e éd, 2010 n° 397 et s; Hardouin M., (1997) "Grossesse et liberté de la femme" *Droit social*, 287; Berthou K. et Masselot A., (1999) "Egalité de traitement et maternité", *Dr. Soc.*, 942.

is paid. On her return from maternity leave, the woman must return to her original role, but she can also ask to work part-time or for further parental leave.

Women working at sea also benefit from this protection, but the implementation of maternity leave is specific to the maritime context. Indeed, although the dispositions of common law should be applied, the specifics of working aboard a ship create some difficulties as it is in movement and often far from the coast. The vibrations and the noise pregnant women are exposed to can constitute risk factors for miscarriage. This means that pregnant women are not considered apt to navigate. In this case, pregnant women are disembarked, even though there are no measures allowing her to get a replacement income before the official start of maternity leave.

Until recently, women working at sea did not expressly have the right to maternity leave as ruled by article L. 1225-17 of the French *Code du Travail*, or to adoption leave.¹⁵ It was only in 2006 that legislators partially ended this juridical insecurity. Law no. 2006-10 of 5/01/2006, transposing directive no. 92/85/CEE of 19 October 1992,¹⁶ inserts article 5-2 in the *Code du travail maritime*, listed in article L 5542-37-1 of the *Code des Transports*, and stipulates that articles L. 1225-1 to L. 1225-15 of the French *Code du travail* apply to women working at sea and to maritime school students. This means they now benefit from provisions relative to the protection of pregnancy and from temporary assignment to another job on the recommendation of a seafarers' doctor.

Although the decree implementing this law has not been published yet, the future text should plan that woman seafarers receive a guaranteed salary during the suspension of their employment contract, composed of an allowance borne by the seafarer's social welfare and a complementary indemnity borne by the employer (C. transp., art. L. 5542-37-1). This proposed decree aims to create specific protection as soon as the pregnancy is medically confirmed, a job on land in the case that it become impossible to navigate or if redeployment is impossible and the allowance of a replacement income. The employment contract will only be suspended during this period.

For now, only the *arrêté du 30 janvier 2015*,¹⁷ modifying article 24 of *arrêté du 16 avril 1986*,¹⁸ indicates that "Any gynaecological disease that, by its form, its evolution or its therapeutic requirements, can engender a risk to the affected person if they find themselves far from appropriate medical help, is incompatible with navigation."

15) Droits Maritimes, dir. Beurier J.P., Dalloz, 2015-2016.

16) Directive n° 92/85/CEE du 19 octobre 1992 concernant la mise en œuvre de mesures visant à promouvoir l'amélioration de la sécurité et de la santé des travailleuses enceintes, accouchées ou allaitantes au travail, JOCE L 348, 28 nov. 1992.

17) JO 10 févr. 2015, p. 2348.

18) JO 4 mai 1986 p. 6013.

Pregnancy must "be the object of a specialized evaluation that takes into account prohibited tasks according to the Code du travail, the living and working conditions aboard, the geographical distance imposed by the type of navigation, professional exposure to infectious, chemical and physical agents, in particular to reproductively mutagenic or toxic substances and organisational factors such as night work. Pregnant women and mothers, up to 6 months after giving birth and during the period of breastfeeding, benefit from increased medical monitoring. Complications in pregnancy are incompatible with navigation."

Like before 2006, women are declared medically unfit, while Directive 92/85 states that *"the notion of adequate allowance in the case of maternity leave should be considered as a technical reference in order to determine the minimum level of protection and it should not be interpreted as implying an analogy between pregnancy and sickness."* As a result, when no redeployment on land is possible, the *Etablissement National des Invalides de la Marine (ENIM)*¹⁹ must provide an extra-legal allowance to cover the period between the unfitness statement and the legal maternity leave. However, the extra-legal allowance, equivalent to 90% of the salary, the rest being covered by the complementary insurance, is non-mandatory and subject to a social inquiry. A text regarding pregnant women who navigate on ships being at sea for less than 24 hours (small-scale coastal fisheries, shell fisheries, port towage) delays the grant of the allowance to the 21st week before the term of the pregnancy, leaving these women with no specific care, unless the pregnancy is recognised to be pathological.

Yet, the Directive 92/85 of 19/10/1992²⁰ stipulates that *"the measures concerning the organization of work that aim for the health protection of pregnant workers, and those who have given birth or are breastfeeding, are not be useful if they are not complemented by the protection of rights linked to the employment contract, including the maintenance of payment and/or an adequate allowance; considering that the measures concerning the maternity leave are also not useful if they are not linked to the protection of rights relating to the employment contract, including the maintenance of payment."*

It also provides in article 5 that, *"if redeployment to another job is not technically or objectively possible, or cannot be demanded for justified reasons, the concerned worker is, in accordance with law or national practices, dispensed of work during the entire period necessary to protect her safety or health. The measures of the present article are applied mutatis mutandis if a worker doing an prohibited activity, according*

19) In charge of the special national security regime for seafarers in France.

20) Directive 92/85/CEE du Conseil, du 19 octobre 1992, concernant la mise en oeuvre de mesures visant à promouvoir l'amélioration de la sécurité et de la santé des travailleuses enceintes, accouchées ou allaitantes au travail, JOCE L 348, 28 nov. 1992, p. 1.

to article 6, becomes pregnant or breastfeeds, and informs her employer."²¹

Finally, it stipulates in article 11, with regard to rights under the employment contract, that, "in order to guarantee to the workers, under article 2, the use of rights concerning their security and health protection recognized in the present article, it is planned that: 1) in cases referred to in articles 5,6,7, the rights under the employment contract, including the maintenance of a payment and/or an adequate allowance for workers under article 2, must be carried out, in accordance with national laws or practices."

The Maritime Labour Convention, 2006, adopted by the ILO, provides that absences at work must be counted as periods of service, except for seafarers employed for periods under one year.²²

1.2. The fight against harassment

As stated in articles L. 1152-1 of the French *Code du travail*,²³ "no employees must suffer recurrent acts of psychological harassment that aim for or result in a degradation of the working conditions that could be a danger to the rights and dignity of the person or that could alter their physical or mental health, or jeopardise their professional future," and L. 1153-1, "acts of harassment by anyone with the aim of getting sexual favours for themselves or another person are prohibited." French law classifies the act of harassment, whether it is psychological or sexual, among the violations of human dignity.²⁴

Psychological or sexual harassment is still too often treated with silence, whether at sea or inland. Employees always have difficulty speaking of intimate experiences or sexuality in the context of work relationships. The legislative and societal concerns do not erase the victims' feeling of shame. We observe that inland, women rarely speak of such aggression to those closest to them (never to the husband), to a union representative or to the occupational doctor. Often, the absence of union representatives in the company forces them to follow external procedures that will

21) Section II - Dispositions générales, art. 5 - Conséquences des résultats de l'évaluation.

22) Titre IV Norme A4-5 Sécurité Sociale.

23) Concernant la Marine nationale l'article 178 de la Loi n° 2002-73 du 17 janvier 2002 modifie l'article 6 de la Loi du 13 juillet 1983 en y incluant directement la notion de harcèlement moral et prévoit des sanctions. Le harcèlement sexuel est aussi abordé mais seulement dans ses conséquences. La Loi n°2005-843 du 26 juillet 2005 - art. 6 condamne à une sanction disciplinaire les mesures fondées sur "(...) le fait qu'il a subi ou refusé de subir les agissements de harcèlement de toute personne dont le but est d'obtenir des faveurs de nature sexuelle à son profit ou au profit d'un tiers; le fait qu'il a formulé un recours auprès d'un supérieur hiérarchique ou engagé une action en justice visant à faire cesser ces agissements; ou bien le fait qu'il a témoigné de tels agissements ou qu'il les a relatés".

24) Recommandation de la Commission européenne du 27 nov. 1991, JOCE L. 49 du 24 février 1992, p. 2.

often not succeed, due to lack of discussion spaces where the fear of generating a conflict in the company could be overcome. The ones that have the courage to break the silence must also face the difficulties encountered in the time between the complaint and the judgment (at work, in the family and in society).

These difficulties are clearly accentuated aboard, because of the weight of socio-cultural rites in a mainly male working environment. But the behaviours are also exacerbated at sea by the exiguous workplace, the distance from family and an often dangerous activity. These conditions make the revelations even more difficult for the victims. The fight against harassment raises a sociological problem specific to the situation on board, also because the working relationships on board are specific and speaking out can have consequences for how the victims of harassment will access justice.

The fight against sexual and psychological harassment can be efficient only with the participation of all the parties involved: employers, unions, occupational medicine. But what could the solution be for a victim of harassment aboard, out at sea, when the delegates on board turn a blind eye to the situation and the employers do not listen to any complaints? The French *Code du travail* does not identify other representatives in land, but the nature of working relationships on board allows another person to intervene: the captain, whose specific status invites us to question his role and responsibility when there is inaction in a proven case of harassment.

There are no particular plans against a "harassing" captain. In French law, this situation would be judged at the level of criminal law and the prosecution of criminal infractions and intentional faults. It regards psychological or sexual harassment as intentional faults engaging the personal responsibility of the offender.²⁵ If a captain perpetuates psychological or sexual harassment, he engages his personal responsibility and can be sentenced to pay his victims damages without the need for criminal justice.

But what about a captain who deliberately ignores harassment acts by a crew member, or who simply does not listen to reports of repeated acts and abuses? *A priori*, the *Code du travail* does impose any obligations on captains concerning the fight against harassment as the articles make reference only to the employer and institutions representing staff. However, it is different if we consider article 1 of the *Code disciplinaire et pénal de la marine marchande*.

As the authority on board, the captain is responsible for the behaviours of crew members aboard the ship, and therefore must stop any illicit behaviours. As soon as his inaction harms the victim, there is a failure to assist a person in danger as expressed

25) Cass. Soc. 21 juin 2006, JCP 2006 – Entreprise et Affaires- 2513, p. 1801 n. S. Prieur; Radé C. (2006), Harcèlement moral et responsabilité au sein de l'entreprise: l'obscur éclaircissement, Dr. Social, p. 826.

in article 223-6 of the *Code Pénal*.²⁶ It states that criminal charges should be brought against the captain. The captain, as the navy's representative on board, is responsible for security. Therefore, he must inform the employer of harassment acts and also implement any measures necessary to prevent the risk thereof.²⁷ As a result, any intentional inaction engages his responsibility and justifies action from the civil party before the criminal court judge. Beyond regulatory elements, we must insist on the pedagogical role given to the captain. In an environment predominated by historic male behaviours, he should raise awareness of the necessary evolution of social relationships at work.

Recent cases in France and in Spain²⁸ that involved very violent acts of harassment,²⁹ showed the difficulties the victims faced to be listened to, the inaction of institutions representing staff and the absence of punishments against the harassing staff. This proves a double discrimination as, most often, these acts concern the hotel staff on board as if the status of women officers implies more respect, partially protecting them from these acts. A hierarchical caesura³⁰ is added to the sexual caesura. This could be due to the fact that the technical competencies of women officers are the best integration vector, as they rely on traditional modes of regulation through the transmission of knowledge. This also shows how the identity of the seafarers is not only built on a social division of gender roles but also on a symbolic division of spaces (land/sea)³¹ that complicates the specifics of the sector even more.

The ship, as a collective working and living place, was traditionally considered an enclosed world and a male domain. The idea of belonging to the community of seafarers was based on a masculine identity that structured sociability on board, from communication to cooperation at work. Nowadays, it is being a seafarer that is the structuring element, not being a man. The spatial division, in land and at sea, does not systematically imply a sexual division of work between men and women. It rather evokes a division between seafarers and non-seafarers based on shared competencies and the confrontation of the dangers of the sea. Sharing risks, i.e. the unpredictability of meteorological conditions and the hard working conditions in a sometimes hostile

26) Chaumette P. (2006), Accident du travail maritime et responsabilité pénale, note sous Cass. Crim., 20 sept. 2005, navire Angélique-Emilie, DMF, pp. 584-595.

27) Cass. Crim., 13 mars 2007, chalutier la Normande, obs. P. Bonassies, DMF 2007, n° 686, pp. 881-886.

28) G. Proutiere-Maulion, O. Fotinopoulou Basurko (2010), Harcèlements à bord des navires: le droit commun appliqué aux spécificités, *Revue de Droits des Transports*.

29) Intimidations, sexual aggressions, rape and attempted homicide.

30) Lacombe Ph., (2005) Enquête sociologique sur la Marine nationale, La documentation française; La féminisation de la Marine nationale entre évidence et questionnement sociologique, *Revue du Champs de mars*.

31) P. Trompette, op.cit

environment, contributes to the construction of a feeling of belonging to a professional group,³² beyond gender issues. By acquiring a culture of the sea, i.e. knowing common technical skills, sharing life aboard, reacting to danger,³³ women, especially the ones doing the most valued and technical tasks, build a sailor identity that takes over from their gender identity.

2. Women seafarers: seafarers as others?

While the feminisation of the maritime sector appeared to be impossible because of the social and the cultural codes that seemed to govern it, the results of the Femmar project showed that feminisation happened with no real difficulties. Although the occupation of seafarer is still considered a masculine one, working conditions show that there is almost no rejection of women from male seafarers, and that there are few problems linked to gender in the different types of activities. The recent evolution of the conditions for embarking women shows that the maritime sector does not avoid the development of women's place in socio-professional spaces. This development can be explained by the professionalization of generations of men who benefitted from education in a mixed environment and by the increasing sharing of economic and social responsibilities.³⁴ What should be now questioned is the relationships these women have with their bodies and their dressing strategies. During the interviews conducted for the project Femmar, the women insisted more on the way they experience femininity aboard than on their specific working conditions.

2.1. Does the appropriation of social codes on board happen through the cross-dressing of the feminine body?

Many women have underlined that they pay attention to the way they dress on board (no make-up and jewellery, neutral clothes when there is no uniform). This can arise as an integration strategy.³⁵ The objective is to avoid any provocation in an enclosed and masculine environment. They adopt neutral behaviours and appearances in order to demonstrate through strict and serious dress that, as women, they can equally assume the tasks. They must address two major challenges: to be both socially and professionally accepted by the group. The expression "prove yourself" regularly comes

32) Grövel A. (2007), Dynamique professionnelle et transformation du genre: la féminisation des lycées professionnels maritimes, Mémoire M2, Paris X, p. 119.

33) Tritarelli M. (2010), Femme marin, une réalité de management, Mémoire technique de fin d'études, ENMM Le Havre, p. 38.

34) La féminisation de la marine nationale, entre évidences et questionnement sociologiques, [online]: www.iufm-pacifique.nc

35) Tritarelli M. *op. cit.*

up in the women's interviews, independently of which maritime sector they work in. However, the higher the function is, implying more responsibilities, the more women must "prove themselves".

Indeed, dressing with clothes collectively perceived as typically masculine allows the women to create some possibilities of socialisation with the men, especially outside of working hours. It is also a strategy to reverse sexual stigma, which is necessarily suspect, and to desexualise themselves by cross-dressing with masculine, sexually neutral elements (as masculine is the point of reference). This contributes to creating a critical distance from their sexual assignment.³⁶ Women's access to the professional group happens through virilization because the professional system relies upon power relationships between the masculine and the feminine.

These changes, embodied in masculine attitudes, indicate practices that go beyond a simple neutralisation of feminine assets: young women try to take on the social codes assigned to men. On board, the feminine body adopts an attitude to integrate into a group; inland, it adopts another one, leaving the social codes of the professional world aboard. It goes from one position to the other, and vice versa. The young women who were interviewed acknowledge these metamorphoses. Some affirm they do not mind this game of two faces, while others suffer from the variation between two opposing attitudes: the masculine and the feminine.³⁷

However, the temptation to erase feminine assets could hide an unconscious form of protection and barrier against male colleagues. Harassment takes different forms and dimensions. To denounce an aggression creates a risk of the victim being excluded from the group. The minimization of verbal aggression or inappropriate behaviours can appear as an adaptation strategy to avoid entering the game and getting caught in sexual roles.³⁸ That explains the need for barriers, through their own effacement (not exhibiting their femininity, not replying and not being too friendly), to avoid the confusion between the two sexes.³⁹ As a result, to find their place as women, in the maritime sector, they adapt the feminine assets (clothes, make-up etc.), consciously or not.

Although they are mostly well accepted, women on board must also adapt to masculine norms. The physiological differences between men and women still play an essential

36) Clair I. (2005), Des jeunes de banlieues "absolument traditionnels", *Lien social et politique* n° 53.

37) Kitada M. (2013), Code of behaviour at sea: women seafarer's shipboard identity management, *WMU, J. Marit Affairs*, 12: 213-227.

38) Cromer S. et Lemaire D. (2007), L'affrontement des sexes en milieu de travail non mixte, in *Inversion du genre, corps au travail et travail des corps*, Guichard-Claudic Y., Kergoat D. (coord.) Cahiers du genre, L'Harmattan.

39) *Ibid.*, p. 7.

role in the representation of men and women in this sector. Indeed, the body exemplifies the idea of gender specific competencies: "*Physical strength remains a male characteristic, and so are courage, endurance, love of risk, technical capacities ... while women are supposedly without these natural masculine qualities.*"⁴⁰ Women are judged competent for their job according to their body's capabilities. The body plays a role in determining the functions, status and actions adopted by women. It will orientate them towards a type of work, of professional competencies marked by the sexual division. Certain gender qualities are associated to some jobs. These concepts were developed based on a binary system of comparisons that ruled the professional world and social relationships, and that reduced the position and role of women within the social organisation of work. As underlined by Grovel, "*the difference between sexes is always and in all the societies, ideologically translated into a binary and hierarchical language. We should not forget that the access to a seafaring job requires a physical aptitude certificate – that institutionalises the strength of the body as a qualification and allows a reproduction of seafarers' social characteristics.*"⁴¹ Women have to prove they will be able to do a man's job aboard.

2.2. Erasing the woman beyond the seafarer

Work cohesion on board conducts inevitably towards the erasure of womanhood beyond the seafarer. The survey and the interviews conducted during the Femmar project prove that the women working aboard assume their roles and technical functions perfectly well. They are the first to claim that "*there are no women on board, only seafarers.*"⁴² Embarked women do not perceive themselves as sexed individual but refer to themselves according to their belonging to a group. Many defend the idea that they do a men's job, and some affirm they are happier doing a masculine job.⁴³ This invites us to think that the question of relationships between men and women and the division of work aboard is erased by the homogeneity of the group, that is, the seafarers⁴⁴ who are defined as a universal category.

The ship, as a collective place where people work and live, was traditionally considered as an enclosed world and a men's universe. The masculine identity used to shape the feeling of belonging to the seafarers' professional community. This identity structured the forms of social life on board. This article, based on the Femmar project's results,

40) *Ibid.*, p. 7.

41) Grövel, A. *op. cit.*, p. 69.

42) P. Trompette, J. Saglio, S. Dufoulon, *op. cit.*




43) *Ibid.*

44) In French, the word "*marin*" is a masculine noun that cannot be declined into the feminine. In current language, *marin* designates a person (man or woman) working on board under the authority of a captain. Seafarer is a neutral term as well.

has developed the idea that it is being a seafarer, and not a man, that is now structuring the forms of sociability and work on board. Shared competencies and experiences of difficult working conditions (unpredictable forecast, hostile environment etc.) participate in the creation of a feeling of belonging to a common professional group,⁴⁵ beyond gender issues. By acquiring a professional culture of the sea, a common language, an expertise in technical tasks, by sharing life on board and because of the necessity of a common reaction in the face of danger,⁴⁶ women have developed an identity of seafarer that wins over the feminine identity on board. However, life aboard mixes working and after-work life. Women develop strategies to ease the enclosed experience aboard and avoid inappropriate situations. In the case of harassment, this creates difficulties for women to speak about their experience. The conditions on board create confined situations, in the ship and the group. Therefore, we have identified how captains have a responsibility to listen to the victim and report acts of harassment to the employer.

45) Grövel A., *op. cit.*

46) Tritarelli M., *op. cit.*



CHAPTER 4
L'évolution du droit et son impact sur la
contribution des équipages
et des parties prenantes des navires à leur
sécurité

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Abstract: *Advances in marine safety systematically result from the experience of maritime accidents. These catastrophes mark the construction of the first maritime law, which initially encompassed technical aspects. The human element was gradually integrated into a "security approach" to become a primary factor, notably in 1978 with the STCW Convention. We observed changes in services, the world economy, technology, media and social expectations. These changes led to a proliferation of regulations and standards that govern the work of companies. How do crews perceive and meet these requirements? How do the latter ensure the safety of passenger ships?*

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Résumé : *Les avancées en matière de sécurité maritime résultent systématiquement des retours d'expérience d'accidents maritimes. Ces catastrophes jalonnent la construction du droit maritime imposant d'abord des aspects techniques. L'élément humain a été progressivement intégré à l'« approche sécuritaire » pour en devenir un facteur primordial, à partir de l'année 1978 avec la Convention STCW⁴, sur la formation des gens de mer et la veille en mer. Nous avons constaté la mutation des services, de l'économie, des technologies, des médias, et des attentes sociales qui ont conduit à une multiplication des réglementations et des normes qui encadrent le travail des compagnies. Il s'agit alors de savoir comment les équipages s'approprient et vivent ces exigences et en quoi elles assurent une meilleure mise en sécurité des navires à passagers.*

Introduction

Le cabinet Resecum a engagé depuis cinq ans, un travail de recherche pluridisciplinaire sur la gestion des risques dans le domaine du transport maritime, et plus particulièrement celui du transport de passagers. Il a constitué une équipe et créé des partenariats au sein des mondes de la recherche académique (droit, gestion et sociologie), de la formation des officiers de marine marchande, des institutions en charge des contrôles de l'application de la réglementation, un armement et nous-mêmes, cabinet de conseil et de recherche sur le management et ses facteurs organisationnels et humains (FOH)⁵. Cet « équipage » pluriel a été motivé par un intérêt commun que nous qualifierons de fondamental pour la finalité de leurs actions : « comment les équipages vivent-ils la gestion des risques inhérents à leur métier ? ». Nous avons en hypothèse une société qui veut aller toujours plus vite, plus loin, plus fort, plus grande, plus efficace et plus sûre. Nous avons constaté la mutation des services, de l'économie, des technologies, des médias, des attentes sociales et la multiplication des exigences dans les domaines des risques : la sûreté, la sécurité des navires et de leur personnel et dans le cas présent la sécurité des passagers. Comme dans de nombreux secteurs d'activité, cela conduit à une multiplication des réglementations et des normes qui encadrent le travail des compagnies. Nous souhaitons contribuer à la connaissance et la compréhension de la manière dont les équipages s'approprient et vivent ces exigences, en quoi elles assurent (ou pas) la sécurité, les sécurités ? Ces travaux nous ont conduits à mener des observations au sein de plusieurs équipages à bord de ferries. Nous avons également pu recueillir la perception de nombreux acteurs des activités support de l'armement, de contrôle des réglementations, des institutions de secours aux navires et de santé des équipages. Si le regard porté dans cet article est pluridisciplinaire, sa finalité reste socio-gestionnaire. Notre approche en trois temps cherche à mieux comprendre « d'où venons-nous ? », « où en sommes-nous ? » et tente de savoir « où allons-nous ? ». Dans un premier temps, nous nous intéresserons à l'évolution du droit du point de vue gestionnaire. Dans un second temps, nous tirerons les conclusions marquantes de nos études de terrain sur le vécu des équipages, afin de proposer des solutions. Dans un troisième temps, nous proposerons quelques pistes de réflexions sur l'évolution des systèmes de management des risques pouvant affecter les navires.

5) Un consortium public/privé a été créé autour de la problématique du **MA**nagement des **R**isques Intégré des **N**avires et de leurs **A**rmements (MARINA). Ce consortium, porté par l'École Nationale Supérieure Maritime, réunit la société Resecum et l'Université de Nantes, responsable scientifique, à travers le Centre de Droit Maritime et Océanique et le Laboratoire d'Économie et de Management de Nantes-Atlantique. L'objet du projet MARINA est d'observer les conditions d'appropriation (facteurs organisationnels) des exigences (économiques, réglementaires, sociales, etc.) par l'équipage, à l'échelle du navire, en lien avec les parties prenantes (port, assureurs, organisme de contrôle, services de sécurité et de protection du territoire etc.).

1. Hier : de la responsabilité des capitaines à celles du « système »

1.1 Une histoire qui se répète

Comme dans de nombreux domaines à risques, le droit maritime évolue avec les exigences de la société et bien souvent en réaction à une catastrophe. Revenons brièvement sur la genèse de ce droit. Lorsqu'un accident survient, la société se questionne, en exprimant le besoin de savoir, de connaître les raisons de cet accident. Le prisme avec lequel la société, et les experts qui la représentent, analysent la situation *a priori* et *a posteriori* évolue. Cette analyse rend le risque « réel », comme le définit Dean : « le risque est une chose qui n'existe pas en réalité. Le risque est une manière – ou plutôt un ensemble de différentes manières – d'ordonner la réalité, de la rendre sous une forme calculable. C'est une manière de représenter les événements tels qu'ils soient gouvernables de manières particulières, à des fins particulières⁶... ». Dans la majorité des cas, les raisons d'un drame mettent en avant des failles dans la législation, permettant d'établir de nouveaux codes, conventions, règles, etc. Les problématiques soulevées par les experts sont décomposées en termes de : santé, sécurité, sûreté, environnement, incendie, etc. Ces nouveaux textes s'imposent inévitablement aux différents armements. Ils doivent se les approprier et les faire vivre les uns avec les autres, tout en déclinant ces exigences, sous la forme de procédures opérationnelles, afin de les « mettre en scène » dans un objectif de performance.

Au bout d'un certain temps, les compagnies peuvent avoir du mal à appliquer ce cadre juridique/normatif. Un décalage apparaît dont l'origine peut être l'évolution de la technique ou des pratiques, pour laquelle Ulrich Beck souligne qu'elle constitue la « face obscure du progrès [lequel] génère des risques ni compensés ni assurés »⁷, ou un déséquilibre de la relation performance/sécurité au profit de la performance, favorisant les conditions de survenue d'un nouveau naufrage ou d'un accident. Nous revenons alors au point de départ, la société se questionne à nouveau. La Convention SOLAS a vu le jour suite au naufrage du *Titanic*, le *Torrey Canyon* a engendré la Convention MARPOL, le Code ISM⁸ s'est révélé nécessaire après les naufrages du *Herald of Free Enterprise* (HFE) et de l'*Estonia*, le Code ISPS résulte de la prise de conscience suite aux attentats du 11 septembre 2001, etc.

Dans l'avènement de la société du risque⁹, la dualité entre recherche de performance

6) Dean, M., (1999). «Risk, calculable and incalculable», in Lupton D. (1999), *Risk and sociocultural theory. New directions and perspectives*. Cambridge: Cambridge University Press, 131-159.

7) Beck, U., 2001. *La société du risque. – Sur la voie d'une autre modernité*. Paris. Aubier, 521.

8) International Safety Management Code.

9) Beck, U., 2001 *ibid*.

et sécurité demeure : il fallait chauffer plus fort pour que l'*Austria* puisse battre le record de vitesse d'une traversée transatlantique, le *Titanic* était le plus beau, le plus grand, le plus fort et insubmersible, l'*Herald of Free Enterprise* (HFE) devait rester rentable, pour le prestige le *Costa Concordia* passait au plus près des côtes. Demain, l'*Harmony of the Seas*, encore en construction sur les chantiers STX à Saint-Nazaire, sera un compromis entre rentabilité et prestige, mais quid du risque ? Parallèlement, au gré des catastrophes et de leurs médiatisations, et ce, dès l'époque de l'*Austria*, les exigences en matière de sécurité croissent sur les aspects techniques pour ensuite intégrer plus d'exigences relatives aux facteurs organisationnels et humains (FOH). Petit à petit, un certain type d'organisation, voire une certaine philosophie, s'impose (santés physique et psychologique, par exemple, constituent des éléments de la sécurité). L'élément humain a été progressivement intégré à l'« approche sécuritaire » pour en devenir un facteur primordial en 1978, avec la Convention STCW¹⁰ sur la formation des gens de mer et la veille en mer. Ceci a conduit à la multiplication de réglementations et de normes ayant pour but de répondre à ces attentes. Or, pour reprendre le cas du *HFE*, le 6 mars 1987, les causes d'un naufrage peuvent être multiples et concernent aussi bien l'aspect technique (la conception du navire) que le facteur humain (mode de communication interne et fatigue de l'équipage). Comme le souligne Christophe Roux-Dufort, si dans un premier temps la recherche du coupable conduit généralement au capitaine, c'est *a posteriori* que le système et ses parties prenantes sont remis en question¹¹.

1.2 Le cas du *Herald of Free Enterprise*, une causalité multifactorielle

L'analyse *a posteriori* de Roux-Dufort souligne bien ce tournant et permet de mettre en avant des symptômes visibles ainsi qu'une réalité souterraine moins acceptable¹² :

- la volonté de maintenir sa position de leader dans un contexte de très forte concurrence oriente la compagnie vers la décision d'acquérir des navires roll-on/roll-off, plus instables, afin de réduire au maximum les temps d'embarquement et débarquement, et de diminuer ses effectifs tout en intensifiant les rotations ;
- le flou de la réglementation britannique sur les questions de fermeture des portes et sur les manières de communiquer à bord. La capacité d'inspection des affaires maritimes britanniques est insuffisante par manque d'inspecteurs ;
- les capitaines alertent la compagnie sur le turn-over des officiers (36 officiers de pont différents en l'espace de 16 mois) ;

10) Convention on Standards of Training, Certification and Watchkeeping for Seafarers.

11) Roux-Dufort, C. (1999). « Le naufrage du car-ferry *Herald of Free Enterprise* – Une crise à double visage ». *Annales des Mines*, juin 1999, 90-100. <http://www.annales.org/gc/1999/gc06-99/10-90-100.pdf>

12) Roux-Dufort, C. (1999). *Ibid.*

- le matelot en charge de la fermeture des portes ne s'est pas réveillé. Les portes d'embarquement restent donc grandes ouvertes lors du départ et aucun système n'empêche le départ ;
- « À la suite d'une réduction du nombre d'officiers de 4 à 3 sur le *Herald of Free Enterprise*, l'officier chargé de la vérification de la fermeture des portes doit, au même moment, se trouver sur le pont pour les manœuvres de départ¹³ » ;
- le mode de communication choisi à bord est le mode « négatif, c'est-à-dire qu'il n'y a pas de communication si aucun problème n'est constaté¹⁴ » ;
- pour pouvoir charger ou décharger au port de Zeebrugge, le ferry doit remplir ses ballasts pour se mettre au niveau du quai. Or, les ballasts n'ont pas été vidés et sont donc « pleins » au départ, ce qui enfonce le navire dans l'eau ;
- la panique s'installe rapidement à bord : aucune consigne de sécurité n'est reçue par les passagers, le plan d'évacuation prévu dure environ 30 minutes.

Le naufrage du HFE est l'illustration qu'un accident n'a pas forcément une cause unique mais peut être la résultante d'une combinaison de défaillances conduisant à l'accident¹⁵. Soulignons néanmoins qu'il est plus facile d'analyser et de mettre en évidence les défaillances *a posteriori*. Nous pouvons le faire aujourd'hui avec un regard plus profond, en mobilisant par exemple les FOH, mais cela reste néanmoins difficile de le faire *a priori*.

Dès lors, les exigences suivent deux directions parallèles, d'un côté celles du droit du travail (Convention MLC 2006), de l'autre celles du droit de la « sécurité » (Code ISM), dans une vision mondialisée du droit. Cette montée en puissance est intrinsèque à la société du risque :

- intolérance aux risques couplée à l'amplification/déformation médiatique,
- augmentation du trafic, associée à la puissance technique, au gigantisme et aux nouveaux risques.

Que constatons-nous aujourd'hui ?

13) Roux-Dufort, C. (1999). *Ibid.*

14) Roux-Dufort, C. (1999). *Ibid.*

15) Reason, J. (1993). *L'erreur humaine*. Paris: Presses Universitaires de France, 403.

2. Aujourd'hui : comment faire en sorte que l'organisation soit performante et sûre ?

Le transport maritime a beaucoup évolué en l'espace d'un siècle, certaines pratiques n'ont plus lieu. De manière synthétique, nous avons comparé dans le tableau suivant ce qui se faisait à bord du HFE et ce qui se fait aujourd'hui à bord d'un ferry, comme celui dans lequel nous avons embarqué.

| <i>Herald of Free Enterprise</i> 1987 | <i>Ferry d'aujourd'hui</i> 2015 |
|---|---|
| Réglementation floue sur les questions de la fermeture des portes | Pas de départ si les portes sont ouvertes et signalisation électrique |
| Communication «négative» | Communication «positive» |
| Aucune consigne de sécurité reçue par les passagers | Annonce sécurité avant le départ |
| <i>Turn over</i> important des officiers | Effectif stable |

Le cadre juridique, l'évolution des technologies et des pratiques rendent ce moyen de transport de plus en plus sûr, avec un accident grave pour 100 000 mouvements. À titre de comparaison, il est de 1 pour 1 000 000 dans le transport aérien¹⁶. La conception des ferries est une étape importante pour la compagnie étudiée, en détachant une équipe composée d'un commandant, d'un chef mécanicien, d'un commissaire, d'un officier radio, de deux mécaniciens et d'un factotum. Cette équipe travaille sur les plans établis par l'architecte naval de la compagnie, suggère des modifications au regard de leurs retours d'expérience. L'objectif est de ne plus reproduire les erreurs des navires précédents, de les rendre plus pratiques et plus adaptés à la ligne et aux ports. Au-delà de ces aspects pratiques, cette étape permet d'envisager les défenses en profondeur, les redondances techniques, les dispositifs de sécurité et leurs emplacements¹⁷. Cette phase est donc essentielle à la construction de la fiabilité du ferry. Pour être prêt en cas de sinistre, un exercice sécurité hebdomadaire est organisé. Par exemple, des simulations, d'alerte à la bombe, d'abandon du navire ou encore d'incendie sont faites.

En outre, la nature même de l'activité impose à la compagnie d'être à l'écoute des remarques des passagers. Nous avons pu constater que les profils des voyageurs embarqués sur ces navires ont beaucoup changé ces dernières décennies. Les voyages d'affaires s'effectuent essentiellement par des modes de transports aériens

16) Chauvin, C. (2010). « Le facteur humain et la sécurité maritime ». *La Revue Maritime*, 489, 14-21.

17) Journé, B. (2009), «Les organisations de haute fiabilité », in Michel X. et Cavallé P. (2009), *Le Management des risques pour un développement durable*, Paris: Dunod, 367-384.

ou ferroviaires, les déplacements par ferry concernent beaucoup le transport de marchandises par camions, les voitures, les caravanes, les bus, les motos... lors des départs en vacances, des déplacements touristiques individuels, en famille, en groupe. Ces voyageurs de tous milieux, de tous âges, ont des métiers extrêmement variés, sont valides et actifs, retraités ou Personnes à Mobilité Réduite (PMR), de cultures et d'horizons différents. Pour eux, le statut de passagers n'inclut pas la prise en compte des dangers, même si au départ la marche à suivre en cas de situation périlleuse est présentée aux points de rassemblement.

L'équipage reconnaît le caractère vertueux et structurant du Code ISM. La règle est, par certains côtés, un objet de partage des pratiques professionnelles, une source de confort psychique sur laquelle se reposer ou encore une aide à bien faire son travail. Elle peut néanmoins être considérée comme une contrainte et, pour certains, être non adaptée, voire dépassée. Ces systèmes de gestion peuvent entraîner une forme d'« asphyxie » face à l'importance de la bureaucratie générée :

- « *L'administratif, c'est de pire en pire. C'est une contrainte, il faut tout écrire et ça prend un temps fou au détriment d'autre chose.* » (un second capitaine) ;
- « *Toutes les entreprises sont gangrenées par l'administratif, c'est une pollution et ce qui m'inquiète c'est que nous ne reviendrons jamais en arrière. Aujourd'hui, 60% de mon temps est consacré à ça. Je dois remplir et signer de nombreux documents. Je dois remplir un document en indiquant mes heures de sommeil pour faire plaisir à l'auditeur, qui considère cette feuille comme une fin en soi.* » (un commandant)

Les capitaines ne sont pas vraiment associés au choix de leurs officiers, ce qui les amène à s'interroger : « *puis-je compter sur eux et dormir sur mes deux oreilles alors qu'on me demande de justifier que je me suis bien reposé* » (un commandant). Si la majorité du temps des commandants est consacrée aux aspects bureaucratiques et administratifs, quand peuvent-ils aller sur le terrain échanger avec l'équipage ou se former ?

Nous pouvons constater également les limites de l'appropriation des facteurs organisationnels et humains, dans un milieu historiquement très hiérarchisé au mode de fonctionnement quasi-militaire. Il y a un déni des risques psychosociaux, perçus comme une faiblesse et un manque de virilité, comme nous le dit un matelot : « *c'est un truc de femmes ça, pas de marins.* ». Cependant, notre travail met en évidence l'isolement au sein de l'équipage, lié principalement aux technologies de l'information et de la communication. Aujourd'hui, chaque personne, ou presque, embarque avec son ordinateur portable ou sa tablette, le connecte au réseau wifi du bord et s'isole dans sa cabine privative pour regarder un film. Ce nouveau mode de vie nuit à la convivialité et à la cohésion de l'équipage. Or cette dernière est capitale lors d'une défaillance grave. Nos résultats mettent également en évidence qu'un tiers de l'équipage, dans un contexte social bouleversé par l'insécurité de l'emploi, a un moral dégradé, ce qui peut engendrer des addictions,

IV. L'évolution du droit et son impact sur la contribution des équipages...

notamment à l'alcool¹⁸, et nuire à la sécurité. La qualité de vie au travail n'est pas abordée dans la littérature mais notre étude souligne que cet élément est à prendre en compte car ce nouveau mode de vie ne concerne pas seulement le domaine maritime. L'hyperconnectivité peut être généralisée à toutes les organisations.

Notre travail met en évidence la perte d'autonomie des hommes du bord au profit d'une volonté de tout maîtriser depuis la terre. Le télécommandement est de plus en plus important¹⁹. Les compagnies suivent en temps réel leurs navires et s'assurent qu'ils empruntent la route fixée, au mille près, en général la plus courte afin de consommer le moins possible. Le métier de marin devient de plus en plus un métier d'exécutant. On embarque de plus en plus la « terre » à bord du ferry. La montée en connectivité du navire entraîne inévitablement des logiques de « terre » dans la vie du navire, les conséquences ne sont pas neutres, impactant l'identité du marin.

La compagnie est composée de différents groupes sociaux (personnel sédentaire, service pont, service machine, service hôtellerie). Ces groupes ont des visions différentes de la sécurité, ce qui provoque des incompréhensions, dans une communication également perturbée par des logiques politiques. Ces logiques politiques engendrent un climat social relativement difficile, où la confrontation et le conflit sont des leviers d'action privilégiés, tant par les syndicats que par la direction pour faire reconnaître leur point de vue. Le dialogue social est en panne et déséquilibré, avec peu de représentation du personnel hôtelier alors que ce dernier représente 80 % de l'équipage.

Enfin, le prescrit est-il adapté à la réalité ? La Convention SOLAS impose l'évacuation du navire en 30 minutes²⁰ à partir du moment où l'ordre d'abandon a été donné par le capitaine. Mais est-ce toujours possible ? Lors des exercices ou simulations, effectués à quai, de jour, sans gîte et dans des conditions météorologiques bonnes, le délai est tenu. Mais il a fallu 3 heures pour évacuer le Costa Concordia le 13 janvier 2012 de 22 heures à 1 heure du matin le 14.

18) Parker, A. W., Hubinger, L. M., Green, S., Sargent, L., & Boyd, R. (2002). *Health stress and fatigue in shipping*. Australian Maritime Safety Agency;

Bergeret, A., et Fort, E. (2008). Enquête descriptive sur les pratiques addictives en milieu maritime français. *Actes des 13èmes journées de la médecine des Gens de Mer*, (p. 2). Paris.

19) Honoré, L. (2010). *Du métier à la carrière: les officiers français de marine marchande*. Paris : Publibook.

20) « Toutes les embarcations et tous les radeaux de sauvetage requis pour permettre à toutes les personnes à bord d'abandonner le navire doivent pouvoir être mis à l'eau avec leur plein chargement en personne et en armement dans un délai de 30 minutes à compter du moment où le signal d'abandon du navire est donné. » Convention SOLAS, Chapitre III Engins et dispositifs de sauvetage, Section II Navires à passagers (prescriptions supplémentaires), Règle 21 1.4.

3. Demain : pluridisciplinarité et intégration des facteurs psychosociaux

Depuis les tragédies humaines énoncées dans la première partie, l'industrie maritime a activement cherché à améliorer son bilan en matière de sécurité. Malgré les nombreux progrès, les défis demeurent importants comme l'ont démontré les accidents récents : *Costa Concordia* (2012), *Sewol* (2014), *Norman Atlantic* (2014).

À la suite de chaque accident, une nouvelle strate de règles juridiques et de moyens s'ajoute aux autres. Ces exigences croissent parallèlement et sont portées par des institutions différentes qui ne se rencontrent jamais (Affaires maritimes, DIRECCTE²¹, etc.) créant une bureaucratie complexe. Les FOH sont évalués par la présence ou non de « *paperasses* » (un commandant) censées justifier l'organisation en place. On notera cependant que l'inspecteur, que nous avons suivi en inspection, mobilise son sens de l'observation, à la lumière de son expérience de capitaine, sur le comportement et la capacité de l'équipage à répondre et agir face à ces questionnements. Cependant, tous les inspecteurs ne mènent pas leurs inspections de la même manière. Il n'y a pas de règle pour appliquer la règle encore moins pour les inspections des différentes administrations. Cela peut donner l'illusion d'une certaine rationalité s'appuyant sur des objets concrets matérialisant la couverture du risque (canots, extincteurs, procédures papiers, feuille d'émargement, etc.).

Les naufrages de l'*Austria*, du *Titanic*, de l'*Herald of Free Enterprise* ou encore du *Costa Concordia*, ont pour origine un facteur psychosocial important lié à la compétition et à l'exercice du pouvoir : plus vite, plus gros/nombreux, gagner plus, plus près, ce qui est encore plus important aujourd'hui avec le gigantisme. Nombre d'accidents montrent la responsabilité du commandant au comportement non adapté à la situation. Les décisions peuvent-elles être collégiales en cas de problème ou est-on définitivement soumis à la potentielle inconséquence d'un commandant à qui l'on n'ose pas faire de remarques. Nous pouvons alors faire le parallèle avec les causalités qui ont entraîné l'accident d'avion de Tenerife en 1992 et le naufrage du *Costa Concordia*. Pour reprendre le titre de la publication de Bienefeld et Grote, c'est ce « *silence qui peut tuer*²² ». Plusieurs raisons expliquent ce silence : la crainte de la punition, un sentiment de futilité, le souci de ne pas nuire aux relations, la peur de se voir accoler une étiquette négative, etc.²³ Il s'avère important de créer un climat de

21) Direction générale des Entreprises, de la Concurrence, de la Consommation, du Travail et de l'Emploi (Direccte).

22) Bienefeld, N., & Grote, G. (2012). Silence that may kill: When aircrew members don't speak up and why. *Aviation Psychology and Applied Human Factors*, 2 (1), 1-10.

23) Ford, J., Henderson, R., & O'Hare, D. (2014). The effects of Crew Resource Management (CRM)

confiance afin que l'environnement facilite la discussion²⁴ entre le commandant et ses officiers car, à l'heure actuelle, il s'agit d'un point de vulnérabilité.

La question des responsabilités nous interroge. Nous fonctionnons sur la recherche du bouc émissaire et le commandant, en général, est le coupable déjà tout désigné. Cependant, l'analyse de l'accident du Herald of Free Enterprise a montré, après coup, les causes systémiques collectives. Cette analyse met aussi en exergue la situation paradoxale dans laquelle se trouve une organisation complexe et fortement couplée²⁵ : elle doit « être simultanément très centralisée et très décentralisée²⁶ ». En effet, l'organisation doit faire preuve d'un haut degré de décentralisation, c'est-à-dire qu'elle doit laisser des pouvoirs de décision aux équipes au plus près des événements, tout en ayant un haut degré de centralisation, concentrant alors la prise de décisions afin d'assurer une cohérence²⁷. L'équation peut alors paraître impossible à résoudre et l'accident devient inévitable²⁸. La solution se trouve certainement dans une meilleure articulation entre l'approche mécaniste (basée sur l'anticipation et le respect absolu des règles) et l'approche organique (basée sur la capacité d'adaptation face à l'aléa). Il s'agit de structurer le caractère organique de l'organisation en effectuant des exercices réguliers²⁹.

Nous pouvons nous interroger sur le plan managérial sur le paradoxe entre:

- le côté positif de reconnaître les causes systémiques d'un accident et par là-même justifier d'y travailler et de donner corps à ce système grâce à des relations de confiance permettant un débat plein et entier sur le risque, sans tabou, et de l'autre, de craindre que cela permette de justifier des formes de déresponsabilisation des personnes s'abritant derrière un « ce n'est pas moi c'est le système ».
- Les « inspectants » devraient quant à eux pouvoir justifier d'un véritable travail à l'interface des droits avec leurs homologues, pour développer leurs capacités d'application du droit avec discernement en fonction des circonstances et dans une vision proche du terrain, des équipages associant hommes, techniques et technologies. Ces équipages ont aujourd'hui la crainte de se voir reprocher en

training on flight attendants' safety attitudes. *Journal of Safety Research*, 48, 49–56.

24) Bienefeld, N., & Grote, G. (2012). *Ibid.*

25) Perrow, C. (1984). *Normal Accident: Living with High-Risk Technologies*. New York: Basic Books, 462.

26) Journé, B. (2009). « Les organisations de haute fiabilité », in Michel X. et Cavaillé P. (2009), *Le Management des risques pour un développement durable*, Paris: Dunod, 367-384.

27) Journé, B. (2009). *Ibid.*

28) Perrow, C. (1984). *Ibid.*

29) Ruillé, J. (2015), *Management des risques intégré des navires et de leurs armements : un ferry peut-il être une organisation à haute fiabilité ?*, Thèse de doctorat, Université de Nantes, 474 p.

cas de problème la non-application stricte du droit. On se trouve alors confronté au développement des dimensions psychosocio-managériales et des compétences individuelles et collectives dans et autour des navires.

Il nous apparaît alors nécessaire, pour les armements, de privilégier une philosophie intégrée « sécurité/performance » proposant une synthèse des exigences multiples évitant au maximum aux équipages et à leur commandement d'être absorbés par la bureaucratie pour pouvoir se consacrer pleinement au terrain, au prospectif, ainsi qu'à la remise en question en étant plus proche des équipages au quotidien. Il nous semble également important de développer une approche telle que celle préconisée pour les organisations à haute fiabilité. Afin de se retrouver dans une configuration mécano-organique, les compagnies devraient :

- réduire les imprévus et développer la capacité à y faire face ;
- placer l'Homme, à la fois maillon faible et ressource indispensable à la fiabilité ;
- rendre visible l'activité par une approche mécaniste vivante et utile ;
- mieux formaliser les process dans tous les services, afin de ne pas reproduire les mêmes erreurs ;
- renforcer les compétences par une mise à niveau grâce au partage d'expérience effectif (intra-navire, inter-navire), à un climat de confiance et à des dispositifs de communication et d'amélioration continue, à l'image des organisations réflexives ;
- développer la capacité de maîtrise des aléas ;
- admettre l'incomplétude de la règle, la remettre en question lorsqu'elle n'est plus adaptée (changement de conditions météo, fonctionnement en mode dégradé, etc.) ;
- échanger régulièrement sur les points forts et les problèmes ;
- développer conjointement stratégies d'anticipation et de résilience ;
- s'assurer de l'exemplarité du management ;
- énoncer les paradoxes et les contradictions et donner des ressources pour les comprendre afin de les dépasser et d'en faire des éléments constitutifs de l'action ;
- développer des représentations communes et mieux « négocier » les paramètres de l'équation ;
- gérer la complexité ;
- concevoir et gérer l'articulation des dimensions contradictoires d'un problème de gestion sans chercher à le réduire à une seule dimension.

Enfin, assumer une approche réellement rationnelle qui implique d'assumer pleinement

les dimensions psychosociales du risque, en considérant l'homme à la fois comme maillon faible mais également comme dernier rempart.

Conclusion




Nous proposons une perspective socio-gestionnaire du droit maritime, de son évolution, son application ainsi que ses conditions d'application, à travers le regard de l'équipage et des parties prenantes.

Les catastrophes maritimes ont jalonné la construction du droit maritime imposant d'abord des aspects techniques, puis intégrant l'élément humain. Aujourd'hui, une compagnie doit tenir compte de la complexité de la nouvelle donne de la concurrence dans le contexte de la mondialisation, et articuler les nécessités de la performance économique avec la sûreté, la sécurité, l'environnement et le social. La complexification du droit est une des réponses apportée au traitement des problématiques qui affectent les navires de transport de passagers.

Pour ce qui est des passagers on peut constater les nouvelles problématiques liées à une diversification des demandes en matière de transport, ainsi qu'aux nouvelles catégories sociales concernées. Les réponses données par les compagnies maritimes se doivent d'être innovantes pour affronter une compétition mondialisée.

L'instauration d'une approche fondée sur un droit que l'on qualifiera de positif, qui fixe un cadre tout en permettant une capacité d'adaptation des différents acteurs du système maritime permettrait d'intégrer les qualités d'une approche organique dans les incontournables régulations mécanistes héritées de l'histoire.






CHAPTER 5


A delicate balance: The seafarers' employment agreement, the system of the Maritime Labour Convention, 2006 and the role of flag States

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***Résumé :** Principalement écrit du point de vue du droit international public, ce chapitre met en évidence les tensions avec le domaine partagé avec le droit international privé dans le contexte des relations de travail dans le secteur maritime de plus en plus globalisé. Ce chapitre fait valoir que l'exigence d'un contrat d'engagement maritime (SEA) par la MLC, 2006 peut être considérée comme une solution stratégique et pragmatique pour les changements structurels et juridiques importants qui sont survenus dans ce secteur, et sont toujours en cours, pour les navires et les marins effectuant des voyages internationaux. Chaque État du pavillon doit veiller à ce que chaque gens de mer dispose d'un contrat d'engagement maritime, signé par lui-même, l'armateur ou le représentant de l'exploitant commercial du navire, comportant 11 items. Ce contrat fait partie des éléments du contrôle par l'État du port. La MLC, 2006 est maintenant de plus en plus centrale, peut-être la seule norme sociale, assurant la sécurité dans une industrie mobile de dimension multinationale. Il convient de concilier le droit de la mer et le droit des contrats internationaux, notamment en raison du rôle pris par les services de recrutement et de placement des gens de mer. Les exigences de la convention du travail maritime de 2006, quant à un contrat d'engagement maritime signé par l'armateur, impose en pratique l'application de la loi de l'État du pavillon, sa revitalisation même, quand elle permet à un tiers contractuel de choisir une autre loi.*



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Abstract: *Primarily written from a public international law perspective, this chapter serves to highlight the tensions within the field of private international law in the context of employment relationships in an increasingly globalized maritime sector. This chapter argues that the seafarers' employment agreement (SEA) requirement of the MLC, 2006 can be understood as a strategic and pragmatic solution to the significant structural and legal changes that have occurred, and are still occurring, for ships and seafarers engaged in international voyages. The MLC, 2006 is now increasingly the central, perhaps the only, area of certainty in an industry with multijurisdictional, mobile, often short-term, workers, employers and workplaces. It also argues that the MLC, 2006 requirement for the SEA provides a pragmatic solution that is largely based on flag State responsibility but still allows for the possibility of party autonomy on matters of choice of law and forum, subject to recognition of the flag State's overriding interest.*

1. Introduction

This chapter explores important legal and practical questions that have emerged since the entry into force of the Maritime Labour Convention, 2006² (MLC, 2006) and with it, the application of the seemingly simple obligation placed on a ratifying State to adopt laws or regulations requiring that "seafarers working on ships that fly its flag shall have a seafarer employment agreement signed by both the seafarer and the shipowner or representative of the shipowner."³ In addition, "[e]ach Member"⁴ (the ratifying State) must also, *inter alia*, adopt laws and regulations specifying the matters that are to be included in the seafarers' employment agreement (SEA) which shall "in all cases contain" the particulars with respect to eleven enumerated items.⁵ Importantly the SEA requirement is a matter that must be inspected by flag States for each ship operating under its flag and, for ships that are also subject to certification,⁶ certified. It may also be the subject of an inspection on a ship when entering a foreign port⁷ (Port State Control or PSC). Since problems identified during a flag

2) It was adopted by the 94th (Maritime) Session of the International Labour Conference (ILC) of the International Labour Organization (ILO) on 23 February 2006. The MLC, 2006 entered in force on 20 August 2013, 12 months after the 30th ratification. At that time those 30 States had a total share of the world's gross tonnage of ships of nearly 60 per cent. As of February 2016, it has been ratified by 70 States (in fact 71 States had ratified but, rather unusually, in October 2015 the ratification of Lebanon was removed apparently because it had not been registered by the International Labour Office because information regarding social security protection as required under Standard A4.5 of the MLC, 2006 had not been provided) including those with international responsibility (as flag States) for more than 80 per cent of the world's gross tonnage of ships. The text of the Convention (http://www.ilo.org/global/standards/maritime-labour-convention/text/WCMS_090250/lang-en/index.htm) and related documents are available on the ILO's dedicated MLC, 2006 website at: <www.ilo.org/mlc>.

3) MLC, 2006 Standard A2.1 paragraph 1 (a) provides:

Each Member shall adopt laws or regulations requiring that ships that fly its flag comply with the following requirements:

(a) seafarers working on ships that fly its flag shall have a seafarers' employment agreement signed by both the seafarer and the shipowner or a representative of the shipowner (or, where they are not employees, evidence of contractual or similar arrangements) providing them with decent working and living conditions on board the ship as required by this Convention.

4) "Member" is the term used by the ILO to refer to States that are members of the Organization and in its Conventions, to Members (States) that have ratified the instrument.

5) MLC, 2006 Standard A2.1 paragraph 4 (a) - (j), and a further item, (k), a catchall clause regarding any other matters required by national law.

6) MLC, 2006 Standard A5.1.3, paragraph 1 and Appendix A5-I; and Regulation 5.1.4, paragraph 1, Standard A5.1.4, paragraph 4.

7) MLC, 2006 Standard A5.2.1 paragraph 2 and Appendix A5-III. See also a recent report from the Paris Memorandum of Understanding (MOU) on PSC. Available at: <http://www.safety4sea.com/images/media/pdf/Paris_MoU_-_Addendum_detailed_MLC_figures_2014.pdf> which shows that 238 problems were identified during PSC in 2014 related to SEAs, constituting 4.33 per cent of the total MLC, 2006 deficiencies. Of these 9.2 per cent of SEA deficiencies (22 cases) were considered "detainable". In other regions for example, on 9 January 2015 the Australian maritime administration (AMSA) banned a ship from accessing Australian ports for 3 months because of MLC, 2006 related deficiencies including expired SEAs. This

State inspection or during PSC can have significant economic consequences if a ship is detained, irrespective of the category of ship (e.g. cruise ship, cargo ship or yacht), there is now a heightened awareness of the SEA for both shipowners/operators and flag State administrations, and a concern for clarity with respect to this requirement under the MLC, 2006. Not surprisingly, there is also increased interest in the SEA on the part of seafarers as an addition to the arsenal of legal and practical measures that can help to ensure fair terms of employment and decent working conditions for this vulnerable workforce. For seafarers still working on board a ship, the MLC, 2006 means that an SEA can be more effectively and rapidly enforced during a voyage.⁸ In addition, the potential impact of complaints to the flag State about MLC, 2006 implementation means that seafarers will also have more possibility of immediate resolution of matters even if they are no longer on board the particular ship or under contract with that shipowner.⁹ This is because, under the MLC, 2006, flag State inspection system ships can be held in port and/or a certificate withdrawn (or renewal not issued) if a shipowner's obligations, including those under an SEA, are not or have not been fulfilled. The inclusion of financial security requirements in the MLC, 2006 for a number of matters including, in the future,¹⁰ the possibility of seafarers having direct access to shipowners' financial security/insurance to address the consequences of abandonment, is also an important step in providing more effective rapid resolution to employment issues facing seafarers.

In fact the requirement that seafarers have some form of employment agreement is not new: an international Convention¹¹ with substantially and substantively the same provisions as the MLC, 2006 on this topic was adopted by the ILO in 1926 and entered into force in 1928 - nearly a century ago. However, as noted above, in the

was the second MLC, 2006 related ban by Australia: <https://www.amsa.gov.au/media/documents/09012015-AMSA-Media-Release-Meratus_Sangatta-Ban.pdf>.

8) This is the case because of the role of complaints under the MLC, 2006 (see discussion *infra* section 2) even though much of the information – the terms of employment – that must be contained in the SEA are not, in principle, the subject of PSC.

9) For example if wages have not been paid under a seafarer's employment agreement, even if the agreement has ended, a flag State administration receiving a complaint from a seafarer or a representative would need to consider this as a matter that would mean a ship could be held in a port or fail to pass an inspection or be certified (or may result in withdrawal of an MLC, 2006 certificate) as compliance with this requirement, including the shipowner's approved onboard policies on wage payments, are matter that must be inspected.

10) See the amendments to the Code of the MLC, 2006 relating to Regulation 2.5 – Repatriation. The *Amendments of June 2014* are expected to enter into force in January 2017 and are available at: <http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_248905.pdf>.

11) *Seamen's Articles of Agreement Convention, 1926* (No. 22) Available at: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312167:NO> The Convention was ratified by 60 States, 31 of which have now automatically denounced it on ratifying the MLC, 2006.

last decade, and particularly since the adoption of the MLC, 2006, there have been significant industry and government questions and concerns about national implementation of the MLC, 2006 requirement on this matter. Interestingly, there is also an increasingly large body of academic commentary on the problem of SEAs and about this global workforce, focusing, in particular, on the complex jurisdictional difficulties and uncertainties from a private international law (sometimes also called "conflict of laws") perspective.¹² In that sense it can be considered a kind of "frontier" topic where new legal approaches are developed.

Certainly the international maritime sector poses some fascinating legal questions for academics, particularly in connection with individual employment arrangements and the uneasy interaction of private and public international law combined with the multiple layers of corporate actors that are increasingly multijurisdictional.¹³ There is now an almost overwhelmingly complex convention-based regime, including regulations developed largely by European Union (EU) and related area countries, which is aimed at providing some certainty to deal with questions about jurisdiction in order to provide enforceable legal remedies through rules on access to forum and choice of law.¹⁴ But even with this elaborate regime there are still many uncertainties for litigation with respect to contracts and torts in the maritime sector. While these often arcane legal questions can be important in some cases, it is also important keep in mind the fact that going to court, with the associated high costs and lengthy delays, to resolve employment contract disputes, is often the last and least desirable resort. Similarly, traditional maritime remedies such as ship arrest and potential sale to meet creditor claims/liens is a draconian procedure that ultimately risks

12) See for example the recent comprehensive and very useful and detailed examination of this issue by Carballo Piñeiro, L., (2015) *International Maritime Labour Law*, Hamburg Studies on Maritime Affairs 34, Springer-Verlag Berlin Heidelberg) and the numerous scholars and other experts cited therein, including Chaumette, P, who has been writing about this and related questions for several decades. For an interesting commentary on the risk to a "just solution" posed by a focus on a rule /codification based approach aimed at certainty see: Lookofsky, J., "Choice of Law in Denmark: Code-Light or Code-Tight?", Danish National Report, *Recent Private International Law Codifications*, Symeon Symeonides, General Reporter International Academy of Comparative Law, 18th International Congress of Comparative Law, Washington, D.C., July 25 to August 1, 2010. Available at: <<http://www.cisg.law.pace.edu/cisg/biblio/lookofsky20.html>>.

13) For example, in a forthcoming "handbook" covering many sectors the focus is essentially on regulatory roles and in connection with sector or issues the topics are related to enforcement in connection with ship safety, marine pollution, renewable and non renewable resources and scientific research. Other than in connection with security and piracy and criminal law, jurisdiction with respect to the "human sector" *per se* is not listed as topic: see Warner, R., Kaye, S. (eds) (forthcoming 2016) *Routledge Handbook of Maritime Regulation and Enforcement*, Routledge.

https://www.routledge.com/products/9780415704458?utm_source=adestra&utm_medium=email&utm_campaign=sbu1_lsb_3rf_1em_6law_cla15_x_77549_hbmaritimeregaug15.

14) The chapter does not address this regime which has been the subject of extensive and useful commentary by many European scholars. Most recently it has been addressed in detail by Carballo Piñeiro (2015) *ibid.* note 12, and see also the numerous authors cited therein.

unemployment for the seafarers concerned if the ship is then abandoned by the shipowner or sold by a court to pay debts.

This chapter argues that the SEA requirement of the MLC, 2006 can be understood as a strategic and pragmatic solution to the significant structural and legal changes that have occurred, and are still occurring, for ships and seafarers engaged in international voyages. The delicate balances struck and the solutions offered under what is described in this chapter as the "system" of the MLC, 2006, were negotiated on an international tripartite basis in meetings spanning half a decade. From a public international law perspective, the flag State, as the responsible actor under the 1982 *United Nations Convention on the Law of the Sea*¹⁵ (LOSC) and under the more specific "regulatory" Conventions adopted by the ILO, particularly the MLC, 2006, for this globalized workforce, is now increasingly the central, perhaps the only point of certainty¹⁶ in an industry with multijurisdictional, mobile, often short-term workers, employers and workplaces.

However, this also a solution which, perhaps brazenly, pushes against legal boundaries, including the conceptualization of employment relationships found in domestic law and private international law. As a result, this has also caused some uncertainty and difficulty in implementation. However, as is usually the case with law reform, it has also provided the impetus for creative solutions such as those now emerging in the insurance markets, in the industry, and in national regulatory responses.

Primarily written from a public international law perspective, this chapter serves to highlight tensions within the field of private international law in the context of employment relationships in the increasingly globalized maritime sector. This is a topic which, although in principle it is "private law" for many sectors, for reasons of public policy and history, it is also the subject of an extensive body of public international law in the form of numerous international Conventions regulating most elements of the relationship and ascribing primary regulatory and jurisdictional responsibility to the flag State.

15) *United Nations Convention on the Law of the Sea*, 10 December 1982, UN Doc. A/Conf. 62/122, 21 I.L.M. 161 (entered into force on 16 November 1994), available at: <http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm>.

16) Arguably a pragmatic regulatory pre-determined "centre of gravity" approach to jurisdictional issues, albeit based on a differing analysis than that employed in a traditional conflict of laws approach. In effect the concern is with the State with the most interest in the issue (the flag State) rather than, for example, the often less interested State where the contract was formed. It can be argued that the MLC, 2006 also provides an overriding public policy solution in cases where parties have included a choice of law and/or forum clause in the SEA where terms seek to "contract out" of the flag State law implementing the MLC, 2006. Ideally the flag State and State where the contract is signed or the State of residence (if it differs), should adopt provisions that are similar so that there is no conflict; However, where a conflict arises, the flag State, as the State with international responsibility for securing the wellbeing of seafarers on its ships, should be regarded as the relevant State with primary jurisdiction.

This chapter begins with a brief overview of the "system" of the MLC, 2006. It is followed by a consideration of the wider international law of the sea and the confirmation of the primary role and responsibility of the flag State in recent decisions of the International Tribunal on the Law of the Sea (ITLOS).¹⁷ It then focuses on the role of the SEA in the MLC, 2006 system and explores the role of the flag State and two related issues that have arisen in the context of government and industry implementation of the MLC, 2006.

2. Overview of the system of the MLC, 2006

In this chapter it is possible to provide only a brief overview of the MLC, 2006 "system", with a focus on the elements that are particularly relevant to the SEA requirement.¹⁸

The MLC, 2006 is a "framework"¹⁹ international Maritime Labour Convention that is over 100 pages in length and brings together (consolidates),²⁰ and in some cases,

17) See <<http://www.itlos.org>> for a list of cases and links to decisions: *The M/V "Saiga" (No. 2) Case* (Saint Vincent and the Grenadines v. Guinea), Judgment, 1 July 1999, *The M/V "Grand Prince" Case* (Belize v. France), Judgment, 20 April 2001; *The M/V "Virginia G" Case* (Panama/Guinea-Bissau), Judgment, 14 April 2014; *Advisory Opinion on the Request submitted to the Tribunal by the Sub-Regional Fisheries Commission*, 2 April 2015.

18) For a comprehensive discussion of the MLC, 2006 and a history of the negotiations see: McConnell, M.L., Devlin, D., Doumbia-Henry, C., (2011) *The Maritime Labour Convention, 2006. A Legal Primer to an Emerging International Regime* (Leiden/Boston: Martinus Nijhoff); or more briefly see for e.g., *inter alia*, McConnell, M.L. (2012) "Forging or Foregoing 'the Genuine Link'?: A reflection on the Maritime Labour Convention, 2006 and other strategies", in *The Regulation of International Shipping: International and Comparative Perspectives. Essays in Honor of Edgar Gold*. Eds., Chircop, A., Letalik, N., McDorman, T., Rolston, S. (Leiden/Boston: Martinus Nijhoff); Moira McConnell, M.L. "The Maritime Labour Convention, 2006 – Reflections on Challenges for Flag State Implementation" (2011) *WMU Journal of Maritime Affairs*, Vol.10. Issue 2, 127-141; McConnell, M. L. "'Making labour history' and the Maritime Labour Convention, 2006: Implications for international law making (and responses to the dynamics of globalization)" in Chircop, A., McDorman, T., Rolston, S., (eds.) (2009) *The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnston*, (Leiden/Boston: Martinus Nijhoff/ Brill).

In addition the ILO's dedicated MLC, 2006 website, <www.ilo.org/mlc>, contains links to numerous resources including the Preparatory Reports (travaux préparatoires) which the ILO calls "Provisional Records (PR)" and other documents leading the adoption of the MLC, 2006 <http://www.ilo.org/global/standards/maritime-labour-convention/text/WCMS_153447/lang-en/index.htm> as well as reports and documents with respect to events after 2006 related to the adoption of guidance on various matters <<http://www.ilo.org/global/standards/maritime-labour-convention/monitoring-implementation-tools/lang-en/index.htm>> and, in 2014 the documents and record of the meeting to adopt the amendments to the Code of the MLC, 2006 <<http://www.ilo.org/global/standards/maritime-labour-convention/special-tripartite-committee/lang-en/index.htm>>; and see also approval of the amendments: <http://www.ilo.org/ilc/ILCSessions/103/reports/WCMS_248905/lang-en/index.htm>.

19) In the same sense as other major multilateral framework Conventions such the LOSC it sets out general principles in many areas and envisages the development of the text on details in the future.

20) Until the MLC, 2006, under ILO practice most Conventions are not amended but are revised in the

updates, 37 of the maritime labour Conventions²¹ and related Recommendations, adopted by the ILO since it was established in 1919, to set international minimum standards covering almost every aspect of working and living conditions for seafarers.

It should be noted that the Convention is intended to protect a wider group of workers as seafarers and a larger number of ships with less discretion than provided for in the predecessor Conventions on the question of scope of application. It has an inclusive definition of a seafarer,²² ship²³ and shipowner,²⁴ with no minimum tonnage and relatively few exclusions from application.²⁵

form of a new Convention, which requires the deposit of an instrument of ratification in order for a State to be bound. This is a lengthy process in most countries, although ILO Conventions typically enter into force with only a few – usually two – ratifications. This means that even very old Conventions dating back to 1920 and Conventions with very low ratification levels remain extant and binding on States that have not ratified the revising Convention (or Conventions as in some cases there have been several revisions, see for example, the Conventions dealing with seafarers' paid annual leave). The means that there was a high level of fragmentation and unevenness in coverage at the international level for the maritime sector. The MLC, 2006 revises 37 of the mandatory instruments and closes these older instruments to further ratification with automatic denunciation by States on ratification of MLC, 2006. In principle, as States move to ratify the MLC, 2006 the 37 revised instruments will "disappear" as they would no longer be binding on any State. For example one of the more widely ratified and implemented maritime labour Conventions, the *Merchant Shipping (Minimum Standards) Convention, 1976* (No. 147), had been ratified by 56 States but has now been denounced by 33 of those States on registered ratification of the MLC, 2006.

See: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312292:NO>

21) 36 Conventions and 1 Protocol. See Article X of the MLC, 2006 for the list. The *Seafarers' Identity Documents Convention (Revised), 2003* (No. 185), and the 1958 Convention that it revises *Seafarers' Identity Documents Convention, 1958* (No. 108), the *Seafarers' Pensions Convention, 1946* (No. 71), and the (outdated) *Minimum Age (Trimmers and Stokers) Convention, 1921* (No. 15), are not consolidated in the MLC, 2006. The Convention also does not include the ILO instruments related to fishers and to dockworkers. It is important to understand that the ILO's "fundamental Conventions", such as the *Freedom of Association and Protection of the Right to Organise Convention, 1948* (No. 87) and the *Right to Organise and Collective Bargaining Convention, 1949* (No. 98), remain applicable independently of the MLC, 2006. The latter aspect is relevant in the context of concerns raised by worker or employers with the ILO's supervisory system and has an impact on potential enforcement action taken in connection with port State inspections of ships, see for example, Guideline B 5.2.1 paragraph 2 of the MLC, 2006.

22) MLC, 2006 Article II, paragraph 1 (f) *seafarer* means any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies.

23) MLC, 2006 Article II, paragraph 1 (i) *ship* means a ship other than one which navigates exclusively in inland waters or waters within, or closely adjacent to, sheltered waters or areas where port regulations apply.

24) MLC, 2006 Article II paragraph 1 (j) "*shipowner*" means the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities imposed on shipowners in accordance with this Convention, regardless of whether any other organizations or persons fulfil certain duties or responsibilities on behalf of the shipowner.

25) There are a few well accepted exceptions to the scope of application to "ships", assuming the ship comes within the definition of a ship which adopts spatial parameters to the Convention's application. The exceptions are for ships of traditional build (e.g., dhows or junks), fishing vessels, warships and ships not

As noted above, the MLC, 2006 is a delicate balance and is based on solutions intended to achieve the twin goals of "decent work for seafarers" and a "level playing field for shipowners" that were jointly sought by the shipowners' representatives and the seafarers' representatives at the ILO. Their proposals for "eight preferred solutions"²⁶ which have been described as sparking "the renaissance of ILO maritime labour standards",²⁷ set the parameters for the overall "system" of the Convention both structurally and substantively.

The general point to be taken from this is that the MLC, 2006 largely reflects industry-devised solutions that respond, in a pragmatic way, to many of the problems that had been identified as connected to poor flag State regulatory enforcement and lack of capacity and the increasingly complex corporate configurations in the sector. With the international character of the sector these solutions were also intended to achieve as close to universal ratification as possible based on "firmness on principles" and "flexibility with respect to the means of implementation."²⁸ The latter aspect is mainly, but not completely,²⁹ explained in an innovative negotiated "Explanatory Note" which

ordinarily engaged in commercial activities and reflect exclusions that are found in most Conventions in this sector. It is, therefore, surprising to note academic commentary that is critical of these exclusions (see: Piñeiro, *ibid.*, note 12, p.48). In fact the move to also clearly include most of the domestic fleet, irrespective of tonnage, was a major step forward to cover ships that for the most part had not been covered by international standards. The exclusion of fishing vessels (which does not prevent a flag State from applying the MLC, 2006 to fishing vessels under its flag), recognizes the fact that during the development of the MLC, 2006 a decision was made to develop a separate instrument following the approach of the MLC, 2006 but specifically designed to respond to the particularities of the sector: see the *Work in Fishing Convention, 2007* (No. 188) which, as of October 2015, has been ratified by five States and is not yet in force as it requires that "the ratifications of ten Members, eight of which are coastal States, have been registered with the Director General" (Article 48 paragraph 2). It is available at: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO:12100:P12100_INSTRUMENT_ID:312333:NO>.

The question of the status of offshore resource extraction vessels, such as mobile offshore drilling rigs (MODUs) is difficult and is not fully resolved. It was the subject of extensive discussion during the development of the Convention but no agreement was reached and the decision was that the Convention would be silent on the matter. The legal result is that they would be covered if they are considered under the law of the State to be a ship. On this question national practice varies and is largely related to the water area in which vessel operates and the fact that, although they may navigate, these vessels are also usually attached the seabed and may also be under coastal State jurisdiction. This is essentially the same situation as expressly addressed in Article 1 paragraph 4 (c) of Convention No. 147.

26) McConnell et al, (2011) *ibid.* note 18, p. 51. As result of website changes and the passage of time some documents are no longer available however the solutions are reproduced in the *Final report. Appendix "Chairperson's Summary"*, Section B at point 2, High Level Tripartite Working Group on Maritime Labour Standards, First Meeting 17- 21 December 2001. ILO Doc. No. TWGMLS/2001/10. Available at: <<http://ilo-mirror.library.cornell.edu/public/english/dialogue/sector/techmeet/twgmls01/twgmls-fr.pdf>>.

27) McConnell et al, (2011) *ibid.*, note 18, p. 48 and also Chapter 5.

28) *Final report. Appendix "Chairperson's Summary"* at p.24, High Level Tripartite Working Group on Maritime Labour Standards, First Meeting 17-21 December 2001. ILO Doc. No. TWGMLS/2001/10 available at: <<http://ilo-mirror.library.cornell.edu/public/english/dialogue/sector/techmeet/twgmls01/twgmls-fr.pdf>>.

29) In particular there is also flexibility on questions of scope and on the details of application based on

is located in the Convention but it is not a legal obligation. However it authoritatively explains the structural and legal relationships between the parts of the Convention.

national tripartite consultation (for e.g., MLC, 2006 Article II paragraphs 3, 5 and 6 and also many examples in Standard A3.1) to make "national determinations". In addition, it is possible in certain circumstances for Governments to implement the Code provisions in Titles 1 to 4 of the MLC, 2006 using of the concept of "substantial equivalence" set out in Article VI, paragraphs 3 and 4. While not the subject of this Chapter it is important to note the *General Observations* on this point made by the ILO's supervisory system Committee of Experts on the Application of Conventions and Recommendations (CEACR) in 2014 (published 104th session of the ILC in 2015) after examining the first set of country reports on national implementation of the MLC, 2006. See: *Report of the Committee of Experts on the Application of Conventions and Recommendations* (Report III (Part 1A) (2015) at page 479, available at:

<http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:3236210,en>

[...]

In addition, the Committee recalls that the concept of substantial equivalence is not a matter for administrative discretion but is a matter to be decided by a Member that must first make sure, in accordance with paragraphs 3 and 4 of Article VI, that it is not in a position to implement the rights and principles in the manner set out in Part A of the Code of the MLC, 2006. Unless expressly provided otherwise in the Convention, the Member may implement the Standards in Part A of the Code in laws and regulations or other measures if it satisfies itself that the relevant legislation or other implementing measures "is conducive to the full achievement of the general object and purpose of the provision or provisions of Part A of the Code concerned" and "gives effect to the provision or provisions of Part A of the Code concerned". The Member's obligation is principally to "satisfy itself", which nevertheless does not imply total autonomy, since it is incumbent on the authorities responsible for monitoring implementation at the national and international levels to determine not only whether the necessary procedure of "satisfying themselves" has been carried out, but also whether it has been carried out in good faith in such a way as to ensure that the objective of implementing the principles and rights set out in the Regulations is adequately achieved in some way other than that indicated in Part A of the Code. It is in this context that ratifying Members should assess their national provisions from the point of view of substantial equivalence, identifying the general object and purpose of the provision concerned (in accordance with paragraph 4(a) of Article VI) and determining whether or not the proposed national provision could, in good faith, be considered as giving effect to the Part A of the Code provision as required by paragraph 4(b) of Article VI. Any substantial equivalences that have been adopted must be stated in Part I of the DMLC that is to be carried on board ships that have been certified. As stated in the practical guidance (paragraph 7) at the beginning of the national report form for the MLC, 2006, explanations are required where a national implementing measure of the reporting Member differs from the requirements of Part A of the Code. In connection with the adoption of a substantial equivalence, the Committee will normally need information on the reason why the Member was not in a position to implement the requirement in Part A of the Code, as well as (unless obvious) on the reason why the Member was satisfied that the substantial equivalence met the criteria set out in paragraph 4 of Article VI.

Explanatory note to the Regulations and Code of the Maritime Labour Convention

1. This explanatory note, which does not form part of the Maritime Labour Convention, is intended as a general guide to the Convention.
2. The Convention comprises three different but related parts: the Articles, the Regulations and the Code.
3. The Articles and Regulations set out the core rights and principles and the basic obligations of Members ratifying the Convention. The Articles and Regulations can only be changed by the Conference in the framework of article 19 of the Constitution of the International Labour Organisation (see Article XIV of the Convention).
4. The Code contains the details for the implementation of the Regulations. It comprises Part A (mandatory Standards) and Part B (non-mandatory Guidelines). The Code can be amended through the simplified procedure set out in Article XV of the Convention. Since the Code relates to detailed implementation, amendments to it must remain within the general scope of the Articles and Regulations.
5. The Regulations and the Code are organized into general areas under five Titles:
Title 1: Minimum requirements for seafarers to work on a ship
Title 2: Conditions of employment
Title 3: Accommodation, recreational facilities, food and catering
Title 4: Health protection, medical care, welfare and social security protection
Title 5: Compliance and enforcement
6. Each Title contains groups of provisions relating to a particular right or principle (or enforcement measure in Title 5), with connected numbering. The first group in Title 1, for example, consists of Regulation 1.1, Standard A1.1 and Guideline B1.1 relating to minimum age.
7. The Convention has three underlying purposes:
 - (a) to lay down, in its Articles and Regulations, a firm set of rights and principles;
 - (b) to allow, through the Code, a considerable degree of flexibility in the way Members implement those rights and principles; and
 - (c) to ensure, through Title 5, that the rights and principles are properly complied with and enforced.
8. There are two main areas for flexibility in implementation: one is the possibility for a Member, where necessary (see Article VI, paragraph 3), to give effect to the detailed requirements of Part A of the Code through substantial equivalence (as defined in Article VI, paragraph 4).
9. The second area of flexibility in implementation is provided by formulating the mandatory requirements of many provisions in Part A in a more general way, thus leaving a wider scope for discretion as to the precise action to be provided for at the national level. In such cases, guidance on implementation is given in the non-mandatory Part B of the Code. In this way, Members which have ratified this Convention can ascertain the kind of action that might be expected of them under the corresponding general obligation in Part A, as well as action that would not necessarily be required. For example, Standard A4.1 requires all ships to provide prompt access to the necessary medicines for medical care on board ship (paragraph 1(b)) and to «carry a medicine chest» (paragraph 4(a)). The fulfilment in good faith of this latter obligation clearly means something more than simply having a medicine chest on board each ship. A more precise indication of what is involved is provided in the corresponding Guideline B4.1.1 (paragraph 4) so as to ensure that the contents of the chest are properly stored, used and maintained.
10. Members which have ratified this Convention are not bound by the guidance concerned and, as indicated in the provisions in Title 5 on port State control, inspections would deal only with the relevant requirements of this Convention (Articles, Regulations and the Standards in Part A). However, Members are required under paragraph 2 of Article VI to give due consideration to implementing their responsibilities under Part A of the Code in the manner provided for in Part B. If, having duly considered the relevant Guidelines, a Member decides to provide for different arrangements which ensure the proper storage, use and maintenance of the contents of the medicine chest, to take the example given above, as required by the Standard in Part A, then that is acceptable. On the other hand, by following the guidance provided in Part B, the Member concerned, as well as the ILO bodies responsible for reviewing implementation of international labour Conventions, can be sure without further consideration that the arrangements the Member has provided for are adequate to implement the responsibilities under Part A to which the Guideline relates.

This structure expressly adopts a treaty design approach that has been successfully used by the International Maritime Organization (IMO) in its Conventions, with the more technical or detailed provisions implementing the Articles and Regulations set out in a "Code" that can be updated as needs arise using a more rapid amendment procedure based on "tacit acceptance" rather than express ratification for entry into force.³⁰ This allows for adjustments on matters of detail rather than principle as the Convention is put into operation on board ships,³¹ or to fill "gaps" on matters that were not settled³² at the time it was adopted, as well as meeting new or emerging issues in the industry.³³

However, the balances within the Convention's system are subtle and go beyond this approach of "firmness and flexibility" and the structural framework which reinforces the substantive solutions. Embedded within the MLC, 2006 are many other solutions, particularly in connection with the SEA, as a strategic response to problems related to globalization and the industry's increasing level of corporate complexity³⁴ and the

30) The procedure under Article XV of the MLC, 2006 also has some ILO specific procedural features. However it is a new process for ILO Conventions. It has already been used with the adoption of the Amendments of June 2014 (to enter into force January 2017): Available at: <http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_248905.pdf>.

31) For example, the second meeting of Special Tripartite Committee under Article XIII of the MLC, 2006 to be held in February 2016 will consider a proposal from the Shipowners' group for an amendment to the ship certification provisions to include the possibility of extension of an expired certificate to allow for delays when a ship has been inspected for renewal but the onboard documents may not be issued by the flag State for several months : See the proposal at: < http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—normes/documents/genericdocument/wcms_386809.pdf>.

32) For example, the issue of shipowners' liability for abandonment and for financial security to address death or injury were not resolved by an Ad Hoc IMO ILO working group until after 2006.

33) For example the Seafarers' group proposed amendments that were considered at second meeting of the Special Tripartite Committee under Article XIII of the MLC, 2006 in February 2016. These amendments are intended to address workplace bullying as an issue for occupational safety and health and also to clarify the contractual situation and wages for seafarers that have captured by pirates: The amendments with respect to occupational safety and health were adopted however the amendments related to piracy were sent to working group with a view to consideration at the next meeting of the Committee which is anticipated for 2018. For the text of both proposals see:

http://www.ilo.org/global/standards/maritime-labour-convention/special-tripartite-committee/WCMS_386796/lang—en/index.htm

For the text that was adopted see:

"Amendments adopted to the Code relating to Regulation 4.3 of the MLC, 2006"

<http://www.ilo.org/global/standards/maritime-labour-convention/events/WCMS_451730/lang—en/index.htm>;

For the resolution with respect to the working group on *inter alia* the amendment related to wages and piracy see:

<http://www.ilo.org/global/standards/maritime-labour-convention/events/WCMS_452072/lang—en/index.htm>.

34) For example the recent (Nov. 2014) UNCTAD *Review of Maritime Transport 2014*, <http://unctad.org/en/PublicationsLibrary/rmt2014_en.pdf> comments, in the Executive Summary (p.xi),

related jurisdictional issues.

For the purposes of this chapter, the most important of the strategic solutions in the MLC, 2006 is the system of ship inspection and certification, including the use of ROs and PSC and the procedures for complaints to be made to flag State and port States, as well as on board ship, about a ship/shipowner's failure to conform to the requirements of the Convention. The impact of this system was noted above in section 1. This system is "backed up" by the ILO's supervisory system which also considers information arising from the system of the MLC, 2006, particularly from PSC (Regulations 5.2.1 and 5.2.2 and the Code). The fact that the flag State must inspect almost all matters and, for ships that are to be certified³⁵ (essentially the majority of ships that are not

that data shows that "the largest fleets by flag of registration in 2014 are those of Panama, followed by Liberia, the Marshall Islands, Hong Kong (China) and Singapore. Together, these top five registries account for 56.5 per cent of the world tonnage." More significantly the data identified a trend to relocate to third countries, leading the Review to introduce a new analysis regarding a third level of nationality for ships:

As regards the ownership of the fleet, this issue of the *Review of Maritime Transport* introduces a novel analysis and distinction between the concept of the "nationality of ultimate owner" and the "beneficial ownership location". The latter reflects the location of the primary reference company, that is, the country in which the company that has the main commercial responsibility for the vessel is located, while the "ultimate owner's nationality" states the nationality of the ship's owner, independent of the location. Just as today most ships fly a flag from a different country than the owner's nationality, owners are increasingly locating their companies in third countries, adding a possible third dimension to the "nationality" of a ship."

The data in chapter 2 of the *Review* and commentary explains (at page 38):

A typical example may be a Greek national (the ultimate owner's nationality is Greece) whose shipowning company is based in the United Kingdom (the beneficial ownership location is the United Kingdom). For 11.8 per cent of the world fleet (dwt), the ultimate owner's nationality is different from the beneficial ownership location, while for 88.2 per cent of the fleet, the owner's nationality and the location of the beneficial owner are one and the same. The top five shipowning countries are the same under both criteria, notably Greece, followed by Japan, China, Germany and the Republic of Korea.

[...]

As mentioned above, for the majority of vessels, the ultimate owner's nationality and the beneficial ownership location are still the same – but the trend appears to be towards a more frequent distinction between the two. A similar situation existed 40 years ago as regards the national flag and the ownership of ships. Historically, a vessel would fly the same flag as the nationality of its owner. Today, however, almost 73 per cent of the world fleet are foreign flagged (see also section D: Registration of ships). The tonnage owned by the 20 largest shipowning countries/economies and the share that is foreign flagged is illustrated in figure 2.5. With the exception of Singapore, Hong Kong (China), Italy and India, all the top 20 shipowning countries/economies have far more than half of their fleet registered abroad, that is, most of the nationally owned tonnage is flagged out.

35) Regulation 5.1.3, paragraph 1. This applies to all ships 500 Gross Tonnage (GT) and above that are engaged in international voyages or voyages between ports in jurisdictions other than the flag State. The Maritime Labour Certificate (MLC) and attached Declaration of Maritime Labour Compliance (DMLC) part I and II are carried on board ship and constitute *prima facie* evidence of compliance with the national law or other measures implementing the requirements of the MLC, 2006 in the flag State. This approach, while new for labour and social matters is essentially the central approach under the maritime Convention adopted by the IMO. The MLC, 2006 was explicitly designed to integrate with this wider ship inspection and certification systems.

operating exclusively in the domestic trade of the flag State), certify a list of areas,³⁶ including the SEA itself and several matters which now, and in the future, constitute the substantive content of the terms in the SEA, means that the flag State has a central interest in ensuring that the SEA of seafarers on its ships at a minimum meet the requirements of the MLC, 2006. Under the MLC, 2006 the flag State is the relevant State to be contacted by PSCOs in the event of on board implementation problems. This is a very important factor. For these reasons, the SEA requirement has been described as the "heart" of the MLC, 2006 because of the multiple "arterial" connections to many other regulations in the Convention and in regard to the compliance and enforcement system set out in Title 5 of the MLC, 2006.³⁷

The clear acceptance under the MLC, 2006 of a Government's decision to use ROs for inspecting MLC, 2006 requirements is also an important step in recognizing the fact that this is a well-established practice for other maritime inspections and certifications.³⁸ This is not simply a capacity issue for developing economies. Most developed economy countries now face reductions in government staff and technical capacity rely on private sector "recognized organizations"³⁹ to carry out the technical surveys/inspections and also, often certification, which is paid for by the shipowner concerned. ROs, most of which operate internationally, with inspectors in all major ports areas of the world, increasingly play an important role in ensuring a certain level of uniformity in the application of international standards in the maritime sector.⁴⁰

36) The current list of 14 areas is set out in Appendix A5-I and A5-III of the MLC, 2006: Minimum age; Medical certification; Qualifications of seafarers; Seafarers' employment agreements; Use of any licensed or certified or regulated private recruitment and placement service; Hours of work or rest; Manning levels for the ship; Accommodation; On-board recreational facilities; Food and catering; Health and safety and accident prevention; On-board medical care; On-board complaint procedures; Payment of wages.

37) McConnell, et al (2011) *ibid.*, note 18 p. 291.

38) Perhaps an anathema from a traditional labour inspection perspective, the use of third party private sector actors such as ship classification societies or other similar organizations, now collectively known as "Recognized Organizations" (ROs) to carry out the inspections/surveys as required by IMO conventions, and now for MLC, 2006, on behalf of the flag State, is a well-established aspect of international maritime industry practice. While on one view this could be seen as situation of conflict of interest in that ROs are paid by shipowners to carry out the survey/inspection to certify the ship, at the same time, as with all auditing firms in other sectors, the value of the auditor's name is based on their reliability and integrity and standards. One important aspect is that rather than relying on national administration which often do not have the capacity to carry out the necessary inspection or respond to issues that may arise in all ports that ships may voyage to, these organization, which operate internationally, provide a certain degree of uniformity in their approach and are themselves subject, albeit voluntary, to accreditation by industry associations (e.g., International Association of Classification Societies).

39) While not necessarily international ship classification societies these are the main organizations involved.

40) The IMO has adopted an approach that recognizes the technical expertise and role of these organizations in proposing what are called "unified interpretations" in the application of IMO conventions. This is not in place in the ILO and such an approach at least at a formal level may be problematic as the ILO already has the supervisory system for considering the application of its instruments.

Another important innovation, which reinforces the primary role of the flag State and the shipowner with respect to the SEA and its content, is the use of an economic or "market" solution to address the potential problem of enforcement where a seafarer's employer does not fulfill its responsibilities. Irrespective of the existence of any outside or third party employer for the seafarer concerned, the flag State must require that the ship or shipowner provide financial security to ensure seafarers are repatriated⁴¹ and for shipowners' liability for compensation for death or long term-disability of a seafarer due to an occupational injury or illness or hazard.⁴² In the future, documentary evidence of a financial security system to which seafarers have direct access will also be required to cover the economic impact of abandonment of seafarers. Although repatriation and shipowners' liability are important terms of an SEA and must be inspected by the flag State they are not currently on the list of areas to be certified. They will be added to the list for the on board ship certification documents (the DMLC) along with requirements for other on-board documentation, in 2017 when the *Amendments of 2014* dealing with abandonment and with financial compensation in the case of the shipowners' liability provisions enter into force.⁴³

The MLC, 2006 also introduced a further economic requirement specifically aimed at providing seafarers with an effective solution to possible SEA enforcement problems arising from the increased role of private recruitment and placement services acting as the intermediary between the seafarer and shipowner or even acting as the employer. It builds upon the requirement in the predecessor *Recruitment and Placement of Seafarers Convention, 1996* (no. 179) that the country in which a private service operates regulate these services and, *inter alia*, require that they have a system of protection by way of insurance or other equivalent measure to compensate seafarers for monetary loss they may incur as result of the failure of the service to meet its obligations to them.⁴⁴ The MLC, 2006 added to this obligation by requiring that the system of protection to be provided by the private service also cover a failure by "the relevant shipowner under the seafarers' employment agreement,"⁴⁵ thus closing a potential gap in protection of seafarers. As will be discussed here in section 4, while

41) MLC, 2006 Regulation 2.5, paragraph 2. See also the amendments to the Code of the MLC, 2006 relating to Regulation 2.5 –Repatriation. The *Amendments of June 2014* are expected to enter into force in January 2017 and are available at: <http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_248905.pdf>.

42) MLC, 2006 Standard A4.2., paragraph 2. *The Amendments of 2014*, *ibid* note 41, which also relate to Regulation 4.2. provide the details for this security for what are also described as "contractual claims" including the requirement that flag States require that documentary evidence of this security be carried on board (see *Amendments of 2014* Standard A4.2 paragraph 11).

43) *Ibid*, notes 41 and 42.

44) Convention No. 179, Article 4, paragraph 4. Available at: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C179>.

45) MLC, 2006 Standard A1.4 paragraph 5 (c) (vii).

possibly problematic for implementation from a legal point of view, this additional element provides the logical counterbalance to the system of holding the shipowner responsible for employment rights even if the seafarer has a third party employer, that has failed to fulfill its obligations. From a pragmatic point of view, irrespective of the corporate or employment arrangements or legal or jurisdictional issues involved, insurance or an equivalent measure is required to provide a further layer of protection for the seafarer to counteract the potential difficulties a seafarer may face in identifying and claiming from the responsible party.

3. The Law of the Sea and the revitalization of the role of flag States

Beyond its important role in the ILO panoply of standards, the MLC, 2006 must also be understood within the wider international legal system of the law of the sea and from a maritime law perspective. As explained by McConnell et al:⁴⁶

Viewed from a public maritime law perspective the MLC, 2006 also constitutes a further elaboration of the international maritime regulatory regime under the LOSC as it pertains to conditions on ships voyaging on the high seas and constitutes an effort to fill a significant gap in the LOSC – long considered the "constitution for the oceans". Despite its constitutive character which was "[p]rompted by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea" and aimed at "establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans,"⁴⁷ the drafters of the LOSC failed to do more than peripherally address the use of the ocean, particularly the high seas, as a workplace or a site for human rights.⁴⁸[T]hese matters are simply left to the "default" jurisdiction of the relevant flag State with a "genuine link" to the ship and its general obligation to "effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag."⁴⁹

[....]

The problem with this approach is evidenced in the much criticized failure to tackle

46) McConnell et al, (2011) *ibid*, note 18 at pp. 6-7, 24-25 .The footnotes in the original text are retained with some additions and numbering has been altered for use in this chapter.

47) *Preamble*, LOSC.

48) (original text footnote 15) There are, however, some human rights provisions relating to slavery and genocide although human security rights are also encompassed in connection with, for example, the provisions governing the protection of the marine environment, or living resources.

49) Article 92- 94ff LOSC.

the thorny international law problem of the "genuine link"⁵⁰ and flag State jurisdiction over the globalized economic activities of shipping and fishing. However, it is equally difficult, from a legal perspective, to envisage a viable alternative to flag State jurisdiction.

The MLC, 2006 while not an amendment to the LOSC itself, is an important step to develop this obligation into a more effective regime.⁵¹ It develops, in detail and at the level of what will be a widely ratified comprehensive multilateral convention, explicit responsibilities for both flag States, in connection with the inspection and certification of labour conditions on ships, and for port States that choose to inspect foreign ships. It also introduces a new player in the flag State, coastal/port State

50) See: McConnell, M.L., (1987) "Business As Usual: An Evaluation of the 1986 United Nations Convention on Conditions for Registration of Ships" 18 *Journal of Maritime Law and Commerce* 435; McConnell, M.L. (1985) "Darkening Confusion Mounted Upon Darkening Confusion: The Search for the Elusive Genuine Link" (1985) 6 *Journal of Maritime Law and Commerce* 365. See also, for example, the resurrected call for a definition of the "genuine link" or even, in the fishing sector, a new Convention to "define" the genuine link: Resolutions 58/240 (at paragraph 42) and 58/14 adopted by the General Assembly of the United Nations at its fifty-eighth session invited the IMO and other relevant agencies to study, examine and clarify the role of the "genuine link" in relation to the duty of flag States to exercise effective control over ships flying their flag, including fishing vessels. Resolutions 59/24 (paragraph 41) and 59/25 (paragraph 30) also requested the Secretary-General to report to the General Assembly at its sixty-first session on the study undertaken by International Maritime Organization (IMO) in cooperation with other competent international organizations on the role of the genuine link and the potential consequences of non-compliance with duties and obligations of flag States described in relevant international instruments. The IMO reported on 23 June 2006 and the lengthy report comprising reports from the various organization concerned was reported to the General Assembly of the United Nations, Document A 61/160, 17 July 2006, Item 69(a) of the provisional agenda in connection with Oceans and the law of the sea. Despite some resurgence of interest in the meaning of the genuine link in cases before the International Tribunal on the Law of the Sea., that report commented, *inter alia*,

28. Participants in the Meeting took the view that the exclusivity attached by the United Nations Convention on the Law of the Sea to the right of States to fix conditions for the grant of nationality, as reaffirmed by the authoritative interpretations of the International Tribunal for the Law of the Sea in the M/V Saiga (No.2) and subsequent cases, as well the other agreements referred to in section 2 above, indicated that the questions relating to the precise criteria or conditions adopted by a State with respect to the grant of its nationality to a ship were a matter beyond the purview of the organizations participating in the Meeting. However, participants in the Meeting also considered that issues relating to securing the objective and purpose of the "genuine link" requirement, that is, assuring the ability of the flag State to effectively exercise its jurisdiction over ships flying its flag, were matters of central concern to all of the organizations and formed a substantial part of their programmes of regulatory initiatives and technical cooperation activities in the shipping and fishing sectors.

Comments from the ITF in 2007 indicate there is a shift in its strategy for dealing with flags of convenience (FOC): "ITF softens FOC stance", *Fairplay Daily News*, July 24, 2007

"SINGAPORE 24 July – The ITF has apparently softened its stand against the flags of convenience system. "Just because the vessel is registered in Panama or Liberia does not mean that it is a substandard vessel," the federation's maritime co-ordinator Stephen Cotton told the Singapore Organisation of Seamen yesterday..."

51) See generally papers in for example, *The Effectiveness of International Environmental Regimes: Causal Connections and Behavioural Mechanisms*, Ed. by O. Young, (Cambridge, MA: MIT Press, 1999).

jurisdictional web - States with labour-supply responsibilities that arise independently of those of the flag State.

Recent judgments of the ITLOS,⁵² in connection with cases of disputed flag State claims under the LOSC for prompt release of ships (and the seafarers on board) that have been arrested in foreign waters or ports for alleged violations of coastal State law, have continued to raise the question of the "genuine link" requirement and legitimacy of the flag State's claim to represent the ship and the seafarers. The "genuine link" requirement under the LOSC is set out in Article 91 "Nationality of ships" of the LOSC:

1. 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. There must exist a genuine link between the State and the ship [...].

As discussed in depth elsewhere,⁵³ ever since the introduction⁵⁴ of this concept in the law of the sea in one of the predecessors to the 1982 LOSC, the 1958 *Geneva Convention on the High Seas*,⁵⁵ the requirement has been controversial.⁵⁶

52) *Ibid.*, note 17.

53) *Ibid.*, note 50, see also *ibid.*, note 18, McConnell, M. L., (2012) and sources cited therein; See also *infra* note 56.

54) The term was drawn from the International Court of Justice (ICJ) decision in *The Nottebohm Case (Liechtenstein v. Guatemala)* [1955] ICJ Rep. 4, a case that did not deal with ship nationality. Rather the case involved the question of whether Liechtenstein could bring a claim for compensation for damage to one of its nationals (Nottebohm), a German national by birth, who had obtained naturalization on the basis of a three week residence in Liechtenstein, but had lived for 34 years in Guatemala. The ICJ pronounced (at p. 23):

"[N]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties.

The validity of using the phrase, the genuine link, has been queried for a number of reasons, including the fact that the case was arguably dealing with a situation of dual nationality and that, as against Guatemala, Liechtenstein had a relatively weaker claim."

55) Geneva, 29 April 1958, 450 *U.N.T.S.* 82, available at <http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf>.

56) In 1960 influential publicists McDougal, M.S., Burke, W. T., Vlasic, I.. "The Maintenance of Public Order at Sea and the Nationality of Ships", *American Journal of International Law* 54 (1960) 105 at 115, warned:

"It is not yet demonstrated that any conceivable good for the common interest of peoples could attend the introduction of this new-found requirement of genuine link ... It has not, in sum, been established that the proposed innovation would serve any common interest which would counterbalance the grave risks and dangers which it would entail. On the contrary, it would seem reasonably clear that the only purposes it would serve are those of disruption, controversy and anarchy."

Or see, in this century, considering wider development in the international maritime, Oude Elferink, A.G. (2003), "The genuine link concept: Time for a post mortem?", in Dekker.I.F., & Post, H.H.G, eds., *On the Foundations and Sources of International Law* Den Haag: TMC Asser Press, 41-63.

The ITLOS decisions on this point have, however, continually reinforced the view that *prima facie* the flag State has jurisdiction and, although on the facts of a particular case questions may be raised about the validity of registration and attribution of nationality, the flag State will be presumed to be the relevant State for the purposes of international legal claims and also responsibility for protection of the ship and, while posing a somewhat more complex legal question,⁵⁷ also for the seafarers on board the ship.

The Tribunal's most recent decision⁵⁸ on this issue was the *M/V "Virginia G" Case* (Panama/Guinea-Bissau).⁵⁹ The case posed a number of procedural and other issues but the relevant facts are that the "M/V Virginia G", an oil tanker, was registered in Panama and owned by a Panama registered company but chartered, through a Spanish intermediary company, to an Irish company that supplied oil to fishing vessels and in this case to vessels registered in Mauritania that were operating in the Exclusive Economic Zone (EEZ) of Guinea-Bissau. Under the laws of Guinea-Bissau, bunkering required a permit and was also potentially subject to taxation by Guinea-Bissau. The ship was arrested, the cargo of oil seized and the crew held in port for failure to have the requisite permit to supply the fishing vessels. The crew was from various countries as noted by ITLOS:

57. At the time of the arrest, the captain of the vessel was Mr Eduardo Blanco Guerrero, a national of Cuba. There were eleven crew members on board, seven of whom were nationals of Cuba, three of Ghana, and one of Cape Verde (now "Cabo Verde").

57) *The M/V "Virginia G" Case* (Panama/Guinea-Bissau), Judgment, 14 April 2014. The judgment is available at: <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment/C19-Judgment_14.04.14_corr2.pdf>.

58) Although not dealing with the genuine link issues specifically, the 2015 advisory opinion the *Request submitted to the Tribunal by the Sub-Regional Fisheries Commission* (SRFC) (2 April 2015), also continued to affirm the responsibility of flag States (albeit a complementary responsibility) in the EEZ to the coastal State, this time in the context of illegal, unreported and unregulated (IUU) fishing. ITLOS commented, *inter alia*, that:

119. It follows from the provisions of article 94 of the Convention that as far as fishing activities are concerned, the flag State, in fulfilment of its responsibility to exercise effective jurisdiction and control in administrative matters, must adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities which will undermine the flag State's responsibilities under the Convention in respect of the conservation and management of marine living resources. If such violations nevertheless occur and are reported by other States, the flag State is obliged to investigate and, if appropriate, take any action necessary to remedy the situation.

Available at: <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion/C21_AdvOp_02.04.pdf>.

59) *The M/V "Virginia G" Case* (Panama/Guinea-Bissau), Judgment, 14 April 2014. The judgment is available at: <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment/C19-Judgment_14.04.14_corr2.pdf>.

There were various legal issues raised by the two parties but essentially Panama as the flag State claimed under the LOSC for prompt release of the ship, oil and crew and actual and moral damages for the wrongful arrest and seizure and for interference with Panama's right to freedom of navigation in the EEZ under the LOSC,⁶⁰ while Guinea-Bissau contested Panama's right to make these claims for various reasons, including the lack of a genuine link as a flag State and no right under international law to seek damages regarding the non-national crew and that the bunkering of fishing vessels in the EEZ constitutes a fishing related activity requiring authorization by Guinea-Bissau.⁶¹

Although a number of individual opinions were also issued, the majority judgment of the Tribunal on the "genuine link" issue,⁶² after considering its previous case law on the matter, concluded with respect to the meaning of the genuine link under the LOSC and its application in the case (emphasis added):

109. The Tribunal observes that under article 91, paragraph 1, of the Convention a State enjoys a right to grant its nationality to ships and recalls that in the M/V "SAIGA" (No. 2) Case it recognized this exclusive right of the flag State when it stated:

Article 91 leaves to each State exclusive jurisdiction over the granting of its nationality to ships. In this respect, article 91 codifies a well-established rule of general international law. Under this article, it is for Saint Vincent and the Grenadines to fix the conditions for the granting of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag. These matters are regulated by a State in its domestic law. Pursuant to article 91, paragraph 2, Saint Vincent and the Grenadines is under an obligation to issue to ships to which it has granted the right to fly its flag documents to that effect. The issue of such documents is regulated by domestic law.

(M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, at pp. 36-37, para. 63)

110. The Tribunal considers that article 91, paragraph 1, third sentence, of the Convention requiring a genuine link between the flag State and the ship should not be read as establishing prerequisites or conditions to be satisfied for the exercise of the right of the flag State to grant its nationality to ships.

111. The Tribunal observes in this respect that article 94 of the Convention requires the flag State to "effectively exercise its jurisdiction and control in administrative,

60) *Id.* para. 54.

61) *Id.*

62) *Ibid.*, note 59. The position of the two parties is set out in paragraphs 102-107. The Tribunal's analysis and decision on the issues is set out in paragraphs 107-118.

technical and social matters over ships flying its flag." Paragraphs 2 to 5 of that article set out the different measures which the flag State is required to take to exercise effective jurisdiction and control, including such measures as are necessary to ensure safety at sea, which must conform to generally accepted international regulations, procedures and practices. Paragraph 6 of that article outlines the procedure to be followed where another State "has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised." As stated by the Tribunal in the M/V "SAIGA" (No.2) Case, "[t]here is nothing in article 94 to permit a State which discovers evidence indicating the absence of proper jurisdiction and control by a flag State over a ship to refuse to recognize the right of the ship to fly the flag of the flag State" (M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, at p. 41, para. 82).

112. As further stated in the M/V "SAIGA" (No. 2) Case, the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States. (M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, at p. 42, para. 83).

The Tribunal reaffirms the above statement.

113. In the view of the Tribunal, once a ship is registered, the flag State is required, under article 94 of the Convention, to exercise effective jurisdiction and control over that ship in order to ensure that it operates in accordance with generally accepted international regulations, procedures and practices. This is the meaning of "genuine link".

114. The Tribunal notes that, on the basis of information available to it, there is no reason to question that Panama exercised effective jurisdiction and control over the M/V Virginia G at the time of the incident.

115. The Tribunal observes that Panama's legislation sets out the conditions for granting Panamanian nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Under Panamanian law, shipowners are required to take specific actions, to carry out certain activities and to submit substantial information and documentation to fulfil all these requirements, in line with Panama's international obligations. The Tribunal in this regard notes that the M/V Virginia G obtained the required documents and technical certificates. It further notes that Panama imposes on owners of vessels specific conditions such as the requirement of a continuous synopsis record, in accordance with the International Convention for the Safety of Life at Sea, 1974 (SOLAS 1974).

116. The Tribunal also notes that Panama exercises its right to delegate the conduct

of an annual safety inspection and the issuance of technical certificates to one of the recognized organizations (Panama Shipping Registry Inc.) in accordance with relevant IMO conventions. The Tribunal finds in this regard that the M/V Virginia G meets the international standards set out in the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78).

117. In light of the above, the Tribunal concludes that a genuine link existed between Panama and the M/V Virginia G at the time of the incident.

As this lengthy extract illustrates, the evidence of national regulatory control exercised by the flag State, as required under international conventions, served also to establish the flag State as the relevant State with jurisdiction and responsibility for exercising authority over the ship and acting on behalf of the ship in question. Although the Tribunal considered a list of IMO regulatory Conventions, in principle, the effective implementation of the MLC, 2006 requirements, also often using the same ROs as the IMO Conventions, such as those relating to the control over the SEA, could also constitute evidence and be considered on the same basis.

But even more central to the inquiry in this chapter, the Tribunal was also asked to consider the more complex international law question regarding flag State jurisdiction and the right to also make a claim for damages for moral harm to the flag State as a result of the actions taken against the seafarers on board the ship. The issue had arisen in the first ITLOS case, the "*M/V Saiga (No.2)*"⁶³, also a prompt release case, with respect to the question of whether the flag State could bring a claim for redress on behalf of seafarers who are not its nationals. In the "*M/V Virginia G*" the question shifted to the whether a flag State could claim damages on its own behalf. The question involved a point that is not clear in the *Draft Articles on Diplomatic Protection* adopted by the International Law Commission in 2006,⁶⁴ which, in a section devoted to specific

63) *Ibid.* note 17, Judgment available at: <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/Judgment.01.07.99.E.pdf>.

64) Available at: <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf> Article 18 and commentary which noted (footnotes removed) that (emphasis added):

(1) The purpose of draft article 18 is to affirm the right of the State or States of nationality of a ship's crew to exercise diplomatic protection on their behalf, while at the same time acknowledging that the State of nationality of the ship also has a right to seek redress on their behalf, irrespective of their nationality, when they have been injured in the course of an injury to a vessel resulting from an internationally wrongful act. It has become necessary to affirm the right of the State of nationality to exercise diplomatic protection on behalf of the members of a ship's crew in order to preclude any suggestion that this right has been replaced by that of the State of nationality of the ship. At the same time it is necessary to recognize the right of the State of nationality of the ship to seek redress in respect of the members of the ship's crew. Although this cannot be characterized as diplomatic protection in the absence of the bond of nationality between the flag State of a ship and the members of a ship's crew, there is nevertheless a close resemblance between this type of protection and diplomatic protection.

(2) There is support in the practice of States, in judicial decisions and in the writings of publicists, for the position that the State of nationality of a ship (the flag State) may seek redress for members of the crew of the ship who do not have its nationality. There are also policy considerations in favour of such an approach.

(3) The early practice of the United States, in particular, lends support to such a custom. Under American law foreign seamen were traditionally entitled to the protection of the United States while serving on American vessels. The American view was that once a seaman enlisted on a ship, the only relevant nationality was that of the flag State. This unique status of foreigners serving on American vessels was traditionally reaffirmed in diplomatic communications and consular regulations of the United States. Doubts have, however, been raised, including by the United States, as to whether this practice provides evidence of a customary rule.

(4) International arbitral awards are inconclusive on the right of a State to extend protection to non-national seamen, but tend to lean in favour of such right rather than against it. In *McCready (US) v. Mexico* the umpire, Sir Edward Thornton, held that "seamen serving in the naval or mercantile marine under a flag not their own are entitled, for the duration of that service, to the protection of the flag under which they serve". In the "I'm Alone" case, which arose from the sinking of a Canadian vessel by a United States coast guard ship, the Canadian Government successfully claimed compensation on behalf of three non-national crew members, asserting that where a claim was on behalf of a vessel, members of the crew were to be deemed, for the purposes of the claim, to be of the same nationality as the vessel. In the *Reparation for Injuries* advisory opinion two judges, in their separate opinions, accepted the right of a State to exercise protection on behalf of alien crew members.

(5) In 1999, the International Tribunal for the Law of the Sea handed down its decision in *The M/V "Saiga" (No. 2) case (Saint Vincent and the Grenadines v. Guinea)* which provides support for the right of the flag State to seek redress for non-national crew members. The dispute in this case arose out of the arrest and detention of the *Saiga* by Guinea, while it was supplying oil to fishing vessels off the coast of Guinea. The *Saiga* was registered in St. Vincent and the Grenadines ("St. Vincent") and its master and crew were Ukrainian nationals. There were also three Senegalese workers on board at the time of the arrest. Following the arrest, Guinea detained the ship and crew. In proceedings before the International Tribunal for the Law of the Sea, Guinea objected to the admissibility of St. Vincent's claim, inter alia, on the ground that the injured crew members were not nationals of St. Vincent. The Tribunal dismissed these challenges to the admissibility of the claim and held that Guinea had violated the rights of St. Vincent by arresting and detaining the ship and its crew. It ordered Guinea to pay compensation to St. Vincent for damages to the *Saiga* and for injury to the crew.

(6) Although the Tribunal treated the dispute mainly as one of direct injury to St. Vincent, 261 the Tribunal's reasoning suggests that it also saw the matter as a case involving the protection of the crew something akin to, but different from, diplomatic protection. Guinea clearly objected to the admissibility of the claim in respect of the crew on the ground that it constituted a claim for diplomatic protection in respect of non-nationals of St. Vincent. St. Vincent, equally clearly, insisted that it had the right to protect the crew of a ship flying its flag "irrespective of their nationality" In dismissing Guinea's objection the Tribunal stated that the United Nations Convention on the Law of the Sea in a number of relevant provisions, including article 292, drew no distinction between nationals and non-nationals of the flag State. It stressed that "the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant".

(7) There are cogent policy reasons for allowing the flag State to seek redress for the ship's crew. This was recognized by the Law of the Sea Tribunal in *Saiga* when it called attention to "the transient and multinational composition of ships' crews" and stated that large ships "could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such a person is a national, undue hardship would ensue". Practical considerations relating to the bringing of claims should not be overlooked. It is much easier and more efficient for one State to seek redress on behalf of all crew members than to require the States of nationality of all crew members to bring separate claims on behalf of their nationals.

(8) Support for the right of the flag State to seek redress for the ship's crew is substantial and justified. It cannot, however, be categorized as diplomatic protection. Nor should it be seen as having replaced

issues, appears to envisage potentially concurrent rights by the flag State and the State of nationality and programmatic solution, in the event the two differ. In the "*M/V Virginia G*" Case ITLOS noted (emphasis added):

119. Panama argues that it "is bringing this action against Guinea Bissau within the framework of diplomatic protection" and that it "takes the cause of its national and the vessel VIRGINIA G with everything on board, and every person and entity involved or interested in her operations, which, it is claimed, has suffered injury caused by Guinea Bissau."

120. In support of its position, Panama refers to paragraph 106 of the Judgment in the *M/V "SAIGA" (No. 2)* Case, where the Tribunal stated:

The provisions referred to in the preceding paragraph indicate that the Convention considers a ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of the Convention. Thus the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant. (*M/V "SAIGA" (No. 2)* (Saint Vincent and the Grenadines v. Guinea), ITLOS Reports 1999, p. 10, at p. 48, para. 106)

121. Panama also relies on article 18 of the Draft Articles on Diplomatic Protection adopted by the International Law Commission in 2006, which provides:

Article 18 Protection of ships' crews.

The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.

122. Guinea-Bissau contends that "the framework of diplomatic protection does not give Panama *locus standi* referring to claims of persons or entities that are not nationals of Panama" and that "Panama is therefore not entitled to bring this action

diplomatic protection. Both diplomatic protection by the State of nationality and the right of the flag State to seek redress for the crew should be recognized, without priority being accorded to either. Ships' crews are often exposed to hardships emanating from the flag State, in the form of poor working conditions, or from third States, in the event of the ship being arrested. In these circumstances they should receive the maximum protection that international law can offer.

(9) The right of the flag State to seek redress for the ship's crew is not limited to redress for injuries sustained during or in the course of an injury to the vessel but extends also to injuries sustained in connection with an injury to the vessel resulting from an internationally wrongful act, that is as a consequence of the injury to the vessel. Thus such a right would arise where members of the ship's crew are illegally arrested and detained after the illegal arrest of the ship itself.

against Guinea-Bissau within the framework of diplomatic protection." Guinea-Bissau further contends that "there is not a single person or entity related to the vessel VIRGINIA G which is of Panamanian nationality" and that "Panama asserts protection before the Tribunal for all crew's members and for the owners of ship and cargo" while "[i]t is undisputed here that none of these persons are nationals of Panama."

123. In relation to the M/V "SAIGA" (No. 2) Case, Guinea-Bissau maintains that this is not a case involving vessels where a number of nationalities and interests are concerned, therefore the judgment of the M/V SAIGA No. 2 Case quoted by Panama is not applicable. In fact, neither the owner nor even a single member of the crew of VIRGINIA G is of Panamanian nationality.

124. As regards article 18 of the Draft Articles on Diplomatic Protection, Guinea-Bissau further maintains that this article only refers to the right of the State of nationality of a ship to seek redress on behalf of the crew members of that ship, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act, which is not the case here.

125. The Tribunal considers that the request of Panama is to be understood in the light of the object of its claim, namely, claims made in respect of alleged violations of provisions of the Convention which resulted in damage caused to, *inter alia*, the ship, the ship-owner, persons and cargo on board.

126. In this regard, the Tribunal recalls its finding in the M/V "SAIGA" (No. 2) Case that, under the Convention, the ship is to be considered as a unit "as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States" (M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, at p. 48, para. 106).

127. The Tribunal finds that the M/V Virginia G is to be considered as a unit and therefore the M/V Virginia G, its crew and cargo on board as well as its owner and every person involved or interested in its operations are to be treated as an entity linked to the flag State. Therefore, Panama is entitled to bring claims in respect of alleged violations of its rights under the Convention which resulted in damages to these persons or entities.

128. The Tribunal observes that, in accordance with international law, the exercise of diplomatic protection by a State in respect of its nationals is to be distinguished from claims made by a flag State for damage in respect of natural and juridical persons involved in the operation of a ship who are not nationals of that State. As stated by the Tribunal in the M/V "SAIGA" (No. 2) Case, "[a]ny of these ships could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such person is a national, undue hardship would ensue" (M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999,

p. 10, at p. 48, para. 107).

129. Accordingly, the Tribunal rejects the objection raised by Guinea-Bissau to the admissibility of Panama's claims based on the fact that the owner of the vessel and the crew are not nationals of Panama.

As the foregoing extract indicates and, as also indicated in the commentary of the International Law Commission, public international law has adopted a pragmatic solution to the problem of the role of the flag State and numerous nationalities on board ship and potentially numerous jurisdictional claims. In effect, as argued above, given the many States that might have jurisdiction, the flag State seems the sensible and, indeed, the obvious State to have the primary role and responsibility for the ship and for the seafarer onboard as a "unit".

However this is clearly a public international law view and based largely on public policy. Questions may, therefore, fairly arise as to whether this can be reconciled with concepts of contract law, including traditional approaches to jurisdiction based on contract formation, and respect for freedom of contract and party autonomy. Or should the two legal approaches simply co-exist and operate largely in isolation from each other?

As suggested earlier, the MLC, 2006 requirement for the SEA provides a pragmatic solution that is largely based on flag State responsibility but still allows for the possibility of party autonomy on matters of choice of law and forum, subject to recognition of the flag State's overriding interest. The next section provides a discussion of the role of the SEA in the "system" of the MLC, 2006 including considering examples of national legal approaches to implementation.

4. The role of the SEA in the system of the MLC, 2006 and national implementation

4.1 The role of the SEA

As noted above in section 1, the SEA requirements in Regulation 2.1 and the Code (Standard A2.1 and Guideline B2.1), of the MLC, 2006 seem a simple, indeed even obvious, employment requirement and essentially reproduce the international standards that have been in place since the 1920s. The high level of current interest stems more from the interaction with the system of the MLC, 2006 and the innovative solutions as discussed above in section 2. The now wider coverage⁶⁵ of seafarers

65) Although under the MLC, 2006 the SEA is a requirement for all ships, its function may differ for ships

and ships, combined with the establishment of the mandatory flag State inspection and ship certification system which explicitly includes the use of Ros, and the increased prominence for the role of PSC, are the driving force for this heightened interest. As already mentioned, since at least the 1920s, seafarers have usually had an individual contract or collective agreements or could point to a document in some form attesting to the terms of their employment. However, as mentioned earlier in sections 1 and 2 and as has been widely noted by many scholars, the impact of corporate organizational changes in the sector has meant the establishment of various layers of ownership/operation of ships and in addition also the employer of the seafarer may not be the entity that is operating or owns the ship. Many private sector actors (with various names e.g. manning agencies, crewing agencies) not only identify, recruit and place seafarers with employers/shipowners; they may also be the employer of all or many of the seafarers on a ship. In addition, in the case of the cruise ship sector, often the workers on board are employed by land based companies with a concession/license ("concessionaires") to operate on the ship (for example, gift ships or health spas).⁶⁶ In the case of seafarers working internationally, the rapid resolution of employment issues such as a failure to provide for repatriation or pay wages or medical costs etc. can be difficult, particularly where, as is often the case, the flag State has no jurisdiction over third party employers or recruitment and placement services or crewing agencies operating in another country. This creates a problem for seafarers as they will have difficulty obtaining a remedy until returning home and, even then, may have to resort to a court process and encounter jurisdictional issues. Equally it presents a problem for the flag State and ships/shipowners where ships are detained or face problems with inspection and certification because of the actions of a third party employer based in a country other than the flag State.

Despite the concerns that have been voiced for now well over half a century about the problem of "flags of convenience" administrations and, presumably, also the ships and shipowners operating under these flags, the MLC, 2006 squarely places

and seafarers operating only in the domestic trade of the flag State (unless the State allows foreign seafarers to work on its ships operating in its domestic trade) in that, from a legal point of view questions of jurisdiction and enforcement are probably less complex. In many cases ships operating only in the domestic trades and, in some regions, the regional /inter-island trade, have not necessarily been covered by the international maritime Conventions. Usually these are small ships and may operate on day trips only or short voyages. This means the SEA is a new requirement for this sector, which may also have other difficulties in meeting the MLC, 2006 requirements. Since these ships are not subject to PSC this is a sector where the ILO supervisory system will play a central role in considering questions of implementation on board ships and nationally.

⁶⁶) This situation presents some specific legal difficulties. For example, USA case law under the relevant US statute, has found that the workers are considered seafarers, but the shipowners have not been considered liable as the shipowner was not the "employer". The "employers" on the other hand, have argued that they are not liable as the issue is a shipowner responsibility under the statute: See: Middleton, P. G. (2010) "Concessionaires", Chapter VIII, *Benedict on Admiralty* (LexisNexis) at Section 8.06. In fact this situation is one of the issues the SEA requirement under the MLC, 2006 is intended to address.

responsibility for almost all aspects of seafarers' working and living conditions with the "shipowner" and the flag State.⁶⁷ The *travaux préparatoires* is clear on the intention of the drafters regarding the definition of a shipowner and the relationship to the SEA and the shipowner's role, as explained by McConnell, et al.⁶⁸

The term 'shipowner' in Article II, paragraph 1(j) is aligned with the IMO conventions and is almost identical to the definition of 'company' found in the ISM Code to SOLAS and the STCW. It also based on, *inter alia*, the definition in the ILO's Convention No. 179. This comprehensive and complex definition has been designed to capture all known variations on corporate organizational, management, and operational practices in the sector. Importantly it specifically reflects the principle that 'shipowners' (as defined) are the responsible employers under the Convention with respect to all seafarers on board a ship.⁶⁹

At the 94th ILC, the last clause of MLC, 2006 Article II, paragraph 1(j), which defines a shipowner, was amended, to add, "regardless of whether any other organization or persons fulfil certain of the duties or responsibilities on behalf of the shipowner" and the word 'agent' was proposed but not agreed as a deletion.⁷⁰ The following extract of the discussion is admittedly lengthy but is important in terms of the range of countries expressing the shared views and the view of the shipowners and seafarers⁷¹ (emphasis added):

126. The Government member of the United Kingdom explained that the amendment comprised two elements. The deletion of the word "agent" was proposed solely for the sake of consistency, since a very similar definition of "shipowners" was provided in the International Safety Management (ISM) Code, 1993. The additional text had been drafted to clarify the provision and remove

67) MLC, 2006 Article II, paragraph 1(j).

68) McConnell (2011), *ibid*, note 18, p. 189-190.

69) ILO, Report I(1A), Note 3 (Article II) *Adoption of an Instrument to Consolidate the Maritime Labour Standards, ILC 94th Session, Geneva, 2006* : <http://www.ilo.org/public/english/standards/relm/ilc/ilc94/rep-i-1a.pdf>.

6. [...] The definition reflects the principle that shipowners are the responsible employers under the Convention with respect to all seafarers on board their ships, without prejudice to the right of the shipowner to recover the costs involved from others who may also have responsibility for the employment of a particular seafarer. This is expressly stated in Standard A2.5 (paragraph 4) on repatriation.

70) By the EU countries .See: ILO, *Report of the Committee of the Whole, 94th Session ILC, 2006, PR7 (Part I)*. <<http://www.ilo.org/public/english/standards/relm/ilc/ilc94/pr-7-i.pdf>>.

125. The Chairperson opened a general discussion on the issues raised in amendment D.8, submitted by the Government members of Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Spain, Sweden and United Kingdom.

71) ILO, *Report of the Committee of the Whole, 94th Session ILC, 2006, PR7 (Part I)*. Emphasis added. <<http://www.ilo.org/public/english/standards/relm/ilc/ilc94/pr-7-i.pdf>>.

any uncertainty regarding the definition of a shipowner.

127. The Employer Vice-Chairperson supported the deletion of "agent", given its use in the ISM Code, as well as the inclusion of additional text proposed. This would clarify the point that the person ultimately responsible under the Convention was the shipowner, irrespective of the entity or person who represented him.

128. The Worker Vice-Chairperson recalled that the term "agent" was used in the Recruitment and Placement of Seafarers Convention, 1996 (No. 179) and therefore was not redundant. The responsibilities under the proposed Convention were significant and the shipowner was ultimately responsible. The speaker did not challenge the intent of the amendment, which was meant to facilitate identification of those responsible for ensuring compliance with the proposed Convention. The wording of the amendment led to confusion, however.

129. The Government member of Japan indicated that he would oppose the amendment, which would modify wording which was basically that contained in several international Conventions, including the SOLAS and STCW Conventions, the International Ship and Port Facility Security (ISPS) Code and ILO Conventions No. 179 and the Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No.180). By introducing new language, there was a danger that serious administrative difficulties could be caused if the meaning of the term "shipowner" differed from that used in other related instruments. Moreover if, as indicated by the sponsors of the amendment, there was no intent to introduce a substantive change, the amendment was not needed. Rather than increasing clarity, its effect would be to amplify uncertainties. The problem arose in situations in which a particular shipowner ("A") decided to delegate certain operating or managerial responsibilities to another party ("B"), who would then pass certain responsibilities to a third party ("C") making it extremely difficult for the seafarer or the public authorities to identify the party truly responsible for fulfilling the obligations under the Convention, for example in relation to the payment of wages. The risk was that the proposed new wording would create a situation in which responsibilities could be endlessly passed from one party to another and in which it would be very difficult to identify the actual shipowner. The inclusion of such a clause would help unscrupulous shipowners to avoid their responsibilities.

130. The Government member of Egypt expressed opposition to the deletion of the term "agent", which was contained in other Conventions that needed to be taken into account in the present instrument. In practice, port state authorities very frequently contacted agents and representatives of shipowners, especially in the case of ships flying foreign flags, as it would otherwise be very difficult to identify the shipowner. The proposed additional text failed to clarify the original text and was likely to create further confusion.

131. The Government member of Norway indicated that the problem lay with the very structure of the shipping industry, and the need for definitions to be adapted to current realities, rather than the other way round. It was very common for functions, such as manning, technical management or commercial operation, to be subcontracted to other entities. In such a situation, it was necessary to be able

to identify the party with the final responsibility. In a context of shared or subcontracted responsibilities, the amendment sought to make it easier to identify the single responsible entity, irrespective of any subcontracting arrangements which might be in place.

132. The Government member of the United Kingdom affirmed that the purpose of the amendment was to provide greater clarity and precision in identifying the ultimate single responsible entity in a complex situation in which the management of ships often involved many subcontracting arrangements. Referring to the example given by the Government member of Japan, he stressed that the intent was to be able to identify party "A". He recalled that in the proposed maritime labour certificate and sample declaration of maritime labour compliance, there was only a single line to enter the details of the shipowner. If any of the wording was causing confusion, such as the term "irrespective", which might be clearer in the French and Spanish versions of the amendment, the input of the Drafting Committee would be welcome.

133. The Government member of France confirmed that the intent of the amendment was to avoid any dilution of responsibility, especially in triangular employment relationships. The French version of the proposed amendment was clear.

134. The Government member of Germany added that the amendment sought to ensure that the responsibilities set out in the Convention could not be avoided through delegation or subcontracting arrangements. It was not the aim of the amendment to reduce the responsibilities of shipowners, but to define them more clearly.

135. The Government member of Singapore believed that the present text of subparagraph 1(j) was sufficiently clear. It should not be modified.

136. The Government member of Spain believed that the proposed amendment served an important purpose in taking into account the real situation in today's world in social and labour relations. The shipowner needed to be clearly identified as the ultimately responsible party, regardless of any subcontracting arrangement. The Spanish version might need to be referred to the Drafting Committee, as a minor inconsistency had slipped into the text as compared to the English and French versions.

137. The Government member of Malta proposed that the term "irrespective" in the English version of the amendment, which appeared to be causing some confusion, could be brought closer to the French and Spanish versions, for example by using a term such as "independently".

138. The Government member of Japan reaffirmed his opposition to the amendment. It was the duty of governments to protect the rights of seafarers, even, where necessary, by making use of administrative or judicial proceedings. Objective criteria were therefore required for the identification of the shipowner. The wording used in the Convention should be that used in other ILO and IMO instruments so as to prevent any dilution of the protection afforded to seafarers, or

any blame being attached to national authorities for failure to protect their rights. The word "irrespective" seemed to be a source of confusion.

139. The Government member of Panama supported the comment made by the Government member of the United Kingdom. The main issue was to ensure that the responsibility of the shipowner was not diluted.

140. The Government member of South Africa said that the amendment created confusion as to the entity ultimately responsible for the vessel. The amendment would also dilute the protection provided under joint and several liability.

141. The Government member of Denmark said that the amendment was essential. The objective was to define the shipowner so as to clearly show who was ultimately responsible for discharging the responsibilities set out in the Convention. Shared responsibility was often weakened responsibility.

142. The Government member of Greece said that the amendment did not encourage subcontracting. However, in cases where subcontracting did exist, the competent authority needed to be able to identify the entity ultimately responsible for the operation of the ship.

143. The Government member of Australia stated that a specific party would have to request the maritime labour certificate from the government, and would be required to provide all relevant information. As with the IMO ISM Code, 1993, finding the entity whose name was on the certificate would not be difficult, since that entity had approached the authorities originally to obtain the certificate.

144. The Government member of Benin agreed with the Government members of Japan and Singapore that it would be best to be consistent with the definitions used in other international instruments. Rather than adding clarity, the amendment created greater confusion.

145. The Employer Vice-Chairperson noted that the proposed language allowed for many interpretations. The Convention would be harmed by this kind of ambiguity. The Committee's intent was that the responsibility should remain ultimately with the shipowner. Perhaps the Drafting Committee could assist in clarifying the language while maintaining this intent.

146. The Worker Vice-Chairperson said that some clarity had been provided by the discussion. The Workers' group was aware of issues such as flags of convenience and beneficial owners, and therefore supported any wording which made it easier to identify the true responsible entity. However, there appeared to be a problem with the drafting of the proposed amendment. It might be clearer, for example, if the various sections of subparagraph (j) could be broken up, perhaps using dashes, so as to make it clear that the phrase "irrespective of any subcontracting to other organizations or persons to perform certain duties and responsibilities on his or her behalf" referred to all of the possible entities identified. The Workers' group could support the amendment if it served the purpose for which it was intended. However, it did not yet do so and would therefore need to be submitted to the Drafting Committee for possible restructuring. The Workers' group opposed the deletion of the word "agent".

147. The Government member of the United Kingdom agreed that the matter could be referred to the Drafting Committee, with the understanding that the discussion of the issue would resume within the Committee subsequent to the advice provided by the Drafting Committee.

148. The Chairperson noted the Committee's agreement on the intended meaning of subparagraph (j) and referred the matter to the Drafting Committee.

149. The Drafting Committee proposed the following wording for Article II, paragraph 1(j):

(j) *shipowner* means the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities imposed on shipowners in accordance with this Convention, regardless of whether any other organizations or persons fulfil certain of the duties or responsibilities on behalf of the shipowner.

150. The Employer and Worker Vice-Chairpersons supported the proposal.

151. The Committee adopted proposal C.R./D.4 from the Drafting Committee. As a result, amendment D.8 fell.

152. Subparagraph 1(j) was adopted as amended.

As the foregoing clearly indicates, there was tripartite consensus involving many major flag States and, importantly, the shipowners' representative that the ultimate point for responsibility, irrespective of any individual or corporate contractual arrangements is the shipowner and therefore the flag State which also has international responsibility for the ship.

This emphasis on shipowner responsibility is reinforced by the obligations, as discussed earlier in section 2, on flag States to require some form of financial security from ships/ shipowners to address responsibilities for repatriation and shipowners' liability in the event of seafarer illness or injury and, in the future, to also provide evidence of protection of seafarers in the case of abandonment.

Why would an instrument that was negotiated on an international tripartite basis with strong seafarer representation and an equal vote to shipowners support this approach?

The answer appears to lie with the shared view and agreement between the representatives of the shipowners and the seafarers and also the wider industry view that, with the decline in interest in seafaring as a profession, conditions in the sector needed to improve. As explained earlier, they developed what can be described as a "strategically pragmatic" approach involving the interplay of above noted elements of the Convention. There was agreement that the approach must be to ensure a level playing field so that shipowners and flag States applying these international standards are not disadvantaged and, arguably, have an advantage, particularly in connection with PSC. In the face of the various options as to which actor in a web of corporate

actors could or should be held responsible in a way that helps ensure the fastest most effective solution for seafarers, the decision to strengthen the role and responsibilities of the shipowner and the flag State can be seen as the simplest and perhaps most certain solution in this globalized context, and where the responsible entity captured by the term "shipowner" is easily identified in the SEA. This is evident in the core requirement that the SEA must be signed by the shipowner (or a representative of the shipowner)⁷² and seafarer thereby establishing a contractual relationship between the two.⁷³

The interesting aspect of this development is that the industry practice regarding use of manning agencies or the existence of outside employers, particularly for example in the cruise ship sector, was well understood and debated at length, mainly, but not solely, in the context of the definition of seafarer during the negotiation of the MLC, 2006. However, ultimately, the above noted approach emerged, although, as discussed in section 4.2 below, it has proved to pose some challenges for national legal implementation.

From⁷⁴ a practical perspective this means that under the approach adopted by the MLC, 2006, the shipowner has overall responsibility for all aspects of working and living conditions on board: seafarers should not have to deal with more than one person with respect to their working and living conditions, and that one person should be the shipowner, who should take responsibility for ensuring that those conditions conform to the requirements of the MLC, 2006, and are respected. This is not simply question of jurisdiction and applicable law but also relates at a practical level to the nature of working life on board ship.

From a purely legal perspective this contractual approach may, at first, seem problematic in that a seafarer may already have an employment contract with his/her employer, who will already be responsible for honouring the obligations in that agreement, in particular those relating to the payment of wages and allowances and social protection obligations, matters that must be included in the SEA. On the other

72) See also the discussion below in section 4.2. In principle, this could allow an outside employer to sign the SEA as a representative of the shipowner, if legally authorized by the shipowner to do so on its behalf – that is - not in their own capacity. However, it seems unlikely that shipowners would consider it advisable to give carte blanche to outside employers to represent them in this way. Equally it seems unlikely that an employer would be viewed as the "shipowner" as it would mean assuming the responsibilities for operating the ship as indicated under the definition of shipowner. In practice the master, although also a seafarer and also required to have an SEA, is understood to be the representative of the shipowner for this purpose.

73) Standard A2.1 paragraph 1. The wording of Standard A2.1, paragraph 1, was drafted to avoid a possible problem of contracting out of the MLC, 2006. Where a seafarer is self-employed, his or her legal arrangements/contract would still need to provide for the same matters.

74) The following discussion draws upon aspects of the discussion in McConnell et al, (2011) *ibid*, note 18, pp. 289-291.

hand it is equally clear that there are certain important elements in the SEA contractual relationship that are of concern to the shipowner rather than to the outside or third party employer (e.g., relating to policies regarding behaviour on board, the authority of the master, and safety at sea, hour or of rest or work, complaints onboard).⁷⁵

However, this does not mean that the shipowner has to renegotiate an existing agreement between the seafarer and the outside employer. There are potentially a number of solutions, some of which, as discussed in the next section, have been adopted to implement the MLC, 2006.

For example, although perhaps unusual in principle, there is no reason why a seafarer cannot have two legally enforceable agreements one with the outside third party employer and one with the shipowner. Obviously a seafarer could not expect to obtain double compensation, however the right to seek a remedy or even bring an action against either party should not be an issue. In that case it seems obvious that a shipowner, as a contractual party, in cases where there may be an outside employer involved who would be held responsible for the obligations of the other, would want to obtain some sort of guarantee or a hold harmless clause in the shipowner's contractual arrangements with the other employer. As noted earlier, this is already referred to in Standard A2.5, paragraph 4, in the case of repatriation costs.

Similarly an SEA with, for example, the signatures of both the shipowner and an outside employer would be viable if it is clear in the SEA that the shipowner is directly responsible to the seafarer for all matters as a matter of joint and several liability or as a guarantor of the outside or third party employer.

Alternatively an SEA with a shipowner could, for example, set out the ship-related conditions of employment and then provide, much like the incorporation by reference of a collective bargaining agreement as envisaged in the paragraph 2 of Regulation 2.1, that all other terms and conditions are contained in the employment agreement concluded between the seafarer and the outside employer. That agreement would be annexed as a schedule to the SEA (and would be subject to flag and port State inspection). The shipowner would, however, have to make sure that the employment terms in the annexed agreement are consistent with the flag State's national requirements implementing the MLC, 2006 and that there are no gaps in coverage.⁷⁶

All of these solutions essentially relate to an evaluation of relative negotiating power.

75) In view of their personal nature, it seems understandable that the related obligations should be entered into by the seafarers themselves (as required by Standard A2.1) rather than by their outside employer acting as their representative.

76) In this case it would also be advisable for the shipowner to conclude a 'hold harmless' agreement with the outside employer.

They reflect the view that shipowners are in the best position in terms of negotiating arrangements with any other entities involved, for example concessionaires, that may have employer responsibilities for seafarers on the ship, to ensure that the shipowners are reimbursed in the event they have to pay wages or other matters that are, by agreement, the primary responsibility of the outside employer. The industry has in fact clearly responded to this approach, not only through development of insurance to cover a number of matters, but also through the adoption of standard clauses for industry contracts such those developed through the Baltic and International Maritime Council (BIMCO).⁷⁷

As explained in section 2, the role of the SEA under the system of the MLC, 2006 recognizes the increasing role and responsibilities of private seafarer recruitment and placement services, most of which are located outside the jurisdiction of the flag State. The Convention includes the innovative, albeit viewed by some countries⁷⁸ as

77) This appears to be the response of the industry to potentially complex contractual questions. See e.g., BIMCO "Recommended Additional MLC 2006 Clauses for BIMCO Contracts", Special Circular No. 2 (11 June 2013): "[t]o address the issue of shipboard personnel not directly employed by the owners, BIMCO has developed a suite of Recommended Additional MLC Clauses for BIMCO Contracts. The Clauses are designed to be added to specific BIMCO contracts as a supplementary clause. The specific BIMCO contracts are SUPPLYTIME, SHIPMAN and CREWMAN", online: BIMCO <www.bimco.org/~media/Chartering/Special_Circulars/SC2013_02_R030713.ashx>.

78) This was raised by the United Kingdom during the first meeting of the Special Tripartite Committee (STC) established under Article XIII of the MLC, 2006, 7-11 April 2014 : See *Report of the meeting*, ILO Doc. GB322./LILS/3 <http://www.ilo.org/gb/GBSessions/GB322/lils/WCMS_315447/lang-en/index.htm>.

409. The representative of the Government of the United Kingdom indicated that his Government had some concerns with regard to the system of protection of seafarers. Standard A1.4, paragraph 5(c)(vi), of the Convention established a system to compensate seafarers for monetary loss that they may incur as a result of the failure of a recruitment and placement service or the relevant shipowner under the seafarers' employment agreement (SEA) to meet its obligations to them. While the MLC, 2006, aimed to create decent conditions and a level playing field for shipowners, that provision was open to wide interpretation. He expressed the hope that through the present discussions, guidance or proposals for amendments for future meetings could be developed. Specific issues included, *inter alia*, the nature of the losses to be covered; the nature of the organizations to be covered and whether the recruiter and shipowner might be expected to cover the same obligations; the legal feasibility of a legal entity obtaining insurance in respect of seafarers for whom that entity no longer had a contractual relationship; the commercial viability of such insurance for small businesses and possible equivalent appropriate measures.

410. The Seafarer spokesperson raised the question of whether employment agencies were covered under the Convention, because, unlike employment and recruitment services, the Convention was silent with regard to the former. The Private Employment Agencies Convention, 1997 (No. 181), would cover employment agencies, but since the Convention was relatively recent, he asked the Office for clarification on this issue.

411. The Chairperson of the Government group, indicated that while there were a lot of similarities between national systems, not all governments had experience with private recruitment services. In the event governments had a legal issue, they could refer to the comments of the CEACR and advice provided by the Office. The representative of the Government of the Philippines indicated that, in his country, employment agencies could directly hire seafarers, were considered as direct employers under the law and were covered by the national Labour Code. Otherwise, the seafarer was hired by

legally difficult to implement, requirement that the service in question has a system of protection such as insurance or an equivalent measure to compensate seafarers for monetary loss that may incur as result of a failure of the service or a shipowner under the SEA. As noted in section 2 above, this provides the logical counterbalance to the system of holding the shipowner also responsible for employment rights under the SEA even if the seafarer has an outside or third party employer. In other words just as a shipowner is expected to pay for repatriation costs (and must have financial security in place) in the event the responsible employer does not do so, in the event a shipowner does not live up to its obligations then any private service that may have been involved in recruiting the seafarer can also be held responsible and a system of protection such as insurance be must be in place. As with the shipowners, presumably these services would or should also require indemnification or hold harmless clauses in arrangements with shipowners. In either case the central point is that the seafarer is to be protected with issues relating to ultimate liability under the various corporate arrangements, left as matter to be addressed by the shipowner and other actors concerned.

However the underlying legal questions of contract formation and party autonomy cannot be ignored and, as discussed below, have given rise to some uncertainty and questions where an SEA (including collective bargaining agreements that provide the content of an SEA) contains a choice of law and/or forum clause. The MLC, 2006 does not contain a provision expressly addressing this issue although, as explained in section 4.2 below, the issue was discussed and was considered resolved during the negotiation of the Convention. The predecessor Convention No. 22 contains a

an agency, which fell under the national recruitment and placement laws. Those laws went beyond the requirements of Standard A1.4 by instituting a licensing system for recruitment and/or manning agencies with requirements as regards capitalization and an escrow of 1 million pesos for claims. In addition, there was joint and several liability on the part of recruitment and/or manning agencies and shipowners in relation to seafarers' money claims, as well as joint and several liability for officers and employees of such agencies, who could be personally liable. The representative of the Government of Norway considered that the points raised by the United Kingdom pointed to a legal ambiguity in Standard A1.4, paragraph 5(c)(vi), which could result in difficulties to obtain insurance for relevant businesses. This problem had been examined when the principles of the Recruitment and Placement of Seafarers Convention, 1996 (No. 179), had been incorporated in the MLC, 2006, and they might wish to deal with the issue in the future. The representative of the Government of China stated that, even though China had not ratified the Convention, the arrangements in place with regard to Standard A1.4 were in line with the requirements of the MLC, 2006, as laws and regulations required a licencing system for recruitment agencies. It was hoped that the ILO would give further guidance on this item in the future. The representative of the Government of Singapore explained that, in Singapore, there were three situations of recruitment of seafarers: recruitment by recruitment and placement agencies; recruitment by shipowner subsidiary companies; and recruitment by the shipping companies. Licences were only required in the first two cases. However, all three cases had to comply with the requirements of Standard A1.4. Recruitment and placement services could opt to use insurance or a bank guarantee, among other options, to provide seafarers with a system of protection under MLC, 2006, Standard A1.4, paragraph 5(c)(vi).

provision regarding jurisdiction but it refers only to the "ordinary rules as to jurisdiction".⁷⁹ However Convention No. 22 dates from a period before the rise of international registers and the transnational maritime work force and there was less likelihood of question of multiple jurisdictions. As discussed below, the related requirement that the shipowner be a signatory/party to the SEA has also presented some difficulties.

4.2 The SEA and national implementation

The following discussion of national implementation must be understood in context: it relates to emerging understanding and practices since the MLC, 2006 became operative in August 2013, with the first examination by the ILO supervisory system occurring only in November 2014. It is likely that with more experience in the sector over the next few years common approaches will surface. In connection with national implementation issues it is of interest to note that, aside from the debates discussed above regarding the definition of shipowner, the requirements regarding the SEA in Regulation 2.1 and the Code were adopted with almost no discussion at the 94th ILC.⁸⁰ This might suggest, therefore, that there was a high degree of international consensus and that implementation would not present difficulties.

Although there have been some interesting questions on the application of various requirements⁸¹ related to the SEA, this section of the Chapter specifically considers

79) Convention No. 22, (1926) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILC_CODE:C022

Article 4

1. Adequate measures shall be taken in accordance with national law for ensuring that the agreement shall not contain any stipulation by which the parties purport to contract in advance to depart from the ordinary rules as to jurisdiction over the agreement.

2. This Article shall not be interpreted as excluding a reference to arbitration.

80) ILO, *Report of the Committee of the Whole*, 94th Session ILC, 2006, PR7 (Part I) paragraphs 393 to 417.

The two issues that arose related to Standard A2.1 paragraph 1(c) regarding copies vs originals of the SEA and in paragraph 4 (a) the reference, which was deleted, to the seafarer's "family" name. <<http://www.ilo.org/public/english/standards/relm/ilc/ilc94/pr-7-i.pdf>>.

81) For example, interesting and important SEA related issues have arisen with respect to the interaction between the requirements for repatriation and the requirement for paid annual leave in connection with the question of length of service on board ship and renewal or extension of an SEA. Another interesting issue, which relates to changing industry contracting practices, is the question of whether seafarers' paid annual leave must also include all benefits such as those set out under shipowners' liability for sickness so that the seafarer remains under the SEA until the end of the paid annual leave entitlement. The ILO 2015 FAQ provides some information on the first of the issues. <http://www.ilo.org/wcmsp5/groups/public/—norm/—normes/documents/publication/wcms_237451.pdf#page=1>

C2.1.j. Does the MLC, 2006 set a maximum limit on the length of an employment agreement? Can I have an SEA for a period longer than 12 months?

The MLC, 2006 does not set a maximum period for a contract of employment. In fact Standard A2.1 envisages SEAs of an indefinite period. However, the interaction between the right of a seafarer to be repatriated after a maximum period of service on board (a period less than 12

two issues that have been raised by governments in international meetings. The two issues are jurisdiction with respect the SEA and the applicable national law, and the related question of the shipowner signature requirement even in cases where a third party or outside employer also has responsibilities.

In terms of constraints on national implementation, although the MLC, 2006 establishes requirements as to the process for signature by seafarer and for the form and content of the SEA, it does not contain a mandatory model form for the SEA. This is because there was an intention to allow for a variety of national legal practices, as indicated in the inclusive definition in Article II, paragraph 1 (g) "seafarers employment agreement" includes both a contract of employment and articles of agreement". However the SEA must be in a "clear, written legal enforceable agreement" that is "consistent with the standards set out in the Code."⁸² As mentioned earlier, Standard A2.1, includes requirements regarding signatures by the shipowner and the seafarer, copies of the agreement, the process related protections for seafarers, and, importantly, the list of the 10 matters which, as a minimum, must be included in the SEA. In addition, as

months) under Standard A2.5 [see C2.5.g. Can a seafarer decide not to exercise a right to be repatriated when that entitlement arises?] and the obligation of the flag State under Regulation 2.4 and the Code to require that seafarers be given the minimum paid annual leave [see C2.4.a. What is a seafarer's minimum entitlement to paid leave?] establishes some limitations on the period of continuous service on board a ship or ships. The specific limits will include questions such as whether the competent authority has decided in some cases to permit seafarers to forgo their minimum paid annual leave [see C2.4.b. Can a seafarer agree to be paid instead of actually taking paid leave?] or to whether a seafarer has chosen not to exercise her or his right to be repatriated [see C2.5.g. Can a seafarer decide not to exercise the right to be repatriated when the entitlement arises?] are matters for national law and practice, including applicable collective agreements.

C2.1.k. Can I sign consecutive SEAs that cover a period longer than 12 months?

Yes. However, the period of continuous service on board a ship or ships would still be subject to the applicable national requirements that seafarers be given minimum paid annual leave under Regulation 2.4 and the Code [see C2.4.a. What is a seafarer's minimum entitlement to paid leave?] and the right of a seafarer to be repatriated after a maximum period of service on board (a period less than 12 months) under Standard A2.5 [see C2.5.a. What is the entitlement to repatriation?]. These are matters for national law and practice, including applicable collective agreements. [see C2.1.j. Does the MLC, 2006 set a maximum limit on the length of an employment agreement? Can I have an SEA for a period longer than 12 months?].

The second issue may well arise in the future meetings at the ILO as it relates to the underlying question of shorter term or voyage contracts which terminate the relationship with the particular shipowner once the seafarer is repatriated (usually without having exercised any or all of her or his paid leave entitlement) versus indefinite or longer term contracts and the nature of paid annual leave in the first context vs lump sum leave or holiday pay entitlements upon termination of the employment relationship. The historical reasons for this are of some interest but are outside the scope of this chapter; See: New Zealand, House of Representatives, *Report of the New Zealand Delegation on the Twenty-Eighth (Maritime) Session of the International Labour Conference, Seattle, Washington . 1946*, AJHR, 1946, I, A-07a.pdf, Report of the Government Delegation. < ojs.natlib.govt.nz/cgi-bin/atojs?a=d&cl=search&d=AJHR1946-I.2.1.2.9&srpos=9&e=——10—1—bySH—0-AJHR_1946_I_AZz-B->.

82) Regulation 2.1 paragraph 1.

explained in sections 1 and 2 and 4.1 above, importantly, the SEA is a matter to be inspected by flag States and is subject to inspection during PSC, however it does not provide the substantive content of the various terms of employment referred to in the SEA.⁸³ These are found elsewhere in the other Regulations and the related Code provisions in the MLC, 2006, many of which, while subject to flag State inspection and verification, are not on the list of areas to be certified and, other than through the seafarer complaint system⁸⁴ established under the MLC, 2006, are areas that "in principle"⁸⁵ are not subject to PSC inspection. However the fact that these are all areas that require the flag State to ensure compliance with the MLC, 2006 as implemented nationally before issuing an MLC to a ship means that the flag State has a legal responsibility to verify compliance with its national laws or regulations on at least the ten matters in the SEA as well as any other topics in the list of 14 areas to be dealt with in the DMLC Parts I and II and certified.⁸⁶ Regulation 5.1.3 paragraph 3 provides (emphasis added):

3. Each Member shall require ships that fly its flag to carry and maintain a maritime labour certificate certifying that the working and living conditions of seafarers on the ship, including measures for ongoing compliance to be included in the declaration of maritime labour compliance referred to in paragraph 4 of this Regulation, have been inspected and meet the requirements of national laws or regulations or other measures implementing this Convention.

The mandatory wording of the forms for the MLC and the DMLC is legally significant in this respect.⁸⁷ The form for the MLC, which is contained in Appendix A5-II of the

83) A point that has been misunderstood by some authors.

84) See Standard A5.2.1, paragraphs 1 (d) and 3 and Regulation 5.2.2. See also ILO *Guidelines for port State control officers carrying out inspections under the Maritime Labour Convention, 2006* <http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-normes/documents/publication/wcms_101787.pdf>.

85) The on-board documents provide *prima facie* evidence of compliance. However in cases where a more detailed inspection is carried out by a PSCO then, in accordance with paragraph 2 of Standard A5.2.1, that inspection shall in principle cover the matters listed in Appendix A5-III. For the list see *ibid*, note 37. See also ILO *Guidelines for port State control officers carrying out inspections under the Maritime Labour Convention, 2006*

<http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-normes/documents/publication/wcms_101787.pdf>.

86) Although the wording in the Convention is not entirely clear on this point, this is the understanding with respect to Regulation 5.1.1 paragraph 4 and is reflected the approach taken in the ILO *Guidelines for flag State inspections under the Maritime Labour Convention, 2006* that were adopted in 2008 by an international tripartite meeting of experts:

<http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-normes/documents/publication/wcms_101788.pdf>.

87) Regulation.5.1.3 paragraphs 4 and 5 provide:

4. Each Member shall require ships that fly its flag to carry and maintain a declaration of maritime labour compliance stating the national requirements implementing this Convention for the working and living conditions for seafarers and setting out the measures adopted by the shipowner to ensure compliance with the requirements on the ship or ships concerned.

Convention, certifies (emphasis added):

1. That this ship has been inspected and verified to be in compliance with the requirements of the Convention, and the provisions of the attached Declaration of Maritime Labour Compliance.
2. That the seafarers' working and living conditions specified in Appendix A5-I of the Convention were found to correspond to the above mentioned country's national requirements implementing the Convention. These national requirements are summarized in the Declaration of Maritime Labour Compliance, Part I.

The form for the DMLC, which is also contained in Appendix A5-II, requires that the flag State set out information regarding its national requirements for the 14 areas including information with respect to any exemptions that have been granted under Title 3 or the use of substantial equivalencies under Article VI paragraphs 3 and 4⁸⁸ in the national implementation of the Code of the MLC, 2006.

The foregoing extracts all serve to illustrate the emphasis in MLC, 2006 on the role of the flag State and its central interest, indeed obligation, to ensure that on ships under its flag, the SEAs and their content are consistent with its national requirements in implementing the MLC, 2006.

Despite this apparent clarity, the question of the primacy of the flag State role in the context of the LOSC and the SEA has arisen. It was formally raised in a written document and in a statement by the representative of one of the largest flag States (based on GT of ships under its flag) at an international meeting at the ILO in April 2014:⁸⁹

413. The representative of the Government of the Marshall Islands recalled that Article 94 of the United Nations Convention on the Law of the Sea (UNCLOS) required "every State to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." It also required every State to take such measures for ships flying its flag as are necessary to ensure the safety at sea with regard, *inter alia*, to: "the manning of ships, labour conditions and the training of crews, taking into account the applicable international

5. The maritime labour certificate and the declaration of maritime labour compliance shall conform to the model prescribed by the Code.

88) See discussion *ibid.*, note 29.

89) The written document is longer but was informally circulated and is not part of the official records. *Report of the first meeting of the Special Tripartite Committee established under Article XIII of the Maritime Labour Convention, 2006 (Geneva, 7–11 April 2014) Report of the Chairperson to the Governing Body, in accordance with Article 16 of the Standing Orders of the Special Tripartite Committee*. ILO Doc.No. GB.322/LILS/.

<http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_315447.pdf>.

instruments." The MLC, 2006, also recognized the jurisdiction of a flag State over its vessels. However, a problem had arisen with respect to the MLC, 2006, and the incorporation of CBAs into SEAs. Some CBAs required the resolution of disputes involving contracts for seafaring labour to be resolved under the laws in the seafarer's country of residence rather than those of the flag State. This had caused a major conflict and an over-abundance of cases of non-conformity issued by inspectors to Marshall Islands-flagged vessels. Unilateral action had to be taken to accept dispute resolution under other member States' laws, where those were substantially equivalent or not of a lesser standard, following a review of the laws and regulations of other member States. From a practical standpoint, that placed a significant administrative burden upon member States. Noting that Article I, paragraph 2, of the MLC, 2006, required that "Members shall cooperate with each other for the purpose of ensuring the effective implementation and enforcement of this Convention." The Marshall Islands had sought to discuss this issue on a bilateral basis with other member States confronted with similar problems. He requested the Office to provide legal guidance in this respect and would welcome discussion with other member States that were labour-supplying States.

414. The Seafarer spokesperson indicated that the concern raised by the representative of the Government of the Marshall Islands had been discussed at considerable length in 2006, when the Convention had been adopted and referred in that respect to paragraphs 903–906 of the report of the Committee of the Whole of the 94th Session of the International Labour Conference. He recalled that in previous meetings, the right of redress had been discussed, a right enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. During the process of negotiation of the text of the MLC, 2006, a compromise had been reached and it was therefore unnecessary to further discuss this issue.

415. The representative of the Government of the Philippines, referring to the MLC, 2006, indicated that member States had responsibilities, which included regulating the recruitment and placement services and the social security coverage of seafarers. His Government would gladly accept bilateral negotiations with the Marshall Islands and other member States based on Article I, paragraph 2, of the MLC, 2006.

The Seafarer spokesperson's comments appear to relate to a different issue in the context of PSCO and access to courts or procedures to investigate complaints in port States. However, the concern for the Marshall Islands⁹⁰ is, as indicated in the statement, a different matter and is not only confined to SEAs incorporating CBAs. In addition to

90) Although only raised in the meeting by the Marshall Islands, concerns about the POEA mandatory agreement which potentially conflicts with the flag State laws and may cause uncertainty during PSC have also been raised less formally by ROs and also some shipowners.

the administrative issues raised, Marshall Island law provides that it applies to SEAs.⁹¹ However, as reflected in the response by the representative of the Philippines, the Philippines is the country of residence to a significant number – approximately one third – of the world's seafaring workforce and, as such, has a long-standing institutional practice⁹² with respect to the regulation of the terms of employment for Filipino seafarers working internationally. This includes a mandatory standard form POEA agreement⁹³ which includes, *inter alia*, clauses on choice of law and choice of forum, both of which designate the Philippines as the location of choice. The POEA agreements are of interest in that they appear to serve a dual purpose. They protect the seafarer in question with minimum standards including social protection etc. in the event the flag State does not do so.⁹⁴

91) Republic of the Marshall Islands Maritime Act, 1990 (MI-107).

§ 853. Contracts for seafaring labor.

1. The following clause shall appear, or be by force of law included, in all contracts for seafaring labor on board vessels of the Republic:

"The parties to this contract hereby stipulate that the terms and conditions laid down herein shall be subject to the applicable provisions of the Maritime Law and Regulations of the Republic of the Marshall Islands. Any dispute as to the terms and conditions of this contract shall be resolved in accordance with the Maritime Law and Regulations of the Republic of the Marshall Islands."

2. All contracts relating to service aboard a vessel registered under this Title shall be governed in interpretation and application by the Laws of the Republic, including this Chapter and any Regulations thereunder. [P.L. 1990-92, § 193.]

For more information on the regulatory situation see also Direct Request (comments) of the ILO Committee of Experts in 2014 (published 104th session of the ILC 2015) after examination of the national report by the Republic of the Marshall Islands:

<http://www.ilo.org/dyn/normlex/en/f?p=1000:80031:0::NO:80031:P80031_COMMENT_ID:3186229>.

92) The Department of Labour, through the Philippines Overseas Employment Agency (POEA), regulates the recruitment and placement of seafarers and other workers internationally. <<http://www.poea.gov.ph/>> See, for example, rules regarding overseas employment of seafarers: "Standard Terms and Conditions Governing the Overseas Employment of Filipino Seafarers On-board Ocean-Going Ships" (Memorandum Circular of the Philippine Overseas Employment Administration (POEA) No. 10 of 2010 (legislation under revision to implement the MLC, 2006). <<http://www.poea.gov.ph/MCs/MC%202010/MC-10-2010.pdf>>. See also Memorandum Circular of the Philippine Overseas Employment Administration (POEA) No. 04 of 2013 regarding "Revision of the One-Page Covering Employment Contract" to include information required under Standard A2.1 of the MLC, 2006 on the seafarer's date of birth and place of birth, shipowner's address and reference to any collective bargaining agreement, if applicable. <http://www.poea.gov.ph/MCs/MC%202013/MC-04-2013.pdf>> the standard form cover page incorporates by reference the standard term of employment in POEA Memorandum No.10 of 2010.

For more information on the regulatory situation see also Direct Request (comments) of the ILO Committee of Experts in 2014 (published 104th session of the ILC 2015) after examination of the national report by the Philippines, refers to other regulatory provisions:

<http://www.ilo.org/dyn/normlex/en/f?p=1000:80031:0::NO:80031:P80031_COMMENT_ID:3190199>

93) <<http://www.poea.gov.ph/MCs/MC%202010/MC-10-2010.pdf>> see sections 29-31.

94) It is perhaps surprising, therefore, that it does not appear that shipowners seek to avoid these choice of law and forum clauses but rather the cases (often involving tort-based claims), are brought by Filipino seafarers who do not wish to be bound by these clauses, presumably because their remedies may be better under other legal systems.

As noted by US District Court, in *Ermany De Joseph v Odjfell Tankers (USA), Inc* 196 F Supp 2d 476

<http://law.justia.com/cases/federal/district-courts/FSupp2/196/476/2517879/> in connection with forum clause in the POEA contract:

[...] Although the Court admittedly sympathizes with Plaintiff's plight, as it does in any and every case involving an injured seaman, it also realizes that the POEA forum selection clause was designed to protect Filipino seamen working aboard international vessels. That vessel owners, who are also obliged to accept the POEA terms, rather than Filipino seamen, have thus far been the parties seeking to enforce these clauses, does not in any way diminish the beneficent and liberal purposes behind the enactment.

In general Courts have upheld the choice of law and or forum clauses in the seafarer employment contracts: See for e.g., *The "Rainbow Joy"*[2005] 3 SLR 719; [2005] SGCA 36, <<http://www.singaporelaw.sg/rss/judg/48879.html>> where the court noted the following with respect to the POEA agreement clause regarding the application of Philippines law (emphasis added):

30 The appellant submitted that the governing law relating to his contract of employment was the law of the flag of the vessel, namely, Hong Kong law. Moreover, the instant claim could be framed either in contract or in tort and the tort having been committed on board the vessel, Hong Kong law should apply.

31 As a general proposition, it is probably correct to say that the law of the flag country should apply in relation to a tort committed on board a vessel which is then on the high seas. However, where in the contract of employment the parties have specified the governing law, the contract term should prevail. *Dacey and Morris on The Conflict of Laws* (Sweet & Maxwell, 13th Ed, 2000) ("*Dacey and Morris*") states at para 32-005:

At common law, the starting point was that every contract was governed at its outset by its "proper law", a term coined by Westlake. When the parties had expressed their intention as to the law governing the contract, their expressed intention, in general, determined the proper law of the contract, at any rate if the application of foreign law was not contrary to public policy and the choice was "bona fide and legal". Where there was no express selection of the governing law, an intention with regard to the law to govern the contract could be inferred from the terms and nature of the contract and from the general circumstances of the case. When the intention of the parties to a contract with regard to the law governing it was not expressed and could not be inferred from the circumstances, the contract was governed by the system of law with which the transaction had its closest and most real connection.

32 Notwithstanding this clear statement of principle in *Dacey and Morris* that where the contract provides for the governing law, that should be the applicable law, the appellant relied on the Canadian Federal Court of Appeal's decision in *The Ship "Mercury Bell" v Amosin* (1986) 27 DLR (4th) 641 ("*Mercury Bell*") to contend that the proper law of this contract of employment between the appellant and the respondent was the law of the flag. However, we do not understand *Mercury Bell* as having held that the flag state law should apply in any event, even in the face of an express governing law provision. This can be seen from the main judgment in the case delivered by Marceau J (at 644):

There is no doubt that to determine the rights of seamen against the owners of the ship on which they are serving, which is the subject-matter of the action, the law of the ship's port of registry is to be looked at. This is required by "the well-established rule of international law that the law of the flag state ordinarily governs the international affairs of a ship" (*McCulloch v. Sociedad Nacional de Marineros de Honduras* (1962), 372 U.S. 10 at p. 21 (U.S. Sup. Ct., 1963)), a rule formally confirmed in s 274 of the *Canada Shipping Act*, R.S.C., 1970 c. S-9, as amended, which reads as follows:

274. Where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, then, if there is in this Part any provision on the subject that is hereby expressly made to extend to that ship, the case shall be governed by that provision; but if there is no such provision, the case shall be governed by the law of the port at which the ship is registered.

That this action must be disposed of on the basis of the law of Liberia is therefore without question. It did not appear to us that Marceau J was there considering a case where the contract had a forum selection clause.

It is noted that the *Canada Shipping Act* provision referred to in the "*Mercury Bell*" is not included in the

However, at the same time they are clearly designed to ensure that the work force also serves the wider public interest of supporting the Philippines economy and ensuring that its seafarers remain competitive in a sector that is increasingly competitive, with seafarers resident in other countries, particularly emerging economies, also seeking to enter the international workforce.

The wider issue of party autonomy in the context of the emphasis in the MLC, 2006 on the flag State's role and responsibilities and public policy as reflected by the adoption of the MLC, 2006 is to ensure a high degree of uniformity in seafarers' employment, at least in relation to the respect for minimum standards. In addition to the concerns raised by the Marshall Islands, the underlying concern is to ensure that SEAs and these clauses are not used to contract out of the MLC, 2006 requirements as implemented by the flag State.

Although, as noted earlier, the MLC, 2006 does not explicitly address the question of jurisdiction, the question of the SEA and the relationship between the role of flag States and the labour supplying States (usually the seafarer's country of residence) was discussed and thought to be settled during the development of the MLC, 2006 text.⁹⁵

In the context of Regulation 2.1 and the Code regarding the SEA, the question of whether this provision is also directed to States with labour-supplying interests was discussed at the fourth meeting of the High Level Tripartite Working Group on Maritime Labour Standards in January 2004. It was decided to remove text in the Regulation that would have also established labour-supplying obligations. The Report⁹⁶ of the meeting states:

current text of the Canada Shipping Act. In addition where the claim is based on a tort occurring in the State's territorial water, in the absence of choice of law and or forum clauses, courts have also chosen to apply the law of the littoral State, for a lengthy review of cases law on this issue and choice of law and forum in this context, see for e.g., *Union Shipping New Zealand Ltd v Morgan* [2002] NSWCA 124 <<http://www.austlii.edu.au/au/cases/nsw/NWCA/2002/124.html>>.

95) The most recent edition (2015) of the ILO *Frequently Asked Questions* includes this following information: <http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—normes/documents/publication/wcms_237451.pdf#page=10>.

C2.1.I. Which national law should be reflected in the terms of an SEA, the law of the flag State or the law of the country where the SEA was signed or the law of a country identified in the SEA?

This is a complex question of international law and the legal practice of courts. The MLC, 2006 does not specifically address this issue; however, a flag State has international legal responsibility and also specific responsibility under the MLC, 2006 for the working and living conditions for seafarers on board its ship. This means that no matter where the SEA is signed or which laws are identified in the SEA as applicable, the flag State would still have a responsibility to ensure that the SEA meets its standards implementing the MLC, 2006.

96) *Final Report*. Working Party D, ILO Doc. No. TWGMLS/2004/19, 19-23 Jan. 2004, Nantes. <<http://ilo-mirror.library.cornell.edu/public/english/dialogue/sector/techmeet/twgmls04/twgmls-r-19.pdf>>.

124. There was an extended debate relating to the phrase "in their territory" and whether Standard A2.1 should cover both flag state obligations and labour-supply obligations to regulate the content of seafarers' employment agreements. Several Government representatives were opposed to legislating for other than their flagships in this matter. This resulted in the deletion of the phrase "in its territory" and the inclusion in the chapeau of a phrase limiting the provision to seafarer contracts on the Members' flagships. It also resulted in the consequential deletion of paragraph 3. The Seafarers' group strongly supported the idea of highlighting the flag state responsibility under paragraph 1(a) in the chapeau and of the deletion of paragraph 3. However, in their view, although their primary concern is directed to ensuring flag state responsibility, the need to also put in place an equally strong system of labour-supply responsibility is also required. There is a need to require that labour-supply governments also legislate in the same way as flag state governments to ensure that the coverage is comprehensive. For this reason the Seafarers' group did not want to delete the provision on this matter in Regulation 5.3, paragraph 3.

This followed an earlier discussion at a meeting in June 2003 which considered *inter alia* the differing responsibilities of labour-supplying States and, emphasized the flag State responsibility for employment contracts.⁹⁷ The preliminary draft of Article V, paragraph 6 (now paragraph 5), had read (deleted text shown in italics):

6. Each Member shall exercise effective jurisdiction and control over seafarer recruitment and placement services in its territory, *as well as effective jurisdiction over seafarers' employment agreements that are concluded in its territory.*

It is clear, therefore, that with respect to the SEA requirement of the MLC, 2006 the intention behind the MLC, 2006 is that the flag State has the responsibility to ensure compliance with its national law implementing the SEA and the terms of employment. This means that even if choice of law or forum clauses designating the laws or tribunals of another country are permitted by the flag State, as a minimum it must also require that the terms of the SEA comply with flag State law implementing the MLC, 2006. In effect this approach simply avoids the jurisdictional problems by requiring that certain standards be met or the SEA is not acceptable for purposes for flag State ship inspection and certification. This appears to be the approach adopted by some countries,⁹⁸ for example, the United Kingdom of Great Britain, provides a Marine

97) *Final report, Third Meeting*. ILO Doc. No. TWGMLS/2003/10 at paragraphs 131-142. 30 June – 4 July 2003, Geneva.

<<http://ilo-mirror.library.cornell.edu/public/english/dialogue/sector/techmeet/twgmls03/twgmls-r-10.pdf>>.

98) See for example *Executive Decree 86* of 2013 adopted by Panama to implement the MLC, 2006. It does not address the issue of choice of law or forum.

<<http://www.segumar.com/wp-content/uploads/2013/03/Executive-Decree-No.-86-of-February-2013.pdf>>.

Guidance Note⁹⁹ (explaining the relevant MLC, 2006 implementation regulation)¹⁰⁰ with standard requirements pertaining to the shipowner's signature and guarantee to the seafarer for coverage of the terms, even if another employer is involved, in addition to basic minimum terms, as well as indicating clauses that cannot be contained in an SEA.¹⁰¹ The Marine Guidance Note addresses the question of choice of law or forum obliquely¹⁰² by envisaging SEAs that are in not written in the English language and also providing with respect to law and forum matters the following with in connection with dealing with seafarer complaints:

16.3 [...] It should be noted that whilst UK ships are subject to UK law, powers to determine matters are not restricted to UK courts. A seafarer or shipowner may undertake proceedings in a court of another country, although such proceedings should normally take account of relevant UK law.

The situation is less clear in other countries. For example, as discussed below, in connection with shipowner's signature, the Netherlands instead provides for substantial equivalence¹⁰³ with respect to the requirement for a shipowner signature based on complex combination of Civil Code provisions which appear to envisage litigation under Dutch law to recover against a shipowner in the event the seafarer's employer fails to meet responsibilities.¹⁰⁴ This would appear to envisage the national law as *de facto* applicable to SEAs on Dutch ships.¹⁰⁵ It is also of some interest to note that

99) UK, Maritime & Coastguard Agency, *Maritime Labour Convention, 2006- Seafarers Employment Agreements*. MGN 477 (M). <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/441086/MGN_477_SEA.pdf>.

100) Statutory Instruments 2014 No. 1613 MERCHANT SHIPPING, The Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc.) Regulations 2014. <<http://www.legislation.gov.uk/ukxi/2014/1613/introduction/made>>.

101) *Ibid*, note 99 at note 15. For example, clauses with respecting joining or not joining a union or disclosure of medical or other sensitive data or paying for repatriation or other charges deducted from wages contrary to UK law.

102) *Ibid*, note 99, sections 8 and 16.

103) Under Article VI paragraph 3 and 4 of the MLC, 2006. See discussion *supra* in section 2, at footnote 29.

104) The English language webpage for the MLC, 2006 implementation including the three DMLC Part I (for differing categories of ships) and other instructions are found on or linked to the following webpage. <http://www.ilent.nl/english/merchant_shipping/ship_owners_dutch_flag/legislation/mlc_maritime_labour_convention/>.

Inspection instructions for Flag State inspections under the MLC, 2006 are set in "Instruction to RO" No. 22, 11 October 2012 <http://www.ilent.nl/english/Images/Instruction%20to%20RO%20No.%2022%20Maritime%20Labour%20Convention_tcm343-363404.pdf>.

Each of the three national DMLC Part I contains a lengthy annex setting out, in English, the relevant provisions and notes and interpretations of the Dutch Civil Code. For example, the Annex dated Version 1 valid from 1 February 2013 for ships built after 20 August 2013 is found at: <http://www.ilent.nl/english/Images/DMLC%20part%20I%2C%20Annex%20ships%20built%20from%20August%2020th_tcm343-363420.pdf>.

105) For example, the Annex dated Version 1 valid from 1 February 2013 for ships built after 20 August

Swedish law provides, in the relevant MLC, 2006 related legislation a provision which came into force in January 2015 that a dispute concerning a seafarer employment relationship may not be brought before a foreign authority.¹⁰⁶ This provision is, however, not applicable if EU legislation provides otherwise.

These are only a few examples of responses. Although, as noted above, still at an early stage, with increasingly active PSC on MLC, 2006 issues, it seems clear that flag States will now begin to exert more control over SEAs and will increasingly review and enforce national requirements for the SEAs and their content irrespective any choice of law or forum clauses. If the SEAs does not comply with flag State laws then it will not be accepted. This should, over time and through the interaction with ROs inspecting ships on behalf of differing flags, produce a high level of uniformity in national laws implementing the MLC, 2006, although of course, procedural matters that may make a jurisdiction more or less attractive, e.g. time bars or heads of damage etc. for some claims would not be affected.

As noted at the beginning of this section (4.2), the second issue considered is the question of the requirement for a shipowner signature to the SEA, is interwoven with the question of jurisdiction and is already referred to above.

Section 4.1 above discussed, in connection with the definition of a shipowner, the strategic and pragmatic approach adopted in the Convention, which is to focus on the "shipowner" as defined in the MLC, 2006 as the single entity that seafarers can look to to fulfill employment-related responsibilities, irrespective of any other arrangements or third party employer. Equally, this provides the link also for the flag State which has jurisdiction over, and international responsibility for, ships/shipowners under its flag. As also explained, the clear legal identification including signature of the entity the "shipowner" as required under paragraph 1 of Standard A2.1 is an important aspect of this approach.

The ILO's CEACR commented on this issue after its examination of the first national implementation reports on the MLC, 2006:¹⁰⁷

2013.

<http://www.ilent.nl/english/Images/DMLC%20part%20I%2C%20Annex%20ships%20built%20from%20August%2020th_tcm343-363420.pdf> provides *inter alia* that:

Art. 1a. Extension applicability

This act and its underlying decrees and regulations are equally applicable to work performed fully or partially outside of the Netherlands by persons, working on board seagoing vessels which on the basis of Netherlands legal rules are entitled to fly the Netherlands flag.

106) Merchant Seamen's Act (1973:282) SFS No.1973:282 as amended, section 14.

107) See: *Report of the Committee of Experts on the Application of Conventions and Recommendations* (Report III (Part 1A) (2015) at page 479 < http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:3236210,en >.

The CEACR also commented on specific national implementation practices in this matter. These are also available on the ILO MLC, 2006 website and MLC database of national information.

In connection with seafarers' employment agreements, the Committee stresses the importance of the basic legal relationship that the MLC, 2006 establishes between the seafarer and the person defined as "shipowner" under Article II. In accordance with paragraph 1 of Standard A2.1, every seafarer must have an original agreement that is signed by the seafarer and the shipowner or a representative of the latter (whether or not the shipowner is considered to be the employer of the seafarer).

Section 4.1 noted potential legal/contractual issues this might pose and several possible solutions to provide for cases where an outside or third party employer or others might also be involved in the employment of seafarers. Nevertheless questions have arisen when putting this into operation and some uncertainty exists, particularly in connection with the question of the possibility of signature by "a representative of the shipowner". In the first meeting of the Special Tripartite Committee under Article XIII of the MLC, 2006,¹⁰⁸ there was the following exchange of views on the SEA and this issue (emphasis added).

416. The representative of the Government of the Marshall Islands further wished to exchange information on the implementation of Standard A2.1, paragraph 1(a), of the MLC, 2006, which required that the SEA be signed by both the seafarer and the shipowner or a representative of the shipowner. It was explained that, with respect to "representative of the shipowner", some registered shipowners required the ship's master to sign the employment agreement as a representative of the company while others provided separate crewing agencies with the authority to implement and sign the employment agreements and others vested their ship management companies with such authority. This was causing a problem in practice, as port State control was citing ship deficiencies because the SEA had not been signed by the same company that had signed Part II of the DMLC and had been named on the Maritime Labour Certificate. Importantly, there needed to be transparency – the entity signing the SEA needed to be vested with the authority to do so via contractual arrangements which were clearly articulated in Part II of the DMLC. He therefore requested clarification from the Office on that issue, more specifically for inspection personnel, and suggested that it could possibly be addressed in courses and activities on the MLC, 2006, offered by the ILO and the International Training Centre in Turin.

417. The Shipowner spokesperson, referring to Parts I and II of the DMLC, indicated

108) Report of the first meeting of the Special Tripartite Committee established under Article XIII of the Maritime Labour Convention, 2006 (Geneva, 7–11 April 2014) Report of the Chairperson to the Governing Body, in accordance with Article 16 of the Standing Orders of the Special Tripartite Committee. ILO Doc.No. GB.322/LILS/.
<http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_315447.pdf>.

that it was a port State control issue and that similar issues would be raised until all parties got used to the implementation of the Convention.

418. The representative of the Government of Greece stated that this issue had already been dealt with and referred to page 33 of the 2012 edition of the ILO FAQ. She believed that the SEA could be signed by a representative of the shipowner, accompanied by appropriate documentary evidence.

419. The representative of the Government of Australia shared the view that this issue was related to port State control, indicating that his Government had also been having implementation issues in that respect. Referring to Standard A2.1, paragraph 1(a), stating that "where they are not employees, evidence of contractual or similar arrangements," he questioned whether all seafarers on board would necessarily need to have an SEA. He supported the request for clarification from the Office made by the representative of the Marshall Islands in this regard. The representatives of the Governments of the Bahamas and Denmark also supported the request for clarification. The representative of the Government of Greece indicated that, based on her understanding, the provision referred to self-employed persons.

[...]

423. The representative of the Government of the Bahamas stated that his country had issued 14,000 Maritime Labour Certificates and that documentation had been one of the principal areas identified in the inspection findings, particularly concerning elements discussed by the Government representative of the United Kingdom, such as contractual agreements and SEAs. In relation to the current definition of the term "shipowner", he noted that the reference to the "assumption of responsibility for the operation of the ship" had various requirements for documentation to clearly demonstrate that assumption as well as the acceptance of such responsibility. He further recalled the statements by the Government representative of the United Kingdom concerning contractual agreements as they related to persons employed on ships that were not directly employed by the shipowner, per se, or the companies which had assumed the responsibility. His Government was of the view that this question had to be clarified in the FAQs.

[...]

The most recent edition (2015) of the ILO's *Frequently Asked Questions*,¹⁰⁹ although not authoritative as legal opinion, sets out questions that have been raised and provides some information as to practice. It provides the following general information on these points:

¹⁰⁹) <http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—normes/documents/publication/wcms_237451.pdf#page=10>.

C1.4.p. When I was recruited to work on a ship, my employer was a manning agency and they signed my employment contract. Is that acceptable under the MLC, 2006?

The answer would depend on whether the seafarer has a seafarers' employment agreement (SEA) that clearly identifies the shipowner as a responsible party under the agreement even if others, such as a manning agency, may also have employment-related responsibilities [see C2.1.e. Can the employer of a seafarer supplying a seafarer to the ship sign the seafarers' employment agreement (SEA) as the shipowner?]. Some countries have developed standard forms for the SEA that allow a shipowner and any other employer to sign as jointly responsible or as guarantor.

C2.1.d. Who must sign a seafarers' employment agreement (SEA)?

In accordance with Standard A2.1, paragraph 1(a), of the MLC, 2006 the SEA must be signed by both the seafarer and the shipowner or a representative of the shipowner. Except in cases where the applicable national law considers that a particular person, such as the ship's master, has apparent authority to act on behalf of the shipowner, any signatory other than a shipowner should produce a signed "power of attorney" or other document showing that he/she is authorized to represent the shipowner [see B14. Who is the shipowner under the MLC, 2006?] [see C2.1.e. Can the employer of a seafarer supplying a seafarer to the ship sign the seafarers' employment agreement (SEA) as the shipowner?].

C2.1.e. Can the employer of a seafarer supplying a seafarer to the ship sign the seafarers' employment agreement (SEA) as the shipowner?

The term "shipowner" is defined comprehensively in Article II, paragraph 1(j), of the MLC, 2006 as "the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities imposed on shipowners in accordance with this Convention, regardless of whether any other organizations or persons fulfil certain of the duties or responsibilities on behalf of the shipowner" [see B14. Who is the shipowner under the MLC, 2006?].

The intention of the drafters of the MLC, 2006 was that there could only be one person – namely, "the shipowner" – who assumes, vis-à-vis each seafarer, all the duties and responsibilities imposed by the Convention on the shipowner. While another person supplying a seafarer to the ship may have concluded an employment contract with that seafarer and be responsible for implementing that contract, including payment of wages, for example, the shipowner will still have the overall responsibility vis-à-vis the seafarer. Such an employer could therefore only sign the SEA as a representative of the shipowner (assuming that the employer has a signed power of attorney from the shipowner).

C2.1.i. My employment agreement has a space for two signatures, one for the shipowner and one for an employer. Is this acceptable under the MLC, 2006?

The MLC, 2006 does not prohibit this practice and it is a matter for the flag State to consider. The answer would depend on whether the seafarer has a seafarers' employment agreement (SEA) that clearly identifies the shipowner as a responsible party under the agreement even if others, such as a manning agency or other employer, may also have employment-related responsibilities. [See C2.1.e. Can the employer of a seafarer supplying a seafarer to the ship sign the seafarers' employment agreement (SEA) as the shipowner?]. Some countries have developed model forms for the SEA that allow a shipowner and any other employer to sign as jointly responsible or as guarantor.

As the extracts indicate, there are various national approaches to implementation and the question of shipowner signature and the question of potential contractual responsibility of third party employers. Some of these responses have generated uncertainty. For example, some countries, such as Denmark, provide as a "tool" an example of a standard form cover page for seafarers on its ships.¹¹⁰ This SEA has basic information complying with the MLC, 2006 However it appears to envisage signature by either a shipowner or an employer. While there is no legal reason that a country cannot use the term employer to refer to the "shipowner" entity (see for example the Philippines POEA) as long as it is clear which entity is referred to, having two alternative categories potentially creates uncertainty, even if national law would allow the seafarer to bring a legal claim against a shipowner in the event of an employer failure.

This approach was the subject of observations by the relevant workers' organization (LO) in response to the Government's national report on the MLC, 2006 and was the subject of the following comment by CEACR¹¹¹ in 2014 on the Danish flag State practice:

Regulation 2.1 and the Code. Seafarers' employment agreements. The Committee notes the observations made by the LO that the employment agreement presented by the DMA is not in line with the Convention since it distinguishes between the shipowner and the employer. The Committee notes the Government's reply that in their view "it is not a requirement under the MLC or in Danish laws and regulations, that the shipowner must be the employer. If the shipowner or the employer does not fulfil the obligations mentioned above, in many cases, for example, on the protection of the seafarer on board, the shipowner may be sanctioned according

110) Denmark has a very useful national MLC, 2006 website <<http://www.dma.dk/Ships/MLC/Sider/default.aspx>> on the SEA see: <<http://dma.dk/Ships/MLC/Sider/SeafarersEmploymentAgreements.aspx>>

111) *Direct Request* (2014)- published ILC 2015.
<http://www.ilo.org/dyn/normlex/en/f?p=1000:80031:0::NO:80031:P80031_COMMENT_ID:3189953?

to section 65 of the Consolidated act on seafarers' conditions of employment, etc."

The Committee recalls that Regulation 2.1 and the Code do not require that the shipowner must also be the employer. However it does require that every seafarer has an original agreement that is signed in accordance with paragraph 1 of Standard A2.1, which provides that a seafarer's employment agreement must be signed by the seafarer and the shipowner, or a representative of the shipowner. It appears under section 1(a) of the Consolidated act on seafarers' conditions of employment, etc. and other instruments that a shipowner may remain responsible for all matters under a seafarers' employment agreement, even if a seafarer has a different employer. However, this is not clear in the legislation. The Committee also notes the standard form agreement provided by the Government which provides alternatively that the agreement can be between the seafarer and a shipowner or a master or an employer. The Committee notes that this agreement creates uncertainty as to who is the responsible party. The Committee recalls that, irrespective of the employment arrangements involved, the seafarer is required to have an agreement signed by both the seafarer and the shipowner or a representative of the shipowner. ***The Committee requests the Government to clarify who are the parties under the Danish law on the seafarers' employment agreement and to consider amending the standard form agreement to ensure that seafarers have an original agreement signed by both the seafarer and shipowner or a shipowner's representative, as required under paragraph 1 of Standard A2.1.***

The national implementation in the UK on this matter was examined by the CEACR in December 2015. However, as of February 2016, no comments have been published. Its practice, as reflected in the sample model for an SEA set out in the Marine Guidance Note discussed above¹¹² appears to follow the approach noted by CEACR in that, although it envisages signature by a third party employer, this must be combined with a signature by the shipowner as "guarantor" for all the obligations, thus creating the contractual link and providing clear information that the shipowner is also fully responsible.

Also examined by CEACR in December 2015 (but as of February 2016 no comments have been published), the practice of the Netherlands, as mentioned above in connection with jurisdiction, and its decision to claim substantial equivalence on this matter appears more complicated. Leaving aside the question of application of substantial equivalence on this requirement, the situation referred to in the Annex to the Dutch DMLC Part I seems to present some problems in terms of the goals of certainty and clarity for seafarer and identifying a single immediately responsible party.

¹¹² *Ibid.*, note 98.

The explanatory notes (extracted) to the Annex to the DMLC Part 1 for new ships states that:¹¹³

Note:

In derogation of Standard A2.1, paragraph 1 (a), of the Convention, the Netherlands allows seafarers' employment agreements to be signed not only by the shipowner or a representative of the shipowner, but also by an employer other than the shipowner or his representative.

Three specific groups of other employers may be identified:

- 1) Temporary employment agencies.
- 2) An employer that has employees work on a part of the ship, that is rented by this employer from the shipowner.
- 3) An employer that has employees work on a ship that has been chartered by the employer for specified work.

Note to "an employer other than the shipowner or his representative":

If the shipowner states his use of this substantial equivalency or the employer on the seafarers' employment agreement is not the shipowner, the substantial equivalency is in place.

The Recognized Organization will then act on the assumption that the other employer is a temporary employment agency and the additional requirements must be followed.

A temporary employment agency is approved if;

- 1) it is located in a country, it has been approved by that country, and that country is a Member of the Maritime Labour Convention, 2006; or
- 2) it has been audited by one of the seven RO's approved by the Dutch authorities:
 1. American Bureau of Shipping
 2. Bureau Veritas
 3. ClassNK (Nippon Kaiji Kyokai)
 4. Det Norske Veritas
 5. Germanischer Lloyd
 6. Lloyd's Register
 7. Registro Italiano Navale
- 3) the shipowner shows proof that the temporary employment agency performs in accordance with the stipulated regulations.

113) For example, the Annex dated Version1 valid from 1 February 2013 for ships built after 20 August 2013 is found at: <http://www.ilent.nl/english/Images/DMLC%20part%20I%2C%20Annex%20ships%20built%20from%20August%2020th_tcm343-363420.pdf>.

Interpretation to The Act on Allocation of Workers by Intermediaries, Art. 1 (3a):

It must be clear from a contract that the work performed is in connection with delivered goods or an accomplished activity. This may be a specific work, related to the maintenance of the ship or it may be the work related to fulfilling a guarantee.

Interpretation to The Act on Allocation of Workers by Intermediaries, Art. 1 (3b):

It must be clear from a contract between the shipowner and a different shipowner that this assistance is rendered without financial profit. The seafarers must be employed by the different shipowner. The different shipowner must be clearly identified as a shipowner.

Interpretation to The Act on Allocation of Workers by Intermediaries, Art. 1 (3c):

Enterprises sometimes allocate the work related to manning to a specific entity in the enterprise. This is allowed under this paragraph. The shipowner must show that the Manning Department forms a full part of the enterprise.

If the shipowner is of the opinion that **one of the other options** applies, he will contact the ILT for further guidance.

The shipowner shall provide the ILT with documentary evidence that the other employer is not a temporary employment agency through:

1. A contract between the shipowner and the other employer specifying the kind of work concerned, and stipulating the duration of the contract.

The DMLC Part I Annex also contains the following the following extract from the Dutch Civil Code:

Art. 738

The shipowner is accountable for fulfilling the obligations arising from articles 706-709, 717-720, 734 and 734a-734l, in case the employer is irrevocably sentenced to fulfillment but fails to comply.

The above extracts are from the DMLC Part I, which must be carried on board ship. It appears that it would be difficult for a seafarer to ascertain who the responsible "shipowner" entity is under this approach, particularly in cases where a temporary employment agency appears to be acceptable to sign the SEA as the employer instead of the shipowner.

However as noted above this is matter to be considered by the ILO CEACR when it examines the national report.

These are but a few illustrative examples. The central point that emerges is that although there is clearly some uncertainty in implementing aspects of the SEA,

V. A delicate balance: The seafarers' employment agreement, the system

especially with respect to the shipowner signature and the direct contractual liability requirements, in all cases it is clear that flag State law and practice are now the focus of legal interest and concern.

5. Conclusion

This Chapter has explored the uneasy relationship between public and private international law in the context of the SEA requirement under MLC, 2006. It has argued that the MLC, 2006 requirement for the SEA, signed by the shipowner and based on flag State responsibility, provides a strategic pragmatic solution proposed by the industry. While there is the possibility for party autonomy on matters of choice of law and forum if flag State law permits, in fact ultimately flag State law will need to be applied and as matter of policy and practice the flag State has the overriding legal interest.



CHAPTER 6

Promouvoir et contrôler l'application de la Convention du travail maritime 2006¹

Retour d'expérience sur des missions conduites en
Afrique francophone de l'Ouest et du Centre²

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Abstract: *This consolidated Convention is complex and the International Labour Standards Department of the International Labour Office is organizing sensitization workshops for stakeholders in West and Central Africa. The Convention's application concerns the States which have ratified it. West and Central Africa iarehome to regional organizations wich run initiatives in this area, raising the question of the relationship between these regional initiatives and member States' obligations due to ratification. The first observations of the Expert Committee on the Application of Conventions and Recommendations (CEACR) ILO were published and sent to the States. They provide clarification and priority elements for implementation of the Convention. Because of its scope, the Convention required an innovative national report form that presents some challenges and questions. It should clarify the relationship between fundamental rights at work in relation to forced labour, and the implementation of the Maritime Labour Convention.*

1) Je tiens à exprimer mes remerciements chaleureux envers l'ensemble des fonctionnaires et collaborateurs du Bureau International du Travail aux côtés desquels j'ai pu me former et redécouvrir constamment la richesse de la MLC. Ma reconnaissance va, en particulier, à Madame Cécile Balima, pour sa confiance et sa patience. Cet article adresse un bien maigre hommage au travail et à l'engagement de Madame Cléopatra Doumbia-Henri, ancienne Directrice du Département des Normes internationales du BIT, actuelle Présidente de la World Maritime University de Malmö. Sa contribution à l'amélioration des conditions de vie et de travail des gens de mer est remarquable.

2) Les propos ici tenus n'engagent que la responsabilité de leur auteur et ne saurait en aucun cas refléter la position de l'institution pour laquelle il a travaillé.

ALEXANDRE CHARBONNEAU

Résumé : *La mise en œuvre de la Convention du Travail Maritime représente un défi pour les États. Le Département des Normes du Bureau International du Travail a engagé diverses actions afin d'assister les États d'Afrique de l'Ouest et du Centre dans leurs efforts pour ratifier cette convention. Par ailleurs, différentes organisations régionales sont intéressées, au regard de leurs compétences, par la mise en application de la MLC. Se pose la question de l'articulation entre ces initiatives régionales et les obligations des États membres en raison de la ratification. Les premiers commentaires de la Commission d'Experts sur l'Application des Conventions et des Recommandations (CEACR) de l'OIT ont été publiés et adressés aux États. Ils apportent des éléments de clarification dans la mise en œuvre de la Convention. Du fait de son ampleur, la Convention a nécessité un formulaire de rapport national innovant qui soulève cependant certaines interrogations. Il conviendrait de clarifier les rapports entre les droits fondamentaux au travail, tel le travail forcé, et la mise en œuvre de la Convention du Travail Maritime.*

Introduction

En adoptant la Convention du travail maritime 2006 (MLC), l'Organisation internationale du travail (OIT)³ a posé une pierre angulaire dans l'édification du droit maritime international contemporain. Elle apporte ainsi un cadre commun à l'œuvre de modernisation du droit social maritime, que de nombreux États ont engagée ces dernières années. C'est en particulier le cas de plusieurs États francophones de l'Afrique de l'Ouest et du Centre, héritiers de législations initialement adoptées dans les années 60 ou 70, très largement inspirées par le droit maritime de leur ancien colonisateur, que l'évolution des règles internationales et des contextes nationaux avaient rendues obsolètes.

En tant qu'instrument novateur, notamment en ce qu'il définit des responsabilités en matière de *manning*, de sécurité sociale, de traitement des plaintes des gens de mer, d'inspection et de certification des navires, la MLC représente un défi pour les États qui s'engagent par la ratification à l'appliquer. Elle porte en elle l'ambition de définir et de protéger de manière durable⁴ les conditions minimales de travail et de vie à bord des navires tout en apportant aux États une certaine flexibilité dans sa mise en œuvre, afin de s'adapter à leur niveau de développement.

Traduisant une exigence de fermeté, la convention étend son application, à travers le mécanisme de contrôle par l'État du port, jusqu'aux navires battant le pavillon d'États qui ne l'ont pas ratifiée⁵. En effet, l'article V, paragr. 7, de la MLC précise que « tout Membre s'acquitte des responsabilités contractées aux termes de la présente convention en faisant en sorte que les navires battant le pavillon de tout État ne

3) Sur la MLC, les conditions de son adoption et de sa mise en application, l'ouvrage de référence est celui de M. McConnell, D. Devlin & Cl. Doumbia-Henry, *The Maritime Labour Convention, 2006 – A Legal Primer to an Emerging International Regime*, Martinus Nijhoff, Leiden-Boston, 2011. Voy., par ailleurs, O. Fotinopoulou-Basaruko, *Aspectos generales del Convenio refundido sobre trabajo marítimo, 2006*, Servicio central de Publicaciones del Gobierno Vasco, Vitoria-Gasteiz, 2006 ; I. Christodoulou-Varotsi, « Critical Review of the Consolidated Maritime Convention, 2006 of the International Labour Organization : Limitations and perspectives », *Journal of Maritime Law & Commerce*, Vol. 43-4, 2012, p. 467 et s. ; Fr. Piniella, J. M. Silos et Fr. Bernal, « Qui donnera effet à la convention du travail maritime de l'OIT, 2006 ? », *RIT*, 2013, p. 67 ; P. Chaumette, « La ratification et la transposition de la convention OIT du travail maritime (MLC 2006) », *Droit social*, 2013, p. 915 et s. ; ainsi que le dossier « La mise en œuvre de la convention du travail maritime de l'OIT : espoirs et défis », A. Charbonneau (dir.), *Revue de droit comparé du travail et de la sécurité sociale*, 2013/2.

4) Dépourvue de numéro, à la différence des autres instruments de l'OIT, elle a vocation dans l'avenir non pas à être remplacée mais à être amendée, selon des procédures définies aux Articles XIV et XV de la MLC. Voy. A. Charbonneau et P. Chaumette, « Premiers amendements à la Convention du travail maritime de l'OIT de 2006 : Garanties financières en matière d'abandon des gens de mer et de responsabilité des armateurs en cas de décès ou de lésions corporelles », *Droit social*, 2014, p. 802 à 810.

5) Article V paragr. 7 de la MLC.

l'ayant pas ratifiée ne bénéficient pas d'un traitement plus favorable que ceux battant le pavillon de tout État l'ayant ratifiée ». Cette clause de traitement pas plus favorable donne à l'instrument une portée universelle et devrait permettre de prévenir les risques de concurrence déloyale qui pèseraient négativement sur les États et acteurs économiques du secteur acceptant de le mettre en œuvre.

Flexible, la MLC consolide sur une centaine de pages l'essentiel de l'acquis des instruments maritimes antérieurs de l'OIT. Elle distingue en son sein des dispositions obligatoires (Articles, Règles, Normes) et des dispositions non obligatoires (principes directeurs)⁶. Plusieurs commentateurs ont souligné l'importance prise par les principes directeurs dans la MLC, à travers le constat que des droits autrefois énoncés par des dispositions conventionnelles (obligatoires) avaient été consolidés dans sa partie non obligatoire⁷. Ce texte serait ainsi en recul sur certains points par rapport au niveau de protection présent dans les conventions antérieures qui l'ont inspiré. De ce fait, l'instrument est conçu pour mieux répondre aux contraintes pesant sur les pays émergents, qui ont dans l'ensemble peu ratifié les conventions maritimes récentes adoptées par l'OIT.

Ensuite, les Normes, en principe obligatoires quant à l'objectif de protection et aux moyens d'atteindre cet objectif qu'elles prescrivent, peuvent faire l'objet d'une mise œuvre par des dispositions dites équivalentes dans l'ensemble⁸. Par ce biais, l'État dispose d'une certaine marge de manœuvre quant aux moyens déployés au niveau national pour atteindre l'objectif de protection fixé par la Norme.

Enfin, si la convention retient, pour son champ d'application, une définition étendue des notions de « gens de mer » (ou marins) et de « navire », elle donne aux États la possibilité d'adapter cette définition à l'échelle nationale en excluant certaines catégories de « gens de mer » ou de « navires ». C'est la catégorie de « navire » qui participe le plus à cette flexibilité poursuivie par la MLC. En effet, la convention s'applique à la plupart des navires⁹, à l'exclusion des navires affectés à la pêche, des

6) Ces dernières doivent cependant dûment être prises en compte par l'État membre au moment de l'application de la convention (Article VI, paragr. 2 de la MLC).

7) Voy., par exemple, I. Christodoulou-Varotsi, « Les défis du bien-être des marins dans le nouveau contexte de la Convention du travail maritime consolidée de l'OIT », *ADMO*, 2007, p. 141 et s.

8) Article VI, paragr. 3 et 4 de la MLC. Sur la notion d'équivalence d'ensemble, *Etude d'ensemble de la Commission d'experts pour l'application des conventions et recommandations, 77^{ème} session de la Conférence internationale du travail, 1990, Etude d'ensemble des rapports concernant la convention 147 sur la marine marchande (normes minima) et la recommandation 155 sur la marine marchande (amélioration des normes) de 1976*, Genève, BIT, 1990, p. 41 et s.

9) Article II, paragr. i) : « navire désigne tout bâtiment ne naviguant pas exclusivement dans les eaux intérieures ou dans les eaux situées à l'intérieur ou au proche voisinage d'eaux abritées ou de zones où s'applique une réglementation portuaire. »

navires de construction traditionnelle et des navires de guerre¹⁰. Cependant, il est possible, après consultation des organisations d'armateurs et de gens de mer concernées, de ne pas appliquer la totalité des dispositions de la MLC aux navires d'une jauge brute inférieure à 200 tonneaux qui ne sont pas affectés à une navigation internationale. De même, différentes dispositions du titre 3 sur le logement à bord autorisent les États à écarter certains types de navires en raison de leur taille.

Le compromis ainsi établi, entre innovation, fermeté et flexibilité, a rendu l'appréhension de cet instrument délicate pour les États destinataires, ce qui explique sans doute le retard pris pour son entrée en vigueur, malgré les espoirs affichés lors de son adoption en 2006¹¹. Celle-ci est finalement intervenue le 20 août 2013.

Dans son approche de la réception par les États membres des conventions internationales du travail, l'OIT distingue deux principales phases. La première concerne la promotion de la norme, afin que celle-ci soit le plus largement ratifiée. Cela permettra de réunir au plus vite les conditions de son entrée en vigueur objective¹² mais aussi de renforcer sa légitimité. Une fois l'instrument entré en vigueur, objectivement puis subjectivement, c'est-à-dire pour chaque État l'ayant ratifié, une seconde phase débute, dite de mise en application. Elle se traduit par de l'assistance technique apportée aux États et par l'activation d'un mécanisme particulier de contrôle, fondé pour l'essentiel sur l'examen de rapports nationaux préparés par les États, qui rendent ainsi compte de leur législation et des pratiques nationales pertinentes au regard de la convention concernée¹³. En 2014, l'OIT a pu examiner les premiers rapports transmis par les États ayant ratifié la MLC et réagir à ces rapports sous la forme de commentaires.

10) Sur les questions soulevées par cette qualification : voir le document de travail établi pour la Commission préparatoire tripartite sur la CTM 2006, Genève, 20-22 septembre 2010 (PTMLC/2010).

11) En effet, l'article VIII de la MLC précise que son entrée en vigueur est conditionnée « à la ratification d'au moins 30 Membres représentant au total au moins 33 pour cent de la jauge brute de la flotte marchande mondiale ». Si la règle relative au tonnage a été rapidement satisfaite, c'est la lenteur des ratifications étatiques qui explique le retard dans son entrée en vigueur.

12) Selon la distinction retenue par J.-M. Servais, *International Labour Law*, Kluwer Law International, 2014, p. 54 et s. L'entrée en vigueur « objective » est définie au regard des dispositions finales des conventions, en référence à un délai et parfois à un seuil de ratifications (en général 12 mois après l'enregistrement de 2 ratifications). L'entrée en vigueur subjective succède à l'entrée en vigueur objective et concerne l'État qui, individuellement, s'engage par la ratification à donner corps et effectivité à la convention dans son droit interne. En règle générale, elle prend subjectivement effet douze mois après enregistrement de sa ratification.

13) Il servira de base à un contrôle régulier exercé par la Commission d'experts pour l'application des conventions et des recommandations : Voir notamment, X. Beaudonnet (dir.), *Droit international du travail et droit interne. Manuel de formation pour juges, juristes et professeurs de droit*, Turin, Centre international de formation de l'OIT, 2009 et M. Rodriguez-Pinero, « Le système de contrôle des conventions internationales du travail de l'OIT et le rôle de la Commission d'experts », in N. Aliprantis (dir.), *Les droits sociaux dans les instruments européens et internationaux*, Bruxelles, Bruylant, 2008, p. 159 et s.

La présente contribution s'appuie sur un travail d'expertise réalisé auprès du Département des normes internationales (Genève) et du Bureau de Dakar de l'OIT, entre 2008 et 2015. Ce travail concerne à la fois la promotion et la mise en application de la MLC. Il a été mené auprès de plusieurs États d'Afrique de l'Ouest (Bénin, Côte d'Ivoire, Sénégal, Togo)¹⁴, ainsi qu'auprès d'organisations régionales couvrant l'Afrique de l'Ouest et du Centre (CEMAC et OMAOC)¹⁵.

Les activités de promotion se sont traduites par l'organisation d'ateliers de sensibilisation des acteurs, au niveau national ou régional, respectant le principe du tripartisme qui gouverne le fonctionnement de l'OIT. Sont donc mis en présence des représentants des administrations (affaires maritimes, travail, sécurité sociale), des organisations de gens de mer et d'armateurs, mais aussi des agences de recrutement et de placement, des membres de foyers d'accueil. Ces ateliers ont pour objectif de discuter, d'enrichir et finalement de valider une analyse comparative de la législation nationale, préparée en amont par un expert du BIT, destinée à mesurer les efforts réels à accomplir pour que l'État se mette en conformité avec la MLC. Concernant la phase de mise en application, pour les États ayant ratifié la MLC, le travail consiste en la préparation de propositions d'amendements de la législation nationale ou d'autres mesures à adopter, soumises elles-mêmes à validation tripartite lors d'ateliers nationaux. Une assistance à la préparation du rapport national, dans le cadre de la procédure de contrôle réalisée par l'OIT, peut aussi être apportée aux autorités nationales.

La mise en application (I) concerne en premier lieu les États qui ont ratifié la MLC. Cependant, l'Afrique de l'Ouest et du Centre est le siège d'organisations régionales susceptibles de prendre des initiatives en la matière. Se pose alors la question de l'articulation entre ces initiatives et les obligations qui incombent aux États en raison de la ratification. Dans quelle mesure viennent-elles coordonner voire suppléer les États dans leurs efforts ? Par ailleurs, les premiers commentaires des organes de contrôle de l'OIT viennent d'être publiés ou adressés aux États (II). Ceux-ci vont nécessairement apporter des éléments de clarification et de priorisation pour la mise en œuvre de la convention. De par son ampleur, la MLC a nécessité la préparation d'un formulaire de rapport innovant qui soulève néanmoins certaines difficultés et interrogations.

14) Le Bénin et le Togo ont déjà ratifié la MLC. Concernant la Côte d'Ivoire et le Sénégal, la mission d'expertise s'intéressait aussi à la convention n° 188 sur le travail à la pêche de 2007.

15) Dans le cadre des discussions régionales mais aussi d'un atelier organisé à Dakar en décembre 2013, par le Centre international de formation de l'OIT à Turin, la situation nationale de certains États a également été prise en compte. Il s'agit de la République du Congo et du Gabon, qui ont ratifié la MLC, ainsi que de l'Algérie, du Cameroun, de la Mauritanie, de la République de Centrafrique, de la République démocratique du Congo et du Tchad.

1 La mise en application de la MLC

Deux principales voies de mise en application se dessinent en Afrique francophone de l'Ouest et du Centre : l'approche unilatérale (A) et l'approche coordonnée (B).

A. La mise en application unilatérale

Qu'il s'agisse du Bénin, du Togo ou de la Côte d'Ivoire, chacun de ces États connaît, dans la période récente, un processus de modernisation de sa législation maritime. Le Bénin a adopté en 2011 une loi portant Code maritime¹⁶. Le Togo¹⁷ et la Côte d'Ivoire¹⁸ ont élaboré des projets en cours d'adoption. Cette loi ou ces projets, de par leur caractère récent, devraient avoir intégré les apports de la MLC. Rappelons que cela correspond à un engagement exprimé par le Bénin et le Togo à travers la ratification de la MLC, et que les autorités de la Côte d'Ivoire ont affirmé leur intention de procéder à cette ratification prochainement. Cependant, il apparaît que ces textes connaissent de réelles lacunes, voire ignorent certaines des prescriptions détaillées portées par la MLC (par exemple en matière de certification, inspections, plaintes, ainsi qu'en matière de santé et sécurité au travail). Un élément d'explication nous semble indispensable à la compréhension du contexte dans lequel ces États agissent sur le plan législatif et réglementaire : l'origine de cette loi et de ces projets remonte à la fin des années 90 ou au tout début des années 2000. L'instabilité politique, la valse des ministres en charge du portefeuille des transports maritimes, les contraintes qui pèsent sur le processus législatif au niveau national, tout cela explique cette lenteur. Dès lors, il est difficile de regarder ces réformes comme portant l'ambition d'assurer la mise en conformité de la législation nationale avec la MLC. Sur ce point, le Sénégal est dans une position particulière, dans la mesure où sa législation maritime en vigueur date de 2002¹⁹. Elle est donc antérieure à l'adoption de la MLC et ne la prend pas en compte.

À travers les missions conduites et les échanges avec les autorités nationales, il semble possible d'identifier certains problèmes récurrents que ces États rencontrent.

Au stade de la mise en conformité de sa législation nationale, l'État qui ratifie la

16) Loi n° 2010-11 du 7 mars 2011 portant Code maritime. Celle-ci abroge l'Ordonnance n° 68-38/PR/MTPPT du 18 juin 1968 portant Code de la marine marchande mais laisse subsister le Statut général des gens de mer, issu de la loi n° 98-015 du 12 mai 1998.

17) Nouveau Code de la Marine marchande appelé à remplacer l'actuelle Ordonnance n° 29 du 12 août 1971 portant Code de la marine marchande.

18) Nouveau Code maritime, appelé à remplacer la Loi n° 61-349 du 9 novembre 1961 relative à l'institution d'un Code de la Marine marchande.

19) Il s'agit de la Loi n° 2002-22 du 16 août 2002 portant Code de la Marine Marchande et principalement du décret d'application n° 2004-283 du 5 mars 2004.

convention est soumis à des obligations de consultation des organisations de gens de mer et d'armateurs. Ces obligations sont présentes à différents endroits de la convention. C'est le cas notamment lorsque l'État souhaite, dans une perspective de flexibilité, exclure certains navires du champ d'application des mesures nationales d'application²⁰.

Le formulaire de rapport sur l'application de la MLC prévoit d'ailleurs que l'État fournisse la liste des organisations consultées²¹. Concernant les mesures de flexibilité, le formulaire de rapport est plus exigeant dans la mesure où l'État doit donner des informations complètes sur le processus de consultation engagé et sur ses résultats²². Une fois le formulaire de rapport complété, l'article 23 de la Constitution de l'OIT prévoit que « chaque Membre communiquera aux organisations représentatives reconnues telles aux fins de l'article 3 copie des informations et rapports transmis au Directeur général en application des articles 19 et 22 ». Cette transmission permet aux organisations représentatives de réagir par des commentaires, au besoin par voie de réclamation, lorsque les informations ne correspondent pas à la réalité observée ou bien si une situation particulière met en évidence un problème d'application.

De quelles organisations s'agit-il ? Le Bénin, le Togo et la Côte d'Ivoire ont connu l'existence d'une compagnie nationale jusqu'à la fin des années 70 ou au début des années 80. En ce sens, pour reprendre le vocabulaire de la MLC, ils étaient États du pavillon, du port et éventuellement fournisseurs de main-d'œuvre. Cette tradition s'est perdue avec la disparition des compagnies nationales. On trouve ainsi peu de conventions collectives adoptées pour régir l'emploi à bord de navires²³. Lorsque les législations récentes renvoient à des textes réglementaires sectoriels ou à des accords d'entreprise, ceux-ci ne sont pas adoptés.

20) Voy., par exemple, l'article II, paragr. 6 et les exclusions prévues au titre 3, Norme A3.1, paragr. 9 a) et 20.

21) Point IV du formulaire de rapport.

22) Point V du formulaire de rapport.

23) Pour le Sénégal, il s'agit de la Convention collective de 1975, fixant les conditions d'emploi des officiers et marins de la marine marchande sénégalaise (section commerce), à laquelle s'ajoute la Convention collective de 1976 fixant les conditions d'emploi des officiers et marins de la marine marchande sénégalaise (section pêche) et la Convention collective nationale interprofessionnelle, conclue le 27 mai 1982 et étendue par l'arrêté interministériel n° 1305 M.F.P.T.-D.T.S.S. du 21 mars 1983. Cette dernière ne s'applique visiblement pas aux gens de mer. Pour la Côte d'Ivoire, il s'agit de Convention collective interprofessionnelle du 19 juillet 1977 et d'une convention collective applicable au travail dans le secteur de la pêche du 19 septembre 1989. Le Bénin dispose d'une convention collective générale du travail applicable aux entreprises relevant des secteurs privé et para-public, conclue en 2005, qui remplace une précédente convention de 1974. Son application aux gens de mer est incertaine. Il en va de même pour le Togo, avec la Convention collective interprofessionnelle de 1978, remplacée le 20 décembre 2011.

VI. Promouvoir et contrôler l'application de la Convention du travail ...

Dès lors, les syndicats appelés à la consultation représentent en général soit les pêcheurs, soit les marins employés par le port ou par quelques armements exploitant des navires sous pavillon national pour un usage local. Parfois, il s'agit d'organisations représentant les marins employés sur les navires affectés à l'exploitation des plateformes. Le représentant local de la fédération internationale des ouvriers du transport (ITF) peut aussi intervenir dans le dialogue avec les autorités nationales. Les marins qui s'engagent sous pavillon étranger, via des agences de recrutement ou de placement, n'ont souvent que peu de contacts avec les organisations syndicales nationales, n'étant parfois tout simplement pas recensés ou suivis par leur propre administration.

Concernant les consultations prévues par la MLC, il n'y a pas d'exigence de représentativité. Celle-ci se manifeste par contre au niveau du système de contrôle (article 23 de la Constitution de l'OIT). D'une manière générale, si la MLC peut avoir un effet structurant sur le dialogue social national, c'est à travers la prise de conscience qu'elle provoque de ce problème de la représentation syndicale des gens de mer. Celle-ci apparaît complémentaire au travail développé par l'ITF²⁴, dans l'intérêt même du suivi de la mise en œuvre de la convention sur le long terme. La MLC prévoit un mécanisme alternatif, à travers la consultation de la Commission tripartite spéciale²⁵, rattachée au Conseil d'administration du BIT pour suivre en permanence l'application de la convention²⁶. Cependant, en pratique, les États peuvent se montrer réticents à faire examiner leurs projets de textes nationaux par des représentants de gouvernements, d'armateurs et de gens de mer provenant d'États étrangers.

Qu'ils s'intitulent « Code des transports » ou « Code maritime », les recueils nationaux de législations qui définissent le régime social des marins soulèvent de nombreuses interrogations au stade de l'application de la MLC. Ils ne distinguent pas toujours le régime applicable à la pêche et au transport, alors que les niveaux de protection prévus par les instruments de l'OIT ne sont pas les mêmes²⁷. La ratification de la MLC engage l'État à remettre à plat l'ensemble des catégories de marins identifiées au niveau national de manière à pouvoir spécifier, s'il l'estime nécessaire, le régime des pêcheurs ou des gens de mer.

24) N. Lillie, *A Global Union for Global Workers. Collective Bargaining and Regulatory Politics in Maritime Shipping*, New York, Routledge, 2006 ainsi que notre contribution à l'ouvrage de I. Daugareilh (dir), « L'articulation des contrôles privés et publics de l'application des normes sociales maritimes », *La responsabilité sociale des entreprises, vecteur d'un droit de la mondialisation ?*, Bruxelles, Bruylant, à paraître.

25) Article VII de la MLC.

26) Article XIII de la MLC.

27) Pour la pêche, se reporter à la convention n° 188 et à la recommandation n° 199 sur le travail dans la pêche de 2007.

Une définition exhaustive de la notion de gens de mer ou de marin est proposée par la MLC, dépassant l'acception habituellement admise au niveau national qui lie cette qualité aux seuls emplois affectés à la marche et à la conduite du navire. Il s'agit « des personnes employées ou engagées ou travaillant à quelque titre que ce soit à bord d'un navire auquel la présente convention s'applique »²⁸. Certaines catégories de travailleurs peuvent être exclues, en tenant notamment compte du caractère occasionnel du travail à bord, au sens de la résolution n°VII concernant l'information sur les groupes professionnels, adoptée le 22 février 2006 par la Conférence internationale du travail²⁹. Durant les ateliers de sensibilisation, le statut des personnes travaillant à bord des plateformes a régulièrement suscité des discussions délicates entre les autorités nationales, les agences de recrutement et de placement, ainsi que les représentants des gens de mer présents. Il en va de même pour les marins engagés sur des navires qui travaillent en lien avec ces plateformes. Le renvoi à la détermination nationale des catégories de « gens de mer » et de « navires » ne va pas sans susciter de tensions.

Par ailleurs, la convention prévoit un niveau de protection équivalent pour les travailleurs à terre et les marins concernant certains des droits qu'elle affirme³⁰. Ce faisant, elle conduit les États à réexaminer le particularisme du régime social des marins. La compétence administrative dans la conduite du processus de mise en conformité de la législation nationale se trouve ainsi mise en question dans plusieurs États³¹. Quels sont les rôles respectifs du Ministère des transports (affaires maritimes) et du Ministère du travail dans ce processus ? L'intervention du Ministère du travail peut favoriser une meilleure articulation avec le droit commun du travail, ainsi qu'une participation de l'inspection du travail terrestre dans le cadre des inspections menées par l'État du pavillon ou du port (visites conjointes), au regard de son expérience. Rappelons aussi que certaines administrations ne traitent que du transport maritime, et ne sont ainsi pas compétentes pour les questions portuaires ou de pêche. Pour prendre l'exemple de la Côte d'Ivoire, la décision d'inclure ou non le statut social des pêcheurs dans le cadre du projet de Code maritime en cours d'adoption ne relèverait pas de la seule administration qui porte ce projet, en l'occurrence la Direction générale des affaires maritimes et portuaires rattachée auprès du Ministère des transports. Le statut des pêcheurs relève de la compétence du Ministère des affaires halieutiques. Cette organisation des compétences pèse sur la mise en application de la MLC.

28) Article II, paragr. 1 f).

29) Voy. aussi le document dit *Questions fréquentes*, Genève, BIT, 2014, actualisé régulièrement, qui détaille un certains nombres de difficultés rencontrées par les États membres dans l'application de la MLC. Il est accessible sur le site de l'Organisation.

30) En matière de soins médicaux (Règle 4.1, paragr. 4) et de sécurité sociale (Règle 4.5, paragr. 3).

31) Voy. les contributions au dossier « La mise en œuvre de la Convention du travail maritime : espoirs et défis » de la *Revue de droit comparée du travail et de la sécurité sociale*, n° 2/2013.

VI. Promouvoir et contrôler l'application de la Convention du travail

Traditionnellement, le critère de rattachement au régime de protection sociale était le pavillon³². La précédente convention n°165 sur la sécurité sociale des gens de mer, de 1987, renvoyait à la législation nationale le soin de définir les gens de mer couverts par elle³³, sous réserve de quelques dispositions particulières³⁴. En vertu de la MLC, les protections en matière de sécurité sociale conférées au titre des Règles 4.1 (soins médicaux) et 4.2 (responsabilité des armateurs en cas d'accident, de maladie ou de décès au service du navire) sont d'application pavillonnaire tandis que les autres risques, énoncés en référence à la Convention n°102 concernant la sécurité sociale de 1952³⁵, sont couverts selon le critère de la résidence. L'État qui ratifie s'engage à faire bénéficier les marins d'une protection pour trois des neuf branches au minimum, l'objectif étant à terme d'atteindre une protection complète.

En pratique, il est fréquent de trouver dans les législations étudiées que les risques vieillesse, famille et accidents du travail et maladies professionnelles (à partir du moment où l'armateur n'est plus responsable) relèvent du régime général de sécurité sociale. Cependant, cette affiliation était effective alors qu'un armement national opérait. Avec sa disparition, les marins du commerce ont recherché des embarquements sous pavillon étranger et ont cessé de relever de ce régime.

L'affiliation par la résidence pourra jouer un rôle subsidiaire lorsque la couverture prévue par le contrat d'engagement (assurance privée) ou par la loi pavillonnaire sera insuffisante ou défailante. En pratique, sa mise en œuvre soulève de sérieuses difficultés pour des caisses de sécurité sociale nationales qui ne concernent qu'une part limitée de la population (à l'exclusion notamment du travail informel). Concernant les marins, les règles de cotisation, qui ouvrent droit aux prestations, doivent souvent être redéfinies. Elles s'avèrent inadaptées en ce qu'elles ne tiennent pas compte de l'irrégularité de l'activité en mer. L'équilibre financier des régimes doit par ailleurs être préservé. Lorsque les marins réalisent leur activité pour plusieurs armements exploitant des navires sous des pavillons différents, les accords bilatéraux ou multilatéraux qui organiseront la prise en charge de la protection sociale devront être passés avec les États du pavillon concernés.

32) Au regard des législations nationales, il s'agit d'un rattachement fondé sur la territorialité, parfois assorti de conditions ayant trait à la nationalité.

33) Article 7 de la Convention n° 165 : « La législation de tout Membre doit accorder aux gens de mer auxquels la législation de ce Membre est applicable une protection en matière de sécurité sociale non moins favorable que celle dont bénéficient les travailleurs à terre, à l'égard de toute branche de sécurité sociale mentionnée à l'article 3 pour laquelle il possède une législation en vigueur ». La convention n°165 n'a été ratifiée que par 3 pays dont l'Espagne en 1991.

34) Articles 16 à 29 de la Convention n° 165.

35) L'objectif est affirmé d'une couverture complète pour les risques suivants : soins médicaux, indemnités de maladie, prestations de chômage, prestations de vieillesse, prestations en cas d'accident du travail ou de maladie professionnelle, prestations familiales, prestations de maternité, prestations d'invalidité et prestations de survivants.

La mise en œuvre de la CTM 2006 ne distingue pas selon la « consistance maritime » de l'État qui la ratifie. Pour les États principalement fournisseurs de main-d'œuvre, qui ne disposent pas de flotte exploitée sous pavillon national, ratifier la MLC implique un imposant travail législatif, qui conduira à l'adoption de mesures détaillées, notamment sur le logement des équipages (titre 3) et sur la prévention des risques professionnels (règle 4.3), mesures qui ne trouveront pas de navire où s'appliquer. Il en va de même concernant les obligations mises à la charge de l'État du pavillon en vertu du titre 5 de la MLC (inspection et certification), qui certes, peuvent être déléguées mais qui supposent un cadrage légal ou réglementaire.

Pour répondre aux contraintes posées par ce travail législatif, un modèle de dispositions nationales a été préparé par le Département des normes internationales du travail de l'OIT³⁶. Ce document présente un double avantage. Il raccourcit le temps de préparation des amendements rendus nécessaires par la ratification de la MLC. Il donne aux administrations nationales des dispositions types qui éviteront d'introduire ou de conserver dans la législation nationale des éléments incompatibles. Le problème juridique que soulève le recours à ce modèle de dispositions nationales est la réception qui sera réservée aux législations ainsi amendées par la Commission d'experts pour l'application des conventions et des recommandations (CEACR), qui est un organe de contrôle indépendant au sein de l'OIT. Même si les dispositions types reprennent étroitement le contenu de la convention, certaines formulations diffèrent. Dès lors, quelles garanties politique et juridique un État va-t-il tirer du suivi de ce modèle de dispositions types quant à la conformité de sa législation ? L'adoption d'une législation compatible suivant le modèle établi n'assure qu'une mise en conformité initiale avec la MLC. En effet, des mesures complémentaires devront être préparées au niveau national pour rendre ce dispositif effectif (réglementaires, conventionnelles).

La MLC définit un cadre social minimal de portée universelle. Cependant, le contexte concurrentiel que connaît le secteur du transport maritime soulève la question du comportement que les États vont adopter à l'égard de la Convention. Certains pavillons, estampillés syndicalement « pavillons de complaisance », sont socialement régis par une législation en apparence compatible. La compatibilité textuelle ne préjuge alors en rien de la réalité du respect des conditions de vie et de travail à bord. Parmi ces États figurent les premières ratifications de la CTM 2006 enregistrées par l'OIT³⁷.

D'une manière générale, l'État qui ratifie la convention est tenu par une clause de non régression³⁸. Cependant, par son ampleur, la mise en œuvre de la Convention implique

36) Département des normes internationales du travail, *Manuel. Éléments d'orientation pour la mise en œuvre de la convention du travail maritime, 2006. Modèle de dispositions nationales*, Genève, 2012.

37) Citons, par exemple, le Libéria en 2006, les Îles Marshall en 2007, les Bahamas en 2008, le Panama en 2009.

38) Article 19, § 8, de la Constitution de l'OIT. Cette exigence est rappelée dans les dispositions liminaires de la MLC.

la réécriture d'une part significative de la législation nationale et ce travail peut coïncider avec le souhait de l'État, au prétexte de toiler cette législation, de supprimer des dispositions jugées obsolètes, parfois au détriment des marins. La prise en compte de l'attractivité du pavillon national peut mettre à mal le respect du principe de non régression, de manière directe ou indirecte, pour le registre national ou des seconds registres ou registres internationaux. Le souci de modernisation du droit national peut parfois être difficile à distinguer de certaines considérations économiques. Comment interpréter, du point de vue du principe de non régression, l'adoption d'un dispositif sur les agences de recrutement et de placement au niveau national alors que le droit jusqu'alors en vigueur ne permettait qu'un modèle de recrutement et d'emploi directs ? Certes le recours à des agences privées de recrutement et de placement (*crew* ou *manning agencies*) n'est pas imposé par la MLC³⁹. Cependant, la ratification de la MLC est l'occasion d'entériner ces pratiques au niveau national, y compris pour des motifs de protection et dans l'intérêt de la main-d'œuvre concernée⁴⁰.

B. La mise en application coordonnée

Une autre voie possible consiste à coordonner la mise en application nationale de la MLC. Au regard de la Constitution de l'OIT⁴¹, les Membres demeurent, en effet, les destinataires des instruments normatifs adoptés par l'Organisation⁴². À ce jour, seuls des États se sont vus reconnaître cette qualité. Cependant, parce que la ratification de la MLC va affecter des compétences que les États ont pu transférer à des organisations régionales ou parce que ces organisations ont pu souhaiter encourager la ratification rapide de la MLC, celles-ci vont intervenir dans le processus de mise en application.

L'exemple le plus documenté est sans doute celui de l'Union européenne⁴³. Une décision du Conseil a ainsi autorisé les États membres à ratifier la MLC en fixant un délai pour le dépôt des instruments de ratification⁴⁴. L'OIT ne pouvait être indifférente

39) Norme A1.4, paragr. 4 b).

40) Au niveau communautaire, cette question doit être rapprochée de la mise en œuvre de la directive 2008/104/CE qui libéralise le recours au travail intérimaire dans une perspective de flexicurité (emploi et sécurité).

41) Constitution de l'OIT, article 1. L'Union européenne a le statut d'observateur auprès de l'OIT.

42) Sur les rapports entre l'Union européenne et les organisations internationales agissant dans le domaine maritime, voir A. Charbonneau, *Marché international du travail maritime. Un encadrement juridique en formation*, Aix-Marseille, Préface de Patrick Chaumette, Presse Universitaire d'Aix-Marseille, 2009, p. 201 et s.

43) Voir notamment les contributions d'O. Fotinopoulou Basurko, « La mise en œuvre effective de la CTM 2006 dans les États membres dépendra-t-elle du rôle normatif joué par l'UE en la matière ? », et d'A. Devouche, « L'Union européenne et le droit du travail maritime : de l'adoption à l'application de la CTM 2006 », in A. Charbonneau (dir.) « La mise en œuvre de la convention du travail maritime de l'OIT : espoirs et défis », *Revue de droit comparé du travail et de la sécurité sociale*, 2013/2, p. 66-77.

44) Décision 2007/431/CE du 7 juin 2007, JOCE du 22 juin 2007, L161/63. L'échéance pour le dépôt

à cette démarche alors qu'à l'époque l'enjeu principal était de réunir les conditions restrictives d'entrée en vigueur de la MLC. L'Union européenne a engagé, en parallèle, un processus de reprise de la MLC en droit communautaire, à travers l'adoption d'une série de directives⁴⁵.

La Communauté économique et monétaire de l'Afrique centrale (CEMAC), qui regroupe le Cameroun, la République de Centrafrique, la République du Congo, le Gabon, la Guinée équatoriale et le Tchad⁴⁶, s'est dotée dès 1994 d'un Code communautaire de la Marine marchande (CCMM)⁴⁷. Ce Code a été, par la suite, révisé à deux reprises, en 2001 puis en 2012, cette dernière version étant en vigueur⁴⁸. L'un des enjeux de la révision de 2012 était d'assurer la mise à jour du Code au regard de l'adoption de différents instruments internationaux, dont la MLC.

Le CCMM est un règlement communautaire. En vertu du Traité révisé qui institue la CEMAC⁴⁹, « les règlements et les règlements-cadre ont une portée générale. Les règlements sont obligatoires dans tous leurs éléments et directement applicables dans tout État membre » (article 41, alinéa 2). L'article 798 du CCMM prévoit que « 1. Le présent Code abroge et remplace toutes dispositions antérieures contraires. 2. Sauf dispositions contraires, le présent Code est impératif dans toutes ses prévisions et est directement applicable dans tous les États membres. Il entre en vigueur dès son adoption par le Conseil des Ministres de l'Union Economique de l'Afrique Centrale (UEAC) et est publié au Bulletin Officiel de la Communauté ».

La consistance de cette applicabilité directe est assez difficile à cerner. Le principal ouvrage traitant de ce droit communautaire fait ainsi constamment référence au droit

des instruments de ratification est alors fixée au 31 décembre 2010 (article 2).

45) Directive 2009/13/CE du 16 février 2009 portant mise en œuvre de l'accord conclu par les Associations des armateurs de la Communauté européenne (ECSA) et la Fédération européenne des travailleurs des transports (ETF) concernant la convention du travail maritime, 2006, et modifiant la directive 1999/63/CE ; Directive 2013/38/UE du 12 août 2013 portant modification de la directive 2009/16/CE relative au contrôle par l'État du port et Directive 2013/54/UE du 20 novembre 2013 relative à certaines responsabilités de l'État du pavillon en ce qui concerne le respect et la mise en application de la convention du travail maritime, 2006.

46) Voy., notamment, M. Fau-Nougaret (dir.), *La concurrence des organisations régionales en Afrique*, Paris, L'Harmattan, 2012, P. Itoua « Lepatrick », *La banque mondiale et la CEMAC. Un partenariat pour l'aide au développement de la sous-région*, Paris, L'Harmattan, 2013, P. Libong Badjan, *Réformes institutionnelles de la CEMAC. Jeu d'acteurs, intérêt des États*, Paris, L'Harmattan, 2013, T. Zogbelemou, *Droit des organisations d'intégration économique en Afrique*, Paris, L'Harmattan, 2014.

47) Il s'agit du Code adopté le 22 décembre 1994 (Acte n° 6-94 UDEAC-594-CE-30). Voy. le commentaire du Code de 2001 de G. Ngamkan, « Etude comparée entre le droit maritime français et le droit maritime communautaire de l'Afrique centrale (CEMAC) », *Le Droit Maritime Français*, 2012, p. 738 et s.

48) Règlement (n° 08/12 – UEAC-088-CM-23) adopté par le Conseil des Ministres de la CEMAC le 22 juillet 2012.

49) La dernière révision en date est celle du 28 juin 2008.

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de l'Union européenne pour interpréter les concepts qui gouvernent son fonctionnement⁵⁰. À l'initiative du BIT et de la République du Congo, un atelier de sensibilisation à la MLC s'est tenu à Brazzaville du 16 au 19 février 2015. À l'occasion de cet atelier, il est apparu que, dans la pratique, le CCMM est directement invoqué devant les juridictions des États membres⁵¹ et s'inscrit donc dans une démarche de constitution d'un droit maritime uniforme au niveau sous régional.

Ce Code, concernant la mise en œuvre de la MLC, a donc pour principal intérêt de définir des conditions communes minimales de mise en œuvre sous le contrôle de la Cour de justice de la CEMAC⁵² (article 48 du Traité révisé et Convention régissant le fonctionnement de la Cour de justice). Son Livre V traite plus spécifiquement des gens de mer. Il propose un socle de dispositions que les États membres pourront, le cas échéant, introduire dans leur droit national et compléter par les mesures législatives, réglementaires ou autres requises.

Les États sont cependant appelés à ratifier la MLC, ce qu'ont fait le Congo et le Gabon, dans la mesure où le Code n'entend pas se substituer à leurs obligations. Le CCMM rappelle d'ailleurs l'importance de cette ratification en son article 196, relatif au contrôle des navires par l'État du port : « (...) Les inspections porteront non seulement sur le respect de la Convention internationale sur la sauvegarde de la vie humaine en mer (SOLAS 74) telle qu'amendée, mais aussi sur celui des conventions ci-après, sous réserve toutefois que l'État membre de la CEMAC qui procède au contrôle les ait lui-même ratifiées : (...) Convention de travail maritime de 2006 de l'Organisation Internationale du Travail (O.I.T.) ».

Les États membres de la CEMAC peuvent donc appliquer le Code directement sous réserve d'adopter une législation, une réglementation ou d'autres mesures (techniques, conventionnelles)⁵³ donnant effet à ses prescriptions, le complétant pour les matières que celui-ci ne détaille pas ou n'aborde pas et assurant une mise en œuvre adaptée avec la situation nationale, conformément à l'objectif de flexibilité poursuivi par la Convention.

50) L. Tengo, *Droit communautaire général. CEMAC.*, Paris, Ed. Ccinia communication, 2013, en particulier les pages 188 et s. concernant le droit communautaire dérivé et les pages 204 et s. concernant le principe de l'applicabilité immédiate.

51) Sur la notion d'invocabilité directe en droit français : J.-Fr. Akandji-Kombé, « De l'invocabilité des sources européennes et internationales du droit social devant le juge interne », *Droit social*, 2012, p. 1014 et s.

52) Voy. l'article 48 du Traité révisé instituant la CEMAC et la Convention régissant le fonctionnement de la Cour de justice.

53) C'est le cas, par exemple, de l'article V, paragr. 1, de la MLC qui dispose que : « Tout Membre applique et fait respecter la législation ou les autres mesures qu'il a adoptées afin de s'acquitter des obligations contractées aux termes de la présente convention en ce qui concerne les navires et les gens de mer relevant de sa juridiction ». La Norme A3.1 relative au logement des équipages prévoit, en son premier paragraphe, que : « Tout Membre adopte une législation exigeant que les navires battant son pavillon (...) »

Cela se retrouve sur le plan de son contenu, qui témoigne, dans sa version de 2012, d'un réel rapprochement avec le niveau de protection voulu par la MLC. Le Code conditionne ainsi l'exercice de l'activité de marin à un âge minimum de 16 ans⁵⁴. Toutefois, il ne fait aucun cas des travaux susceptibles de compromettre la santé ou la sécurité des jeunes gens de mer⁵⁵, laissant aux États membres le soin de déterminer les types de travaux concernés. Il en va de même pour d'autres aspects de la convention, pour lesquels le CCMM se limite à fixer un cadre général. Les États membres devront ainsi adopter les politiques et programmes requis en matière de santé et sécurité au travail⁵⁶, ils devront déterminer et organiser au niveau national les procédures relatives aux responsabilités de l'État du pavillon et du port concernant le respect de la MLC (Titre 5). En matière de sécurité sociale, le CCMM reprend textuellement le contenu de la Règle 4.5 et de la Norme A4.5⁵⁷, à charge là aussi pour les États de réaliser le programme dessiné par ces dispositions. Sous réserve de certaines exceptions, les principes directeurs n'ont pas été inclus dans le texte du CCMM.

Les principales difficultés concernent le champ d'application retenu pour la mise en œuvre du Code, lequel comprend les navires de pêche et s'appuie sur des définitions autonomes des notions de gens de mer et de marins, susceptibles de ne pas répondre aux exigences de la MLC⁵⁸.

Certains des États membres de la CEMAC sont des États sans littoral (Tchad, République de Centrafrique). Ceux-ci n'ont pas ratifié, par le passé, les conventions de l'OIT traitant du travail maritime ni même les conventions de l'OMI⁵⁹. Ils n'intègrent pas la coordination régionale en matière de contrôle des navires par l'État du port, dite du mémorandum d'Abuja. La CEMAC n'a d'ailleurs pas vocation à assurer la coordination du contrôle par l'État du port qu'encourage la MLC. Les États à littoral membres de la CEMAC ne participent pas tous au même titre au MoU d'Abuja, comme le Cameroun et la Guinée équatoriale⁶⁰, même si les rapports de l'Organisation font état de statistiques au sujet de cette dernière. Le MoU d'Abuja retient, parmi les instruments pertinents fondant son dispositif de contrôle par l'État du port, la Convention du travail maritime de 2006, la convention STCW et la Convention 147 relative aux normes minima dans la marine marchande, 1976. Le MoU d'Abuja n'a toutefois pas

54) Articles 387 et 404 du CCMM.

55) Norme A1.1, paragr. 4 de la MLC.

56) Voir l'ensemble de la Règle 4.3 de la MLC.

57) L'article 446-1 du CCMM reproduit le contenu de la Règle 4.5. L'article 447-1 reprend, pour sa part, la Norme A4.5 à l'exception des paragraphes 10 et 11 qui précisent les obligations qui incombent aux États membres au moment de la ratification.

58) Articles 2, paragr. 17 et 41 et article 372, paragr. 2 du CCMM.

59) Le Tchad a cependant ratifié la Convention de Montego Bay le 14 août 2009.

60) Ils ne sont pas considérés comme « *full members* », voir le Rapport 2013 du MoU d'Abuja : http://www.abujamou.org/assets/annual%20report_2013.pdf.

été révisé (pratique des amendements) pour tenir compte des procédures instituées par la MLC⁶¹.

L'Organisation Maritime de l'Afrique de l'Ouest et du Centre (OMAOC) est elle-même à l'initiative de la préparation d'un Code maritime. Créée en 1975 et établie à Abidjan, elle réunit 25 pays de la région, essentiellement dans la perspective de promouvoir et d'accompagner le développement du secteur des transports maritimes sur le plan commercial et institutionnel. Le projet de Code maritime en cours d'adoption reprend étroitement le texte du Code communautaire de la CEMAC. Sa nature juridique demeure à ce stade incertaine. La CEMAC et l'OMAOC sont des organisations qui, au regard de leur composition, se superposent⁶². Cette question renvoie à la clarification des sphères d'implantation des organisations régionales et sous-régionales sur le continent africain et de leurs compétences sur le plan normatif⁶³. Il faut aussi tenir compte des différentes langues administratives utilisées au niveau national (anglais, espagnol, français, portugais) qui peuvent limiter la portée de certains instruments régionaux.

2. Le contrôle de la mise en application

Le système de contrôle de l'application des normes de l'OIT traverse une période de crise et a soulevé des difficultés particulières concernant la MLC (A). Après examen des premiers rapports, il commence cependant à livrer des éclairages précieux pour les États qui doivent à présent mettre en application la convention (B).

A. La MLC à l'épreuve du mécanisme de contrôle de l'application des Normes

Le système de contrôle régulier de l'OIT⁶⁴, concernant les conventions ratifiées par

61) Voir le texte du Mémorandum d'entente de 1999 sur le contrôle des navires par l'État du port dans la région de l'Afrique de l'Ouest et du Centre, tel qu'amendé en octobre 2012.

62) Le Cameroun, la République du Congo, la République de Centrafrique, le Gabon, la Guinée équatoriale et le Tchad sont membres des deux organisations.

63) Le recours à l'Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA), qui concerne la plupart des États considérés dans la présente étude, pourrait être utilement envisagé à travers l'adoption d'un acte uniforme. Sur le droit de l'OHADA envisagé de manière critique : A. Cissé, « Pour une approche plurale du droit africain », in *De l'esprit du droit africain*, Mélanges G. Pougué, Ed. Wolters Kluwer/CREDIJ, 2014, p. 1 et s.

64) Se reporter à la contribution de M. Rodriguez-Piñero, « Le système de contrôle des conventions internationales du travail de l'OIT et le rôle de la Commission d'experts », in Aliprantis N. (dir.), *Les droits sociaux dans les instruments européens et internationaux*, Bruxelles, Bruylant, 2008, p. 159 et s., qui détaille la procédure suivie au plan institutionnel. Présentant un bilan positif du travail de cette Commission : I. Boivin et A. Odero, « La Commission d'experts pour l'application des conventions et recommandations et les progrès des législations nationales », *RIT*, 2006, p. 234 et s.

les États, se fonde sur l'article 22 de la constitution de l'organisation : « Chacun des Membres s'engage à présenter au Bureau international du Travail un rapport annuel sur les mesures prises par lui pour mettre à exécution les conventions auxquelles il a adhéré. Ces rapports seront rédigés sous la forme indiquée par le Conseil d'administration et devront contenir les précisions demandées par ce dernier ».

Ce système traverse une période de crise, et ceci pour plusieurs raisons. En premier lieu, il souffre d'un manque de moyens administratifs. Les rapports adressés par les États sont examinés par des fonctionnaires du Département des Normes du BIT qui préparent des projets de commentaires, lesquels sont ensuite formellement adoptés par les experts de la Commission d'experts pour l'application des conventions et des recommandations internationales du travail « CEACR ». Ces commentaires peuvent prendre la forme d'une simple demande directe adressée à l'État ou d'une observation publiée dans le rapport annuel, cette dernière traduisant la volonté de manifester une réaction plus insistante devant le mutisme de l'État ou des cas de déficience constatés. Devant l'augmentation du nombre de conventions adoptées et de ratifications enregistrées, les obligations constitutionnelles ont fait l'objet d'aménagements. Concernant les conventions ratifiées, les rapports ont cessé d'être annuels pour devenir cycliques⁶⁵. Malgré cela, le constat est régulièrement dressé que les États membres ne satisfont que très insuffisamment à leurs obligations en relation avec l'article 22 de la Constitution de l'OIT⁶⁶, prétextant souvent le poids administratif trop lourd de la rédaction des rapports. Or, en tant que convention consolidée, c'est-à-dire réunissant plusieurs normes antérieures, la MLC fait plus de 100 pages dans sa version française. Cela nécessitait l'adoption d'un formulaire de rapport adapté, afin de ne pas décourager les États dans le respect de leurs obligations.

Le manque de moyens n'est pas la seule raison de la crise actuelle. Les membres employeurs siégeant à la Commission de l'application des normes de la Conférence internationale du travail ont provoqué le blocage du travail des organes de contrôle,

65) À l'exception de certaines conventions, dont les conventions fondamentales, le premier rapport est demandé un an après l'entrée en vigueur subjective de la convention, les rapports suivants sont demandés tous les cinq ans.

66) A. Wisskirchen, « Le système normatif de l'OIT : pratique et questions juridiques », *R.I.T.*, 2005, p. 267 et s. et E. Gravel, « Les mécanismes de contrôle de l'OIT : bilan de leur efficacité et perspectives d'avenir », in *Les normes internationales du travail : un patrimoine pour l'avenir, Mélanges en l'honneur de Nicolas Valticos*, Genève, O.I.T., 2004, p. 3 et s., lequel évalue entre 60 % et 65 % le taux de rapports réceptionnés par la Commission d'experts pour l'application des conventions et recommandations. Il précise qu'elle n'arrive à traiter que 65 % des rapports reçus. Voir la synthèse de L. Picard « Le contrôle de la mise en œuvre des instruments adoptés par l'organisation internationale du travail », in J.-M. Thouvenin et A. Trebilcock, *Droit social international*, Bruxelles, Bruylant/CEDIN, 2013, p.702 et s. et de J.-M. Servais, *International Labour Law*, Kluwer Law International, 2014, p. 301 et s.

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en juin 2012, concernant un cas qui avait pour objet le droit de grève⁶⁷. Indépendamment de la question ayant justifié le blocage, c'est la capacité de la CEACR à interpréter les conventions internationales qui est mise en cause, cette fonction étant, d'après le Groupe employeur, constitutionnellement dévolue à la Cour internationale de justice⁶⁸. Si les différentes parties ont semblé récemment trouver un accord pour que le système de contrôle maintienne son fonctionnement, c'est dans la perspective de sa réforme future.

C'est donc dans un contexte bien particulier que la CEACR a examiné les premiers rapports adressés par les États ayant ratifié la MLC, à la fin de l'année 2014⁶⁹. Ces premiers rapports sont l'occasion pour la Commission d'éclairer les États dans la mise en œuvre de la convention, sur des points particuliers posant problème. Cependant, à la lumière du compromis actuel, il ne s'agit que « d'avis et recommandations à caractère non contraignant, leur objet étant de guider l'action des autorités nationales »⁷⁰.

Le Conseil d'administration de l'OIT, lors de sa session de mars 2010, a approuvé le formulaire de rapport définitif de la MLC⁷¹. Celui-ci est conçu pour simplifier la tâche des États membres. Le rapport ainsi simplifié distingue une partie consacrée à des demandes d'ordre général et une partie destinée à recueillir des informations spécifiques, relatives à différentes prescriptions de la MLC. L'idée générale est de sortir d'un modèle classique de rapport fondé sur des questions couvrant, disposition par disposition, l'ensemble de la mise en œuvre nationale d'une convention internationale du travail. Pour la MLC, les États sont tenus de fournir la législation (et autres mesures) applicable afin que les fonctionnaires du BIT puissent opérer par eux-mêmes ce contrôle systématique. L'État doit alors concentrer ses efforts à répondre à des questions précises qui peuvent concerner des aspects législatifs

67) L. Swepston, "Crisis in the ILO Supervisory System: Dispute over the Right to Strike", *The International Journal of Comparative Labour Law and Industrial Relations*, 29, n° 2, 2013, p. 199 et s. ; J. R. Bellace, « L'OIT et le droit de grève », *RIT*, 2014, p. 33 et s. ; BIT, *Document de référence pour la Réunion tripartite sur la Convention (n° 87) sur la liberté syndicale et la protection du droit syndical, 1948, pour ce qui est du droit de grève ainsi que les modalités pratiques de l'action de grève au niveau national*, Genève, 23-25 février 2015.

68) Voir l'article 37 de la Constitution de l'OIT.

69) BIT, *Rapport de la Commission d'experts pour l'application des conventions et des recommandations, Rapport général et Observations concernant certains pays*, Rapport III Partie I(A), Genève, 2015.

70) Il s'agit de la formulation qui figure au paragr. 29 du Rapport précité 2015 de la CEACR, voy. la déclaration conjointe du Groupe des travailleurs et du Groupe des employeurs en date du 23 février 2015 : Résultat de la Réunion tripartite sur la Convention (n° 87) sur la liberté syndicale et la protection du droit syndical, 1948, pour ce qui est du droit de grève ainsi que les modalités pratiques de l'action de grève au niveau national, Genève, 23-25 février 2015.

71) Le formulaire de rapport sur l'application de la MLC a été soumis au Conseil d'administration de novembre 2009 dans une version incomplète (document GB.306/LILS/7/1), puis de novembre 2010 dans sa version complète (document GB.307/LILS/5). La version approuvée et définitive est disponible dans le document GB.307/10/2 (Rev.).

(clarifier le champ d'application des mesures nationales, telle ou telle disposition du Code) ou qui portent sur sa situation nationale (informations statistiques ou documentaires). L'ensemble est présenté sous la forme de tableaux favorisant une saisie électronique.

Le formulaire s'appuie sur des informations que l'État doit joindre à son rapport national, en fournissant notamment un exemplaire des documents, établis au niveau national, qui assurent la certification sociale des navires (du certificat de travail maritime et de la déclaration de conformité du travail maritime (DCTM)). Lorsque des questions portent sur des éléments inclus dans la DCTM, l'État peut alors simplement cocher une case et apporter des précisions complémentaires lorsque cela est requis. De la même manière, dans sa réponse, l'État peut se limiter à renvoyer à une disposition législative, réglementaire ou conventionnelle pertinente⁷².

L'Observation générale publiée par la CEACR montre que les États ont adopté des attitudes très variées concernant ce formulaire de rapport. Certains ont apporté des informations très détaillées tandis que d'autres ont utilisé les facilités proposées en renvoyant systématiquement à la DCTM ou à des textes nationaux, sans plus de commentaires. La CEACR souligne cependant que la DCTM s'avère parfois insuffisante quant aux informations qu'elle apporte sur la législation nationale en vigueur et les mesures prises par les armateurs, en se limitant à de simples renvois à d'autres documents⁷³. Cela pose un problème pour la bonne réalisation du contrôle par l'État du port mais aussi pour l'examen des rapports étatiques.

Concernant les États pris en compte dans le cadre de cette étude, à savoir le Bénin et le Togo, qui étaient tenus d'adresser leur rapport avant le 31 août 2014, plusieurs difficultés sont apparues au stade de la préparation du rapport⁷⁴.

En premier lieu, sur le plan institutionnel, l'administration qui est traditionnellement l'interlocuteur de l'OIT dans le cadre des activités de contrôle de l'application des normes est le Ministère en charge du travail. C'est souvent un fonctionnaire de ce Ministère qui prépare concrètement les rapports. Concernant la MLC, cela nécessite la collaboration entre fonctionnaires du Ministère du travail et du Ministère en charge des transports maritimes. Cette collaboration est inhabituelle et les fonctionnaires du Ministère des transports ne sont pas familiers des procédures propres à l'OIT. La collaboration peut prendre la forme d'une simple transmission du rapport afin qu'il

72) Voir les conseils pratiques qui introduisent le formulaire de rapport.

73) Voir la Norme A5.1.3, parag. 10, qui précise les informations que doit contenir la DCTM. Celles-ci ne se limitent pas à des renvois à la législation nationale applicable (ou autres mesures), mais doit aussi comporter « dans la mesure nécessaire des informations concises portant sur les points importants des prescriptions nationales ».

74) Ceux-ci ont bénéficié d'une assistance technique pour le préparer.

soit complété ou bien d'un travail conjoint, à l'occasion de réunions de travail interministérielles. C'est l'option qui a été privilégiée concernant le Bénin et le Togo. Il s'agit tout d'abord de faire prendre conscience aux différents représentants de ces Ministères qu'ils seront appelés à renouveler régulièrement l'exercice (tous les cinq ans au moins). Ensuite, il faut entretenir le lien entre les représentants du Département des Normes du BIT et l'administration en charge des transports maritimes. Puisque l'enjeu est la mise en application de la MLC, cette administration est la principale destinataire des commentaires de la CEACR et de l'assistance technique qui peut être déployée. C'est elle qui préparera et portera les projets de lois et de réglementations qui vont assurer la mise aux normes, qui coordonnera aussi le travail en lien avec les organismes de sécurité sociale concernés, les acteurs privés ou publics engagés dans le cadre de la mise en œuvre du titre 5 de la MLC (inspections, certification, traitement des plaintes). Enfin, il faut que l'administration en charge des transports maritimes identifie les informations statistiques et documentaires requises pour que le rapport puisse être entièrement complété.

Cela constitue la deuxième difficulté identifiée. Le Bénin comme le Togo sont principalement des États du port et des États fournisseurs de main-d'œuvre. Par ailleurs, ils n'ont pas encore adopté la législation destinée à appliquer la MLC. Cela entraîne plusieurs conséquences. N'ayant pas mis en place la certification sociale des navires, ils ne peuvent utiliser les facilités prévues par le formulaire de rapport en renvoyant à des éléments documentaires comme la DCTM. Ils doivent alors répondre de manière systématique à l'ensemble des questions posées par le formulaire, ce qui représente un travail administratif important. Ensuite, ils ne disposent pas des moyens pour réunir les informations statistiques demandées (nombre de navires / de gens de mer)⁷⁵. En premier lieu parce que la définition même de la notion de « gens de mer » et de « navire » au niveau national n'est pas arrêtée, mais aussi en raison d'un manque de connaissances, par exemple du nombre de marins qui résident sur le territoire national et qui travaillent sous pavillon étranger. En ce sens, le formulaire de rapport constitue un outil précieux pour amener les administrations nationales à se doter de ressources pour assurer un meilleur suivi du secteur. Cela nécessitera sans doute plusieurs années avant de produire des résultats.

B. La MLC ressourcée par le mécanisme de contrôle de l'application des Normes

Dans l'observation générale publiée par la CEACR, celle-ci souligne, en premier lieu, la complémentarité entre le système de contrôle régulier de l'OIT et le mécanisme du contrôle par l'État du port. Elle vise le rapport récemment publié par une organisation régionale coordonnant le contrôle par l'État du port des navires sur les déficiences

75) Voir le point VII de la première partie du Formulaire de rapport.

constatées, qui offre un premier regard sur le degré d'application effectif de la MLC⁷⁶. Elle distingue ensuite plusieurs enjeux ayant été sources de difficultés, à la lumière des premiers rapports examinés.

Concernant le champ d'application de la MLC, la CEACR apporte quelques précisions importantes. Ainsi, le recours à « l'équivalence dans l'ensemble » ne peut être invoqué concernant l'article II, qui énonce les définitions des notions de « navire » et de « gens de mer ». Il est réservé aux Normes, pour les titres 1 à 4 de la MLC. Ensuite, elle rappelle que l'exemption visant les navires d'une jauge brute inférieure à 200 tonneaux qui n'effectuent pas de voyages internationaux n'est que partielle, limitée à des éléments particuliers de la convention, déterminés par l'autorité compétente en consultation avec les organisations de gens de mer et d'armateurs. Il ne saurait s'agir d'une exemption totale. En particulier, les Règles leur sont applicables. L'observation insiste ensuite sur l'enjeu que représente le respect des dispositions en matière de recrutement et de placement, de signature du contrat d'engagement maritime, de durée du travail ou du repos et de sécurité sociale⁷⁷.

Concernant les États pris en compte dans cette étude dont les rapports étaient examinés (Bénin et Togo), la CEACR aborde la question de la stratégie conduite au niveau national pour mener à bien la mise en conformité de leurs législations.

Le Bénin a ratifié la MLC le 13 juin 2011. La législation sociale maritime béninoise tient essentiellement en deux textes : la loi n° 2010-11 du 7 mars 2011 portant Code maritime du Bénin et la loi n° 98-015 du 12 mai 1998 portant statut général des gens de mer. Ces textes, qui soulèvent des problèmes d'articulation, ne présentent pas un niveau de protection pleinement compatible avec celui prévu par la MLC. Comme souligné précédemment, cela s'explique par le fait que le Code maritime a été préparé avant l'adoption de la MLC. Par ailleurs, le Bénin ne considère pas avoir immatriculé de « navire », au sens de la MLC. Dès lors qu'une révision du Code maritime s'impose, en quoi devrait-elle consister ? S'agit-il d'amender le Code de telle sorte qu'il respecte la MLC dans ses grandes lignes, tout en renvoyant le plus possible à des mesures réglementaires et/ou conventionnelles la mise en œuvre détaillée ? Cela permettrait la préparation d'un projet de loi ramassé et sans doute plus rapide à faire adopter. Ou bien faut-il viser une large reprise de la MLC dans le Code maritime, ce qui peut

76) <https://www.parismou.org/results-first-year-maritime-labour-convention>. Voy. aussi le Rapport Annuel 2014 du Paris MoU, en particulier les pages 48 et s.

77) Voir P. Chaumette, « Convention du travail maritime OIT de 2006. Déclaration de conformité et rapports nationaux », *Neptunus*, vol. 21, 2015/2, lequel passe en revue ces différents enjeux. Il revient notamment sur la prise en compte du critère de la résidence en matière de sécurité sociale, à la lumière du droit communautaire européen et, en particulier, d'un récent arrêt de la CJUE, 5^{ème} ch., 9 mars 2015, aff. C-266/13, Kik, note P. Chaumette, « De l'affiliation sociale des gens de mer en droit européen : extension vers les marins ressortissants européens, expatriés sous pavillon tiers », *Droit Maritime Français*, 2015, p. 769 et s. et J.-Ph. Lhernould, « Conflits de lois en matière de sécurité sociale : la *lex loci laboris* en question », *Droit social*, 2015, p. 457 et s.

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représenter un chantier législatif d'une grande envergure et différer d'autant la mise en œuvre effective de la convention au niveau national ? Dans la première hypothèse, il faut cependant prendre en considération le fait que, par le passé, les textes réglementaires prévus n'ont jamais été adoptés. Le choix entre ces deux stratégies revient aux autorités nationales mais il peut conduire le BIT à exprimer une préférence dans le cadre d'une assistance technique. Concernant le Bénin, la demande directe adressée par la CEACR fait référence à la feuille de route adoptée de manière tripartite lors de l'atelier de validation des propositions d'amendements, organisé à Cotonou du 22 au 26 juillet 2013⁷⁸. Autrement dit, même si la mise à niveau de la législation nationale relève d'un acte de souveraineté, la CEACR considère cependant que les autorités nationales ne peuvent être indifférentes aux orientations définies dans le cadre de l'assistance technique dont elles ont bénéficié. L'enjeu de l'assistance technique est rappelé tant par l'observation générale⁷⁹ que par les demandes directes⁸⁰.

Le Togo a ratifié la MLC le 14 mars 2012. Sa législation sociale maritime consiste en une Ordonnance n° 29 du 12 août 1971 portant Code de la marine marchande. Un projet de Code de la marine marchande révisé est en cours d'examen parlementaire. Comme pour le Bénin, celui-ci a été préparé antérieurement à l'adoption de la MLC et ne reprend que partiellement son contenu. Faut-il, dans cette situation, suspendre la procédure parlementaire pour modifier le projet afin qu'il soit mis en conformité au moins avec les grands principes posés par la MLC (Règles) ou bien faut-il poursuivre son examen et engager en parallèle un projet de loi d'amendement, plus complet ? Là aussi, le choix revient aux autorités nationales, mais le calendrier de mise en application effective de la MLC en sera affecté, de même que l'ampleur de la tâche de préparation des mesures réglementaires complémentaires. La CEACR note que le projet de feuille de route élaboré lors de l'atelier tripartite de validation des propositions d'amendements organisé à Lomé, en octobre 2013, faisait état de la possibilité de modifier directement le projet en cours d'adoption. Il semble cependant

78) En l'espèce, la feuille de route prévoit en premier lieu de fonder le statut des gens de mer de 1998 dans le Code maritime puis d'assurer la mise à niveau du Code, suivant les amendements préparés, au besoin par l'adoption de textes réglementaires complémentaires.

79) « La commission a observé que plusieurs gouvernements ont indiqué que, pour le moment, ils ne sont pas des États du pavillon étant donné qu'ils n'ont aucun navire auquel la convention est applicable. Ils n'ont, par conséquent, pas encore adopté une législation détaillée pour mettre en œuvre la MLC, 2006. La commission note cependant que d'autres obligations de la convention, dans la mesure où elles concernent un pays, par exemple la réglementation des services privés de recrutement et de placement, la promotion d'installations de bien-être à terre, et la réalisation des responsabilités de l'État du port, s'appliquent et doivent être mises en œuvre. Dans certains cas, la commission a observé que le Membre concerné bénéficierait de l'assistance technique et de la coopération afin d'aller de l'avant en ce qui concerne la mise en œuvre ».

80) La demande directe adressée au Bénin comme au Togo précise que : « dans ce contexte, la commission espère que le Bureau sera en mesure de continuer d'offrir au gouvernement son assistance technique dans le cadre de la réforme législative en cours pour aligner la législation nationale sur les exigences de la convention ».

que les autorités togolaises ont abandonné cette possibilité en ne rapportant que sur l'Ordonnance de 1971, qui est obsolète, sans donner à la Commission accès au contenu du projet de Code des transports. Elles renvoient la mise en application de la MLC à l'adoption de futures mesures législatives et réglementaires, sans fixer de calendrier, ce à quoi la CEACR réagit en attirant l'attention du gouvernement « sur la nécessité d'adopter prochainement des lois, des règlements ou d'autres mesures nécessaires à assurer la conformité de la législation nationale ».

Le Bénin et le Togo rencontrent une difficulté commune concernant le volet sécurité sociale. En effet, l'affiliation fondée sur la résidence n'est pas prévue et la couverture des marins par application du régime général n'a qu'une portée textuelle, sans application concrète. La CEACR prend en compte cette difficulté dans ses commentaires, puisqu'elle engage par exemple le Bénin à « lui apporter des informations complémentaires sur les conditions effectives d'affiliation des marins résidant habituellement sur son territoire au régime de sécurité sociale de droit commun ». Deux autres enjeux sont rappelés à travers la demande directe, à savoir le traitement pas moins favorable des gens de mer par rapport aux autres travailleurs⁸¹ et l'élargissement de la protection offerte vers une couverture complète de sécurité sociale⁸².

« Lors de la ratification, la protection assurée par tout Membre conformément au paragraphe 1 de la règle 4.5 doit inclure au moins trois des neuf branches énumérées au paragraphe 1 de la présente norme »⁸³. Les États sont ainsi tenus de déclarer les branches pour lesquelles la protection est assurée au moment du dépôt de sa ratification⁸⁴. L'observation générale de la CEACR rappelle cette obligation. Plusieurs questions mériteraient cependant d'être clarifiées sur ce point. En effet, le contenu de la déclaration faite par l'État membre, au sujet des branches de sécurité sociale couvertes n'entraîne aucune vérification au stade de l'enregistrement de sa ratification. La non-déclaration empêche simplement la ratification de produire ses effets⁸⁵. Quel impact aurait l'identification par la Commission d'un cas de violation de cette obligation, concernant un État pour lequel la MLC est entrée en vigueur ? Cette obligation vise-t-elle une protection effective, comme semble l'indiquer le recours à l'expression

81) Pour le Bénin : « La commission prie le gouvernement de lui apporter des informations complémentaires sur le respect de ce principe de traitement pas moins favorable des gens de mer ».

82) Pour le Bénin : « La commission prie le gouvernement de fournir des informations sur les décisions et les mesures adoptées, en fonction de la situation nationale du Bénin, à titre individuel comme dans le cadre de la coopération internationale, pour atteindre progressivement une protection de sécurité sociale complète pour les gens de mer résidant habituellement au Bénin ».

83) Norme A4.5, paragr. 2 et Principe directeur B4.5, paragr. 1. de la MLC.

84) Norme A4.5, paragr. 10 de la MLC.

85) C'est le cas pour le Liban, qui a ratifié la MLC le 18 février 2013, mais pour lequel la ratification n'est pas enregistrée à défaut d'information concernant les branches de sécurité sociale couvertes. En conséquence, la convention n'est pas entrée en vigueur.

« protection assurée » ou bien la Commission doit-elle admettre la protection simplement prévue par les textes ? Le Bénin a déclaré six branches et le Togo a déclaré trois branches. Pour ces deux pays, la couverture est en partie assurée par renvoi au régime général de sécurité sociale⁸⁶, lequel pour l'instant n'affilie pas de marins.

Au terme de son examen, la CEACR, qui n'ignore pas que les États qui ont ratifié la MLC et expérimenté le nouveau formulaire de rapport ont réalisé un effort important⁸⁷, a cependant entendu avancer à 2016 la date de remise des réponses aux commentaires, initialement prévue en 2019. Cela vaut pour le Bénin et le Togo. Par ce biais, la Commission a sans doute voulu maintenir une pression sur les États qui s'engagent dans la voie de l'application de la MLC, afin que ceux-ci prennent le pli de rapporter précisément sur leur législation et pratique nationales et qu'ils corrigent rapidement les éventuelles lacunes identifiées.

Si l'on excepte cette initiative, un échéancier de la mise en application semble se dessiner, progressif, qui distinguerait une première étape de mise en conformité initiale, avec pour horizon la préparation du premier rapport l'année suivant l'entrée en vigueur subjective de la Convention pour l'État qui la ratifie. Il s'agit d'assurer la mise en place d'un cadre législatif compatible avec les grands principes posés par la MLC, à la lumière des enjeux nationaux (champs d'application, agences de recrutement et de placement, soins médicaux, sécurité sociale). Une seconde étape s'engagerait alors, visant à la mise en conformité technique et effective avec, pour horizon, la préparation du second rapport, cinq ans après. Il faut cependant insister sur le défi que représente cette seconde étape pour les États étudiés ici. Celle-ci requiert en effet des moyens administratifs et humains, ainsi que l'adoption de textes réglementaires et/ou conventionnels complémentaires. C'est le cas notamment pour la mise en œuvre du titre 5 de la MLC (inspections, certification, traitement des plaintes). Force est de rappeler que les conventions collectives et les textes réglementaires auxquels les précédentes législations maritimes béninoises et togolaises des années 60 et 70 renvoyaient n'ont que peu ou pas été conclus ou adoptés⁸⁸. Dès lors, la capacité des États à tenir du calendrier esquissé ci-dessus soulève quelques doutes.

En parallèle de ce contrôle sur la mise en application de la MLC, la question se pose du lien que la convention établit avec d'autres instruments de l'OIT, notamment à travers la notion de droits fondamentaux au travail⁸⁹. L'article III de la MLC fait ainsi

86) Loi n° 98-019 du 21 mars 2003 portant Code de la sécurité sociale (Bénin) et loi n° 2011-006 du 21 février 2011 portant Code de la sécurité sociale au Togo.

87) Voy. la conclusion de l'observation générale.

88) La Côte d'Ivoire constitue une exception en la matière.

89) Voir notamment : Fr. Maupain, « L'OIT, La justice sociale et la mondialisation », *R.C.A.D.I.*, Tome 278, 2000, p. 262 et s. ; Cl. La Hovary, *Les droits fondamentaux au travail. Origines, statut et impact en droit international*, Paris, PUF, 2009, p. 155 et s., p. 187 et s.

référence à la Déclaration de 1998 sur les principes et droits fondamentaux au travail. « Tout Membre vérifie que les dispositions de sa législation respectent, dans le contexte de la présente convention, les droits fondamentaux suivants : a) la liberté d'association et la reconnaissance effective du droit de négociation collective ; b) l'élimination de toute forme de travail forcé ou obligatoire ; c) l'abolition effective du travail des enfants ; d) l'élimination de la discrimination en matière d'emploi et de profession ».

Si la MLC traduit ce contenu dans ses dispositions, notamment concernant l'âge minimum à bord⁹⁰ ou l'abolition du travail forcé⁹¹, ces droits fondamentaux sont en réalité déclinés au sein de conventions particulières, que l'OIT a adoptées. La question se pose donc de la portée juridique de l'article III de la MLC⁹², laquelle semble éclairée par le formulaire de rapport approuvé par le Conseil d'administration de l'OIT, lors de sa session de mars 2010.

Le point III de la première partie du formulaire prie les États « d'indiquer comment il a été tenu compte, dans la mise en application de la convention, des droits et principes fondamentaux suivants énoncés à l'article III : (...) ». Toutefois, cette exigence ne vaut que si l'État n'a pas ratifié les conventions fondamentales qui donnent leur contenu à ces principes, ce qui en limite l'intérêt au regard du taux de ratification de ces conventions.

L'observation générale publiée par la CEACR précise la portée de son examen : « En ce qui concerne l'application de l'article III et de l'article VI, dans le cadre de la MLC, 2006, l'approche de la commission est que, lorsqu'elle examine les rapports de gouvernements sur l'application de la MLC, 2006, elle ne peut pas se faire utilement une opinion sur des questions générales, notamment celle de savoir si le Membre s'est dûment assuré que sa législation respecte les droits fondamentaux mentionnés à l'article III (...). Au lieu de cela, l'examen de la commission, par principe, portera sur les dispositions concrètes des titres 1 à 5 de la convention, sur les prescriptions nationales mettant en œuvre ces dispositions dont il ressort qu'elles n'ont peut-être pas suffisamment tenu compte d'un droit fondamental mentionné à l'article III, et sur les pratiques concernant l'application de certaines prescriptions des titres 1 à 5 qui pourraient indiquer que la législation nationale n'a pas suffisamment pris en considération un droit fondamental mentionné aussi à l'article III »⁹³.

90) Règle 1.1 de la CTM 2006.

91) À travers l'exigence de conclusion d'un contrat d'engagement maritime : Règle 2.1 de la CTM 2006.

92) A. Charbonneau, « La référence aux principes et droits fondamentaux au travail dans les conventions de l'OIT. L'article III de la MLC, 2006 », *Droit Prospectif*, n° 3, 2011, p. 1363 et s.

93) L'observation générale s'inscrit dans la même approche que la position adoptée par le Conseiller juridique du Directeur du BIT devant la Commission technique préparatoire : « L'article III sera, comme toute disposition obligatoire de la convention, l'objet de l'examen des organes de contrôle de l'application des normes de l'OIT. La question importante est de savoir sur quelle obligation portera ce contrôle. Un Membre qui ratifie la future convention aura l'obligation, en vertu de l'article III, de vérifier que sa

VI. Promouvoir et contrôler l'application de la Convention du travail ...

Il en résulte une faiblesse, selon nous, en ce que le contrôle exercé s'enferme dans une approche par instrument, manquant de recul ou de transversalité. L'exemple de la demande directe adressée en 2015 au Bénin, concernant la Convention fondamentale n° 105 sur l'abolition du travail forcé, de 1957⁹⁴, est parlant.

La convention 105 prévoit que : « Tout Membre de l'Organisation internationale du Travail qui ratifie la présente convention s'engage à supprimer le travail forcé ou obligatoire et à n'y recourir sous aucune forme : (c) en tant que mesure de discipline du travail ; (d) en tant que punition pour avoir participé à des grèves (...) ». Le paragraphe c) vise une pratique longtemps répandue dans le cadre des législations portant droit disciplinaire et pénal à bord des navires, visant à sanctionner comme infractions pénales les fautes disciplinaires.

La CEACR a adressé aux autorités béninoises le commentaire suivant : « Article 1 c) de la convention. Travail imposé en tant que mesure de discipline du travail. La commission prend note de l'adoption du Code maritime en République du Bénin (...). La commission note avec *satisfaction* que les manquements à la discipline du travail qui faisaient l'objet de ses précédents commentaires (comme, par exemple, l'absence irrégulière du bord ou le refus d'obéir à un ordre) ne sont plus passibles de peines de prison ».

Cette préoccupation peut échapper à celui qui, préparant ou expertisant une législation nationale se focalise sur la seule MLC. Il en va de même pour les protections portées par les autres conventions fondamentales. Il serait donc intéressant, dans l'optique d'une amélioration du formulaire de rapport, que certains enjeux plus spécifiquement maritimes en matière de droits fondamentaux au travail, en particulier lorsque ceux-ci ne sont pas expressément traités par la MLC, soient insérés sous la forme de questions particulières.

législation respecte, dans le contexte de cette convention, les quatre catégories de droits fondamentaux. Comme toute obligation conventionnelle, celle-ci doit être exécutée de bonne foi. Sous réserve de la décision du Conseil d'administration du BIT quant aux précisions qui pourraient être demandées dans le formulaire de rapport en vertu de l'article 22 de la Constitution de l'OIT, l'examen des organes de contrôle portera sur cette obligation précise. Cette disposition n'impose pas d'obligation additionnelle pour les États qui ont ratifié l'une ou l'autre des conventions fondamentales puisque celles-ci couvrent déjà, sans exception, les travailleurs visés par la future convention ». Voy. Rapport I (1A), *Adoption d'un instrument consolidé regroupant les normes du travail maritime*, présenté à la 94^{ème} session (maritime) de la CIT, 2006, p. 22 et s.

94) Sur cette question, voy. notamment : J.-M. Thouvenin, « Travail forcé ou obligatoire », in J.-M. Thouvenin et A. Trebilcock, *Droit social international*, Bruxelles, Bruylant/CEDIN, 2013, p. 1416 et s. ; BIT, *Halte au travail forcé, Rapport global en vertu du suivi de la Déclaration de l'OIT relative aux principes et droits fondamentaux au travail*, Genève, 2001 ; BIT, *Une alliance contre le travail forcé, Rapport global en vertu du suivi de la Déclaration de l'OIT relative aux principes et droits fondamentaux au travail*, Genève, 2005 ; BIT, *Éradiquer le travail forcé, étude d'ensemble relative à la convention n° 29 sur le travail forcé (1930) et à la convention n° 05 sur l'abolition du travail forcé (1957)*, Genève, 2007.





CHAPTER 7

La certification sociale à bord des navires de commerce, une garantie pour les droits des marins?

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Abstract: *The effective character of the adopted work standards challenges each company which wishes to give a direction and life to the legal requirements on which it takes positions. With a view to effective application, the Maritime Labour Convention, 2006 (MLC, 2006) integrated in its provisions the principle of registered certification of the ships, with the aim of facilitating the measurement of its effectiveness while making it possible to reduce the existing differences in good practice between the flags and shipowners. From this angle, certification brings more rationality and rigour to the shipowners' practices and is thus presented in the form of a innovative device for respecting seafarers' rights. This major achievement for seafarers' rights should not occult the reality of some shipowners' practices being extremely reprehensible. The competitive environment in which maritime work exists is not sufficient justification. These repetitive practices highlight the need for continuous improvement of any international requirement of certification whose finality is to enforce the legal protection created for the seafarers's benefit.*

Résumé : *Le caractère effectif des normes de travail adoptées défie chaque société, souhaitant donner une direction et de la vie aux exigences juridiques instituées. En vue d'une application effective, la convention du travail maritime de 2006 (CTM, 2006) a intégré dans ses dispositions le principe de la certification sociale des navires dont la finalité est d'être un outil pour faciliter la mesure de son efficacité, tout en permettant de réduire les différences existantes entre les pavillons et les armateurs ayant de bonnes pratiques, et tous les autres. Sous cet angle, la certification apporte plus de rationalité et d'exigences dans les pratiques des armateurs et se présente donc sous la forme d'un dispositif innovant pour le respect des droits des gens de mer. Cette innovation majeure pour les droits des gens de mer ne doit pas occulter la réalité de certaines pratiques répréhensibles d'armateurs. L'environnement concurrentiel dans lequel intervient le travail maritime ne rend pas tout justifiable. Ces pratiques répétées soulignent la nécessité d'une amélioration continue de toute exigence de certification internationale dont la finalité est de faire respecter les protections juridiques créées au profit des gens de mer.*

La question sociale est au cœur des préoccupations de toutes les sociétés modernes. Mais plus qu'ailleurs, le secteur maritime porte une attention toute particulière au respect des droits des marins, du fait de plusieurs facteurs liés tels l'hostilité du milieu, l'Histoire, la forte concurrence internationale mais également la spécificité des règles techniques et juridiques applicables. Par son caractère universel et contraignant, la Convention sur le travail maritime (Maritime Labour Convention 2006) se présente comme un socle de qualité des droits des travailleurs de la mer¹. Elle impose le respect de normes minimales applicables à bord des navires, notamment en matière de conditions d'emploi, de santé, de sécurité au travail, d'hygiène et de bien-être. L'importance d'une telle démarche pose naturellement la question de la mise en œuvre de la norme internationale, à l'heure où les premiers commentaires formulés par un des organes de contrôle de l'OIT sur la mise en œuvre effective de la MLC sont consignés et publiés dans un rapport². C'est dire que, même si elle n'appartient pas à la définition de la règle de droit³, le caractère effectif des normes du travail adoptées se pose à toute société qui souhaite donner un sens et de la vie à des dispositions légales sur lesquelles elle a pris des positions. Dans le schéma d'une application effective, la MLC a intégré dans ses dispositions le principe de la certification sociale des navires dont la finalité est d'être un outil facilitant la mesure de son effectivité tout en permettant de réduire les écarts existants entre les pavillons et armateurs ayant de bonnes pratiques et tous les autres.

1) CHAUMETTE P. (2015), « L'impact du droit européen sur le droit social des gens de mer », *Neptunus, revue électronique*, Centre de Droit Maritime et Océanique, Université de Nantes, Vol. 21, 2015/1 ; CHAUMETTE P. (2013), « La ratification et la transposition de la Convention OIT du travail maritime (MLC 2006). Loi n° 2013-619 du 16 juillet 2013 portant diverses dispositions d'adaptation au droit de l'Union européenne dans le domaine du développement durable, Titre II Chap. III », *Droit social* 2013, n° 11, pp. 915- 924 ; CHARBONNEAU A. (2013), « La mise en œuvre de la Convention du travail maritime de l'OIT : Espoirs et Défis », *Rev. de Droit Comparé du Travail et de la Sécurité Sociale*, COMPTRASEC, Bordeaux 2013/2 et *English Electronic* ; CHARBONNEAU A. et CHAUMETTE P. (2010), "The ILO Maritime Labour Convention 2006 (MLC, 2006): An example of innovative normative consolidation in a globalized sector", *European Labour Law Journal*, Intersentia, Vol. 1, n° 3, pp. 332-345 ; CHARBONNEAU A. (2009), *Marché international du travail maritime - Un cadre juridique en formation*, Presses universitaires d'Aix-Marseille, PUAM, Aix-en-Provence, coll. Berthold GOLDMAN, pp. 177-191 ; LEFRANCOIS A. (2011), *L'usage de la certification – Nouvelle approche de la sécurité dans les transports maritimes*, Presses universitaires d'Aix-Marseille, PUAM, Aix-en-Provence, coll. Centre de Droit Maritime et des Transports, 2011 ; DOUMBIA-HENRY C. (2004), "The consolidated maritime labour convention: a marriage of the traditional and the new", *Les normes internationales du travail : un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos*, OIT, Genève, p. 320 ; MARIN M. et CHARBONNEAU A. (2008), « Une convention innovante pour le travail maritime ? Les apports de la Convention du travail maritime (CTM) 2006 », *Neptunus, revue électronique*, Centre de Droit Maritime et Océanique, Université de Nantes, Vol.14, p.1.

2) La Commission d'experts pour l'application des conventions et recommandations de l'OIT (CEACR) est un organe de contrôle de l'OIT sur la mise en œuvre effective de la MLC. Elle vient de rendre son rapport basé sur un certain nombre de rapports émanant de pays membres de l'OIT et ayant ratifié la MLC.

3) CARBONNIER J. (2014), *Flexible droit, Pour une sociologie du droit sans rigueur*, LGDJ Lextenso éditions, 493 pages, p. 136.

Désormais, la réglementation internationale se positionne en garante des conditions de travail par une amorce significative des contrôles sur la conformité réelle de ces dernières avec le vécu des marins. Sous cet angle, la certification apporte plus de rationalité et de rigueur aux pratiques armatoriales et se présente ainsi comme un dispositif innovant pour le respect des droits des marins (I). Cette avancée majeure pour les droits des marins ne doit pas, pour autant, faire occulter la réalité de certaines pratiques armatoriales très critiquables et non justifiables par l'environnement très concurrentiel dans lequel s'inscrit le travail maritime. La persistance de ces pratiques nous rappelle la nécessité d'une amélioration continue de tout dispositif international de certification dont la finalité est de faire respecter les protections juridiques créées au profit des marins (II).

1. La certification, un dispositif innovant pour le respect des droits des marins

Historiquement, la certification est née des besoins d'une industrie en quête de dispositifs de qualité lui permettant de donner l'assurance écrite qu'une organisation, un processus, un service, un produit ou des compétences professionnelles sont conformes à des exigences spécifiées dans un référentiel⁴.

En soi, la certification n'est pas une innovation dans le secteur maritime. Dès le XIX^e siècle, les navires faisaient déjà l'objet de certification technique afin de répondre au principe de navigabilité⁵, imposé par les réglementations nationales et internationales.

Dans ses principes, la Convention sur la sauvegarde de la vie humaine en mer (Convention SOLAS) impose l'émission d'un document, le certificat, par une entité agréée et indépendante selon une procédure établie. Le document ainsi produit, le certificat, atteste de la conformité à une norme connue. Par la suite, le travail d'évaluation de la conformité qui peut être simplement une étude documentaire, est complété pour les certificats statutaires de navires par une visite d'inspection à bord du navire de manière à confronter la réalité technique aux indications portées sur le certificat.

L'idée de certifier les compétences des marins, en charge de la conduite, de l'exploitation et de la maintenance des navires a vu le jour à la fin des années 1960, par une résolution de l'OMCI devenue l'OMI, qui servira de prémisses à la Convention

4) Définition classique de la certification tirée du site internet de l'Association Française de Normalisation (AFNOR). Voir www.afnor.fr

5) Sur la perception du principe de navigabilité du navire se référer à LALLEMENT C. (2004), *La navigabilité*, Thèse de droit, Université de Nantes, Centre de Droit Maritime et Océanique (CDMO) ; *Droit Maritime Français* 1963, n° 242, p. 246 obs. BONASSIES P.

sur les normes de formation des gens de mer adoptée en 1978 (*Standard of Training Certification and Watchkeeping for Seafarers*), plus connu sous le sigle Convention STCW. Concrètement, l'État, par la délivrance de brevets au marin, *Certificate of competency* en anglais (CoC) atteste que ce dernier a suivi une formation sanctionnée par un diplôme à laquelle s'ajoute la réalité de la pratique du métier de marin (le temps d'expérience professionnelle embarqué). Toutefois, le progrès social de l'application de ces normes se voit mis à mal par l'ultralibéralisme qui règne dans le secteur d'activité du commerce maritime et l'effectivité des normes sociales se confrontent à la difficulté d'un contrôle efficace au regard de la disparité des ratifications par les États. Ainsi, par le passé, nombre de certificats STCW furent établis de manière douteuse⁶. L'idée de certifier les navires sur le plan social émerge à la suite de l'application du Code ISM⁷ qui traite de la sécurité des navires lors de leur exploitation et, de la protection de l'environnement marin. Le document de conformité des compagnies au Code ISM et des certificats de gestion de la sécurité des navires constituent essentiellement des normes d'organisation de la « compagnie »⁸ et de leurs navires.

Ce schéma de la certification est partiellement reproduit, dans son principe, par l'Organisation Internationale du Travail dans la MLC dont l'innovation réside en une implication très forte de l'armateur dans l'établissement de la déclaration de conformité au travail maritime, la DCTM, partie II. Cette démarche promeut la responsabilisation de l'État du pavillon et de l'armateur, premiers acteurs dans la mise en œuvre des normes au travers d'un label institutionnel qu'est la certification (A). Le franchissement de cette première étape permettra au marin d'être plus au fait de ses intérêts et de pouvoir les défendre (B).

A. Un label institutionnel de qualité qui responsabilise État du pavillon et armateur⁹

L'adoption d'une règle est toujours une tâche ardue. Elle suppose la prise en compte de plusieurs paramètres et intérêts parfois divergents. Ce constat est très perceptible

6) Malheureusement, l'OMI fait face depuis quelques années au développement inquiétant de pratiques illicites liées à la fraude de brevets d'aptitude, de visas, à la modification de renseignements relatifs à l'expérience dans le livret des marins. Voir Document de travail du Sous-comité de formation et de veille de l'OMI, *notification de brevets frauduleux*, STCW 41/4/add 1 en date du 3 juillet 2009 ; STW 41/4/add en date du 15 juillet 2009 sur la question.

7) Code ISM : Code international pour la gestion de la sécurité de l'exploitation des navires et la prévention de la pollution tel qu'adopté par l'OMI le 4 novembre 1993 par la résolution A.741 (18), amendée.

8) Définition de compagnie par le code ISM : « 1.1.2. « Compagnie » désigne le propriétaire du navire ou tout autre organisme ou personne, telle que l'armateur gérant ou l'affréteur coque nue, auquel le propriétaire du navire a confié la responsabilité de l'exploitation du navire et qui, en assumant cette responsabilité, s'acquitte des tâches et des obligations imposées par le Code. ».

9) L'armement, c'est d'abord la collectivité des armateurs avant d'être l'opération qui consiste à équiper

surtout dans le domaine du travail où le renforcement des droits des travailleurs va souvent de pair avec la mise en place d'obligations annexes ou supplémentaires à la charge de l'armateur ou de l'employeur.

À cette difficulté première s'ajoute une autre, et pas des moindres, liée au cadre international où l'adoption de règles cohérentes et universelles s'avère difficile en raison « *des antagonismes inhérents au secteur maritime dont il a fallu tenir compte, en définissant une norme contraignante mais souple, adaptable à la diversité des niveaux de développement en présence dans le monde actuel* »¹⁰.

Aussi, la convention MLC met à la charge de l'État du pavillon¹¹, garant des engagements internationaux applicables par « ses nationaux », la délivrance d'un certificat maritime auquel est annexé une déclaration de conformité au travail maritime remplie par l'armateur et par laquelle celui-ci atteste du respect de la réglementation nationale¹² mettant en œuvre les 14 points concernés par la certification. Concrètement, tout navire soumis au respect de la convention MLC doit détenir :

1° Un certificat de travail maritime, délivré à l'issue d'une inspection du navire par l'autorité compétente¹³ ou par un organisme reconnu dûment qualifié¹⁴.

un navire et désigner enfin l'ensemble des opérations qui réalisent les différentes modalités d'exploitation des navires. Se référer à NDENDE M. (2014), « Généralités sur l'armement maritime et ses structures juridiques », *in Droits maritimes*, J.P. BEURIER (dir.), collection Dalloz action, éditions Dalloz, Paris, p. 331 ; CHAUMETTE P. (2014), « L'armateur communautaire, bénéficiaire de la liberté de prestation de services », *Neptunus, E-revue*. Centre de Droit Maritime et Océanique, Université de Nantes, vol. 20, 2014/3 ; CORBIER I. (1999), *La notion juridique d'armateur*, Presses universitaires de France, PUF, Paris, 1999, p 1.

10) MARIN M. et CHARBONNEAU A. (2008), « Une convention innovante pour le travail maritime ? Les apports de la Convention du travail maritime (CTM) 2006 », *op. cit.* p. 1.

11) Directive 2013/54/UE du Parlement européen et du Conseil du 20 novembre 2013 relative à certaines responsabilités de l'État du pavillon en ce qui concerne le respect et la mise en application de la convention du travail maritime 2006.

12) Par réglementation nationale, nous entendons réglementation de l'État du pavillon. C'est elle qui sert de référence pour la certification sociale des navires.

13) En France, cette tâche revient au Chef du centre de sécurité des navires conformément à l'instruction en date du 17 juin 2015 portant sur le processus de certification sociale des navires. Le chef de centre de sécurité des navires établit le certificat de travail, vise ou refuse de viser le rapport de visite du navire, le certificat de conformité ou le certificat de travail.

14) Le dispositif français de certification (Instruction en date du 17 juin 2015) prévoit que « *lorsqu'une visite est nécessaire et doit être réalisée à l'étranger dans une zone fortement déconseillée par le ministre des affaires étrangères, le ministre chargé de la mer peut déléguer à une société de classification habilitée le pouvoir de délivrer au nom de l'État le certificat de travail maritime provisoire. Cette délégation prend la forme d'une décision administrative signée par le ministre chargé de la mer ou son représentant* ». Cette disposition bienheureuse apporte une solution aux navires se trouvant par exemple dans des zones de conflits.

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2° Une déclaration de conformité du travail maritime (DCTM), annexée au certificat de travail maritime et qui se compose de deux parties :

- la DCTM I, établie par l'État du pavillon, et qui synthétise pour chacun des quatorze points la réglementation nationale applicable à bord du navire ;
- la DCTM II, établie par l'armateur, et qui détaille pour chacun de ces quatorze points, les mesures mises en œuvre à bord afin d'assurer le respect continu de la réglementation. Par cette déclaration, l'armateur confirme le respect de pratiques et d'organisation considérées comme légitimes et obligatoires par l'Administration maritime dont il relève.

L'importance et le rôle de la déclaration de conformité ont été rappelés par la commission d'experts pour l'application des conventions et recommandations de l'OIT (CEACR) dans son rapport de 2015. La commission a constaté en particulier que, souvent, la partie I de la DCTM nationale ne contient qu'une liste de titres d'instruments législatifs nationaux ou de mesures d'application ou des références à ces instruments et mesures, parfois des références incorrectes, avec très peu ou pas d'informations.

Au risque d'aboutir à un système lourd et très lacunaire, un effort de documentation cohérente et pertinente est naturellement à faire dans ce sens par les États du pavillon.

En France, la certification sociale des navires est encadrée par une instruction de la Direction des affaires maritimes du Ministère chargé de la mer datée du 17 juin 2015 qui en décrit le processus conformément à la convention MLC, aux directives européennes et à la législation française. Une lecture attentive de cette instruction renseigne sur les différents types de certificats (provisoire ou initial), leurs conditions de délivrance, les services étatiques compétents ainsi que l'articulation administrative lors du processus, le management des ressources et la maîtrise des enregistrements et de la documentation. La Direction des affaires maritimes, autorité nationale compétente pour la mise en œuvre de la Convention MLC, s'appuie sur ses services centraux, notamment dans la détermination des dispositions à faire appliquer, et sur les chefs de Centres de Sécurité des Navires pour la réalisation des inspections et la délivrance des certificats. Parce que le certificat de travail garantit au moment de sa délivrance le respect par l'armateur de la réglementation à un instant donné, il est prévu des inspections entre la seconde et la troisième année de validité des certificats MLC afin de maintenir à niveau les pratiques « certifiées ». Toutefois, il n'est pas anodin de relever que la certification sociale, au regard la diversité des États de pavillon, n'est possible et réalisable qu'à la condition de l'existence d'une administration maritime forte, organisée et capable de mettre en musique des engagements pris au niveau international. Si en Europe la question est plus ou moins réglée grâce une intégration juridique significative largement portée par des mécanismes communautaires assurant une bonne pratique législative au travers des directives et règlements, il n'en est pas toujours de même dans le reste du

monde¹⁵. Dans ce contexte, le marin reste le meilleur défenseur de ses intérêts.

B. Le marin, meilleur défenseur de ses intérêts grâce à une meilleure régulation des pratiques sociales

L'homme est au cœur de l'expédition maritime. Les navires sont construits par des hommes et sont conduits, exploités et maintenus par des hommes. Ce sont eux qui, sous forme d'équipage, partent en mer avec pour première préoccupation la préservation de la vie humaine durant toute l'expédition. Toute la technologie employée à bord nécessite donc, pour son efficacité, un personnel qualifié mais également serein dans ses conditions d'emploi, de travail et de vie à bord. Le cadre particulier de travail et de vie que constitue le navire place les marins dans un environnement très différencié d'une entreprise classique terrestre.

Inéluctablement, la relation de subordination établie entre les marins, salariés de l'armateur et le capitaine, représentant à bord de l'armateur revêt un caractère extrêmement marqué et les situations d'abus de pouvoir, voire d'esclavagisme se produisent facilement en mer. De fait, plus encore que pour les salariés terrestres, la relation contractuelle entre armateur et marins doit être établie de manière rigoureuse et contrôlée. Le contrat d'engagement maritime, objet du titre 2 de la convention MLC 2006 permet de définir le périmètre de la prestation de travail en instaurant un cadre professionnel acceptable pour toutes les parties.

Au travers des quatorze (14) points couverts par la certification (âge minimum, certificat médical, qualification des gens de mer, contrats d'engagement maritime, recours à tout service de recrutement et de placement privé sous licence ou agréé ou réglementé, durée du travail et du repos, effectifs du navire, logement, installations de loisirs à bord, alimentation et service de table, santé et sécurité et prévention des accidents, soins médicaux à bord, procédures de plainte à bord, paiement des salaires), le marin et les gens de mer embarqués à bord de navires de commerce voient leurs droits renforcés à bien des égards.

Les pratiques sociales des armateurs, selon la MLC, sont régulées de plusieurs manières. L'une des premières obligations de l'armateur est de proposer un contrat d'engagement maritime écrit¹⁶ au marin. Le contrat doit intégrer un certain nombre de dispositions obligatoires (nom, prénom du travailleur, sa fonction, son âge, sa

15) Sur cette question lire CHARBONNEAU (A.), *La mise en œuvre de la Convention du travail maritime de l'OIT : Espoirs et Défis*, op. cit.

16) Cette obligation est reprise dans la réglementation française et plus précisément dans l'article L5542-3 du Code des transports de 2010. Cet article précise également les mentions obligatoires du contrat d'engagement maritime, en sus de celles imposées par le Code du travail français.

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rémunération, etc.). Il est signé par l'employeur¹⁷ et le salarié maritime, qui en conserve une copie originale.

Le travail, selon ce contrat, s'effectue à bord d'un navire qui dispose d'un certificat de conformité à la Convention sur le travail maritime et dont l'armateur a fait l'objet d'un audit de conformité sociale dont les domaines sont clairement spécifiés.

Il n'est pas inutile de relever que le contrat de travail est une des premières grilles de lecture d'un juge saisi d'un contentieux entre le marin et son employeur. Son contenu doit être suffisamment précis afin de définir l'exercice d'un travail décent dont l'équilibre doit se trouver entre la liberté contractuelle et l'ordre public de protection du marin. Ce n'est qu'à cette condition que le marin pourra se saisir des différents instruments mis à sa disposition par la convention MLC (procédure de plainte à bord ou à terre, exercice droit de retrait, etc.) pour défendre ses intérêts. Désormais, les normes de recrutement des marins sont également indirectement améliorées par la norme internationale. Avant l'entrée en vigueur de la MLC, une société d'armement, pour ne pas donner suite aux revendications du marin impayé, pouvait se retrancher derrière la mauvaise foi de la société de placement du marin qui, bien que désintéressée par ses soins, n'a pas rémunéré pour autant le marin. Aujourd'hui, l'armateur répond des manquements de la société de placement grâce à qui le marin est au service du bord : c'est une grande avancée au regard des diverses situations de détresse observées et recueillies par les associations de défense des intérêts des marins.

Dans une dynamique similaire de préservation et d'amélioration de l'environnement de travail, la MLC met un point saillant à la négociation collective au sein des entreprises maritimes. Régulièrement organisées, les concertations sociales, encore appelée « *safety meetings* », sont prévues par la norme A4.3, 2.d) de la Convention. Elles imposent des échanges sur les conditions de travail et de sécurité à bord et constituent ainsi l'amorce du dialogue social et la prise en compte des impératifs de toutes les parties. Il reste que la culture de la négociation collective, si elle est relativement bien établie dans les pays riches, a besoin d'être confortée dans d'autres populations.

S'agissant de la procédure de plainte, elle fait l'objet de la règle 5.1.5 de la MLC et constitue l'un des domaines du contrôle par l'État du Port. Elle permet au marin de pouvoir exprimer et solutionner des situations d'abus. Ceci présente une réelle nouveauté pour nombre de navires, alors qu'en France elle existait déjà. L'ancien système français de plainte de l'équipage nécessitait une démarche collective et

17) L'employeur peut être l'armateur ou bien une société de placement qui recrute le marin et le met à disposition de l'armateur.

écrite auprès de l'administration maritime. Avec la MLC, la procédure de plainte est désormais plus fluide et mieux protégée, avec l'obligation d'existence à bord d'une procédure identifiée et portée à la connaissance de tous les gens de mer, la possibilité de se faire accompagner ou de se faire représenter. C'est dire que le principe de réalité nous interpelle encore une fois sur les effets pervers de la mondialisation et sur la nécessité d'une amélioration continue de la certification sociale.

2. La certification, un dispositif à parfaire dans un marché du travail très ouvert

Par essence internationale, l'activité maritime s'est beaucoup développée et enrichie avec le libéralisme des affaires. En consacrant le principe de la libre immatriculation, le droit international de la mer n'est pas parvenu à imposer des sanctions quant aux abus de la complaisance. Malheureusement, les conditions de vie et de travail à bord des navires ont servi de variable d'ajustement lors de crises économiques ou tout simplement lorsqu'une société est en recherche de forts profits avec peu de dépenses de fonctionnement.

Aussi la certification n'a de véritable sens et n'est crédible que lorsqu'elle fait l'objet de contrôle par un organisme extérieur au processus de certification. Dans notre schéma, cet organisme est représenté par l'État du port qui va s'assurer de sa réalité.

Par la force des choses, le contrôle par l'État du port va être un relai à l'action de l'État du pavillon afin de maintenir à niveau les normes certifiées initialement et lutter efficacement contre la persistance des navires sous normes (A). Très vieille institution, les principes du PSC étaient déjà prévus dans la première Convention SOLAS de 1914 sur la sauvegarde de la vie humaine en mer¹⁸.

Dans ce dispositif, l'élément humain reste une question centrale avec la problématique de la formation des agents étatiques en charge du contrôle (B).

18) L'article 61 de la SOLAS de 1914 prévoit que « *Tout navire, muni du certificat de sécurité délivré par les fonctionnaires de l'État contractant dont il relève, est soumis, dans les ports des autres États contractants, au contrôle des fonctionnaires dûment commissionnés par les gouvernements, dans la mesure où ce contrôle a pour objet de s'assurer qu'il existe à bord un certificat de sécurité valable et, si cela est nécessaire, que les conditions de navigabilité sont remplies en principe conformément aux mentions dudit certificat, c'est-à-dire de telle manière que le navire puisse prendre la mer sans danger pour l'équipage et pour les passagers* ».

A. La persistance des navires sous normes

L'introduction de la certification par l'OIT est une avancée remarquable pour la facilitation du contrôle, notamment par l'État du port. Les 14 points soumis à certification sociale par la convention MLC forment le fondement du système d'inspection. Ce sont eux que les autorités de l'État du port peuvent contrôler pour en vérifier la conformité avec la MLC.

De manière générale, tout certificat qualifié d'international est probant et est reconnu de manière universelle dans tous les États. Un navire muni de ses certificats ne doit pas, en principe, faire l'objet de contrôles approfondis. Les autorités du port d'escale doivent faire, a priori, confiance aux mentions du certificat, sauf preuve du contraire : certificat jugé invalide ou frauduleux, ou bien si l'état du navire n'est visiblement pas en conformité avec les déclarations. Il convient de noter tout de même, qu'au moment de veiller au respect de la Convention du travail maritime, les autorités portuaires doivent s'assurer que les navires battant le pavillon d'un État qui n'a pas ratifié la MLC ne soient pas avantagés par rapport à ceux sous pavillon d'États l'ayant ratifiée. Il s'agit de la clause dite du traitement pas plus favorable, portée dans divers instruments juridiques.

Au titre de la MLC, les premiers contrôles par l'État du port ont été diligentés dans le cadre du Mémorandum de Paris (MoU *pour Memorandum of Understanding* selon la grammaire anglaise de Paris) ainsi que dans le Tokyo MoU en 2014. Des résultats, il ressort un certain nombre de déficiences dont les points saillants portaient, entre autres, sur l'existence et les irrégularités des contrats de travail à bord et la persistance de salaires impayés, des dispositions lacunaires dans la convention collective dans laquelle manquait la grille de salaire ou le nom du navire. En outre, il a été relevé que les marins ne disposaient pas d'argent, pas de dentifrice et que l'accès à des soins médicaux à terre avait été refusé de manière récurrente. Ces premiers cas de détention de navires dans le cadre de la mise en œuvre de la MLC démontrent, si besoin était, que la question sociale commence par le respect de dispositions simples. Le second constat est que même sous les pavillons ayant ratifié depuis longtemps la MLC, les pratiques notamment sur le temps de travail maximum autorisé ou le temps de repos minimal ne sont pas toujours conformes. On peut se poser la question de savoir si ces ratifications rapides n'avaient pas pour objectif d'offrir un affichage de bonne conduite sociale. Le navire est a priori protégé par un certificat officiel établi en bonne et due forme, lequel était une première garantie de bon ordre à bord et donc de facilités d'affrètement des navires. Le troisième constat est que les armateurs, employeurs des marins, devraient s'impliquer fortement.

Les mauvaises pratiques orchestrées par certains armateurs peu scrupuleux participent largement à la dégradation des conditions de travail des marins qui, selon les évaluations de l'International Chamber of Shipping (ICS) et du Baltic and Maritime International Council (BIMCO)¹⁹, représentent près d'1,4 million de salariés au service de l'industrie du transport maritime. On comprend aisément avec ce chiffre, les enjeux

liés à la réduction des coûts sociaux. Le phénomène est tel qu'une réflexion sur le sujet est en cours au niveau européen avec un projet de Directive qui peine à se mettre en place en l'absence de consensus avec les pays fournisseurs de main-d'œuvre. Ces derniers doivent veiller au respect de la Convention, en matière de recrutement, de placement, de sécurité sociale, vis-à-vis de leurs ressortissants nationaux et de leurs résidents, en mettant en place un système efficace d'inspection et de surveillance, qui doit conduire au contrôle des agences de *manning* (Règle 5.3). De fortes recommandations ont été faites dans ce sens par la Commission en charge de CEACR.

Des pays tels la Turquie ou la Chine où la population jeune est très nombreuse sont les nouveaux pourvoyeurs de main-d'œuvre maritime, en plus des traditionnels philippins, indiens et européens d'Europe centrale (Ukraine, Croatie, Pologne). Ils sont les premiers concernés par cette question au niveau international mais leur mobilisation tarde à se faire.

Il reste que pour réguler les pratiques sociales, il y a trois voies prévues par la MLC : le contrôle par le pavillon, celui par l'État du port et enfin, celui par l'équipage lui-même. L'action de l'équipage ou de ses représentants peut s'effectuer, a priori, à travers la négociation des conventions collectives. A posteriori, elle s'effectue après une réclamation ou une plainte, ou encore après accident si celui-ci fait l'objet d'une enquête.

Le contrôle par l'État du pavillon trouve ses limites dans la complaisance de certaines administrations. Le contrôle par l'État du port trouve quant à lui une limite d'application géographique, les accords d'entente administrative pour procéder à ce genre de contrôle étant par nature confinés à une région spécifique.

B. La question de la formation des agents étatiques en charge du contrôle

C'est une problématique centrale dont dépend largement la réussite du système de certification des navires. Toutes les réglementations internationales et communautaires veillent à ce que le personnel chargé de l'inspection au titre du pavillon ou dans le cadre du PSC possède la formation, les compétences, les pouvoirs, le statut et l'indépendance nécessaires à leur mission.

Conscient du fait que les inspections sont des outils importants pour une amélioration constante des différents aspects de la MLC et parce qu'il est important de s'assurer de l'effectivité de celle-ci au moyen d'un système d'inspection efficace par les États du pavillon, lui-même complété par un contrôle généralisé et harmonisé par l'État du

19) Voir site BIMCO suivant le lien www.bimco.org

port, le Bureau International du Travail (BIT) a publié en 2009 une série de Directives. La première destinée aux agents chargés du contrôle par l'État du port effectuant des inspections²⁰ et des Directives pour les inspections des États du pavillon²¹.

Le contrôle des navires, et pis encore des conditions de travail et de vie des équipages, semble être a priori un frein à l'action économique, dans un monde d'entrepreneurs. Pour peu que l'on souhaite du développement économique, il est tentant, sur le prétexte de la liberté d'entreprendre, de « laisser faire », « laisser aller » jusqu'à ce qu'un évènement grave se produise. En matière sociale, l'« accident » est l'arrêt de travail pour raison de sécurité, la grève, l'abandon du navire. L'arrêt de travail pour raison de sécurité peut être délivré aussi bien par l'autorité du pavillon arboré par le navire, qu'à l'occasion d'une escale dans un port étranger, par l'autorité en charge du contrôle par l'État du port.

La grève survient lorsque des droits fondamentaux sont bafoués. Pour les navires cela se traduit par un retard à l'appareillage de 24 heures, reconductible, car en mer, pour des raisons évidentes de sécurité de la navigation, il n'est pas question de ne pas assurer la navigation, donc le quart. Mais peut-on imaginer, de nos jours, qu'un porte-conteneurs géant soit bloqué à quai par 24 heures de retard à l'appareillage ? Ou encore retenu par un contrôle par l'État du port ? Ces situations sont absolument inconcevables pour les opérateurs qui ne comprendront pas que leur ligne commerciale et/ou leur modèle économique soi(en)t perturbés. Toutes ces problématiques avec leur lot de stress pour les agents en charge des différentes inspections doivent être prises en compte lors de leur formation. Malheureusement, la qualité des moyens humains ou matériels plus ou moins disparates dont disposent les différents États au niveau international a un impact direct sur la qualité des inspections menées. Toujours est-il que s'il est constaté que le navire présente des déficiences trop importantes et trop nombreuses, l'inspecteur en charge du contrôle a le pouvoir d'interdire son appareillage, tant que celles-ci ne sont pas rectifiées. Les journées d'immobilisation pèsent non seulement en charges supplémentaires mais font perdre les bénéfices que représente l'exploitation normale du navire opéré le plus souvent dans un contexte économique tendu. La détention au titre du contrôle par l'État du port peut mettre hors affrètement un navire (*off hire*) selon les clauses de la charte-partie. Si cette clause est insérée dans la charte-partie, elle devient cruciale pour l'amélioration des normes.

Par ailleurs, l'action de l'État du port est aussi soutenue par celle d'associations militantes qui disposent d'une influence importante dans le monde du shipping. L'exemple de l'International Transport Workers' Federation (ITF), association de syndicats de gens de mer et de personnel portuaire retient notre attention. Elle

20) Directives pour les agents chargés du contrôle par l'État du port. BIT, Genève, 2009, 82 pages.

21) Directives pour les inspections des États du pavillon, BIT, Genève, 2009, 81 pages.

regroupe environ 700 syndicats représentant 4,5 millions de travailleurs de la mer ou des ports. Elle a réussi à imposer à nombre d'armateurs l'« *ITF Blue Card* » ou l'« *ITF Blue Certificate* », qui est un engagement de l'armateur à respecter les grilles de salaires et les conditions d'emploi minimales édictées par l'organisation elle-même. Les navires dont le pavillon figure sur la liste des 34 pavillons de complaisance établie par l'ITF et qui ne sont pas couverts par la *Blue Card* se voient différer certains services de remorquage portuaire et se font plus facilement, voire systématiquement visiter par les inspecteurs encartés « ITF ».

Lorsque le navire fait relâche dans un port d'un pays à faible PIB, bien souvent l'administration est moins précise sur les conditions d'emploi des marins. Il y a souvent absence totale de contrôle. Dans les pays où les structures administratives sont très établies, il faut distinguer ceux dont les services de contrôle sont présents et actifs, des autres administrations. La portée et l'action du contrôle relèvent alors d'une volonté politique. Lorsque celle-ci est inexistante sur le plan social, l'action de l'International Transport Workers' Federation (ITF) revêt une importance majeure. Dans les pays où les politiques publiques prennent en compte justement le droit social, l'action de l'État se traduit par des procédures de contrôle bien établies. Or dans la pratique, l'ITF dans les pays qui assurent le contrôle étatique, comme globalement ceux qui sont membres du Mémorandum de Paris, réalise des contrôles en son nom, puis, le cas échéant déclenche l'action publique. Cela constitue-t-il de la compétition entre services « publics » et services « privés » de contrôle ? Telle est la question qui peut se poser. Il s'agit pour chaque acteur de respecter les compétences et l'action des autres. Mieux, il faudrait tendre vers une complémentarité des rôles et éviter toute concurrence. Chacun peut contribuer à la consolidation de normes sociales plus vertueuses, lesquelles participent largement à la conduite générale de l'expédition maritime dans de meilleures conditions de sécurité et de motivation.

Conclusion

Avec la certification sociale, la MLC qui vient en complément d'autres conventions internationales majeures, témoigne du consensus international sur les prescriptions minimales relatives aux conditions de travail et de vie des gens de mer à travers les mers du globe.

Une amélioration notable de leurs droits est à attendre dans les prochaines années même si des efforts conséquents sont encore nécessaires. Les États du pavillon et ceux du port doivent renforcer leurs législations nationales auxquelles renvoie la MLC dans le cadre de son application. Le manque de moyens de certains États est souvent teinté d'un laxisme contre lequel luttent bienheureusement les différentes associations de défense des droits des gens de mer au niveau international. Ce n'est qu'à ces conditions que la fébrilité de certains armateurs peu scrupuleux sera combattue et les bonnes pratiques des compagnies vertueuses récompensées.




CHAPTER 8


The Ship Master and the Maritime Labour Convention¹

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Abstract : *The Maritime Labour Convention, which entered into force on 20 August 2013, applies to all seafarers working on commercial vessels flying the flag of States which have ratified it. The Ship Master occupies a single position. As a seafarer, he is entitled to the protection of the Convention. As a master, he needs to ensure its implementation. This social function transpires from reading the convention, but is not expressly stated. It complements the nautical, commercial and public functions of the master. It may represent a substantive change in the responsibilities of the master.*



Résumé : *La Convention du Travail Maritime, entrée en vigueur qui est entrée en vigueur le 20 août 2013, s'applique à tous les gens de mer travaillant sur un navire commercial, battant le pavillon d'un Etat qui l'a ratifiée. Le capitaine de navire occupe une position unique. Comme un marin, il est soumis à la Convention. En tant que capitaine, il doit assurer sa mise en œuvre. Cette fonction sociale, qui transparait à la lecture de la convention, n'est expressément déclarée. Elle complète les fonctions nautiques, commerciales et publiques du capitaine. Elle dessine peut-être un changement de fond dans les responsabilités du capitaine.*

1) Article from the annual Confederation of European Shipmasters' Association Congress, CESMA / ACOMM, May 11, 2013, Maison de la Mer, Nantes, AFCAN, October 2014, <http://www.afcan.org/dossiers1.html>, *Droit Maritime Français*, 2015, n° 770, pp. 481-498.



VIII. The Ship master and the Maritime Labour Convention

The Maritime Labour Convention (MLC) is an International Labour Convention (ILO) established in 2006. It entered force on August 20, 2013 and stipulates the minimum requirements for seafarers to work².

It applies to all seafarers who work on commercial ships flying the flag of ratifying countries³. The Convention also applies to all ships flying non-member flags and entering the harbours of State parties.

Philosophy and challenges – The philosophy of the convention is set out in the preface. The objective was to "create a single and coherent instrument embodying as far as possible all up-to-date standards of existing international maritime labour Conventions and Recommendations, as well as the fundamental principles to be found in other international labour conventions"⁴. The objectives and challenges are not only social but also economical. The Convention seeks to contribute to improved commercial maritime trade. Unfair competition is the result of flags of convenience that allow these ships from avoiding to pay for costs generated from respecting international standards regarding navigation safety, maritime social law and low cost vessel chartering. If the later cannot be eliminated, they must be reduced. The first effects of the entry into force of the convention can already be observed. On September 5, 2013, the offshore Atlantic Carrier vessel flying the flag of Panama was detained in the Danish port of Esbjerg after the Port state conducted an inspection and found that the crew lacked employment contracts⁵.

Historical overview – This specific event cannot overshadow the twelve years it took to draft the convention⁶. The process began in 2001 by means of when of an agreement reached by the ILO Joint Maritime Commission. Working sessions were organized from 2001 to 2006⁷ and lead to the adoption of the Convention in Geneva

2) I. Christodoulou-Varotsi, "Critical Review of the Consolidated Maritime Labour Convention (2006) of the International Labour Organization: limitations and perspectives", *Journal of Maritime Law & Commerce*, Vol. 43, No. 4, Oct. 2012. 467-489; M. Marin and A. Charbonneau, "Une convention innovante pour le travail maritime? Les apports de la Convention du travail maritime (CTM) 2006", *Annuaire de Droit Maritime et Océanique*, University of Nantes, t. XXVII, 2009, pp. 445-469.

3) Art. II. 2 & 4, Definitions and scope of application, MLC, 2006.

4) Preamble, MLC, 2006. V. on the international sphere: A. Charbonneau, *Marché international du travail maritime, un cadre juridique en formation*, coll. "Berthold Goldman", PUAM, 2009.

5) <http://www.meretmarine.com/fr/content/une-premiere-detention-de-navire-au-titre-de-la-convention-mlc> - Convention du travail maritime. Première application, <http://blogs.univ-poitiers.fr/jp-pancracio/category/droit-de-la-mer-traites-gestion-des-oceans/> September 25, 2013.

6) M. Guillou-Marin, "Vers la reconnaissance d'un statut juridique international des gens de mer: le rapport préliminaire de convention du travail maritime consolidée", *Annuaire de Droit Maritime et Océanique*, University of Nantes, 2003, t. XXI. p. 225.

7) P. Chaumette, "La Convention OIT du travail maritime en mouvement", *Neptunus*, e-magazine, Vol. 17, 2011/3, <http://www.cdmo.univ-nantes.fr/>

with 314 votes and only 4 abstentions on February 2006. Its entry into force was subject to the following conditions: ratification of the convention by a minimum of 30 ILO Member States and representing at least 33 per cent of the world gross tonnage of ships, a delay of 12 months between the ratification and the entry into force. These conditions were fulfilled on August 20, 2012 and allowed the entry into force of the convention on August 20, 2013.

France ratified the Convention on November 29, 2012⁸, which led to a significant overhaul of the Code of Transport, in particular Book 5 regarding Seafarers⁹.

Architecture and content – The consolidation logic that guided the development of the convention allowed conserving the existing law while clarifying and consolidating it into a single document. The convention is organized into two parts. The first part is comprised of sixteen articles stipulating provisions and standards. The second part of the convention is called "Rules and Codes" and it is organized into five titles. The first four titles set out the minimum age requirements (Title 1), employment conditions (Title 2), Accommodation, Recreational Facilities, Food and Catering (Title 3), Health Protection, Medical Care, Welfare and Social Security (Title 4). Title 5 Compliance and Enforcement stipulates requirements for flag states and port states, and for the first time, labour agencies.

Each title is organized around three categories that address: requirements, standards and guidelines. The provisions in the convention are numerically divided up (1 for Title 1, 2 for Title 2 and so forth) while the standards and guidelines are alphabetized, and then numerical. Letter A identifies standards and Letter B the guidelines. Letters A and B are followed by the number 1 in Title 1. Letters A and B followed by the number 2 fall under Title 2 and so forth.

The provisions in the convention are of variable scope. Article VI "Standards and Guidelines of Code A and B" differentiates between the regulations, the standards and the guidelines. The regulations and standards (A) are of mandatory compliance. The regulations and standards are subject to direct applicability and cannot be ignored by signatory states. The mandatory compliance of the convention allows differentiating

8) Law No. 2012-1320, adopted on November 29, 2012 authorizing the ratification of ILO's Maritime Labour Convention, JO No. 0279 adopted on November 30, 2012.

9) Law No. 2013-431 adopted on May 28, 2013 regarding several provisions infrastructure and transportation services JO No. 0122 adopted on May 29, 2013, page 8794; Law No. 2013-619 adopted on July 16, 2013 regarding the adoption of EU law in the field of sustainable development (Title II – Provisions regarding transport, Chapter III: Provisions regarding the transposition of decree 2009/13/CE adopted by the Council on February 16, 2009 regarding the implementation of the agreement reached between EC shipowner associations and (ECSA) et the European Transport Federation (ETF) regarding the Maritime Labour Convention, 2006, and modifying instruction 1999/63/CE and regarding the modernization of seafarers social rights).

the guidelines (B). The guidelines act as a kind of call for action.

Issue – The rights were drafted for Seafarers, the largest maritime category. For the longest time, the ship master was responsible for recruiting the crew. The ship master was also the shipowner's proxy and his commercial role and as such he held a special position: he was dismissible ad num; he was a voter and eligible to be elected to the Commercial Court of France, without being a merchant. It was only in 1997 that the right to dismiss was applicable to ship masters¹⁰. *"In many countries ships' masters, and often engineers, are not considered 'seafarers' for propose of the application of hours of work or rest. During the negotiation to develop the MLC, 2006 many governments did not agree that the master should be covered by hours of work or rest provisions."*¹¹ *"The Convention changes the legal climate for the master. For the master, the MLC is a substantive step to consolidation the primacy and protection of the master in command and to bring about owners' cooperation with him in best command practices, often with the force of flag State law"*¹².

The ship master now falls within the category of seafarers. The application of the convention to this stakeholder who is a key player on a ship and the last to abandon it, should not pose any challenges. The ship master is a seafarer and unless he is self-employed, is employed by the shipowner or ship operator. That being said, the ship master is not a regular employee, he is a merchant navy officer and a leader. There are prerogatives attached to his rank of ship master¹³. They are independent from his duties of ship master, even if they are activated upon signing a maritime employment contract. Firstly, the ship master has nautical skills. He is the leader of a maritime expedition. He is the master of the vessel and thus ensures the nautical operation of the vessel and is responsible for the safety of the expedition. Secondly, the ship master has commercial skills. He is the shipowner's proxy. The ship master must see to the normal vessel operation. The ship master also represents the shipowner's commercial interests. Lastly, the ship master has public authority responsibilities. A vessel is an asset tied to a nationality and where a crew is recognized as a community of individuals. This means the ship master can act as a representative of the State and perform duties of a civil, public and ministry official. The ship master

10) P. Chaumette, "Du capitaine responsable de la préservation du navire, de sa cargaison et de la sécurité des personnes se trouvant à bord", *Annuaire de Droit Maritime et Océanique*, University of Nantes, t. XXVI, 2008, pp. 411-437.

11) M. McConnell, D. Devlin & Cl. Doumbia-Henry, *The Maritime Labour Convention*, Martinus Nijhoff Publishers, 2011, p. 308.

12) J. AC Cartner, "The Ship master and the Maritime Labour Convention 2006", in J. Lavelle, *The Maritime Labour Convention 2006 – International Labour Law Redefined*, Informa Law, Routledge, 2014, pp. 47-68.

13) A. Montas, "Capitaine : attributions et responsabilité", *Droits Maritimes*, J.-P. Beurier dir., Dalloz Action, 3rd Ed., 2014, Chapter 351 and "Droit pénal de la sécurité maritime", No. 381.21 and f.

can also take on a judicial role.

These responsibilities place the ship master at a crossroads of several rights, particularly those associated to shipowners and states and also contemplated by the convention. Individuals who exercise the role of a ship master are also holders of rights and responsibilities that apply to all seafarers. It also falls within the scope of maritime labour law. This combination of statuses raises several questions in regards to the convention. Is the ship master subject to the convention? Does the convention provide ship masters specific social responsibilities? Do these responsibilities place ship masters in a specific category? If the ship master is considered just a seafarer, how do labour rights address their specific roles? The convention does not provide any clarity on the ambivalent character of the ship master. This ambivalence brings to light two sets of observations. The first is with how the Maritime Labour Convention is applicable to ship masters (I) and the second is in regards to the content of the rights and responsibilities of the ship master (II).

I – Applying the convention to ship masters

The Maritime Labour Convention, like all regulations, created a legal space that governs the acts and/or facts entering this space. It should therefore be determined if the convention is applicable to ship masters and if it should set the boundaries of the created space (who and what does it affect and where the convention is applicable). However, determining the scope of the Maritime Labour Convention is not enough to determine if the convention is applicable to ship masters. The judicial nature of the convention as well as its structure, in particular the distinction made between mandatory and non-mandatory standards¹⁴, allow for various modes of implementation. Is it also necessary to address if the convention is applicable within the scope of the convention (A) and how it shall be implemented (B).

A – The scope of the convention

The scope of the Maritime Labour Convention is governed by Article II and in particular by Article II.2 and II.4. The first article addresses seafarers and does not address the situation of the ship master. The second article addresses vessels engaged in commercial activities. The following two cumulative conditions must be met for the convention to be applicable to ship masters: ship masters must belong to the category of seafarers (1) and serve aboard a commercial vessel (2).

¹⁴) Article VI. 1, Regulations and parts A and B of the code, MLC 2006.

1 – Ship masters belonging to the category of seafarers

The Maritime Labour Convention is applicable to all seafarers. Categories, for the purpose of the convention, that seem synonymous, refer to "individuals who are employed, engaged or working in any capacity on board a ship"¹⁵. The fact that ship masters belong to this category does not seem to pose any challenges. Ship masters are hired by shipowners —by means of a maritime labour agreement—to work aboard a vessel and manage it just like a company on land would be managed and ensure command of the ship. Ship masters thus work under the subordination of shipowners¹⁶. More broadly, the convention does not isolate ship masters in any particular manner. Ship masters are treated like any other seafarer and are entitled to the rights recognized by the convention. In addition, the convention provides that "measures shall be taken to ensure that clear information as to the conditions of their employment can be easily obtained on board by seafarers, including the ship's master, and that such information, including a copy of the seafarers' employment agreement, is also accessible for review by officers of a competent authority, including those in ports to be visited"¹⁷.

However, the incision "including the ship's mater" reveals the particularity of the ship master's position. The Maritime Labour Convention assigns social roles to the ship master, in particular in regards to health protection, occupational safety and accident prevention, which goes beyond his duties. These attributes are additional or are confused with the more traditional attributes associated to ship masters. The convention provides that ship masters can, in the same manner as a public officer, receive complaints on board regarding violations of the convention. Ship masters are also shipowners' proxies and this role is not well defined by the convention. Article II defines shipowners and also states that this role is multi-faceted. The term "shipowner" for the purpose of the convention means "the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility of the operation of the ship from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities imposed on shipowners in accordance with this Convention, regardless of whether any other organization or persons fulfil certain of the duties or responsibilities on behalf of the shipowner"¹⁸. Ship masters can thus be assigned a mandate with commercial powers.

15) Art. II, § 1 f, Convention, MLC 2006.

16) The situation was addressed by French law in the *Lamoricière case*: Cass. Civ. June 18, 1951, *Droit Maritime Français* 1951, p. 429 ; *Recueil Dalloz* 1951, p. 717, note G. Ripert.

17) Standard A2.1 d) – Maritime employment contract (Title 2 Employment conditions, MLC 2006).

18) Art. II j, Definition and scope of application, MLC.

These commercial, public and social powers do not preclude to maritime employment agreements. The fact that the ship master is autonomous when dictating vessel operations, managing crews, does not remove the relationship of subordination. The autonomy ship masters' exercise when fulfilling their responsibilities is not compatible with the figure of a salaried seafarer. Terrestrial labour law solutions are transferable to maritime labour laws. Ship masters are not regular workers. Within the meaning of terrestrial law, ship masters should be considered autonomous workers¹⁹ rather than to senior officers. Ship masters are autonomous when implementing shipowners' instructions but they do not participate in the management of the company, which is a criterion of eligibility to be considered a senior officer²⁰. Nonetheless, the convention is not applicable to all ship masters. It only governs ship masters working on vessels engaged in commercial activities.

2 – Working onboard commercial vessels

The Maritime Labour Convention applies to all ship masters and more generally to all seafarers working on vessels engaged in international shipping and commercial activities. Tonnage criterion is not a determining factor²¹.

Ship progress area – The convention applies to all ships which "do not navigate exclusively in inland waters or waters within, or closely adjacent to, sheltered waters or areas where port regulations apply". How should this negation be interpreted? Should it be based on the size of a ship and that ships only navigating in inland waters are exempt from international criteria? The convention does not expressly take into account this criterion. Should we then take into consideration the operating conditions of vessels and understand that concerned vessels are those navigating outside inland waters? If so, should this type of navigation be regular, timely or prospective so as not to be exclusive? This applies, for instance, to professional yachting. This type of navigation, although frequent, is not exclusively limited to inland waters. The convention allows a large number of vessels of being detained based on a negative criterion. If any doubt exists, the convention provides that "questions shall be answered by a competent national authority, after consultation with the concerned shipowners' and seafarers' organizations²². The question again

19) En ce sens : P. Chaumette, "Le Capitaine de navire : statut et responsabilités ; La voie pénale crée-t-elle des remous ?", Magazine: AFCAN, French Association of Ship Captains, April 2008, http://www.afcan.org/dossiers_juridiques/statut_cdt2.html

20) Cass. soc. January 31, 2012, Sté Bruno Saint-Hilaire c/ Mme R.Soc., Bull. civ. 2012, 45; Cass. soc., November 30, 2011, M. B. c/ SARL Vitauto and a., obs. B. Bossu, Criteria to identify quality by the executive management of *La Semaine Juridique Sociale*, JCP-S 2012, 1133.

21) B8, FAQ Maritime Labour Convention, 2006 (MLC2006), ILO, 2012.

22) B4. Which ships are governed by the MLC, 2006? Maritime Labour Convention, 2006 (MLC, 2006), FAQ Revised edition, 2012.

is should these vessels be engaged in commercial activities?

Commercial assignment to vessels – The convention applies to "vessels, whether publicly or privately owned, and ordinarily engaged in commercial activities". Although the commercial assignment criterion is determinative, it is not defined. This criterion applies to vessels transporting merchandise and people. 24-metre yachts should be included²³. Ship masters working on vessels engaged in other activities are not subject to the convention. The two different types of exclusion need to be differentiated. The first regarding warships and naval auxiliaries is absolute and does not withstand any exceptions. Personnel working on these types of vessels are excluded from the scope of the convention. The second type of exclusion, under specific conditions, can extend the scope of the convention to personnel that were initially excluded. It applies to ship masters working aboard vessels "engaged in fishing or in similar pursuits [...] and ships of traditional built such as dhows and junks". The Maritime Labour Convention can be extended to these types of seafarers if expressly provided by a provision. The choice remains with the state but remains under the control of the ILO²⁴.

B – Implementation of the convention

The implementation of the convention varies as its entry into force depends on State parties or seafarers. The Maritime Labour Convention is directly applicable to State parties. However, it does not seem to have the same effect on seafarers. In fact, the ship master, and more specifically seafarers, cannot take advantage of the rights recognized by the convention a priori contrary to shipowners. The convention is not directly applicable. It must be the subject of a national transposition law or equivalent measure²⁵. The ship master must (if he considers that the shipowner has violated his rights) assert national law. It is an important limitation to ensure the effectiveness of the convention²⁶. Some legal systems, such as that of France, allow limitations to be bypassed by recognizing a direct effect on international conventions. The effectiveness of seafarers' rights is directly linked to States complying with their obligations. It is thus necessary to focus first on the obligations of State parties (1) before addressing

23) B13. Is the MLC, 2006 applicable to yachts? MLC, 2006, FAQ Revised edition, 2012.

24) B5. When is a ship considered to be regularly engaged in commercial activities? MLC, 2006, FAQ Revised edition, 2012. – M. Bek, "Yachting and the Maritime Labour Convention 2006", in J. Lavelle, *The Maritime Labour Convention 2006 – International Labour Law Redefined*, Informa Law, Routledge, 2014, pp. 69-93.

25) A7. Is the MLC, 2006, directly applicable to shipowners and seafarers? FAQ MLC2006, ILO, 2012.

26) In regards to effective Ness: A. Charbonneau, "Le bien-être après l'adoption de la Convention du travail maritime consolidée (OIT) : quelles avancées pour quelles lacunes ?", *Neptunus*, Volume 12, 2006/4 e-magazine Vol. 12, 2006/4, <http://www.cdmo.univ-nantes.fr>

the rights of ship masters (2).

1 – State party obligations

In accordance with Article I.1 of the convention, all members who have ratified the convention must respect and implement the convention. This is a classic example of the principle *Pacta sunt servanda* where every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Compliance with the convention – State parties are free, except as otherwise provided in the convention, to choose legal instruments to incorporate the convention into their domestic legal systems, applicable collective conventions; practices or measures with the equivalent effect²⁷. The ILO manual "Maritime Labour Convention, 2006-Frequently asked questions" emphasises that each country is free to decide whether a specific provision in the Maritime Labour Convention, 2006, should be the subject of a law (such as a decree passed by Parliament or Congress), a rule or another subsidiary instrument such as an administrative instruction or an official notice from the maritime administration²⁸. There is thus no unity. The choice of which measure to implement is based on the legal system of each country²⁹. France decided to use legislation to incorporate Maritime Labour Convention provisions into their Code of Transportation.

This incorporation of MLC provisions trumps the alignment of national law the rights recognized by the convention. The convention imposes that Members satisfy that the provision of its law and regulations the fundamental rights it sets forth: freedom of association and the effective recognition of the right to collective bargaining; elimination of all forms of forced or compulsory labour; the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation³⁰. Members must, in the case of a discrepancy between the convention and national law, make the necessary amendments.

Applying the convention – The convention places the onus on Members to ensure the convention is respected. This obligation pertains firstly to vessels that fly its

27) Article IV. 5 Convention MLC, 2006. V. également : D. Fitzpatrick et M. Anderson, "International compliance and enforcement mechanism", in *Seafarers' Rights*, D. Fitzpatrick et M. Anderson, dir., Oxford University Press, 2005, p. 83.

28) A8. Quelles mesures un pays doit-il prendre pour garantir que la MLC, 2006, soit appliquée convenablement?

29) F. Wolf, "L'application des Conventions internationales du Travail par voie de conventions collectives", *Annuaire français de droit international*, volume 20, 1974. pp. 103-114.

http://www.persee.fr/web/revues/home/prescript/article/afdi_0066-3085_1974_num_20_1_2263

30) Art. III. MLC, 2006.

flag³¹. Although the convention allows State parties to choose their means of control, it forces them to ensure that "ships that fly its flag carry a maritime labour certificate and a declaration of maritime labour compliance"³². State parties can, if they believe the vessel falls within the scope of the convention, inspect a vessel flying the flag of a non-signatory country to ensure the vessel complies with requirements of the convention. These inspections can be conducted if the vessel falls within the scope of the convention and if it ship is in one of its ports³³. More generally, the convention requires that members ensure that "ships that fly the flag of any State that have not ratified the Convention do not receive more favourable treatment than the ships that fly the flag of any State that has ratified it"³⁴.

2 – The rights of ship masters

The Maritime Labour Convention sets up rights for seafarers. The convention does not specify, however, if ship masters can directly claim these rights or should they rely on national law implemented by the convention. In this regard, two situations must be differentiated. The first does not present any challenges as it involves ship masters of vessels that fly the flag of a State that has implemented a law or measure equivalent to the convention. The second situation is more complex as it involves ship masters working on ships that do not fly the flag of a State party, or ships that fly the flag of signatory countries but that have not implemented the convention. Could it not be said that since the vessel is navigating in French territorial waters, the ship master can claim the rights granted by the convention?

Based on the interpretation provided by the ILO, the convention does not directly apply to ship masters³⁵. This interpretation is debatable. It does seem illogical to conclude in the absence of direct effect when the convention seeks to consolidate a set of national rights which members can use against non-signatory states. There are two possible ways to bypass the later. The first can be done administratively as set out in the convention. Ship masters can put into play the procedure *complaint on board*³⁶. The complaint would lead to the State port conducting an inspection³⁷. The

31) Art. V.2, Implementation and Enforcement Responsibilities, MLC 206.

32) Art. V. 3, Implementation and Enforcement Responsibilities, MLC 206.

33) Art. V. 4, Implementation and Enforcement Responsibilities, MLC 206.

34) Art. V. 7, Implementation and Enforcement Responsibilities, MLC 206.

35) A7. Is the MLC 2006 directly applicable to shipowners, vessels and seafarers? FAQ MLC 2006, ILO, 2012.

36) *Standard A5.1.5 – Onboard complaint procedures.*

37) *Standard A5.1.4 point 5 – Inspection and enforcement:* "If a Member receives a complaint that seems clearly unfounded or acquires proof that a ship sailing under its flag is in violation of the provisions set forth in the Maritime Labour Convention, it shall undertake the necessary measures to investigate and address the shortcomings".

second is to undertake a judicial route, which would be more complex. *It is thus preferable to determine the provisions of the convention that would have a direct effect, if the authority of the judge is left aside.* The case law of the Social Chamber of the French Supreme Court and State Council would be an example. The Social Chamber ruled in 2006, without justification that "Article 1, Article 2, paragraph 2.b and article 11 of the International Labour Convention No. 158 regarding the termination of the employment relationship at the request of the employer is of direct application before national courts"³⁸. In a more recent ruling, the Social Chamber ruled that the first three articles in the ILC No. 180 regarding the length of seafarers' and ship personnel hours of work are self-executory. This decision is notable. The judges did in fact apply the convention during legal proceedings after it was ratified but before a decree was passed incorporating the instruction into the French legal system³⁹.

The Maritime Labour Convention could be the subject of a direct application in light of these rulings. On one hand the Social Chamber applies Convention No. 158 unconditionally. On the other hand, Convention No. 158 is more restrictive than the Maritime Labour Convention. ILO No. 158⁴⁰ imposes a complimentary act compared to the MLC⁴¹. For its part, the State Council deemed that the provisions of an international convention such as Article 6 of the ILC No. 97, adopted on July 1, 1948, regarding migration for employment "can be therefore evoked [...] when it creates rights individuals are entitled to exercise"⁴². It is subject to two requirements: The provision in question is recognized as a direct effect if on one hand "its sole purpose is not govern the relations among States" and on the other it "does not require the intervention of any complementary act to generate effects on individuals"⁴³.

38) Cass. soc., March 29, 2006, Sté Euromédia Télévision c/ Peter. Obs. R. Vatinet, Direct application of the ILC No. 158 before the national courts, *La Semaine Juridique- Sociale, JCP-S.*, 2006, No. 1427.

39) After referring to ILC No. 180 regarding seafarers' hours of work and the manning of ships, ratified on April 27, 2004 in their visa, and having established that the convention was adopted via decree No. 2004-1216 on November 8, 2004, as well as Articles 3, 4, 5 and 18-3, the Social Law Chamber of the French Supreme Court ruled that it follows that the first three articles are self-executory under domestic law on October 27, 2004—six months after the International Labour Office (ILO) registered said convention—that the hours of work for seafarers and other workers is technically eight hours per day with one day of rest per week, in addition to the rest days associated to bank holidays. When seafarers are on call, they must benefit from compensatory rest periods if the normal length of his rest is disturbed by calls": Cass. soc., January 23, 2013, obs. P. Chaumette, "Le temps de travail du capitaine de navire clarifié par l'effet direct de la convention numéro 180 de l'OIT", *Droit social* 2013, p. 287.

40) ILC No. 158 regarding involuntary termination of employment.

41) "The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations". Article 1, ILC No. 158 regarding involuntary termination of employment.

42) Cass. soc., March 29, 2006, op. cit.

43) Conseil d'Etat, CE, April 1, 2012, No. 322326, Gisti and a, Thibaut Fleury, *Conditions de l'effet direct des traités internationaux, Droit Administratif*, 2012, comm. 76.

The Maritime Labour Convention fulfils the first of the two conditions. The sole purpose of the MLC is not to govern relations among States but to ensure seafarers have the right to decent employment by establishing an international body of common law. As such, the convention contains precise and unconditional regulations. For example, Title 1.1 regarding the minimum age stipulates that no person under the minimum age can be employed, engaged or working aboard a vessel. The purpose of Title 2.1- Maritime employment contracts is to ensure that seafarers have 1) access to fair maritime employment agreements. The terms and conditions for employments of a seafarer are set out or referred to in a clear written, legally enforceable agreement and shall be consistent with the standards set out in the Code; and 2) the maritime employment agreement shall be agreed to by the seafarer under conditions which ensure that the seafarer has the opportunity to review and seek advice on the terms and conditions in the agreement and freely accepts them before signing.

However, the fulfilment of the second condition can be disputed. The convention provided that "unless otherwise specified in the convention, such implementation may be achieved through national laws or regulations through application collective agreements or through other measures or in practice"⁴⁴. The convention thus suggests, without imposing, transposition measures. In this regard, the convention shall not have a direct effect. Nevertheless, other provisions in the convention call to conclude in favour of the direct effect. The convention stipulates under *General Obligations* that each member who ratifies the Convention undertakes to give complete effect to its provisions in the manner set out in Article VI in order to secure the right of all seafarers to decent employment⁴⁵. Article VI, which is referred to by Article I, provides that the regulations and provisions of Part A of the Code are mandatory. The provisions of Part B of the Code are not mandatory⁴⁶. The convention would thus impose itself only by ratification and would be swept by this positioning. The MLC could be directly evoked by seafarers, especially the ship master since it grants him a set of rights and duties.

II – The content of the convention: the rights and duties of the ship master

The convention does not isolate the ship master in general terms. The ship master is considered a seafarer like any other, who benefits from the rights recognized by the convention to seafarers (A). However, the ship master is not a seafarer like the rest.

44) Art. IV, Seafarers' Employment and Social Rights.

45) Art. I, General Obligations, MLC 2006.

46) Art. VI, General Obligations, MLC 2006.

The convention sets out a series of rights and obligations stemming from common law (B).

A – The rights and duties of ship masters common to all seafarers: The ship master, a seafarer among others

The MLC was drafted with the view of consolidating a series of international maritime labour regulations and recommendations. It thus establishes a core of coherent regulations at the international level setting out the rights of seafarers in terms of employment, work and social protection. It constitutes as a response to the particular nature of maritime employment⁴⁷. Article IV stipulates that every seafarer has the right to a safe and secure workplace that complies with safety standards; to fair terms of employment; to decent working and living conditions on board ship; and to health protection, medical care, welfare measures and other forms of social protection. In this regard, the convention states the rights of seafarers in the manner of a code⁴⁸. This affects the conditions governing admission to the occupation of seafarer. Firstly, it governs the minimum requirements for seafarers such as age, medical fitness, training, qualifications, recruitment and placement. Secondly, it governs the terms and conditions of employment. The convention stipulates the minimum standards regarding maritime employment contracts, wages, length of working days, rest periods but also—and specific to seafarers—repatriation, compensation in the event a vessel is lost or foundered; career and skill development and employment opportunities. The convention also sets out standards regarding accommodation, recreational facilities as well as food and catering. Lastly, the convention stipulates requirements in terms of health protection, medical care, welfare and social security of seafarers. The convention also contemplates medical attention onboard ship and ashore as well as shipowner liability

The convention does not differentiate ship masters from seafarers in regards to employment, work and social protection rights. These rights are applicable to the category of seafarers and the ship master falls in this category. This precision would be superfluous but one exception should be pointed out. Standard A.2.1. d) stipulates "seafarers' employment agreement includes both seafarers and ship masters. It also provides that measures shall be taken to ensure that clear information as the conditions of their employment can be easily obtained on board by seafarers, including the ship's mater, and that such information, including a copy of the seafarers' employment agreement, is also accessible for review by officers of a competent authority, including

47) D. Fitzpatrick & M. Anderson, "International standards" in *Seafarers' Rights*, D. Fitzpatrick & M. Anderson dir., Oxford University Press, 2005, p. 39.

48) M. Marin & A. Charbonneau, "La convention du travail maritime 2006: vers une codification du droit du travail maritime international", *Droit Maritime Français*, 2007, pp. 110-116.

those in ports to be visited⁴⁹. The distinction is rooted in the fact that the ship master, even if he is a shipowner's proxy, is above all a salaried seafarer who operates under the direct authority of the shipowner. These functions, which are not be confused, indicate that the ship master is not a seafarer like the rest.

B – The rights and obligations of the master, the same as other sailors: The ship master, a seafarer unlike the restship mastership master

The ship master is not an ordinary seafarer who must provide a service like the other seafarers. There are specific skills linked to position of ship master. There are three conventional skills linked to the role of the ship master: nautical, commercial and public skills. The MLC completes these skills by allocating a series of social rights and responsibilities to the ship master⁵⁰. The only specific and distinctive right allocated to ship masters, as per stipulated in the convention, is his own private accommodations. The ship master shall have, in addition to their sleeping rooms, an adjoining room or equivalent additional space. The convention stipulates that this additional space may serve as a sitting room or an office⁵¹. The convention also stipulates under its main guidelines to provide separate mess rooms are to be provided to masters and officers when mess separate mess rooms facilities are provided to seafarers⁵². The rights regarding accommodation should not be interpreted as specific social rights. The spaces considered are not associated the right and respect to privacy. This public space is destined to allow the ship master to fulfil his different responsibilities, in particular social.

The ship master's social obligations

The convention provides the ship master a series of responsibilities. These responsibilities are not compiled under a single title, contrary to French Law, the ship master. They appear on a case by case basis in the regulations, standards and/or the guidelines stipulated in the convention. They should be referred to by adopting the manner by which they are referred to in the convention among the standards of mandatory compliance (Regulation and standard, Reference A) and the guidelines (guidelines, Reference B).

49) Standard A2.1 – Maritime employment agreement, MLC 2006.

50) J. AC Cartner, "The Ship master and the Maritime Labour Convention 2006", In J. Lavelle, *The Maritime Labour Convention 2006 – International Labour Law Redefined*, Informa Law, Routledge pp. 47-68.

51) Standard A3.1 § 9 m Accommodation and Leisure, MLC 2006.

52) "In the event different mess rooms are set up for seafarers, different mess rooms need to be set up for: a) the captain and officers; b) other ship personnel and seafarers." (Guideline: B3.1.6§ – Mess rooms B3.1 – Accommodation and recreational facilities).

Wages

The ship master is mentioned in regards to seafarer wages and his specific responsibility in regarding overtime. The convention does not assign regulations of mandatory compliance on the ship master. However, the convention sets out a guideline. The convention suggest that for the calculation and payment of overtime, records all overtime worked would be maintained by the master, or a person assigned by the master, and endorsed by the seafarer at no greater than monthly intervals⁵³.

Hours of work and hours of rest

This guideline should be correlated with the *Standard A2.3 – Hours of work and hours of rest* set out in Regulation 2.3–*Hours of work and hours of rest*. The ship master or a person authorized by the ship master and the seafarer are responsible for ensuring the records of seafarers' daily hours of work of rest are duly signed.⁵⁴ The ship master is responsible for maintaining records of hours worked. The ship master has a specific responsibility in this case. He is at a crossroads between the social rights of seafarers and the vessel's profitability imperative. Counting hours, including overtime, requires a rigorous management of count of working hours. Poor management of counted hours could cause disputes between seafarers and the shipowner, and could lead to the ship master being liable.

The issue is more sensitive because the ship master is responsible for the safety of the vessel and thus must take all the necessary measures to ensure the vessel reaches its destination. Therefore, the ship master has the right to require seafarers to perform any hours of work necessary for the immediate safety of the vessel, persons onboard, the cargo or for the purpose of providing assistance to other ships or persons in distress at sea. The ship master can also suspend the schedule of hours of work or hours of rest and require seafarers to perform any hours of work necessary until the normal situation has been restored. The ship master must ensure that seafarers receive adequate rest periods between assignments⁵⁵. The ship master exercises a discretionary power regarding social and economic imperatives. The convention emphasizes in fact that "nothing in this convention limits" the power the ship master has to require a seafarers to perform a safety-related duty.

Lastly, the convention provides a guideline for Young Seafarers. The guideline

53) Guideline B2.2.2 § 1, d) – Calculation and payment (Regulation 2.2 – Wages under Guideline B2.2 – Wages, MLC, 2006).

54) Standard A2.3 § 12 – Hours of work and hours of rest (Regulation 2.3 - Hours of work and hours of rest, MLC, 2006).

55) Standard A2.3 § 14 – Hours of work and hours of rest (Regulation 2.3 - Hours of work and hours of rest, MLC, 2006).

stipulates that the ship master must record hours of work and rest periods of young seafarers and the reasons for this exceptional situation⁵⁶.

Repatriation

Maritime employment has the particularity of keeping seafarers away from any furnished area and especially from their home. The right to repatriation is therefore an essential right which could almost be considered a fundamental right.

The convention refers to an agreement of repatriation that is struck between the seafarer and the ship master when seafarers put ashore in a foreign port for reasons for which they are not responsible and to remind members of the convention are responsible for ensuring repatriation of seafarers on ships that fly its flag. The convention does not state any particular obligation to the ship master. It is important to understand that should a seafarer be put ashore in a foreign port for reasons for which they are not responsible; ship masters can work with seafarers to decide on the landing port. This agreement could be subject of a control⁵⁷.

Accommodation, recreational facilities, food and catering⁵⁸

Accommodation – The ship master is assigned as the competent authority to inspect accommodations. These inspections are performed to ensure that seafarer accommodations are clean and decently habitable. Inspection periods are not stipulated though the convention refers to frequent inspections. It does not stipulate how the inspections are to be conducted, in particular to the presence of the seafarer(s) who occupy the unit. The inspection seems to be limited to its purpose and does not go beyond ensuring the good state of the unit. The ship master must record the results of each inspection⁵⁹. The ship master is also the competent authority responsible for ensuring the return of bedding and mess utensils should members consider applying the guideline set forth by the convention and inviting shipowners to supply seafarers with the abovementioned⁶⁰.

56) Guideline B2.3. § 3 – Young seafarers, (Regulation 2.3 - Hours of work and hours of rest, Guideline B2.3 – Hours of work and hours of rest, MLC, 2006).

57) Guideline B2.5.2 § 2, iii) – Implementation by members (Regulation 2.5 – Repatriation, Guideline B2.5 – Repatriation, MLC, 2006).

58) I. Christodoulou-Varotsi, "Les défis du bien-être des marins dans le nouveau contexte de la convention du travail maritime consolidée de l'OIT", *Annuaire de Droit Maritime et Océanique*, University of Nantes, t. XXV. 2007, pp. 141-156.

59) Standard A3.1 § 18– Accommodation and Recreational Facilities (Regulation 3.1 – Accommodation and Recreational Facilities, MLC, 2006).

60) Guideline B3.1.10 § 1 – Bedding, mess utensils and miscellaneous provisions (TITLE 3. Accommodation, recreational facilities, food and catering, Regulation 3.1 – Accommodation and recreational facilities, Guideline B3.1 – Accommodation and recreational facilities, MLC, 2006).

Food and catering – The ship master must ensure adequate supplies of food, drinking water and proper stocking of galleys and kitchens. The ship master is required to conduct "frequent documented inspections"⁶¹. This requirement has a direct impact on the health and wellbeing of seafarers as it affects essential elements. The target ensures collect up-to-date information on nutrition and on methods of purchasing, storing, preserving, cooking and serving food, and catering on board a ship⁶².

Health protection, medical care, welfare and social security

Ships are living spaces but also work spaces. In this respect, seafarers have the right (like any other worker) to the protection of their health. This protection is founded on risk prevention (occupational health and safety) coverage (medical care, welfare and social security). Shipowners are responsible for the general provision of such services. The convention in particular emphasizes that each member shall provide seafarers employed on the ships with a right to material assistance and support from the shipowner with respect to the financial consequences of sickness, injury or death occurring while they are serving under a seafarers' employment agreement or arising from their employment under such agreement⁶³.

However, the daily management of safety-, hygiene- and health-related events fall upon the ship master.

Medical attention on board ship and ashore – The ship master must record the medical care provided onboard ship and ashore in a standard medical report adopted by members⁶⁴.

Health and safety protection and accident prevention – It is probably in the area of health and safety protection and accident prevention (Standard A4.3) that the responsibilities of a ship master are more substantial. The convention specifies that the duties of the ship master take specific responsibility. This signifies the importance of the role of the ship master. However, the object of this responsibility seems strictly defined. It is not up to the ship master to implement the ship's occupational safety and health policy program⁶⁵. This obligation falls upon the shipowner. In this respect,

61) Standard A3.2 § 7– Food and catering (Regulation 3.2– Food and catering, MLC, 2006).

62) Guideline B3.2.1 § 1 – Inspection, education, research and publication (Guideline B3.2 –Food and catering, Regulation 3.2– Food and catering, MLC, 2006).

63) Regulation 4.2 – Shipowners Liability, MLC 2006.

64) Standard A4.1 § 2– Medical attention on board ship and ashore (Regulation 4.1 – Medical attention on board ship and ashore, MLC 2006).

65) Standard A4.3 § 2, c) – Health and Safety Protection and Accident Prevention (Standard A4.3 – Health and Safety Protection and Accident Prevention, Regulation 4.3, Health and Safety Protection and Accident Prevention, MLC, 2006).

it is unfortunate that the convention does not have a regulation concerning the liability of shipowners as such is the case for the protection of seafarers from financial consequences of sickness, injury or death as a result of their job. The convention allows Members to adopt the necessary measures which shipowners will have to comply with. However, the convention relies on the ship master to ensure compliance and it is up to the ship master to implement the decision adopted by the shipowner in regards to occupational health and safety. The shipowner takes on a secondary role. It could result in the ship master being held accountable for the shipowner's shortcomings. We understand as such that the ship master does have a special responsibility.

Maritime labour certificate and declaration of maritime labour compliance Regulation 5.1.3 – There is also another special responsibility that falls upon the ship master in regards to the maritime labour certificate and declaration of maritime labour compliance. This certificate attests that the working and living conditions on board the ship comply with the provisions set forth by national regulations and "14 points" subject to the certification. The ship master must be familiar with the requirement of the convention and the responsibilities for implementation even if it is an interim maritime labour certificate⁶⁶. The convention also states in a guideline that to ensure ongoing compliance should include general international requirements for ship masters keep themselves informed of the latest advances in technology and scientific findings concerning workplace design, taking into account the inherent dangers of seafarers' work, and to inform the seafarers accordingly, thereby guaranteeing a better level of protection of the seafarers' working and living conditions on board⁶⁷.

Inspection and Enforcement – Ship masters are not responsible for the implementation of the convention. This responsibility falls upon the members. Members must inspect and enforce the provisions set forth in the convention by putting the place inspection equipment to ensure the convention is respected⁶⁸. The convention also sets out that ship masters must receive a copy of the inspection report⁶⁹. In addition, the convention stipulates in the guidelines that inspectors should be empowered to question the ship master, seafarer or any other person, including the shipowner or the shipowner's representative⁷⁰ and inform the shipowner, the operator of the ship

66) Standard A5.1.3 § 7, c) – Maritime labour certificate and declaration of maritime labour compliance (Title 5. Compliance and Enforcement, MLC, 2006).

67) Guideline B5.1.3 § 3 – Maritime labour certificate and declaration of maritime labour compliance, (Title 5. Compliance and Enforcement, MLC, 2006).

68) Regulation 5.1.4 – Inspection and Enforcement; Standard A5.1.4 § 3 – Inspection and Enforcement (Title 5. Compliance and Enforcement, MLC, 2006).

69) Standard A5.1.4 § 12 – Inspection and Enforcement (Title 5. Compliance and Enforcement, MLC, 2006).

70) Guideline B5.1.4 § 8 a) – Inspection and Enforcement, (Title 5. Inspection and Enforcement, MLC, 2006).

or the master, deficiencies which may affect the health and safety of those on board ship⁷¹.

Potential and identified violations must also be brought to the attention of Members to ensure the effectiveness of these measures. The convention suggests, in one of the guidelines, to enable ship masters, seafarers or representatives of the seafarers to request an inspection when they consider it necessary. It would provide at least two advantages if it were implemented. Permanent controls are put in place by means of the ship master if they are empowered with the responsibility of determining if a violation was committed or not. Moreover, it legally protects the ship master from any potential recourse that could be filed by the employer⁷². This procedure should not be confused with the provisions set out regarding onboard complaint procedures.

Onboard complaint procedure – The convention states that seafarers can lodge complaints if they feel the convention is not being respected⁷³. In fact, the convention sets forth that seafarers can complain directly to the ship master and, where they consider it necessary, to appropriate external authorities⁷⁴. The onboard complaint procedure also recognizes that breaches of rights are often ‘invisible’ and unlikely to be identified during an inspection without a complaint from the seafarer⁷⁵. The ship master has a key role in the onboard complaint procedure⁷⁶. As a seafarer, the ship master will have no other choice but refer to an external authority. Standard A5.1.5 §4 stipulates that seafarers must be provided, in addition to a copy of their employment agreement, a copy of the on-board complaint procedures applicable on the ship. This shall include contact information for the competent authority in the flag State and, where different, in the seafarers’ country of residence, and the name of a person or persons on board the ship who can, on a confidential basis, provide seafarers with impartial advice on their complaint and otherwise assist them in following the complaint procedures available to them on board the ship. It is apparent that this Standard is very ambitious. Regulation 5.1.5 regarding onboard complaint procedures

71) Guideline B5.1.4 § 8 f) – Inspection and Enforcement (Title 5. Compliance and Enforcement, MLC, 2006).

72) Guideline B5.1.4 § 8 f) – Inspection and Enforcement (Title 5. Compliance and Enforcement, MLC, 2006).

73) Regulation 5.1.5 – Onboard complaint procedures (Title 5. Compliance and Enforcement, MLC, 2006).

74) V. regarding how onboard complaints are processed onshore: M. Marin and A. Charbonneau, "La convention du travail maritime 2006: traitement à terre des plaintes déposées par les gens de mer", *Annuaire de Droit Maritime et Océanique*, University of Nantes, t. XXV, p. 173 - J. AC Cartner, "The Ship master and the Maritime Labour Convention 2006", in J. Lavelle, *The Maritime Labour Convention 2006 – International Labour Law Redefined*, Informa Law, Routledge, 2014 p. 67.

75) M. McConnell, D. Devlin & Cl. Doumbia-Henry, *The Maritime Labour Convention*, Martinus Nijhoff Publishers, 2011, p. 543.

76) Standard A5.1.5 § 2– Onboard complaint procedures; Guideline B5.1.5 § 1, a) – Onboard complaint procedures (Title 5. Compliance and Enforcement, MLC, 2006).

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sets up in Paragraph 2 a "whistle blower" provision⁷⁷. The ship master will have to clear when he is lodging a complaint if he is lodging it as a ship master or as a seafarer⁷⁸.

Port state responsibilities⁷⁹ - The convention sets out that foreign vessels calling at a port of a Member state are subject to being inspected for the purpose of reviewing compliance with the requirements of this Convention. This responsibility falls upon Port states. The ship master of the foreign vessel does not have any specific responsibilities. However, the convention does stipulate that the ship master is to be immediately informed of any violations identified during the inspection and the prescribed deadlines for their rectification⁸⁰.

77) M. McConnell, D. Devlin & Cl. Dombia-Henry, *The Maritime Labour Convention*, Martinus Nijhoff Publishers, 2011, p. 545.

78) V. to illustrate challenges: P. Chaumette, "Le capitaine de navire et son pouvoir de représentation en justice", *Neptunus*, e-magazine, Vol. 11, 2005/3, <http://www.cdmo.univ-nantes.fr/>

79) I. Christodoulou-Varotsi, "Port state control of labour and social conditions: measures which can be taken by port states in keeping with international", *Annuaire de Droit Maritime et Océanique*, University of Nantes, t. XXI. 2003, p. 251.

80) A5.2.1 § 4– Inspections in port (Title 5. Compliance and Enforcement, MLC, 2006).



CHAPTER 9

The role of manning agencies or the seafarer's recruitment in the maritime employment market

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Résumé : Dans le cadre de l'éclatement de la fonction armatoriale, les sociétés de manning interviennent dans la gestion de la main-d'œuvre maritime, afin de fournir des équipages, de gérer les contrats d'engagement maritime, de rémunérer les gens de mer, parfois pour fournir et embaucher elles-mêmes les gens de mer et les mettre à la disposition de l'exploitant du navire. Les sociétés de manning sont parfois des ship managers, des exploitants de navires. La conférence maritime internationale et de la Baltique (BIMCO) propose deux contrats-type SHIPMAN (Standard Ship Management Agreement) et CREWMAN, centré sur l'équipage, distinguant Crewman A (Cost plus fee) pour le compte de l'exploitant du navire et Crewman B (lump sum) en son nom propre. L'encadrement des sociétés de manning hésite entre approche internationale et approches nationales. La convention du travail maritime de l'OIT de 2006, convention consolidée et universelle, constitue une base substantielle minimale. L'Union européenne n'a pu adopter, jusqu'à présent, une directive concernant les obligations des États fournisseurs de main-d'œuvre, liée à la mise en œuvre de la convention de l'OIT. L'Espagne fut le premier État membre de l'Union européenne à ratifier cette convention du travail maritime dès 2010 ; les agences de manning installées en Espagne ont été certifiées dans le cadre d'une procédure administrative formelle, sans lien avec la convention relative au travail maritime. La loi de 2014 sur la navigation maritime affirme la responsabilité solidaire des armateurs et des agences, installées en Espagne, qui recrutent des marins ressortissants nationaux ou résidents, pour des embarquements sous pavillon étranger. Dans un marché international du travail, la mise en œuvre effective de l'encadrement des sociétés de manning constitue évidemment un défi.



1. Introduction

The qualification as maritime companies of those acting as intermediaries for recruitment seafarers has become a problematic question. In fact, in this industry, the interposition of the employer figure is very frequent, existing agencies whose are involved in the signing of the maritime employment contracts, but they are not the receivers of the seafarers' work. Stated more clearly, in the maritime industry it is very habitual to found intermediaries specialised in the recruitment of seafarers who are then "granted" to provide services on board a ship operated by someone other than the one who has formally contracted the services and even different to the one who has actual ownership of the property. The purpose of these practices is not only to speed up the contracting in the maritime ambit, to which the ship owner was once directly dedicated, but, of course, to consciously reduce the labour costs of ship operation. It is clear that the end also achieved in this way is none other than the elusion of the final responsibility arising from the assuming of the condition of employer to the intermediary, who sometimes is but a fictional employer without the means to face any claims the seafarers may make¹.

In line with this issue, we must emphasise the *modus operandi* used for recruit seafarers, improved thanks to the possibilities provided by open registers², the existence of an absolutely globalised maritime employment market³, and "disinterest" from states in regulating the labour factor in maritime transport, aware of the indubitable role that this industrial sector offers in the framework of the global economy⁴. Various doctrinal works have been aimed at the study of this reality, focusing partially or wholly on the analysis of the organisations that act as intermediaries in the seafarers recruitment and their qualifications as employers from the legal perspective⁵, distinguishing between the shipping agencies⁶ on the one

1) In the same sense, on various occasions, see Meléndez Morillo–Velarde, L (2002), *La dimensión laboral del empresario maritime*, Ediciones Laborum, Murcia.

2) McCuskey, W.S (1998), "Registers and manning: How some compare", in AAVV, *Which register, which flag...now? Lloyd's Ship Manager, Shipping News International*, Lloyd's of London Press, inc. Essex House, New York, October 19-20. Also, Laguna Ibañez, F (1960), *A propósito del contrato de enrolamiento*, Instituto editorial Reus, Madrid, 20. Alonso Barcón, A (1978), *La condición obrera de los marinos mercantes. Aspectos sociológicos del trabajo en el mar*, Akal editorial, Madrid, 192 and ff.

3) Wu, B. and Winchester, N (2005), "Crew Study of seafarers: a methodological approach to the global labour market for seafarers", *Marine Policy*, 29, 323–330.

4) For a general description of this reality, vid. Dimitrova, N (2012), *Seafarers' rights in the globalized Maritime Industry*, Kluwer International, Netherlands, 12-14.

5) Bornaechea Fernández, J.I (1985), "Contrato de embarco entre trabajador español y armador extranjero, interviniendo consignataria española. Informe sobre la naturaleza jurídica y la legislación aplicable al contrato", *Relaciones Laborales*, vol. II, 805-815. Ruiz Soroa, J.M and Díaz Sánchez, J (1986), "Reflexiones sobre las banderas de conveniencia y el derecho marítimo y laboral español", *Anuario Derecho Maritime* vol. IV, 71 and ff. In a confused way with regard to employment questions, Górriz López, C (1998), "Análisis comparativo entre los Acuerdos-tipo *Shipman* para la gestión de

hand and the manning agencies on the other⁷. Regardless for the moment of the role played by shipping agencies, we will now focus on the manning agencies and the instruments that these companies use in the framework of intermediation in maritime labour in the world-wide context. I refer specifically to the ship management contracts, but above all, for their very high specialisation in this ambit in crew management contracts, given that these latter are dedicated to crews only while the former (ship managers) also undertake the technical management, commercial administration, ship operation and chartering as well as the recruitment of the ship's captain and crew. Despite the differences between the types of contracts mentioned, from the employment point of view it is true that both have the same question mark – to whom to channel a triangular relationship of this type from the legal point of view, since its purpose is to protect seafarers from the diversification of subjects in the ambit of their recruiting, contracting and later undertaking of services⁸.

buques, *Crewman*, para la gestión de la tripulación", *Anuario de Derecho Marítimo*, vol. XV, 421-451. More recently, and dedicating an entire chapter to this question, Meléndez Morillo-Velarde, L (2002), *La dimensión laboral del empresario marítimo*, Laborum, Murcia, 237–271.

6) On this specific aspect, among others, Orione, M (1995), "Brevi osservazioni sull'arruolamento di marittimi per il tramite dell'agente raccomandatario", *Il Diritto Marittimo*, vol. II, 159-160. Other works on the Italian doctrine can also be consulted in the work of Bevilacqua, S (2005), "Liberalizzazione e flessibilità del mercato del lavoro marittimo: le agenzie di lavoro e l'arruolamento dell'equipaggio", *Rivista di Diritto dell'economia, dei trasporti e dell'ambiente*, vol. III, 1-10.

7) Shipping agencies are organisations which in some cases act as intermediaries in the contracting of seafarers. They are individuals or companies that act on behalf of the ship owner –manager or charterer– who assist them in all the necessary legal acts –administrative, technical and commercial– as well as materials for dispatching the ship in the ports it visits [Gabaldón García, J.L and Ruiz Soroa (2002), *Manual de Derecho de la Navegación marítima*, Marcial Pons, Madrid, p. 379. Ruiz Soroa, J.M (1990), *Manual de Derecho Marítimo: El buque, el naviero, personal auxiliar*, Escuela de Administración Marítima, IVAP, Oñati, 123-124]. In principle, the functions of the ship's agent include the recruiting and contracting of the crew, although at the same time the statutes constituting these companies rarely refer to these activities. Despite this, personnel recruitment and contracting personnel who then provide services in the ambit of the organisation of the ship owner or ship manager is a widespread practice by ships' agents. The differences between manning agencies and agents is that a) manning agencies do specifically and formally recruit personnel; b) agents undertake more functions than manning agencies, such as, for example, the commercial management of the ship in port, which brings them close to ship management contracts; c) usually the ship does not visit the port in which the manning agency is located but it does where the agent is located; d) the purpose of the agent's activity is not only to recruit workers and sign embarkation contracts but also includes paying wages, determining holiday periods, giving orders relating to embarking and disembarking, etc, so that to the workers it has a wide range of powers belonging to the employment entrepreneur (but on behalf of the ship owner).

8) For a specific study of crew management agreements, see Díaz de la Rosa, A (2011), "*Los contratos de gestión de tripulaciones de buques. Crew Management Agreements*", La Ley, Madrid.

2. Crew administration agencies and crew manning agreements

As stated, crew administration agencies are trading organisations that act as intermediaries for recruiting seafarers in the shipping industry and, very especially, in the context of the open registers. These companies form part of the group of organisations that act in current maritime traffic as external ships' managers whose rise, heyday and later consolidation in the sector is due to diverse causes⁹. Generally, it can be said that their existence fulfils the need of shipping companies to adapt to current maritime navigation conditions, the complexity of which requires the ship owner to resort to third parties who, depending on their specialisation, undertake various aspects of ship management including, in this case, crew administration. In fact, the resort to companies that recruit and/or contract ships' crews is so frequent that these are not only well known in the sector but are easily accessible to ship owners¹⁰. In addition, and despite what one might think, they act almost without restriction by locating themselves in places that are the most convenient to them, normally in emerging maritime labour supply countries¹¹. It is therefore not strange that they have formed real world-wide networks where crew managers contact ship owners with the crew to provide services on the ships they operate or own.

The contractual relationship that connects the ship owner to the crew management company is through the signing of a manning agreement¹² through which the manager

9) The reasons for their appearance depend on each historic moment in which they arise and are developed. Thus, Rodríguez Docampo, M.J (2014), "*Contrato de gestión naval: criterios para la determinación del régimen jurídico*", doctoral thesis defended in the University of La Coruña, 2014, 23 and ff. This work can be consulted at www.ruc.udc.es/bitstream/2183/.../RodriguezDocampo_MariaJose_TD_2014.pdf

10) It is sufficient to enter the phrase "manning agencies" in Google for an idea of what the above is saying.

11) See for example, the situation in some Asian countries, Hawkings, J (2001), "Quality shipping in the Asia Pacific Region," *International Journal of Maritime Economics*, vol. 3, number 1, 79-101 and Zhao, M. and Amante, M.S.V (2005), "Chinese and Philippine seafarers: A race to the top of the bottom," *Modern Asian Studies*, vol. 39, number 3, 535-557. Taking into account that the predominant nationality in maritime labour is Philippine, we cannot fail to quote some works on the subject, such as Margatas, S.V.A (2003), *Philippine global seafarers: A profile*, Seafarers International Research Centre (SIRC), Cardiff. Also, Terry, W.C (2009), "Working on the water: On legal space and seafarer protection in the cruise industry," *Economic Geography* 85 (4), 463-482. Meanwhile, and to show the size of these practices in the Philippines, see the official Web site of that country's Department of Employment and Labour with the POEA agency (Philippine Overseas Employment Administration) which manages the expatriation of seafarers with that nationality. Recently, and in relation to the case of Vietnam, vid. Nguyen, T.T; Ghaderi, J; Caesar, L.D and Cahoon, S (2014), "Current Challenges in the Recruitment and retention of seafarers: An Industry Perspective from Vietnam," *The Asian Journal of Shipping Logistics*, vol. 30, number 2, 217-242.

12) On agencies acting as intermediaries for contracting seafarers, Martín Osante, J.M (2001), *La responsabilidad civil del naviero por abordaje*, Government of the Basque Country Central Publications Service, Vitoria-Gasteiz, 235-236.

commits to the owner to manage the crew in exchange for remuneration. With regard to the management of the crew and its contractual channelling, the parties resort to the so-called forms law¹³, that is, standard contracts that can be called "atypical" in that they are not covered by international law and their compliance is relegated to the strictly private ambit. This is because they are crew agreements created by the BIMCO (Baltic and International Maritime Council¹⁴) which, as such, is an international maritime association accredited as a non-governmental organisation with the United Nations. This organisation has created various contractual modes, notably including for our interests those dedicated to crew management. Originally, the first of these formulas created by the IMCO was the 1988 SHIPMAN agreement (Standard Ship Management Agreement), modified 10 years later, the latest edition of which is that of 2009. Originally, this agreement covered a wide range of commitments relating to the administration or management of the ship, including human resources. Indeed, as well as the obligation assumed in the management of crews, they are also dedicated to technical management (choice of the ship's maintenance inspectors, repairs, etc) or commercial management (services for chartering, insurance, accountancy, collaboration in the purchase and sale of the ship or bunkering). It was soon necessary to diversify the diverse types of management through other, more specific, instruments, creating the standard CREWMAN agreement in 1994, limited exclusively to crew management¹⁵. This last has been used by the ship owners exclusively either in combination with the previous one or excluding elements relating to the crew from the SHIPMAN agreement. As well as the purpose of the contract itself, the fundamental difference between the two agreements lies in the way in which the ship manager or crew manager relates to the crew or, to be more exact, in the way in which the managers exteriorise their position with the workers according to both agreements. So, while in the SHIPMAN agreement, the manager generally acts on behalf and in the name of the ship owner, in the CREWMAN Agreement, the administrator acts on behalf of the ship owner but in its own name¹⁶. In both cases, it must be remembered that the seafarer signs the maritime employment contract with the agency, thus producing the triangular relationship mentioned above.

Over time, the needs of the increasing specialisation in the outsourcing of crew management and its adapting to the new international regulations to be obeyed such as the ISM Code, led the BIMCO, as occurred with its Shipman counterpart, to create the CREWMAN A and CREWMAN B agreements, in force since 2009, which

13) See Boi, G.M (2008), *I contratti marittimi. La disciplina dei formulari*, Giuffrè, Milan, especially pp. 42–44 which speak of the CREWMAN A and CREWMAN B contracts.

14) <https://www.bimco.org>

15) Górriz López, C (1998), "Análisis comparativo entre los Acuerdos-tipo *Shipman* para la gestión de buques, *Crewman*, para la gestión de la tripulación", *Anuario de Derecho Marítimo*, vol. XV, 422.

16) Górriz Lopez, C (1998), "Análisis comparativo entre los Acuerdos-tipo *Shipman* para la gestión de buques, *Crewman...*, loc. cit. 435.

set the rules for the contractual relationships arising from the crew management contracts. In essence, the first pages of both instruments contain various mentions identifying the main elements of the contract so that for these purposes there is no discrepancy. However, according to their contents, they differ in the following aspects. Firstly, and as the most important aspect, in CREWMAN A, contracting is undertaken on behalf of the ship owner, compared to the CREWMAN B agreement where it is the manager who contracts the crew in its own name. In the standard CREWMAN A agreement, the manager, acting on behalf of the ship owner, assumes as an additional part of the contract the same obligations as in Shipman 98 with regard to the preparation of budgets and annual balance sheets and may also assume accountancy services as an addition to the contract, which does not occur in the CREWMAN B agreement. Likewise, in the former, insurance policies can be negotiated and contracted not only relating to the crew but of other types, something that does not occur in the CREWMAN B. Another difference between them relates to the way in which services are paid for. Not in vain is the CREWMAN A agreement called Cost plus fee, meaning that the ship owner pays a predetermined sum monthly and in advance, while in the case of CREWMAN B, a lump sum is paid, also monthly in advance, that covers all the costs of managing the contract. Finally, the non-compliance penalties are similar except for the amount to be paid. Not in vain must 10 times the annual sum be paid in CREWMAN A compared to CREWMAN B where the payment is six times the lump sum. In both cases, the manager is freed of all liability for the crew's acts or omissions unless there is evidence of these being due to the so-called fault in selecting.

Despite these differences, the typical obligation relating to the crew management is identical. Both involve:

- a) Selecting, contracting and managing the crew, including, when applicable, the negotiation of salaries, the negotiation of pensions, social security contributions, taxes and other obligatory concepts relating to their employment, payable in the state of residence of each crew member.
- b) Ensuring that the requirements of the flag state's legislation are complied with regarding the rank, qualifications and certificates of the crew as per the requirements of STCW95 and also employment regulations such as the crew's taxes and social insurance.
- c) Ensuring that all the crew members have passed a medical check-up by a qualified doctor (flag state requirements or other, higher, medical standards agreed with the ship owners).
- d) Ensuring that crew members work with a common language (as per the ISM Code and the ISG Code – international safety code), as well as a sufficient knowledge of English to carry out their work safely (multi-cultural crews).
- e) Ensuring that crews receive training in the ISM Code.
- f) Instructing the crew to obey all the reasonable orders of the ship owners or of

- the company, including orders relating to safety, and navigation, preventing pollution and protecting the environment.
- g) Ensuring that nobody sails without the prior consent of the ship owners and/or of the company.
 - h) Taking care of the crew's transport, including their repatriation.
 - i) Crew training.
 - j) Undertaking trade union negotiations.
 - k) If the company's policy on alcohol and drugs requires measures to be taken before the crew joins the ship, undertaking these measures.

It is thus possible to state that for the purpose of the contract, from the perspective of the obligations the manager assumes regarding the crew are very wide, which raises enormous questions regarding its qualification as an employer. In this sense, the fact that in CREWMAN A contracting is undertaken on behalf of the ship owner, compared to the CREWMAN B where, as we have stated, it is the manager that contracts the crew in its own name, has meant that from the perspective of the commercial law studies, the ship owner is considered –depending on the contents of the maritime employment contract¹⁷– as the real employer of the crew in CREWMAN

17) In fact, this is the posture of British courts, which although attaining a laudable objective from the employment law perspective, is based –in my judgement– on an excessive formalism by making the employer dependent on the ship owner as indicated in the seafarer's employment contract. In this sense, see the judgment handed down by the High Court of Justice Queen's Bench Division Commercial Court, *Ferryways v Associated British Ports* (2008) EWHC 225 (Comm), in a case in which a ship's officer was hit by a tug vehicle driven by an employee of a port operator to which the defendant had sub-contracted this activity, resulting in death. The ship's P&I Club paid the relevant compensations for death and the repatriation of the body to the family of the deceased seafarer. The plaintiff in this case, as the bareboat charterer of the ship and member of the insurer, tried to recover the amounts paid by suing the port operator. The question in this case was none other than to determine whether these sums were recoverable, which in turn depended on whether or not the plaintiff (bareboat charterer) was the employer of the deceased seafarer. In this case, the bareboat charterer had contracted the crew management and the ship's technical management separately. With regard to the personnel management contract, this had been signed with the agency Ambra Armatorial Limited Cyprus ("Ambra") using the BIMCO CREWMAN A agreement for the purpose. In virtue of the crew management contract between both companies, the plaintiff was classified as the owner while Ambra appeared as the crew manager. The definition of "company" in the document was, "*The owner of the vessel or any other organisation or person who has assumed the responsibility for the operation of the vessel from the owner and who, on assuming such responsibility, has agreed to take over all duties and responsibilities imposed by the ISM Code.*" In the maritime employment contract, the employer was Ambra and the employee, the deceased seafarer; that is, no reference is made to the bareboat charterer in the context of the employment contract. Despite these data, typical in this context, the British court argued that although it is sometimes excessively formalist, given that it did not analyse the exercising of power to direct, it reached the conclusion that the bareboat charterer was also the co-employer together with Ambra regarding the obligations and responsibilities arising from the employment relationship. Thus, the British court stated that, 1) although only Ambra appeared in the maritime employment contract as employer,

A, while in CREWMAN B, as far as the manager contracts in its own name, it will appear as employer for the crews. This distinction means that obviously the operators in the sector use and in fact is recommended to use the second of the standard agreements, above all the large ship owners needing large-scale labour supply. However, regardless of this doubly lucky manifestation giving rise to various theories being prepared from the commercial law perspective on the representation, agency and/or mandate for legally channelling a type of policy exempt from *ad hoc* regulation also, generally, in national rights¹⁸, the truth is that from the legal and labour law point of view the situation is not so simple, if I may say so. Indeed, for this branch of law, an employer is anyone who exercises and assumes the so-called power to direct the crew, regardless of the formal mechanism used by the intermediaries to avoid labour law's responsibilities in this context. One thing therefore seems clear, without prejudice to the parties or employers involved in recruiting seafarers trying to avoid appearing as employers through the type of agreement used, the truth is that from our perspective what is really important is who exercises the employer's powers to the seafarers.

there was no specific exclusion for imputing responsibilities to others; 2) the law applicable to the contract was the law of the flag, so that the judge considered that the legal regulations chosen were the more favourable to the charterer than to the crew agency, and 3) although the contract stated that in principle only Ambra could be considered as the beneficiary of the provision of the seafarer's services, in reality a detailed analysis of the clauses in the contract led to a different response – in particular, those relating to the procedure for resolving conflicts, the application of the company's code of conduct and its policy regarding safety management systems (SMS). In this sense, the judge understood that as the crew management agency was small, it was difficult for it to have sufficient personnel to carry out the conflict resolution procedures, that it had capacity to set up a code of conduct or that it could structure an SMS for each of its client's ships. The judge also considered whether the worker had previously provided services for any of the bareboat charterer's ships, which in fact happened. Not in vain did the maritime employment contract signed with Ambra date from 2005 and the seafarer has provided services for it from the start of 2003 through voyages contracts. Thus this judgment shows that, without prejudice to the contents of the maritime employment contract identifying the agency and not the principal as the employer, it was necessary to investigate beyond the formalities. It remains to be seen what would have occurred if the crew management agency had been larger and with greater capacity, to manage even technical questions.

18) At least in the Spanish case, since until the adoption of the Maritime Navigation Law in 2014, there was no specific regulation for this type of contract, which can now come under the standards in Title IV of the naval management contract, articles 314 and ff, the concept of which is, "*Through the naval management contract, a person undertakes in exchange for a remuneration, to manage on behalf of the ship owner all or some of the aspects involved in the operation of the ship. These aspects may refer to the commercial, nautical, employment or insurance management of the ship*".

3. How to handle crew management legally through manning agencies? Between an international regulation of minima and national legislative solutions

Given the above, it is not easy to respond from a juridical point of view to a challenge such as that of the intermediation of maritime labour in the globalised context. In this sense, the most appropriate would be that given any phenomenon on which capital is supported to evade the national legal and employment standards, one could also respond with an international regulation that could play in the same league and with the same intensity. To this end, and as is well known, the international organisation with competences in the matter is the ILO which, from its start, has been concerned precisely with the existence of manning agencies in the context of labour relations in general and especially in the maritime sector. In fact, one of the first regulatory actions carried out by this organisation was the adopting of the 1920 Convention 9 on the placement of seafarers¹⁹, later modified by Convention 179 of 1996²⁰ on the same question. From that time to date, the ILO has not ceased in its interest in the regulatory treatment of these intermediation activities, the latest contribution being, without looking further, in the Maritime Labour Convention (MLC 2006) in the context of the definitions, where according to article II, paragraph 1.h) MLC 2006, the seafarer recruitment and placement service must be understood as, any person, company, institution, agency or other organization, in the public or the private sector, which is engaged in recruiting seafarers on behalf of shipowners or placing seafarers with shipowners. While this is so, and although the process developed to date is praiseworthy, we cannot forget that this organisation's Conventions are but regulatory products subject to a consensus between the members of its tripartite composition, so that, as will be seen below, the regulation in MLC 2006 shows the difficulties of balancing the economic interests underlying this industrial sector with due protection for the workers in the sector in a question as ticklish as this.

3.1. The regulatory action of the ILO versus the contracting, placement and supply of maritime labour in MLC 2006

MLC 2006 is an important regulatory milestone at the international level in relation to seafarers' living and working conditions²¹. Specifically, and regarding seafarers'

19) Adopted on 10 July 1921 and came into force on 23 November 1921. ratifications number 41.

20) Adopted on 22 October 1996 and came into force on 22 April 2000. This Convention was ratified by only 10 states, Bulgaria, Croatia, Philippines, Finland, France, Ireland, Morocco, Nigeria, Norway and Russia.

21) On this particular, *inter alia*, Charbonneau, A (2009), *Marché International du travail maritime. Un cadre juridique en formation*, Presses Universitaires d'Aix-Marseille. Charbonneau, A. and Chaumette, P. (2010), "The ILO Maritime Labour Convention 2006 (MLC, 2006): An example of innovative normative

recruitment and placement, regulation, the contents of the convention can be considered as relatively complex. In this sense, in the text of the revised Convention, we must distinguish, firstly, the part that can be considered as the main core of the regulatory option of the ILO in the matter. Not in vain does Rule 1.4 (developed specifically in the A1.4 standard and recommendations in guideline B1.4) and also, albeit partially, Title V, establish a system of control and certification for the activity carried out by these intermediation agencies²², in what can be considered as a palpable proof and also hopeful of the attempts to set a level and limits through the actions of the states involved –flag, port and suppliers of maritime labour– relating to these formulas for elusion of employment responsibilities with regard to seafarers. Indeed, the revised Convention chooses to establish the requirements for certificates or licenses that each member state must require an issue to the manning agencies –above all the private ones– to operate in its territory as well as the possibility of controlling these agencies by the port state since the certification system includes this possibility through the inclusion in the maritime labour certificate and declaration of Maritime Labour Compliance (Appendices 5-I and 5-II) of the aspects relating to the recruitment and placement of seafarers. Together with both states, the responsibilities of the states supplying maritime labour are also associated in accordance with rule 5.3 of MLC 2006. The standard and guideline establish that the member states introduce effective systems for inspection and control as well as judicial procedures that guarantee compliance with the responsibilities relating to the supply of labour in accordance with the Convention. For these purposes, the states supplying labour are expected to ensure that the private seafarer contracting and placement services established in the member's territory and making seafarers available to a ship owner, regardless of its residence, duly comply with the terms of the employment agreements signed with the seafarers²³.

consolidation in a globalised sector", *European Labour Law Journal*, vol 1, number 3, 332–345. Chaumette, P. (2009), "El Convenio sobre el trabajo marítimo, cuarto pilar del Derecho internacional marítimo", *Revista del Ministerio de Trabajo e Inmigración* number 82, 65-76. Chaumette, P; Charbonneau, A and Proutière-Maulion, G (2010), "Les Conventions ILO sur le travail maritime de 2006 et 188 sur le travail à la pêche de 2007", Scritti in onore di Francesco Berlingieri, number sp. *Il Diritto Marittimo*, Genoa, 337–360. Charbonneau, A and Marin, M (2007), "La Convention du travail maritime 2006: vers une codification du droit du travail maritime international?" *Le Droit Maritime Français*, 110 and ff. Bollé, P. (2006), "La nouvelle convention sur le travail maritime: un instrument novateur", *Revista Internacional del Trabajo*, 157 and ff. Fotinopoulou Basurko, O (2006), *Algunos aspectos del Convenio refundido sobre trabajo marítimo de la OIT, 2006*, Government of the Basque Country Publications Service, Vitoria-Gasteiz. Doumbia-Henry, C (2004), "The Consolidated Maritime Labour Convention: A marriage of the traditional and the new" in *Les normes internationales du travail: un patrimoine pour l'avenir, Mélanges en l'honneur de Nicolas Valticos*, Geneva, ILO, 319 and ff.

22) On the system for certification in maritime transport and the difficulties relating to it in CTM 2006, consult Lefrançois, A (2011); *L'usage de la certification. Nouvelle approche de la sécurité dans les transports maritimes*, Presses Universitaires d'Aix-Marseille.

23) For more on the regulation in MLC 2006, McConnell, M.L; Devlin, D and Doumbia-Henry, C (2011), *The Maritime Labour Convention, 2006*, Martinus Nijhoff Publishers, Leiden-Boston, 261–273.

As can be seen, the Convention has apparently shown an interest only in regulating the activity of these agencies when they carry out mediation functions in the employment market, that is, only when their condition as public or private manning agencies can be determined, excluding any mention of the problems arising from classifying these agencies as true employers²⁴, a mention that is missing in the context of the definitions used in the international instruments that we are discussing. Indeed, as we have mentioned, considering that these agencies are not limited in their activity to putting the shipowners and seafarers in contact, it is possible that on more than one occasion they could be considered as employers, assuming the relevant responsibilities for the workers supplied to a maritime employer. From this perspective, it is true that it would be possible to appeal, nevertheless, to the amplitude in which MLC 2006 moves when defining the notion of ship owner. According to article II, section 1.j) of CTM 2006²⁵, this concept covers the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities imposed on shipowners in accordance with this Convention, regardless of whether any other organization or persons fulfil certain of the duties or responsibilities on behalf of the shipowner. Thus the definition of ship owner in the MLC is enormously positive since with it, the ILO sets minimum bases in substantive international regulation that allow employment and social security responsibilities to be imputed to any individual or organisation involved in the recruitment and placement of seafarers.

However, as can easily be deduced, the success of MLC 2006 with regard to the existence of these placement and contracting formulas will therefore depend on what the regulation of these agencies covers with respect to seafarers and with respect to the attributing of employment and social security responsibilities, to which the internal legislations of each state in the Convention are sensible to this reality, ordering –on the one hand– a system for certification and real and not exclusively formal control of these companies' activities and, on the other, of the inclusion –whether in general employment legislation or in maritime legislation when it exists– of regulations aimed if not to qualify these agencies as true maritime employers at least to impute the consequences in some regulations when the intermediation of maritime work occurs illegally, such as occurs in the Spanish case²⁶.

24) In the same sense, Ruiz Soroa, J.M (2006), "Las cuestiones laborales en el anteproyecto de ley general de la navegación marítima" en VVAA: *Cuestiones actuales de Derecho laboral marítimo*, Government of the Basque Country, Vitoria–Gasteiz, 107.

25) Following the notion of "company" used by the IMO, specifically in the SOLAS Convention on human safety at sea, 1974, as well as the defining elements described in article 1.1.c) of ILO Convention 179.

26) Indeed, in Spanish legislation, and especially in the 2014 Maritime Navigation Law (LNM), it avoids

That is, regulating the joint responsibility of the ship owner and the agency with regard to any employment non-compliances.

3.2. Which regulatory and case-law action in the European Union with respect to maritime manning agencies?

Until now we have been able to check the scope that the ILO regulations have on seafarer placement and contracting systems, which leave states with the true impulse to limit labour intermediation practices and to impose, when possible and feasible, the responsibilities in employment and social security matters to the employers involved in them. In line with the above, and remembering that the EU has adopted a firm position for member states to ratify and/or implement MLC 2006 in their respective internal legislations, I consider it timely to cover, albeit briefly, the role of this regional supra-national organisation on the specific matter although it should be noted that the EU regulations also do not appear to deviate at any moment from the path opened by the ILO in this sense. From this perspective, I consider it necessary and, without qualifications, to describe the position of the EU as schizophrenic since although on the one hand, it emphasises the enormous concern caused by the drop in maritime employment for EU crews in favour of the massive resort to seafarers from third countries²⁷, the existence of ship management companies (including those dedicated to crew management) is encouraged and protected by the extension of these taxation benefits on tonnage, as for maritime transport companies²⁸.

It is true that to obtain these advantages, not considered as state aid by the Commission itself²⁹, it is necessary –however– to comply with some requirements

considering crew management companies as true entrepreneurs for employment purposes. Despite this, however, we must acknowledge that the LNM (article 164.2 LNM) attributes joint responsibility to the agents and representatives of foreign ship owners who contract national or resident seafarers in Spain to provide services on foreign ships.

27) See, for example, the study by the European Commission (2011), *Study on EU Seafarers employment final report*, on the base of the contract tender MOVE/C1/2010/148/SI2.588190. Also, from the trade union perspective, see the report of the ETF prepared by Chaumette, P, Kahveci, E and Lillie, N (2011), *How to enhance training and recruitment in the shipping industry in Europe*, which shows that social dumping also exists even at the intra-community level with regard to this aspect. Not in vain are Poland and Romania emerging states for Maritime Labour supply compared to traditionally maritime states which are, on the other hand, "importers" of seafarers.

28) Communication from the Commission providing guidance on State aid to shipmanagement companies COM (2009/C 132/06), 11 June 2009. This communication notes the adhesion of Cyprus to the Community given that it is a country with the largest ship management sector in the world.

29) Following the line of the *Sloman Neptun* case, Joined cases C-72/91 and C-73/91, *Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG*. ECJ of 17 March 1993-I, pp. 887-937, gave the European instance the possibility of pronouncing on the compatibility of German legislation on the second registration of ships (GIS) with community law (article 117 EEC

such as, for example, that the ship management company has a connection with the economy of the Community, for which it must carry out its activity in the territory of one or several states and that most of the persons employed on board ships or in land activities have community nationality. However, the scope of the economic connection with the Community will depend on the tonnage controlled by these companies, in turn allowing them to operate in a decentralised way in third countries. Not in vain is the requirement that the management of ships be controlled from (and not in) the territory of the EU. Likewise, and with regard to crews, so that the managers can opt for these aids, it is necessary that these companies guarantee the application of MLC 2006 as well as –obviously– Directive 2009/13/EC³⁰, which incorporates the previous one into community law, noting that they must specifically comply with the dispositions relating to the agreement on the employment of seafarers, the loss or sinking of the ship, medical care, the ship owner's responsibility, including the payment of salary in the case of accident or illness and repatriation. As can be seen, it is relatively curious that nothing is said specifically on the compliance by these companies with the rules on the placement and recruitment of seafarers since, without prejudice to their not being regulated in Directive 2009/13/EC, they are in the contents of MLC 2006, which fully applies to the member states that have ratified it. This, however, should not surprise us since the reinforcing at the EU level of the standards on maritime work is carried out from an economic approach and, to be more exact, an essentially competitive one³¹, as well as taking into account the peculiar structure of the EU and its regulation system³², the ways of implementing MLC 2006 in Europe are occurring in a fragmented way in various community acts. These instruments, adopted in what is known as the Erika III packet, cover various questions that regulate the international instrument. However, and at the time these pages were written, the Directive relating to labour supplying responsibilities of States has yet to be adopted, accompanying the Directives on the responsibilities of the port state³³ and the flag

Treaty), as well as –mainly– whether the GIS regulation was compatible with the then article 92 EEC treaty. As is known, the ECJ interpreted –unlike the Commission's opinion– that the regulatory conflict on the maritime employment conflict with a non-community national established in the regulation that affects the GIS is perfectly compatible with the system of aids in article 92 ECC Treaty.

30) Directive 2009/13/CE of the Council, of 16 February 2009, by which the Agreement between the Association of European Community Shipowners Association (ECSA) and the European Federation of Transport Workers (ETF) on the Maritime Labor Convention 2006 and amending Directive 1999/63/EC.

31) This is affirmed without circumlocution in the Document COM (2006) 287 final, of 15 June 2006, on the strengthening of maritime labour standards in accordance with article 138, section 2 of the EC Treaty. This Communication gave rise to the adoption of Council Decision 2007/431/CE, of 7 June 2007, authorising Member States to ratify, in the interests of the European Community, the Maritime Labour Convention, 2006, of the International Labour Organisation (OJ L161, 22 June 2007).

32) Miranda Boto, J.M (2009), *Las competencias de la Comunidad Europea en materia social*, Aranzadi, Pamplona.

33) Directive 2013/38/EU of the European Parliament and of the Council of 12 August 2013 amending Directive 2009/16/EC on port State control Text with EEA relevance (OJ L218, 14 August 2013).

state³⁴ in complying with and controlling the application of MLC 2006, expected to be adopted in a still distant future³⁵. It is possible that the EU shows a certain lack of interest in adopting the standard described insofar as its member states are, with certain exceptions such as Poland and Romania, normally seafarers "importers" and that the control and inspection of the documents annexed to MLC 2006 (Maritime labour certificate and declaration of maritime labour compliance) these items include the question of the placement and recruitment of seafarers already form part of the user checks according to the contents and regulations in the respect of the various national legislations. However, it should not be forgotten that a good number of ship owners who contracts to these management companies are European and neither must we forget the fact that many ship managers are located in one of the member states, such as the specific case of Cyprus, without going further.

Neither is the jurisprudential vision especially encouraging in relation –already in this case– with the attribution of employment and social security responsibilities to the maritime labour intermediation agencies from the European perspective. Indeed, the famous Voogsgeerd case³⁶ partially confirms the bad omens regarding this question. Not in vain does it base its argument around the interpretation to be given to the conflict of law rule about place of business regulated in article 6.2.b) of Rome Convention and article 8.3 of Rome I, which –in my opinion– that is excessively formal, excluding from the consideration as employer for applicable legal purposes the factual question relating to who exercises the power of direction over seafarers. Stated more clearly, in this judgment –in debt to its Koelzsch³⁷ precedent– the ECJ leads to the understanding that the crew management agency and the ship owner concerned in the case could be considered as contracting establishments for the purposes of the standards as a function of what the maritime employment contract states formally, opening the door to a related demand only in the case in which it is shown that one of the two companies acted on behalf of the other³⁸, which happens

34) Directive 2013/54/EU of the European Parliament and of the Council of 20 November 2013 concerning certain flag State responsibilities for compliance with and enforcement of the Maritime Labour Convention, 2006 Text with EEA relevance (OJ L329, 10 December 2013).

35) Note in this sense, article 6.2 of Directive 2013/54/EU which states, "No later than 31 December 2018, the Commission shall submit a report to the European Parliament and to the Council on the implementation and application of Regulation 5.3 of MLC 2006 regarding labour-supplying responsibilities. If appropriate, the report may include proposals for measures to enhance living and working conditions in the maritime sector"

36) ECJ Judgment of 15 December 2011, in the Case C–384/10. For a critical commentary, which we also share, vid. Maestre Casas, P (2012): "El contrato de trabajo de marinos a bordo de buques mercantes (A propósito of the STJUE de 15 December 2011, Jan Voogsgeerd and Navimer SA, As. C–384/10)," *Cuadernos de Derecho Transnacional*, vol. 4, number 2, 322–341.

37) ECJ Judgment of 15 March 2011, Case C–29/10.

38) Note that the ECJ first declares that for the intermediary company to be taken into consideration it is necessary that it forms part of the main company structure. In this point, what it states –lightening this

in CREWMAN A but not when it is employed the CREWMAN B agreements discussed above. Thus, the ECJ will interpret this question excluding any analysis of whether or not there had been transfer of direction power³⁹. As a positive aspect, it must be said that at least the Luxemburg Court suggests that the consideration of business place of contracting could be imputed to both companies as long as there is an objective element that allows a real situation to be established that differs from that in the terms of the contract⁴⁰.

3.3. The role of the states in relation to the implementation of MLC 2006 in matters of seafarer placement and recruitment: the case of Spain.

Both by means of the conventional international instrument and by the path used by the EU, it is true that the success of the effectiveness of MLC 2006 depends on what

first opinion – is that it is possible to consider the intermediary as an establishment if it acts on behalf of another company. Thus, as Jault–Seseke (2012) says, "*Il est finalement à la lecture de l'intégralité de l'arrêt difficile de savoir si l'établissement d'une société tierce qui intervient dans le processus d'embauche alors même que cette société n'a pas la qualité d'employer.*" This author affirms that there would have been a little more clarity by the ECJ in the "Loi applicable aux salariés mobiles: la Cour de justice de l'Union Européenne poursuit son travail d'interprétation de l'article 6 of the Convention of Rome," *Revue de Droit de Travail*, 118.

39) On the particular, the General Advocate clarifies this position in the his opinion to the judgment. Indeed, sections 86 to 90 specifically state –as it could not be otherwise– that the exercising of power to direct constitutes a central part for considering existence of an employment relationship. Although this is so, and although the employer generally has the power to direct, its delegating of certain powers cannot be ruled out.

40) In this sense, Chaumette, P (1993). who tackles this problem, stating that "*S'il apparaît que les sociétés propriétaires des navires, gestionnaires commerciales des navires, gestionnaires des équipages sont imbriquées, quant à la composition de leur capital, quant aux dirigeants et managers, quant aux statuts ou avantages conventionnels du personnel sédentaire, il se peut qu'elles constituent un groupe de sociétés ou mieux encore une unité économique et sociale, c'est-à-dire une entreprise unique au delà des découpages obtenus par l'utilisation du droit des sociétés,*" en "Le marin à la recherche de son employeur", *Il Diritto Marittimo*, 173–174, especially, 164. Palao Moreno, G (2000), *Los grupos de empresas multinacionales y el contrato individual de trabajo*, Tirant lo Blanch editorial, Valencia, 169, states that to be able to apply the conflict of law rule contained in article 6.2.b) RC to these cases it would be for the company recruiting seafarers to actively intervene in contracting and that the ship owner group has a secondary establishment with a certain permanence in this place. Meanwhile, Prof. Carbone, who states that the application of article 6.2.b) RC or article 8.3 Rome I could be complex given the underlying reality in this industrial sector (generally favouring the applicability of the closest connection clause), does not hesitate in affirming that its operation would be feasible precisely taking into consideration certain real factors such as the establishment place coinciding with the place from which the ship is effectively used or not coinciding with the establishment in which the ship owner has its own decision or business place and/or activity centre. He also defends the possibility of applying this conflict of law criterion when the establishment coincides with the state of the ship's usual port (real and not administrative port) or with the operational bases located in the sense of North American jurisprudence in the Jones Act. In this sense, Carbone, S.M (2010), *Conflicts de lois en droit maritime*, L'Académie de Droit International de la Haye, 185-187.

purpose it regulates but, above all, on what effectively is done in each state member or part of mentioned international instruments. In this sense, I would like to describe what happened in Spain regarding this issue⁴¹. Not in vain do I consider that ours could be a "good" example of how, through the regulatory action of the states, we have managed to clean the facade somewhat but much remains to be done with regard to the foundations⁴². Thus, as is known, Spain was the first European state to ratify MLC 2006 in 2010, with its coming into force in August 2013, such that it is a standard that forms part of our internal legal system. Regarding crew management agencies, the relevant authorities certify all these agencies based in Spain in accordance with the international Convention. However, from the legal point of view, it must be said that the legal rule used to allow the certification of the activity of these companies is erroneous since it sweetens reality. Not in vain has Royal Decree 1796/2010, 30 December, regulating manning agencies⁴³, been used, the purpose of which is to adapt Spanish regulations to ILO Convention 181 on manning agencies which specifically excludes from its scope of applying article 2.2 to the recruiting and placement of seafarers, given the existence in this international organisation for specific Conventions on the matter. Without going into other important aspects⁴⁴,

41) It must be noted that the search for information on manning agencies and the national regulations existing on the matter, is enormously complicated given the opacity in which we often move and, in other cases, because MLC 2006 is still not in force in some ratifying countries such as Argentina, Bangladesh, Congo, Fiji, Gabon, Iran, Ireland, Kenya, the Lebanon, Maldives, Mauritius and Montenegro.

42) In this sense, and from a compiling of the data available on the Web site of the ILO itself in this respect, it could be said that we have found almost no variation with respect to the contents of MLC 2006 in national legislation is. This is the case of the Republic of the Marshall Islands (Standard 6 Marine Notice number 7-045-1 of the Maritime Administration Bureau), the Isle of Man (Maritime Labour Notice, 2012 which distinguishes between Employment Business, Employment Agency and Placement Business for the purposes of control and inspection), Norway (Notice of the maritime authority in this country), Malta (Arts. 17 to 19 Subsidiary legislation 234.51, developed in the Merchant Shipping Act – Cap. 234 and Merchant Shipping – MLC) Rules, 2013. LN 145, 2013), the Philippines (in this country, the regulation development and its access is simpler, distinguishing between Philippines embarked on foreign ships for maritime cabotage transport – Order 129 of the Department of Work and Employment 2013– or embarked on international transport ships – Order 130, 2013), Cyprus (Arts. 36 to 39 of Law 6 (III)/2012, The Maritime Labour Convention 2006 (Ratification) and for matters connected therewith Law of 2012), Panama (Article 16 Employment code of Panama in Cabinet Decree 252, 30 December 1971, modified in 1995 and, with regard to this matter, vid. Arts. 22 to 30 of Executive Decree number 84, 22 February 2013), Singapore (Note of the Singapore Maritime and Port authority. Circular number 16, 2012), Tuvalu (Marine Circular MC-8/2012/1), the Bahamas (information bulletin number 147), Australia (Marine Order 11 – Living and working conditions of vessels, 2013), Antigua and Barbuda (The Merchant shipping –maritime labour convention, 2006– Regulations, 2012. Statutory Instrument number 15, 2012. *Official Gazette* Vol. XXXII, number 41, 2 August) and Gibraltar (Subsidiary legislation 2013/120 made under s. 118 of the Gibraltar Merchant Shipping Act, 1993. Standard that in turn transposes 1999/63/EC and 2009/13/EC).

43) Official State Bulletin 318, 31 December 2010.

44) Such as if, for example, the activity of the manning agencies can be subjected and/or the ambit of the Spanish manning standard, given that "*Employment intermediation is the set of actions designed to put into contact the offers for employment with workers seeking employment for their placement.*"

this means that all the certificates issued in our country with regard to these agencies are void in law. As can be imagined, resulting from the above and the speed with which the certification has been carried out, it does not seem that the authorities have made an exhaustive control of the activities of these agencies. All this means that in our country, from the strictly formal point of view, they have complied with the requirements regarding the certification of these companies. What appears very incoherent with this situation is that then, when penalising what other countries do in this respect, we are more holy than the Pope. Indeed, Law 5/2000 on infringements and penalties of social order, reformed by Law 40/2006, regulating the citizen's statute abroad, describes "*The contracting of Spanish seafarers by the foreign ship owning companies carried out by persons or organisations not authorised by the employment authorities to carry out this task*" as a serious administrative infringement. Considering the complacency and permissiveness in which we move in this matter, there is always doubt as to what is to be done in practice. I greatly fear that the inspectors enabled in other states will be limited –because it is very graphical– to placing an X in the relevant box, confirming that everything is in order with regard to compliance with the minimum prescriptions in MLC 2006 and *vice versa*. This is a reality in a country such as Spain which although not in the best economic moment in its history, is at least a state with means to tackle, if it wished, the requirements involved in adapting international regulations to the content of this international Convention in general and with regard to the placement and recruitment of seafarers in particular. Evidently, and without wanting to be excessively pessimistic, it must be asked whether this occurs in the rest of the countries that have ratified the Convention for controlling and checking questions belonging to the intermediation of maritime labour. And in this case, I refer to any country, whether in its condition as flag, port or labour supplier state.

As a counterpoint to the above, it must be recognised that in Spain, our lead internal employment legislation is positive with regard to the imputing of joint responsibilities in employment and social security matters to those who intermediate in labour management, whether because the institute of legal ceding in article 43 of the Workers' Statute so states or whether it is specifically regulated in the 2014 Maritime Navigation Law in article 164.2 LNM on contracting crews, which states that *The agents or representatives of foreign ship owners who contract national or resident seafarers in*

Employment intermediation has the purpose of providing workers with employment that matches their properties and of facilitating employers with the most suitable workers for their requirements and needs". It seems difficult to sustain that all these companies (or even most of them) can be classified as mere placement agencies when the crew managers do not appear to carry out the employment intermediation activity in the strict sense, given that they do not match employment offers and demands, on the margin of the resulting legal business, but that the crew manager, as the direct representative of the maritime entrepreneur, participates in the signing of the employment contract but also covers the question of all employment aspects, greatly exceeding the functions attributed to a manning agency.

IX. The role of manning agencies or the seafarer's recruitment in the ...

Spain to provide services on foreign ships will be jointly responsible with the ship owner for complying with the contract signed⁴⁵.

4. Final reflection

Evidently, and as we have repeatedly stated until now, the success of MLC 2006 with regard to setting up a control and limits on crew management activities worldwide depends on how the national regulations of the countries supplying maritime labour and its receiving or importing countries are established for the purpose. It is to be hoped, to reach a real conclusion on what happens in a world as opaque as that of seafarer recruiting and placement, but after a reasonable time has elapsed we will know the true scope of the success of MLC 2006 in the matter in the various states.

45) *They are also obliged to take out financial insurance which provides compensations of a similar amount to those set in the Spanish social security review for cases of death, disability through accident and repatriation. The emigration authorities do not approve contracts signed that do not comply with this requirement.*






CHAPTER 10

Bilan et devenir d'une négociation collective internationale

L'action d'ITF dans le transport maritime

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Abstract: *The adoption and implementation of the ILO Maritime Labour Convention, 2006, developed as part of tripartism, led to a redefinition of international trade union action. The agreement does not solve the issue of remuneration of seafarers, nor really that of social protection. Collective agreements supported by ITF (Standard Agreement, Total Crew Cost (TCC) Agreement or International Bargaining Forum (IBF) Agreement) complete the ILO Convention. Social certification of ships as established by the Flag States with the support of competent companies is in line with the minimum provisions of the Convention. As it is controlled by the port States, does such a certification allow a true intervention of trade union inspectors, despite complaints procedures on board and onshore? International maritime transport, largely open to free registration of vessels, is under pressure from the International Federation, and is now framed by international and national standards. Since 2003, the evolution of the International Bargaining Forum agreement (IBF) has anticipated this transformation in the social dialogue with the Joint Negotiating Group (JNG). The negotiation and dispute settlement proceedings bind the social partners, so that Union inspectors may target ships that are not covered by the IBF agreement.*

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Résumé : *L'adoption et la mise en œuvre de la Convention du Travail Maritime de 2006 de l'OIT conduisent à redéfinir le rôle de l'action syndicale internationale dans ce secteur. La convention ne règle ni la question de la rémunération des gens de mer, ni vraiment celle de leur protection sociale. Les accords collectifs soutenus par ITF (Standard Agreement, Total Crew Cost (TCC) Agreement, ou International Bargaining Forum (IBF) Agreement), complètent la Convention de l'OIT. La certification sociale des navires conformes aux dispositions minimales de la Convention, élaborée par les États du pavillon avec le soutien des organisations habilitées, contrôlée par les États du port, laisse-t-elle une place à l'intervention des inspecteurs syndicaux, au regard des nouvelles procédures de plainte à bord et de plainte à terre ? Le transport maritime international, largement ouvert à la concurrence par la libre immatriculation des navires, a principalement été encadré sur le plan social par le biais d'accords conclus avec ITF et sous la pression de l'action syndicale. Depuis 2003, l'évolution de l'accord International Bargaining Forum (IBF) a anticipé cette transformation, dans le cadre du dialogue social avec le Joint Negotiating Group (JNG). La négociation et la procédure de règlement des différends lient les partenaires sociaux, de sorte que les inspecteurs syndicaux peuvent cibler les navires non couverts par l'accord IBF.*

X. Bilan et devenir d'une négociation collective internationale

Cette contribution s'appuie sur une précédente communication, dans laquelle nous avons abordé cette expérience particulière de négociation collective internationale sectorielle². Son objet porte sur les conséquences de l'adoption et de la mise en œuvre de l'accord *International Bargaining Forum* (IBF), conclu le 13 novembre 2003 entre la Fédération internationale des ouvriers du transport (ITF – International Transport Workers' Federation) et le Joint Negotiating Group (JNB), réunissant pour l'occasion 75 armateurs de 24 pays associés dans l'International Maritime Employers' Committee (IMEC) et les armateurs japonais, représentés par l'International Mariners Management Committee of Japan (IMMAJ).

Parfois désigné comme le « premier secteur économique réellement mondialisé »³, le transport maritime a connu de profondes mutations depuis la fin de la seconde guerre mondiale. Sur le plan juridique, suite aux mouvements de décolonisation et à la chute du mur de Berlin, de nombreux « nouveaux États maritimes » ont mis sur le marché leur pavillon⁴, offrant des conditions sociales et fiscales avantageuses d'exploitation des navires. L'exigence traditionnelle d'un lien substantiel⁵ entre le navire et le pavillon qu'il arbore, consistant en l'exercice effectif de prérogatives administratives et la convergence des nationalités entre pavillon, équipages et armateurs, semble privée d'effet, tellement la liberté d'immatriculation est ancrée dans les pratiques. Les compagnies maritimes sont engagées dans une concurrence exacerbée, amenant les États à remettre en cause les protections accordées aux marins par les législations nationales⁶. Sur le plan technique⁷, l'automatisation des navires et l'accélération des opérations de chargement/déchargement⁸ sont venues

2) Communication au 47^{ème} congrès de l'Association canadienne de relations industrielles (ACRI) et du Centre de recherche interuniversitaire sur la mondialisation et le travail (CRIMT), « Les systèmes de représentation au travail : à la mesure des réalités contemporaines », Université Laval, Québec, Canada, 16-18 juin 2010, parue in *Annuaire de Droit Maritime et Océanique*, t. XXIX, 2011, Université de Nantes, pp. 361-383. Cette communication reprenait certains développements d'une thèse de doctorat soutenue à l'Université de Nantes : CHARBONNEAU A., *Marché international du travail maritime - Un cadre juridique en formation*, Presses Universitaires d'Aix-Marseille (PUAM), coll. Berthold GOLDMAN, 2009.

3) BIT, Rapport I 1(A), *Adoption d'un instrument consolidé regroupant les normes du travail maritime*, Conférence internationale du travail, 94^e session (maritime), Genève, 2006, p. 11 ; ALDERTON T. et al., *The Global Seafarer. Living and working conditions in a globalized industry*, Genève, OIT, 2004.

4) Alors qu'à la création des Nations Unies, en 1945, 51 États en devinrent les membres « originaires », on décompte aujourd'hui 192 États membres (sources : <http://www.un.org/french/aboutun/annees.shtml>).

5) Les Conventions de Genève sur la haute mer, en 1958, puis de Montego Bay, en 1982, ont réaffirmé le droit des États à conférer leur pavillon à des navires avec lesquels ils entretiennent un « lien substantiel » ainsi que le principe de l'exercice de la juridiction pavillonnaire civile et pénale de l'État du pavillon.

6) Pour un panorama très complet de la situation actuelle : FITZPATRICK D. & ANDERSON M., *Seafarer's Rights*, Oxford University Press, 2005 ; voir aussi les études développées dans le cadre du Seafarers International Research Centre (SIRC) de l'Université de Cardiff : <http://www.sirc.cf.ac.uk/>.

7) LACOSTE R. et CARIU P., « Le transport maritime », in *Mare Economicum*, GUILLOTTEAU P. dir., Presses Universitaires de Rennes, PUR, 2008, pp. 319-359 - HESSE Ph.-J., « Histoire et sources des droits maritimes », *Droits maritimes*, BEURIER J.P. dir., Paris, Dalloz Action, 3^{ème} éd., 2014, pp. 17-67.

8) La conteneurisation est ici un phénomène central. Voir GUILLAUME J. (dir.), *Les transports maritimes*

réduire les effectifs embarqués et les durées d'escale. Les nouvelles infrastructures portuaires sont éloignées du centre des villes, ce qui, accentué par l'allongement des périodes de navigation, isole les marins et fragilise leur situation sur le plan social⁹. Le recours à des équipages multinationaux, justifié par le souci de limiter le coût d'armement du navire mais aussi par les règles internationales qui précisent les exigences de formation des marins¹⁰, participe au délitement de la « société du bord », organisée hiérarchiquement et lieu d'expression de solidarités.

Pourtant, les marins ont entretenu une capacité de mobilisation importante face à l'altération de leurs conditions d'embarquement. Sans prétendre ici envisager l'ensemble des facteurs d'émergence de cette solidarité professionnelle, plusieurs peuvent cependant être évoqués. En France, les gens de mer ont été au confluent de deux formes d'organisation favorisant l'apparition d'une identité commune et de collectifs pour la défense de leurs intérêts : d'une part, ils ont longtemps relevé d'un statut présentant un caractère public, obligatoire et protecteur¹¹ et, d'autre part, le marché national du travail maritime s'est historiquement organisé sous une forme corporatiste, conférant à la profession un contrôle dans l'accès à l'emploi¹².

La remise en cause de ce contexte pèse fortement sur l'action syndicale. Concernant ITF, la fédération syndicale internationale a ainsi tenté de construire les bases d'une

dans la mondialisation, Paris, L'Harmattan, 2008. Le conteneur ne peut être regardé seulement comme une simple modalité pratique du transport maritime de marchandise. Ce facteur technique va progressivement « normer » la gestion du trafic, au point d'instituer une valeur, l'E.V.P. (équivalent vingt pieds), qui agit comme une mesure comptable. Sur les relations entre normes comptables et normes sociales : JUBÉ S., *Droit social et normalisation comptable*, LGDJ, Paris, coll. Droit et Économie, préface LEMARCHAND Y. et SUPLOT A., 2011.

9) Alors que, dans la ville portuaire, les marins étaient en contact direct avec la population et les associations caritatives et syndicales concernées, ce lien se trouve distendu par l'éloignement des nouvelles zones portuaires.

10) La formation maritime dispensée dans les « États à tradition maritime » assure encore à leur main-d'œuvre nationale un accès privilégié à l'emploi, notamment aux fonctions d'officier à bord (passerelle et machines).

11) Afin de s'assurer d'une main-d'œuvre suffisante, la France a imposé à sa population maritime un service à bord des navires militaires, par voie d'inscription maritime. En contrepartie, les marins ont bénéficié d'une des premières formes de pension de retraite au travers de l'Établissement des invalides de la marine : se reporter, par exemple, à HESSE Ph.-J., « À la voile et à la rame », in BEURIER J.-P. (dir.), *Droits maritimes*, Paris, Dalloz, 2006, p. 38 et s.

12) Cette approche corporatiste du marché du travail « marine marchande » a été développée par PARADEISE C. et VOURC'H F., *Problèmes de régulation d'un marché du travail corporatiste : la marine marchande*, document dactylographié, 1982 ; voir aussi la synthèse de PARADEISE C., « La marine marchande française : un marché du travail fermé ? », *Revue française de sociologie*, 1984, p. 352 et s. Ces auteurs appréhendent comme corporatiste le « système occupationnel organisé sous une forme qui lui assure, en tant que système de négociation, la maîtrise de sa constitution et de sa reproduction ». Pour une étude plus récente : HONORÉ L., *Du métier à la carrière – Les officiers de la marine marchande*, Paris, EPU, Editions Publibook Université, 2010.

régulation articulée sur deux axes : d'une part, l'élaboration de normes unilatérales destinées à définir un socle statutaire minimal pour les marins et, d'autre part, la labellisation éthique des comportements pavillonnaires et, plus généralement, des professionnels investis sur ce secteur. À travers les campagnes de lutte contre les « pavillons de complaisance », ITF bénéficie d'une expérience unique, de près de 60 ans d'engagement syndical contre ce phénomène, aujourd'hui considéré comme une manifestation de la mondialisation. Tous les navires qui arborent un pavillon de complaisance doivent être couverts par une convention collective approuvée par l'ITF, signée conformément à cette politique.

Sur le plan normatif, la stratégie conduite par ITF consiste en la signature d'accords entre des syndicats nationaux de marins et des armateurs. Ces accords doivent se conformer à des conventions d'adhésion, élaborées directement par ITF. Le financement de l'action syndicale dépend largement des contributions que les armateurs s'engagent à verser lorsqu'ils concluent un accord avec un syndicat adhérent à ITF. La décision de procéder à une révision approfondie et systématique de la campagne contre les pavillons de complaisance a été prise au 41^{ème} Congrès de l'ITF tenu à Durban en août 2006 ; le résultat de cette révision a finalement été présenté au 42^{ème} Congrès de l'ITF à Mexico en août 2010¹³. Depuis 1998, le nombre d'inspecteurs ITF a quasiment doublé. L'accord IBF représente une évolution significative de ce point de vue. D'une approche unilatérale, syndicale, concrétisée par des conventions d'adhésion ouvertes aux armateurs, l'accord IBF pose les bases d'une responsabilité sociale organisée de manière paritaire, par le biais d'instruments dont le contenu a été négocié avec les armateurs (I).

Parallèlement à cet effort de régulation privée, le secteur a donné lieu à une initiative sans précédent de l'Organisation internationale du travail, avec l'adoption de la Convention du travail maritime, 2006 (MLC, 2006)¹⁴, soutenue par ITF. Le travail des gens de mer a, depuis les débuts de l'OIT, fait l'objet d'une attention particulière, aboutissant à la constitution d'un corpus d'environ soixante-dix conventions et recommandations internationales du travail maritime, dont les plus anciennes datent

13) « Politique de Mexico - Politique de l'ITF sur les conditions minimales appliquées à bord des navires marchands », novembre 2011, http://www.seafarerstrust.org/files/publications/FRA/32816/Mexico%20City%20Policy%202_fre.pdf

14) BOLLÉ P., « La nouvelle convention sur le travail maritime : un instrument novateur », *RIT*, 2006, p. 157 et s. ; DOUMBIA-HENRY Cl., "The Consolidated Maritime Labour Convention : A marriage of the traditional and the new", *Les normes internationales du travail : un patrimoine pour l'avenir, Mélanges en l'honneur de Nicolas VALTICOS*, Genève, OIT, 2004, p. 319 et s. ; FOTINOPOULOU BASURKO O., *Aspectos generales del Convenio refundido sobre el trabajo marítimo*, Gobierno Vasco, Departamento de Transportes y Obras Públicas, Vitoria-Gasteiz, 2006 - M. MCCONELL, D. DEVLIN & Cl. DOUMBIA-HENRY, *The Maritime Labour Convention*, Martinus Nijhoff Publishers, 2011 - LAVELLE J. *The Maritime Labour Convention 2006 – International Labour Law Redefined*, Informa Law, Routledge, 2014 - CARBALLO PIÑEIRO L., *International Maritime Labour Law*, International Max Planck Research School for Maritime Affairs at the University of Hamburg, n° 34, Springer, 2015.

de 1920. Or, ces normes entendaient répondre à des besoins spécifiques, concernant un ou plusieurs aspects particuliers de la relation de travail maritime, et le constat a finalement été dressé que cette fragmentation, assortie d'un très faible taux de ratification des instruments conventionnels¹⁵, nuisait considérablement à l'efficacité de l'action de l'OIT¹⁶. La MLC, 2006, est destinée, notamment depuis son entrée en vigueur¹⁷, à devenir le quatrième pilier de la réglementation internationale du secteur maritime, avec les 3 conventions de l'Organisation Maritime Internationale (OMI) que sont la convention SOLAS sur la sécurité et la sauvegarde de la vie humaine en mer, la Convention MARPOL sur la prévention de la pollution en mer, la Convention STCW relative aux brevets maritimes et à la veille à la passerelle, révisée en 1995. Il s'agit, pour l'OIT, de procéder à la consolidation des normes antérieures au sein d'un instrument unique, doté d'un système de contrôle efficace, d'un mode de révision souple et bénéficiant d'un taux de ratification comparable aux instruments de l'OMI¹⁸. La MLC, 2006, se veut ainsi être un complément, voire un correctif à une réglementation internationale jusqu'alors dominée par des considérations techniques, qui plaçaient le navire au centre de l'attention¹⁹.

Cette initiative internationale pose un problème de redéfinition du champ d'action syndicale international. En effet, il y a une réelle proximité entre les objectifs poursuivis par ITF, au travers de ses propres conventions ou de l'accord IBF, et ceux de la MLC, 2006. Il s'agit de combler un vide au plan international, à savoir l'édiction de règles minimales acceptées et appliquées dans l'ensemble du secteur. La coexistence de normes privées et publiques soulève le problème de la légitimité des conventions syndicales, dès lors que le navire sera certifié conforme à la MLC, 2006, et contrôlé par des inspections pratiquées sous la responsabilité de l'État du pavillon et de l'État du port, comme le prévoit la nouvelle convention de l'OIT. Avec l'adoption de la MLC, 2006, c'est donc la perspective d'une « publicisation » d'un espace privé de régulation qui se dessine et qui interroge l'avenir de l'action syndicale (II).

15) BIT, Rapport I 1(A), *Adoption d'un instrument consolidé regroupant les normes du travail maritime*, Conférence internationale du travail, 94^e session (maritime), 2006, Annexe B, p. 81 et s.

16) BIT, *Conséquences des changements structurels survenus dans le secteur maritime sur les conditions de vie et de travail des gens de mer*, Rapport soumis aux fins de discussion à la 29^{ème} session de Commission paritaire maritime, 2001.

17) L'entrée en vigueur est intervenue le 20 août 2013 à la suite de la ratification de 30 États membres représentant au total au moins 33% du tonnage mondial. En août 2015, 65 États ont ratifié la Convention, représentant 82 % de la flotte mondiale

18) GUILLOU-MARIN M., « Vers la reconnaissance d'un statut juridique international des gens de mer : le projet préliminaire de convention du travail maritime consolidée », *Annuaire de Droit Maritime et Océanique*, t. xxi, 2003, p. 225 et s.

19) Sur l'influence exercée par les normes de l'OMI sur l'adoption de la MLC, 2006, LEFRANÇOIS A., *L'usage de la certification, nouvelle approche de la sécurité dans les transports maritimes*, PUAM, Aix-en-Provence, collection Centre de Droit Maritime et des Transports, 2011.

1. Responsabiliser socialement le secteur du transport maritime

L'élaboration de normes constituant un socle de nature statutaire (B) et la labellisation éthique des comportements des différents acteurs impliqués (État, armateurs et compagnies maritimes) (A) participent à la diffusion d'un modèle de responsabilité sociale, qui tente aujourd'hui de dépasser les limites d'une approche unilatérale et conflictuelle, pour devenir paritaire et trouver une nouvelle légitimité.

A- Labelliser des conditions éthiques de travail

Les campagnes ITF contre la complaisance maritime²⁰ commencent au lendemain de la seconde guerre mondiale. Avec la revente de la flotte de guerre américaine, les armateurs sont entrés en recherche de conditions fiscales et sociales d'exercice de leur activité plus avantageuses que celles proposées par les pavillons des États à tradition maritime²¹. De nouveaux pavillons ont commencé à attirer les armateurs, constituant progressivement une première catégorie de pavillons qualifiés « de complaisance » par ITF, à savoir les « Panlibhon »²². En juillet 1948, lors du congrès d'Oslo, les représentants des marins et des dockers ont soumis une résolution commune condamnant ces pratiques et appelant au boycott des navires arborant de tels pavillons. S'ensuit une première campagne de blocages, avec la signature d'accords entre ITF et les armateurs, afin de garantir des conditions sociales minimales à bord et de prévenir les actions contre leurs navires. Le bilan de ces campagnes s'avèrera mitigé, avec des succès enregistrés mais aussi le constat que les pratiques complaisantes sont en constant développement. ITF bénéficie alors du soutien des États à tradition maritime, qui voient dans la complaisance la source d'une remise en cause de la puissance de leur flotte nationale.

En 1958, quatre journées d'action sont organisées à l'échelle mondiale avec, pour perspective, de montrer la capacité syndicale de boycottage des navires sous pavillons

20) Sur l'histoire des campagnes ITF contre les pavillons de complaisance : BOCZEK B. A., *Flags of convenience. An international legal study*, Cambridge, Harvard University Press, 1962, p. 62 et s. ; NORTHROP H. R. et ROWAN R. L., *The International Transport Workers' Federation and Flag of Convenience Shipping*, Philadelphia, Industrial Research Unit, University of Pennsylvania, 1993, p. 31 et s. ; ITF, *Solidarity, The First 100 years of the International Transport Workers' Federation*, Chicago, Pluto Press, 1996, p. 135 et s. ; LEWIS H., *The International Transport Workers' Federation (ITF), 1945-1965: an Organizational and Political Anatomy*, University of Warwick, Department of Sociology, 2003 ; ITF, *Campaign against flags of convenience and substandard shipping*, Annual report 2004, ainsi que le rapport *International Transport Worker's Federation, A Comprehensive Review of the ITF's FOC campaigns, From Oslo (1948) to Delhi (1998)*.

21) FITZPATRICK D. et ANDERSON M., *Seafarers' rights*, Oxford, Oxford University Press, 2005, p. 24 et s. - NIKOLAIEVA DIMITROVA D., *Seafarers' Rights in the Globalized Maritime Industry*, BLANPAIN R. Ed., Bulletin of Comparative Labour Relations, n° 75, Wolters Kluwer, Kluwer Law International, 2010.

22) Abréviation de Panama, Libéria, Honduras. En réalité, les deux premiers pavillons visés par les campagnes ITF étaient le Panama et le Honduras. Le Libéria les a rejoints quelques années après.

de complaisance n'étant couverts par aucun accord ITF. Ces journées constituent un coup d'éclat et représentent la première action coordonnée de cette ampleur initiée par une fédération syndicale internationale²³. En réaction, de nombreuses actions judiciaires vont être engagées contre ITF et ses affiliés dans les différents États touchés par le blocage. Progressivement, le regard des États à tradition maritime évolue et ITF subit les conséquences de la remise en cause des immunités syndicales en droit américain. La catégorie des pavillons de complaisance connaît, elle aussi, une importante mutation, ne désignant plus seulement des pavillons particuliers mais tout État proposant son immatriculation sans qu'il y ait convergence avec la nationalité ou l'établissement du propriétaire/exploitant du navire²⁴.

Les années soixante-dix et quatre-vingt prolongent cette période de luttes ciblées, débouchant régulièrement sur l'engagement de la responsabilité syndicale. Dorénavant, en partie justifié par la contrainte des crises pétrolières, le recours aux pavillons de complaisance devient le principe et l'immatriculation des navires sous « pavillon national » l'exception. Il n'y a pas de consensus au niveau des organisations syndicales nationales sur les finalités des campagnes de lutte contre la complaisance, en particulier concernant la question du salaire minimum²⁵. La fédération doit tenir compte, pour la détermination de la stratégie syndicale, de l'impact financier des actions en responsabilité qui la visent et qui reçoivent un accueil favorable auprès des juridictions britanniques. De ce point de vue, l'affirmation, pourtant considérée doctrinalement comme restrictive, du droit fondamental de mener une action collective, y compris le droit de grève, qui émane de l'arrêt Viking Line²⁶, a été initialement

23) Se pose, en arrière-plan, la question de l'intérêt des comparaisons sectorielles pour sortir d'une appréhension étroite du mouvement social international, fragmentée selon les domaines de compétence des Fédérations syndicales internationales. Sur l'histoire de ces secrétariats, devenus fédérations : RÜTTERS P., « Histoire et développement des secrétariats professionnels internationaux », in DEVIN G. (dir.), *Syndicalisme. Dimensions internationales*, La Garenne-Colombes, Éditions Européennes ÉRASME, 1990, p. 251 et s. et les différentes contributions à l'ouvrage de DESCOLONGES M. et SAINCY B., *Les nouveaux enjeux de la négociation sociale internationale*, Paris, Éditions La Découverte, 2006.

24) La définition habituellement mise en avant par ITF, adoptée en 1974, est la suivante : « sont considérés comme navires sous pavillon de complaisance les navires pour lesquels la propriété réelle et le contrôle se situent dans un pays autre que celui des pavillons sous lesquels ils sont immatriculés ».

25) Sur les oppositions des organisations nationales aux stratégies développées par ITF, en particulier en Inde : LILLIE N., "Global Collective Bargaining on Flag of Convenience Shipping", *British Journal of Industrial Relations*, Mars 2004, p. 47 et s.

26) CJCE, 11 décembre 2007, Viking Line ABP, aff. C-483/05 et CJCE, 18 décembre 2007, Laval, aff. C-341/05 : DORSSEMONT F., JASPERS T. et VAN HOEK A. (dir.), *Cross-border collective actions in Europe : a legal challenge – A study of the Legal Aspects of Transnational Collective Actions from a Labour Law and Private International Law Perspective*, Oxford, Intersentia, Antwerpen, 2007 ; CHAUMETTE P., « Les actions collectives syndicales dans le maillage des libertés communautaires des entreprises », *Droit social*, 2008, p. 210 et s. ; ROBIN-OLIVIER S. et PATAUT E., « Europe sociale ou Europe économique (à propos des affaires Viking et Laval) », *Revue de Droit du Travail*, 2008, p. 80 et s. ; BÜCKER A. & WARNECK W., *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert*, Baden Baden, Nomos, 2010.

saluée comme un progrès par ITF, qui se trouvait directement impliquée dans cette affaire et poursuivie devant les juridictions londonniennes, lieu de son siège social²⁷.

Dans la période récente, outre la promotion de normes syndicales unilatérales et bilatérales, ITF a continué ses campagnes de dénonciation médiatique de la complaisance, d'information et de défense des droits des marins. Le nombre de marins engagés dans le respect des normes ITF va croître nettement dans les années 1990, en particulier pour les navires battant pavillons de complaisance. Le réseau des inspecteurs ITF s'étoffe et se professionnalise²⁸, pour couvrir très largement le trafic international. Le soutien d'ITF à l'adoption et à la ratification de la MLC, 2006, ainsi que la défense des droits des gens de mer dans le cadre de la mise en œuvre du Code ISPS de sûreté des navires et des installations portuaires²⁹ sont aussi considérés sous l'angle de la lutte contre les conséquences sociales de la complaisance³⁰.

Pour mener à bien cette lutte contre les pavillons de complaisance, ITF s'est dotée de moyens institutionnels et financiers³¹. Dès 1948, les sections gens de mer et dockers vont créer une entité commune en charge de coordonner les luttes syndicales, désignée aujourd'hui « Département spécial des gens de mer ». La définition des conditions éthiques de navigation sous pavillon de complaisance, acceptables syndicalement, relève d'un Fair Practice Committee (comité des pratiques équitables)³². Confrontée à des actions en responsabilité et à des besoins en matière de soutien aux personnes impliquées dans un blocage, ITF a séparé un « Welfare fund » de son compte général, l'alimentant par les contributions des armateurs qui

27) Se reporter au communiqué de presse du 11 décembre 2007. David COCKROFT, Secrétaire général d'ITF, y précise que : "We welcome the Court's assertion that the right to take collective action - including the right to strike - is a fundamental right which forms an integral part of the general principles of Community law. As particularly laid out in paragraphs 43, 44 and 77 of its judgement the Court has indicated that the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the free movement rights. The devil's in the detail and it's now up to the Court of Appeal to apply this guidance to the particular facts of this case. (...)". Cette position a, par la suite, évolué à mesure que la CJCE rendait ses arrêts Laval, Rüffert et Commission c/ Luxembourg : cf. le *Report on activities 2006-2009/Organising Globally*, § 39, ITF 42^{ème} Congrès, Mexico, 5-12 août 2010. L'approche de la CJCE semble aujourd'hui remise en cause par la commission d'experts de l'OIT pour l'application des conventions et recommandations internationales du travail : LAULOM S., « Les arrêts Viking et Laval : et après ? », *Droit ouvrier*, 2010, p. 570 et s.

28) LILLIE N., "Union Networks and Global Unionism in Maritime Shipping", *Industrial Relations*, Vol. 60, n° 1, 2005, p. 88 et s.

29) Le Code ISPS a été adopté sous l'égide de l'OMI consécutivement aux attentats de New York du 11 septembre 2001.

30) ITF, *Campaign against flags of convenience and substandard shipping*, Annual report 2004, p. 5 et s.

31) NORTHROP H. R. et ROWAN R. L., *op. cit.*, 1993, p. 3 et s. et 135 et s.

32) Sur la composition du Fair Practice Committee : LILLIE N., "Global Collective Bargaining on Flag of Convenience Shipping", *British Journal of Industrial Relations*, Mars 2004, p. 47 et s.

sont versées lors de la conclusion d'une convention avec un syndicat affilié à la fédération. Afin de distinguer les actions syndicales des actions menées en matière de bien-être, le Welfare Fund finance un fonds particulier, le « ITF Seafarers' Trust »³³, qui a notamment joué un grand rôle dans l'émergence et le développement des foyers d'accueil en France, Seamen's clubs, dédiés à l'accueil et au bien-être portuaire des marins de toutes les nationalités sur les lieux d'escale des navires³⁴. Ces associations ont été directement impliquées dans la prise en charge des équipages abandonnés par les armateurs, qui cessent alors de payer les salaires et d'avitailier le navire. Le « ITF Seafarers' Trust » participe donc au financement des activités de bien-être des gens de mer et, ce faisant, il structure un réseau associatif relais pour l'information syndicale et, à son tour, source d'informations pour les inspecteurs ITF en charge du suivi de l'application des normes syndicales.

À travers la référence aux pavillons de complaisance, ITF s'est donc engagée dans la dénonciation des pratiques d'immatriculation des navires auprès d'administrations maritimes qui n'entretiennent aucun lien substantiel avec eux. Au regard de son approche de ce que devraient être les conditions d'attribution d'un pavillon, ITF poursuit une logique de reconstitution de l'unité entre les nationalités des marins, du propriétaire et de l'exploitant du navire pour le rattachement à une loi sociale applicable à l'ensemble de l'équipage. Les conventions ITF présentent, en ce sens, une ambition statutaire en ce qu'elles concourent à l'unité du traitement social de l'équipage, malgré le fait accompli des équipages multinationaux et l'organisation du transport international sous des formes complexes et peu transparentes.

La stratégie d'ITF s'articule sur la détermination de trois marchés du travail : les pavillons des pays industrialisés, les registres internationaux et complaisants, les pavillons des États en développement. L'objectif est aujourd'hui d'empêcher que les navires basculent sous registre international ou complaisant³⁵. Les registres internationaux, aussi appelés seconds registres, sont destinés à rendre concurrentiels les pavillons des États développés. Ils offrent une alternative au registre principal, en faisant référence à la résidence des marins pour la détermination de leur régime social. C'est ainsi que le second registre français, dit « Registre international français des navires » (RIF), renvoie à la loi d'autonomie, choisie par les parties, la définition des conditions de travail des marins non résidents dans un État membre de l'Union européenne, sous réserve de certaines garanties (prévues directement par la loi instaurant le RIF, par renvoi aux conventions internationales de l'OIT ou à la

33) ITF, *Seafarers' Trust, Annual report 2013*, <http://www.seafarerstrust.org/files/extranet/-1/44470/Seafarers%27%20Trust%20Annual%20Report%202013.pdf>

34) CHARBONNEAU A., *Marché international du travail maritime - Un cadre juridique en formation*, Presses Universitaires d'Aix-Marseille (PUAM), coll. Berthold GOLDMAN, 2009, p. 365 et s.

35) LILLIE N., *A Global Union for Global Workers. Collective Bargaining and Regulatory Politics in Maritime Shipping*, New York, Routledge, 2006, p. 56 et s.

négociation collective)³⁶. Les marins qui résident dans un État membre de l'Union européenne bénéficient, pour leur part, des protections de la loi française. Le RIF se trouve aujourd'hui estampillé « pavillon de complaisance » par ITF, à la demande des syndicats français de marins, à défaut de toute négociation salariale. Avec le développement des registres internationaux, la définition de la complaisance va donc prendre en compte, substantiellement, les garanties effectives accordées aux marins en matière de conditions de vie et de travail à bord³⁷.

Une seconde forme de certification sociale concerne l'établissement d'une liste noire de compagnies et d'individus (propriétaires de navires, agents de manning, etc.) qui ont commis des atteintes graves aux droits des marins. Depuis 1999, la liste noire comporte le nom de navires immatriculés sous pavillon national ou d'opérateurs nationaux. En 2002, la liste noire est ouverte aux compagnies ou individus auteurs d'abandons de gens de mer, lorsque ceux-ci laissent les marins sans ravitaillement ou support. L'enjeu est ici de publier l'identité d'acteurs réputés dangereux au regard des critères éthiques dégagés par ITF, autour d'une logique de transparence envers les marins en recherche d'engagement. Des campagnes ciblées ont aussi pu être menées à l'encontre de compagnies ou d'individus désignés sur la liste de manière à éradiquer de telles pratiques³⁸.

B- Imposer des conditions sectorielles de travail

Dans son approche normative, ITF distingue les navires sous pavillons dits « de complaisance » et les autres navires, sous pavillons dits « nationaux ». Il y a donc, en réalité, une étroite imbrication entre labellisation et action normative. Cela s'explique principalement à travers le constat que la majorité de la flotte internationale exerce sous pavillon de complaisance et que, à ne s'en tenir qu'aux seuls gens de mer embarqués sous pavillon national, ITF verrait la portée de ses conventions amoindrie.

Pour les navires arborant un pavillon national, un accord avec un syndicat reconnu par ITF doit être conclu. Cet accord doit expressément exclure toute discrimination fondée sur la nationalité des membres d'équipage et prévoir des moyens d'assistance syndicale au soutien des réclamations que le marin pourrait émettre. Il détermine des conditions acceptables de navigation, en référence à une convention d'adhésion désignée « Convention collective standard ». Sont notamment abordés, la durée du travail, en particulier les périodes maximales d'embarquement, les horaires journaliers

36) CHAUMETTE P., « Le registre international français des navires (RIF). Le particularisme régénéré ? », *Droit Maritime Français*, 2005, n° 660, p. 467 et s.

37) LILLIE N., *op. cit.*, 2006, p. 60 et s.

38) Sur les objectifs poursuivis par la liste noire et des exemples d'actions menées contre des armements ou individus blacklistés : ITF, *Campaign against flags of convenience and substandard shipping*, Annual report 2004, p. 10 et s.

de travail et de repos, l'accès aux soins médicaux, les conséquences d'un accident du travail et d'une maladie professionnelle, le rapatriement du marin, les différentes circonstances débouchant sur le terme de l'engagement et les effectifs embarqués (...). Le navire couvert se voit alors attribuer un *blue ticket* ou *blue certificate*, qui manifeste l'approbation par le secrétariat d'ITF des conditions négociées applicables à bord.

Pour les navires arborant un pavillon de complaisance, un accord doit être conclu avec un syndicat du pays dont dépend l'exploitant ou, le cas échéant, avec un syndicat du pays dont les marins sont ressortissants. Les conditions de recevabilité par ITF d'un tel accord sont inscrites dans l'ITF-TCC (Total Crew Cost). Elles sont moins favorables que celles issues de la convention standard³⁹. L'accord-cadre prévoit des dispositions obligatoires et des dispositions qui peuvent être négociées en fonction de considérations locales. La diversité des accords qui en résultent peut s'avérer nuisible au contrôle de leur application par le réseau d'inspecteurs ITF⁴⁰.

L'accord *International Bargaining Forum* (IBF) du 13 novembre 2003 est appelé à progressivement se substituer aux conventions unilatérales ITF-TCC. ITF s'est orientée vers une dynamique de négociation paritaire au début des années 90. Les organisations représentant les armateurs, voire les armateurs individuellement, n'ont jamais constitué un front uni vis-à-vis d'ITF et de ses conventions. Certains sont entrés en relation directement avec la fédération syndicale pour conclure des accords tandis que d'autres restaient sur une position hostile à toute discussion. La négociation, qui a effectivement débuté en décembre 1999 avec l'*International Maritime Employers' Committee* (IMEC), s'est centrée principalement sur la question des salaires. Un des enjeux récurrents dans la définition des seuils de rémunération, que ce soit en interne, dans les relations d'ITF avec les organisations qu'elle fédère, ou en externe, vis-à-vis des représentants des armateurs, est d'arriver à un compromis qui permette de contourner l'argument du protectionnisme. En effet, des seuils de rémunération trop élevés sont perçus, par les organisations syndicales des pays fournisseurs de main-d'œuvre, comme un moyen de protéger l'emploi des marins en provenance de pays développés⁴¹. En 2003, le *Joint Negotiating Group* a été constitué avec l'arrivée de l'*International Mariners Management Committee of Japan* (IMMAJ) à la table des négociations.

39) Selon cet accord, l'*able seaman* (AB), ou marin qualifié, doit bénéficier d'un salaire de 1 806 US\$ par mois, au 1^{er} janvier 2015, heures supplémentaires et compensation pour les congés payés annuels comprises (soit 850 US\$ de salaire de base). Pour un AB, le salaire de base est de 1 563 US\$ sous convention collective standard.

40) TALLONNEAU L., *Le contrôle des conditions d'engagement par les inspecteurs ITF*, Mémoire pour le Master de droit maritime et océanique, Université de Nantes, 2009, p. 55.

41) L'étude la plus documentée sur cette négociation est l'œuvre de LILLIE N., *A Global Union for Global Workers. Collective Bargaining and Regulatory Politics in Maritime Shipping*, New York, Routledge, 2006.

En passant d'une approche unilatérale, traditionnelle⁴², à une responsabilité sociale organisée de manière paritaire, par le biais d'instruments dont le contenu a été négocié avec les armateurs, ITF poursuit l'objectif d'une meilleure diffusion des normes dans le secteur, moins conflictuelle. L'accord IBF s'avère plus flexible que les conventions unilatérales d'ITF⁴³. Pour ce qui concerne les accords en vigueur pour la période 2008-2009, les conditions ont été rapprochées de celles prévues par l'ITF-TCC, avec une marge de négociation locale. Il s'agit de remédier à la distorsion des conditions concurrentielles d'exploitation des navires que rencontrent les armateurs qui acceptent de conclure un accord avec un syndicat affilié. En définissant des conditions sectorielles d'engagement maritime, de manière paritaire, les organisations impliquées dans la négociation de l'accord IBF tentent d'enrayer le dumping social. Afin de bien distinguer cette approche paritaire, les navires couverts par un accord IBF se voient attribuer un *green ticket*⁴⁴. En 2008, l'IBF a pris en compte les attaques de piraterie et violences en mer au large de la Somalie, le corridor international de transit, *the Internationally Recommended Transit Corridor (IRTC)*, a été reconnu zone de haut risque ; ces espaces sont régulièrement révisés, notamment le 28 mars 2011, et ont pris en compte les attaques dans le Golfe de Guinée. Le 1^{er} juillet 2014, un nouvel avenant a été conclu modifiant la liste des corridors recommandés pour le transit maritime international (Internationally Recommended Transit Corridor – IRTC) dans le golfe d'Aden. En effet, les visées des pirates sur certaines zones relativement étendues ne sont plus les mêmes et ne peuvent donc plus être considérées comme des zones à hauts risques. Cela a donc pour conséquence la suppression du versement du double de la solde des gens de mer naviguant dans ces zones modifiées. Dans cette zone, des mesures de protection plus strictes que les *Best Management Practices* (consignes intersectorielles sur la

42) BOURQUE R., *Les accords-cadres internationaux et la négociation collective internationale à l'ère de la mondialisation*, Institut international d'études sociales, Genève, 2005, p. 24 et s., souligne que « la stratégie suivie par ITF pour conclure cette convention collective n'est pas sans rappeler l'action des premières organisations ouvrières de métiers pour imposer le tarif ouvrier aux employeurs dans les pays européens au XIX^e siècle ». « (...) L'ITF a basé son action sur la fixation de tarifs minima pour chacune des professions à bord des navires marchands qui étaient ensuite publicisés auprès des employeurs, leur application étant assurée par des inspecteurs de l'ITF œuvrant dans les principaux ports mondiaux ».

43) L'accord IBF décentre son approche du montant d'un salaire minimum vers la référence au coût total mensuel de l'opération du navire, soit 46 170 \$ en 2004 pour un navire de 23 membres d'équipage. À l'occasion de l'International Bargaining Forum de Tokyo, les 5 et 6 octobre 2005, ce montant a été révisé pour passer à 48 478 \$ au 1^{er} janvier 2006 et 50 787 \$ au 1^{er} janvier 2007. Un salaire minimum s'en déduit, qui est moins élevé que celui imposé par l'ITF-TCC, soit en 2004, pour un AB, 1300 \$. 15 % de la rémunération peuvent être affectés à la formation et à la protection sociale du marin. La réunion de Manille, qui s'est tenue en octobre 2009, a vu les négociations salariales être renvoyées à 2010 en raison de la crise financière. En juin 2014, les membres du Joint Negotiating Group ont finalement décidé d'une augmentation de 6,5 % de la rémunération IBF sur les trois prochaines années.

44) SMITH J., « Le passage du *blue ticket* au *green ticket* : le dialogue collectif entre ITF et les armateurs peut-il améliorer le respect des droits des marins ? », *Annuaire de Droit Maritime et Océanique*, t. xxii, 2004, p. 265 et s.

prévention de la piraterie) doivent être adoptées en fonction de la taille et du type de navire, de la vitesse et de la hauteur de franc-bord. Il peut s'agir de personnel de sécurité ou de systèmes de prévention ou de riposte. Le taux spécial de rémunération et d'indemnisation s'applique également dans cette nouvelle zone étendue pour toute journée marquée par l'attaque d'un navire.

Normes unilatérales, les conventions traditionnelles d'ITF ne rencontrent, a priori, aucun support juridique, comme une procédure d'agrément ou d'extension par les autorités administratives nationales, pour contraindre un armateur ou une compagnie maritime à les appliquer sur un navire, à une flotte. Elles doivent être imposées, au besoin par le biais d'une action collective de l'équipage, voire de solidarité externe. La prohibition de telles actions par les juridictions nationales fut ainsi le premier moyen invoqué devant les juges pour rendre inopposables les conventions ITF, acceptées par les armements en tant que condition de sortie de crise⁴⁵. Un second moyen réside dans la territorialité qui contraint la validité des conventions et accords collectifs. L'armateur installé en France qui adhère à une convention établie par une organisation syndicale basée à Londres, ITF, pourra toujours faire valoir devant les juridictions françaises que son engagement relève d'une décision unilatérale susceptible de dénonciation, ces accords ne répondant pas aux exigences légales du code du travail en matière de négociation collective. L'entremise d'une organisation syndicale nationale légalement constituée peut permettre de donner une valeur juridique à la convention conclue par elle⁴⁶. Les conventions ITF privilégient l'incorporation contractuelle de leur contenu au travers de la stipulation suivante : « cet accord est considéré comme incorporé dans le contrat d'emploi individuel du marin, avec ses conditions d'emploi, que la compagnie ait signé ou non un contrat d'emploi individuel avec le marin ». Néanmoins, dans les deux cas, les juridictions nationales peuvent se montrer réticentes si le consentement de l'armateur ou de la compagnie a été vicié par un contexte conflictuel menaçant ou violent⁴⁷.

45) Outre les commentaires de P. CHAUMETTE sur les actions judiciaires menées en la matière, se reporter à GOINEAU J., « La responsabilité civile des grévistes et des syndicats », *Droit social*, 1988, p. 702 et s. ; au commentaire de l'ordonnance de référé du TGI de Nantes du 26 juin 1979 dans l'affaire du navire *Bernhard-Oldendorff*, par P. SIMON et M. QUIMBERT, *Droit Maritime Français*, 1980, p. 37 et s. ; à l'obligation, imposée par les magistrats de la Chambre des Lords, de restitution à la charge d'ITF de l'argent versé par l'armateur, en raison de la contrainte économique inhérente à l'action collective étudiée par Lord WEDDERBURN, « Le législateur et le juge. À propos des conflits collectifs de travail », *Les transformations du droit du travail, Mélanges LYON-CAEN*, Paris, Dalloz, 1989, p. 123 et s. Pour le droit italien : Enrico LUCIFREDI C. et ORIONE M., « L'action de l'ITF et les juges italiens », *Colloque Droit Littoral et Mer*, Université de Nantes, 1992, p. 115 et s.

46) CHAUMETTE P., « Les transformations au sein de la marine marchande. Une relation de travail sans attache ? », *Annuaire de Droit Maritime et Océanique*, 2001, t. XIX, p. 53 et s. ; du même auteur, « Fragment d'un droit des conflits internationaux du travail ? », *Droit social*, 2005, p. 295 et s.

47) Plusieurs compagnies maritimes françaises ont, cependant, adhéré à des conventions de flotte : SMITH J., *op. cit.*, *ADMO*, 2004, p. 265 et s.

Le passage de normes unilatérales à une convention bilatérale, l'IBF, contribuera-t-elle à changer le regard sur l'action normative d'ITF ? Le nombre de navires et de marins couverts par une convention IBF⁴⁸ semble démontrer l'efficacité de ces normes au plan international. Sur le fond, la conformité des conventions ITF avec l'ordre public local apparaîtra comme déterminante pour le juge. Celui-ci, confronté à une réclamation salariale, pourra être amené à évaluer des arriérés de salaires en fonction de standards internationaux disponibles, ce que propose ITF au travers de ses normes.

2. Articuler responsabilité sociale et normes internationales du travail

Après quelques années de mise en œuvre, il apparaît intéressant de dépasser le bilan quantitatif dressé (70 000 marins couverts par un accord IBF en 2011, soit 233 000 couverts par un accord ITF, c'est-à-dire 30 % de la flotte mondiale qualifiée FOCs)⁴⁹ pour s'intéresser qualitativement à l'impact de cet accord sur le suivi des conditions de vie et de travail à bord des navires, ainsi qu'à l'articulation de cet accord avec la réglementation internationale du travail maritime, qui résulte, pour l'essentiel, des normes de l'OIT.

Il faut envisager la question de l'avenir du réseau d'inspecteurs ITF, alors que la MLC, 2006, vise au développement d'une inspection sociale au niveau de l'État du pavillon et, surtout, de l'État du port (A). Par ailleurs, il faudra s'interroger sur le rôle de l'action normative syndicale, alors que cette même MLC, 2006, élabore un statut social minimal presque complet pour les marins engagés dans le transport international (B).

48) À l'IBF de Tokyo, les 5 et 6 octobre 2005, le bilan suivant a été dressé : 55 000 marins sont couverts par un accord IBF et 3 200 navires. En 2007, lors de l'IBF de Londres, le bilan s'élève à 70 000 marins couverts et 3 500 navires. Le *Report on activities 2006-2009/Organising Globally*, § 41, ITF 42^{ème} Congrès, Mexico, 5-12 Août 2010, concernant l'ensemble des normes syndicales, avance les chiffres de 10 500 accords conclus pour 175 636 marins couverts, soit environ 33,5 % de la flotte naviguant sous pavillon de complaisance.

49) L'influence des normes ITF ne se limite d'ailleurs pas au nombre de contrats signés et déclarés conformes. Certains armateurs décident volontairement de s'aligner sur les salaires ITF afin de prévenir tout problème avec la fédération syndicale et son réseau d'inspecteurs, sans pour autant conclure de convention : LILLIE N., *A Global Union for Global Workers. Collective Bargaining and Regulatory Politics in Maritime Shipping*, New York, Routledge, 2006, p. 40 et s.

A- L'avenir du contrôle syndical de l'application des normes ITF

1- Le contrôle syndical de l'application des normes ITF

Le contrôle de l'application des normes ITF repose sur un réseau composé d'environ 130 inspecteurs⁵⁰. Celui-ci s'est principalement constitué et structuré à partir des années quatre-vingt⁵¹. Si ces inspecteurs sont payés par ITF et doivent se conformer aux instructions adressées depuis Londres, ils sont en réalité salariés par des organisations syndicales nationales (pour la France, il s'agit de la CFDT, CGT-FO, CGT), seules compétentes pour les renvoyer⁵². Se profile derrière cet enracinement le problème de leur statut, en ce qu'ils demeureraient sinon l'émanation d'une association étrangère et ne bénéficieraient pas des protections et moyens que confère le droit syndical national. Ils s'insèrent donc dans une hiérarchie complexe, qui va générer des contraintes mais aussi leur assurer des marges de manœuvre, tant dans leurs rapports à leur organisation nationale (parfois très peu impliquée sur les questions ayant trait aux conditions de travail d'une main-d'œuvre étrangère relevant d'une législation étrangère) que dans leurs rapports à ITF. Dans le cadre de la signature des accords avec les armateurs pour une flotte ou un navire particulier, ils disposent de marges de négociation, prévues par la « convention collective standard » ou l'ITF-TCC. Lorsqu'ils exercent le contrôle de l'application des normes, ils doivent suivre certaines directives arrêtées par ITF, comme renseigner régulièrement une base de données sur le résultat de leurs inspections et tenir compte de cette base de données pour cibler les navires à contrôler, privilégier le règlement à l'amiable des litiges en se gardant de mener des actions qui engageraient la responsabilité d'ITF et adopter une certaine réserve médiatique⁵³. En dehors de ces prescriptions, les inspecteurs ITF ont la connaissance du contexte social des ports sur lesquels ils exercent, acquise grâce à un travail souvent long et fastidieux pour faire reconnaître la légitimité de leur présence, et bénéficient alors d'une réelle autonomie.

En effet, de bonnes relations avec les différents acteurs portuaires conditionnent la réalisation de leur mission. Ils sont amenés à intervenir sur un espace caractérisé par une coexistence de régimes juridiques complexes, le port, et doivent rencontrer

50) *Report on activities 2006-2009/Organising Globally*, § 41, ITF 42^{ème} Congrès, Mexico, 5-12 Août 2010. TALLONNEAU L., *Le contrôle des conditions d'engagement par les inspecteurs ITF*, Mémoire pour le Master en Droit Maritime et Océanique, Université de Nantes, 2009, avance le chiffre de 175 inspecteurs et coordinateurs. Pour un témoignage, M. SAMSON, journal *Le Monde*, « Les justiciers de la mer », 2 janvier 2007, qui suit Yves REYNAUD, inspecteur ITF, lors de son intervention auprès des marins de l'*Antonios-P.*, immobilisé à Sète, après que le pilote ait découvert le capitaine et son second « raides saouls », www.lemonde.fr/a-la-une/.../les-justiciers-de-la-mer_851181_3208.html

51) LILLIE N., *op. cit.*, 2006, p. 65 et s.

52) TALLONNEAU L., *op. cit.*, 2009, p. 61 et s. Elle développe notamment la question de la sélection des futurs inspecteurs et de la formation suivie par eux.

53) TALLONNEAU L., *op. cit.*, 2009, p. 64 et s.

les marins sur leur lieu de travail, le navire, lequel constitue de ce point de vue un territoire étranger. Dès lors, la conduite de leur action dépendra de l'attitude qu'auront les autorités portuaires et le capitaine du navire à leur égard. En particulier, la question de l'accès au navire dans le contexte de la mise en œuvre du Code ISPS, destiné à garantir la sûreté des navires et des installations portuaires, relève du bon vouloir local⁵⁴. Ceci alors même que ce Code émet des préconisations pour le respect du droit syndical⁵⁵.

Parallèlement à ce corps d'inspection, le contrôle de l'application des normes est dévolu aux organisations syndicales nationales signataires d'un accord ou d'une convention ITF. Les conventions ITF prévoient, en effet, que le syndicat signataire ou affilié pourra prendre « toutes les mesures qu'il jugera nécessaires en son nom ou en celui des marins afin d'obtenir réparation ». Cette formule, imprécise, concerne à la fois les actions juridiques et les actions syndicales de blocage des navires, par exemple en accord avec les représentants des dockers, qui seront, éventuellement, eux-mêmes affiliés à ITF.

Avec la signature de l'accord IBF, une sorte de pari se dégage sur la responsabilisation des armateurs dans le respect des seuils salariaux. Les armateurs adhèrent, souvent contraints, à un accord unilatéral ITF-TCC et agissent ensuite en gérant le risque de l'intervention d'un inspecteur ITF : ils ne respectent pas le seuil salarial fixé mais paient les arriérés de salaires en cas de contrôle⁵⁶. Impliquée dans la mise en œuvre de l'accord IBF, dans le cadre d'une procédure de règlement des conflits à laquelle elle participe, la profession devient alors son « propre juge » afin de séparer, selon un motif qui lui est cher, les bons des mauvais armateurs. L'approche éthique est ici prégnante et tend à soulager ITF et son réseau d'inspecteurs du rôle caricatural de gendarme social unilatéral, portant le poids et la responsabilité de révéler des pratiques de gestion du personnel éthiquement et/ou juridiquement condamnables. Les inspecteurs ITF auront vocation à cibler leurs contrôles sur les navires non couverts par un accord IBF.

54) Les réponses au questionnaire qui permet à ITF de rédiger son rapport sur l'application du Code ISPS, *Access Denied* (voir notamment la contribution d'ITF sur ce rapport aux *Actes des journées nantaises 2006 de l'Observatoire des droits des marins*, Nantes, 2006, p. 157 et s., font apparaître les difficultés rencontrées par les inspecteurs pour accéder aux navires dans certains ports.

55) C'est ce qui résulte du point 10 du préambule du Code ISPS, qui fait référence aux droits fondamentaux au travail, parmi lesquels figure la liberté syndicale. Le plan de sûreté des installations portuaires prévoit l'accès « des visiteurs au navire, y compris les représentants des services sociaux et des syndicats des gens de mer » (Règle 16-3.15 relative au plan de sûreté des installations portuaires). Sur l'influence d'ITF quant au contenu du Code ISPS, voir *Transport International*, n° 2, 2003, p. 9.

56) SMITH J., *op. cit.*, *ADMO*, 2004, p. 265 et s., lequel souligne que les armateurs peuvent parfois récupérer « de la main des marins les dollars remis quelques heures plus tôt ».

2- Le contrôle par l'État du port de l'application de la MLC, 2006

En 1976, la Convention n° 147 de l'OIT sur la marine marchande (normes minima) a, en son article 4, été précurseur du contrôle social par l'État du port. Ce dispositif, ambitieux et imparfait (facultatif) a, par la suite, été intégré dans le mécanisme régional de coordination, dit du Mémorandum de Paris⁵⁷, signé le 26 janvier 1982 et communautarisé par la directive 95/21 du 19 juin 1995⁵⁸. Pour ce qui concerne la France, le constat a été dressé du caractère inapproprié de ces fondements. Les inspecteurs en charge de réaliser les contrôles sont, au regard de la formation qu'ils ont reçue et de leur expérience professionnelle requise, de véritables techniciens de la sécurité maritime, des spécialistes du navire. Même s'ils sont tenus d'exercer leurs contrôles à la lumière des « instruments pertinents » du Mémorandum de Paris, au nombre desquels figure la Convention n° 147 de l'OIT, ils jugent ce fondement trop vague, en particulier lorsque la question de l'immobilisation du navire est en jeu⁵⁹. Devant ces insuffisances, la MLC, 2006, porte l'ambition de dessiner des contours plus précis aux compétences de l'État du port en matière sociale, en dressant un catalogue de droits clairs, aisément compréhensibles par les personnes concernées.

La MLC, 2006, opère une répartition des responsabilités dans la mise en œuvre de la convention, entre l'État du pavillon, l'État du port et le fournisseur de main-d'œuvre. Concernant l'État du port, la Convention prévoit un système d'inspection ainsi que la possibilité de recevoir à terre les plaintes des gens de mer⁶⁰. Sur quoi ces contrôles par l'État du port vont-ils porter ? La MLC, 2006, affirme tout d'abord clairement le principe de l'interdiction du traitement plus favorable des navires battant pavillon

57) Il existe plusieurs autres initiatives régionales de même nature : voir, notamment, FITZPATRICK D. et ANDERSON M., *Seafarers' rights*, Oxford, Oxford University Press, 2005, p. 156 et s.

58) CHAUMETTE P., « Le droit communautaire maritime », in BEURIER J.-P. (dir.), *Droits Maritimes*, Paris, Dalloz Action, 3^{ème} éd., 2014, p. 161 et s. ; NDEDE M. et VENDE B., « La transposition par les États de la directive portant communautarisation du Mémorandum de Paris », *Droit Maritime Français*, 2000, p. 307 et s. La directive 95/21/CE a fait l'objet d'une refonte, comprenant une nouvelle politique de ciblage des risques, par la directive 2009/16/CE du Parlement européen et du Conseil, du 23 avril 2009. Pour une présentation claire de l'émergence du contrôle par l'État du port et de son organisation : LEFRANÇOIS A., « Contrôle technique et social par l'État du port : un enjeu pour l'Union européenne », *Annuaire de Droit Maritime et Océanique*, T. XXVIII, 2010, p. 355 et s.

59) Se reporter au travail de GUILLOU M., *Promouvoir un véritable contrôle « social » à bord de tous les navires, un enjeu pour les nouveaux inspecteurs du travail maritime*, Mémoire pour le DEA de droit maritime et océanique, P. CHAUMETTE (dir.), Université de Nantes, 2002.

60) D'un point de vue pratique, se reporter aux *Directives pour les agents chargés du contrôle par l'État du port effectuant des inspections en application de la convention du travail maritime*, 2006, adoptées en septembre 2008 à Genève et à notre étude : « La Convention du travail maritime 2006 : Traitement à terre des plaintes déposées par les gens de mer », (avec M. MARIN), communication au 4th European Colloquium on Maritime Law Research, Nantes, *Annuaire de Droit Maritime et Océanique*, T. XXV, 2007, p. 173 et s.

d'un État ne l'ayant pas ratifiée⁶¹. Ces navires devront dès lors être contrôlés sur la base des prescriptions minimales qu'elle énonce. Elle instaure ensuite deux degrés d'inspection, à savoir l'inspection et l'inspection plus détaillée.

Au stade initial, un simple « contrôle papier » est exercé par un « fonctionnaire autorisé » sur présentation du certificat de travail maritime et de la déclaration de conformité du travail maritime, qui constituent la base d'un mécanisme de certification sociale⁶². Il incombe, en effet, à l'État du pavillon « d'exiger des navires battant son pavillon⁶³ qu'ils conservent et tiennent à jour un certificat de travail maritime certifiant que les conditions de travail et de vie des gens de mer à bord (...) ont fait l'objet d'une inspection et répondent aux prescriptions de la législation nationale ou autres dispositions visant à l'application de la présente Convention »⁶⁴. Le certificat doit être accompagné d'une déclaration de conformité « mentionnant les prescriptions nationales visant à l'application de la présente convention en ce qui concerne les conditions de vie et de travail des gens de mer et énonçant les mesures adoptées par l'armateur pour assurer le respect de ces prescriptions sur le navire ou les navires concernés »⁶⁵. La certification sociale ainsi initiée peut être réalisée par « des institutions publiques ou autres organismes (...) » habilités⁶⁶. La référence aux autres organismes renvoie notamment aux sociétés de classification, déjà impliquées dans le domaine technique⁶⁷. La MLC, 2006, établit des documents types qui précisent les 14 points des conditions de travail et de vie des gens de mer qui doivent être envisagés à l'occasion d'un contrôle portuaire⁶⁸.

61) Article V 7. de la MLC, 2006.

62) LEFRANÇOIS A., « La certification du travail maritime : un défi pour les États du pavillon et du port », *Journées d'études 2008 de l'Observatoire des droits des marins*, Nantes, 2008, p. 227 et s. et MICHEL X., « La certification sociale ? Tendances et spécificités maritimes au regard de la convention OIT 2006 », *ibid.*, p. 239 et s. ; FOTINOPOULOU BASURKO O., « El Control y Certificación, del Cumplimiento del Convenio de Trabajo Marítimo 2006 de la OIT: Aspectos críticos del RD 357/2015 », *Revista de Derecho del Trabajo y de la Seguridad Social*, Madrid, n° 41, 2015.

63) Ces documents concernent, a priori, les navires d'une jauge brute égale ou supérieure à 500, affectés à des transports internationaux ou battant le pavillon d'un Membre et opérant à partir d'un port ou entre deux ports d'un autre pays.

64) Règle 5.1.3.3 de la MLC, 2006.

65) Règle 5.1.3.4 de la MLC, 2006.

66) Norme A5.1.1.3 de la MLC, 2006. Il est exigé du Membre qu'il vérifie la compétence et l'indépendance des organismes reconnus.

67) Sur le système des classes, voir BONASSIES P. et SCAPEL Ch., *Droit maritime*, Paris, LGDJ, 2^{ème} éd., 2010, p. 198 et s. ; ainsi que l'ouvrage de BOISSON Ph., *Politiques et droit de la sécurité maritime*, Paris, Éditions Bureau Veritas, 1998, notamment les pages 125 et s.

68) Il s'agit des points suivants : « Âge minimum ; Certificat médical ; Qualifications des gens de mer ; Contrats d'engagement maritime ; Recours à tout service de recrutement et de placement privé sous licence, ou agréé ou réglementé ; Durée du travail ou du repos ; Effectifs du navire ; Logement ; Installations de loisirs à bord ; Alimentation et service de table ; Santé et sécurité et prévention des accidents ; Soins médicaux à bord ; Procédures de plainte à bord ; Paiement des salaires ». Cette liste

Lorsque le fonctionnaire autorisé relèvera qu'il « existe de solides raisons de croire que les conditions de travail et de vie à bord du navire ne sont pas conformes aux prescriptions de la Convention », il pourra alors effectuer une inspection plus détaillée. Si l'inspection plus détaillée conclut à la non-conformité avec les dispositions de la Convention et que « a) les conditions à bord présentent un danger évident pour la sécurité, la santé ou la sûreté des gens de mer; ou b) la non-conformité constitue une infraction grave ou répétée aux prescriptions de la présente convention, y compris les droits des gens de mer »⁶⁹, la décision d'immobilisation du navire pourra être prise.

Outre l'immobilisation du navire jusqu'à sa mise en conformité, les sanctions traditionnellement encourues dans le cadre du contrôle par l'État du port, comme dans le cadre du Mémorandum de Paris, sont la publicité et le bannissement. La première consiste à publier l'identité du navire qualifié de « navire sous-normes ». La répétition des cas de navires sous-normes immatriculés sous un même registre pourra entraîner le classement de ce dernier sur une liste noire. Outre l'opprobre jeté par la publicité, ce travail d'identification permet d'alimenter des fichiers mis à disposition des administrations maritimes qui peuvent ainsi orienter leurs contrôles ou restreindre l'accès à leurs installations portuaires⁷⁰. La dernière sanction, la plus lourde, demeure le bannissement du navire et, plus rarement, de l'ensemble des navires battant un pavillon « blacklisté ».

3- La coexistence d'une inspection syndicale et publique

Le rôle joué par les inspecteurs ITF dans le contrôle social des conditions de navigation pourrait-il être dévolu entièrement au système public d'inspection, relevant des responsabilités de l'État du port, au sens de la MLC, 2006 ?

L'étude de ce dispositif est révélatrice de la proximité qui existe entre la responsabilité sociale mise en œuvre par le réseau des inspecteurs ITF et le contrôle par l'État du port en application de la MLC, 2006. Les deux mécanismes procèdent à la certification des conditions de travail en référence à une norme sociale, au contrôle à bord de cette certification et font encourir des menaces similaires de sanction en cas d'infraction : l'immobilisation ou le blocage du navire. À l'échelle internationale, cette coexistence d'une inspection syndicale et d'une inspection publique des conditions de travail, nous semble utilement comparable aux débats sur le contrôle ouvrier, qui

sera complétée pour tenir compte des amendements à la MLC, 2006, adoptés en 2014.

69) Norme A.5.2.1 6. de la MLC, 2006.

70) Sur les conditions de mise en œuvre du refus d'accès au port en droit international : MORIN M., *La pollution par les navires de commerce et les États côtiers*, Thèse de doctorat, Y. TASSEL (dir.), Université de Nantes, 1995, p. 118 et s. ; voir, également, l'étude de KASOULIDES G. C., *Port State Control and Jurisdiction. Evolution of the Port State Regime*, Dordrecht, Martinus Nijhoff Publishers, 1993.

se développèrent, en France, à la fin du dix-neuvième siècle et au début du vingtième siècle⁷¹. L'affirmation d'une inspection publique du travail ne s'est pas faite sans résistance syndicale, la figure de l'inspecteur du travail apparaissant ambiguë, trop proche du patronat et incompétente, notamment sur le plan technique⁷².

Si l'inspection publique du travail s'est finalement imposée en France, tant dans un rôle pédagogique que dans sa fonction de contrôle de l'application de la législation sociale, au sens large du terme⁷³, elle a surtout permis d'introduire d'autres formes de sanctions que celle du rapport de force syndical, comme la grève, dont l'issue est incertaine. La protection pénale accordée à tout ou partie de la législation sociale est un moyen efficace d'en assurer l'effectivité. L'inspecteur du travail est ainsi compétent pour dresser un procès-verbal lorsqu'il constate une infraction, ce qui débouchera éventuellement sur des poursuites pénales. L'intérêt du régime élaboré par la MLC, 2006, est de fonder en droit un mécanisme de contrôle assorti de sanctions, alors que les inspections conduites par ITF et les éventuels blocages de navires sont dépendants de l'appréciation de leur licéité à l'échelle nationale et peuvent engager la responsabilité civile des organisations syndicales impliquées.

La question se pose, selon nous, de l'avenir de cette coexistence de l'inspection syndicale et de l'inspection publique des conditions de vie et de travail des gens de mer. Serait-il absurde d'envisager l'inclusion des normes collectives adoptées paritairement, comme l'accord IBF, dans le champ matériel des instruments contrôlés par l'État du port ? Cela renvoie à la question de la valeur juridique incertaine de la responsabilité sociale des entreprises⁷⁴, en général, et de ces normes

71) ARIES P. « Inspection du travail et inspection ouvrière dans le discours de la CGT de la genèse de l'Institution à l'entre-deux guerres », *Droit et société*, 1996, p. 389 et s. ; voir aussi DEHOVE G., *Le contrôle ouvrier*, Thèse, Lille, 1937.

72) ARIES P. *op. cit.*, 1996, p. 389 et s.

73) GROSSIN W., *La création de l'inspection du travail*, Paris, L'Harmattan, 1992 ; VIET V., *Les voltigeurs de la République, L'inspection du travail en France jusqu'en 1914*, Paris, CNRS Éditions, 1994 (2 Tomes) ; ROBERT J.-L. (dir.), *Inspecteurs et inspection du travail sous la III^e et la IV^e République*, Paris, La Documentation française, 1998. Sur la pluralité des fonctions : DECOUST M. J., « L'évolution du rôle de l'inspection du travail », *Droit social*, 1946, p. 119 et s. ; CHETCUTI Cl., « Réflexions sur l'inspection du travail », *Droit social*, 1976, p. 19 et s., qui parle du triptyque « conseil, contrôle, conciliation » ; VIEILLE V., « Inspecter le travail ou veiller à l'application du droit du travail : une mission impossible ? », *Droit social*, 2006, p. 666 et s. ; STRUILLLOU Y., « La réforme de l'inspection du travail : répondre aux exigences d'un service public constitutionnel », *Droit social* 2014, n° 9, p. 689.

74) Voir, notamment, CAUSSÉ N., *La valeur juridique des Chartes d'entreprise au regard du droit du travail français*, Aix-Marseille, P.U. d'Aix-Marseille, 2000, p. 183 et s. ; SOBCZAK A., *Réseaux de sociétés et Codes de conduite. Un nouveau modèle de régulation des relations de travail pour les entreprises européennes*, Paris, L.G.D.J., 2002, p. 211 et s. ; BOIRAL O., « Certifier la bonne conduite des entreprises : enjeux et perspectives d'avenir », *R.I.T.*, 2003, p. 345 et s. ; BEAUJOLIN-BELLET R. et KERBOURC'H J.-Y., « La notation sociale des entreprises », *Semaine sociale Lamy*, n° 1095, 28 octobre 2002, p. 85 et s. ; NEAU-

conventionnelles internationales, en particulier, qui s'apparentent à des accords-cadres internationaux⁷⁵. Cet écueil pourrait être contourné par la réception de l'argument de l'application volontaire : les armateurs adhérant aux organisations signataires pouvant déclarer leur volonté de se soumettre aux normes conclues. Il est clair, cependant, que la MLC, 2006, nécessitera de nombreuses années avant de connaître une application satisfaisante à l'échelle mondiale. Certains États ne mettront pas en place d'inspection portuaire et pour les navires qui échapperont à ce type de contrôle du fait de l'itinéraire suivi, la raison d'être d'une inspection syndicale demeurera.

B- La définition d'un domaine d'action syndicale international

L'approche de la MLC, 2006, en matière de certification sociale, semble coïncider avec les objectifs poursuivis par ITF au travers de ses propres conventions ou de l'accord IBF. Nous l'avons vu, la certification sociale initiée par la MLC, 2006, porte sur les 14 points précisés en annexe A. 5.1 de la MLC, 2006, qui définissent un socle social de facture statutaire. Si l'OIT intervenait jusqu'alors de manière fragmentée, accréditant la vision doctrinale d'un self-service normatif⁷⁶, ITF suppléait à cette fragmentation à l'aide de conventions et d'accords abordant de nombreux aspects de la relation de travail. En proposant une norme unique consolidant et actualisant son corpus antérieur, l'OIT propose aux acteurs du transport maritime un socle étendu de conditions de travail.

Même s'il ne se veut pas alternatif aux normes d'ITF, ce socle risque de constituer un argument de remise en cause de la légitimité des seuils syndicaux pour les armateurs. Le devenir des conventions ITF-TCC ou IBF se heurtera vraisemblablement à une contestation de leur bien-fondé et de leur contrôle par les inspecteurs ITF, dès lors que le navire dispose d'un certificat et d'une déclaration conformes, au regard des exigences de la MLC, 2006. Le principal manque dans le système de la MLC, 2006, concerne l'absence de précision quant au salaire minimum, hormis les principes

LEDUC Ch., « La responsabilité sociale de l'entreprise : quels enjeux juridiques ? », *Droit social*, 2006, p. 952 et s.

75) BOURQUE R., « Les accords-cadres internationaux (ACI) et la négociation collective internationale à l'Ère de la mondialisation », Genève, ILO, 2005 ; voir aussi les contributions à l'ouvrage de DESCOLONGES M. et SAICY B., *Les nouveaux enjeux de la négociation sociale internationale*, Paris, Éditions La Découverte, 2006 ; DAUGAREILH I., « La responsabilité sociale des entreprises transnationales et les droits fondamentaux de l'homme au travail, le contre-exemple des accords-cadres internationaux », in DAUGAREILH I. (dir.), *Mondialisation, travail et droits fondamentaux*, Bruxelles, Bruylant, 2005, p. 349 et s. Derrière cette question se profile l'affirmation progressive d'un droit social de la mondialisation : se reporter aux contributions de l'ouvrage de MOREAU M.-A., MUIR WATT H., RODIÈRE P. (dir.), *Justice et mondialisation du droit du travail*, Paris, Dalloz, coll. Thèmes et commentaires, 2010.

76) SUPLOT A., « Du nouveau au Self-service normatif : la responsabilité sociale des entreprises », *Analyses juridiques et valeurs en droit social, Études offertes à Jean PÉLISSIER*, Paris, Dalloz, 2004, p. 641 et s.

directeurs qui invitent à fixer un salaire minimum qui tient compte du montant établi par la Commission paritaire maritime, sous l'égide de l'OIT⁷⁷. Ce salaire, inférieur aux minima syndicaux⁷⁸, trouve cependant une raison d'être aux yeux d'ITF. En effet, il aurait vocation, au regard de son texte fondateur⁷⁹, la Recommandation 187 sur les salaires et la durée du travail des gens de mer et les effectifs des navires, de 1996, à proposer un seuil pour tous les marins, y compris ceux navigant sous pavillon national et affectés à des trafics nationaux, voire même les pêcheurs⁸⁰. Le terrain syndical privilégié demeurerait alors la fixation d'un salaire minimum dans le transport international avec une concentration des inspections sur ce sujet.

Rappelons que la remise en cause des accords syndicaux entraîne la fragilisation de l'organisation syndicale et de ses actions, puisque les armateurs liés sont tenus de contribuer financièrement. Ces sommes permettent de financer les campagnes de lutte contre la complaisance et le réseau d'inspecteurs ITF. Il en va de même pour le réseau associatif œuvrant au bien-être portuaire des marins⁸¹, qui bénéficie grandement du ITF Seafarers' Trust, alimenté de la même manière. Avec l'accord IBF, la gestion des contributions sociales devient elle-même paritaire, dans la mesure où un pourcentage des sommes versées servira à financer des actions ou des avantages sociaux définis conjointement avec les armateurs, notamment en matière de formation. La MLC, 2006, traite du bien-être dans son titre IV et prévoit, au titre du financement des installations de bien-être, des contributions volontaires des armateurs qui existent déjà dans les faits, sous forme de contribution versées à l'escale. Les armateurs seront-ils prêts à payer durablement deux fois le même service ?

77) Principes directeurs B2.2.3 et B2.2.4., de la MLC, 2006.

78) Il était de 585 US\$ pour un AB et est passé à 592 dollars au 1er janvier 2015, puis à 614 dollars au 1er janvier 2016 ; il convient d'y ajouter les heures supplémentaires.

79) Article 1 de la Recommandation n° 187 : « 1 (2) Dans la mesure où, après consultation des organisations représentatives des armateurs à la pêche et des pêcheurs, l'autorité compétente considère que cela est réalisable, elle devrait appliquer les dispositions de la recommandation à la pêche maritime commerciale ». Article 4 : « 9. Aux fins des dispositions qui suivent, l'expression « matelot qualifié » désigne tout marin qui est censé posséder la compétence professionnelle nécessaire pour remplir toute tâche dont l'exécution peut être exigée d'un matelot affecté au service du pont autre que celle du personnel de maîtrise ou spécialisé, ou tout marin défini comme matelot qualifié au regard de la législation ou de la pratique nationales ou en vertu d'une convention collective ».

80) Soulignant l'imprécision de la Recommandation n° 187 : LILLIE N., *A Global Union for Global Workers. Collective Bargaining and Regulatory Politics in Maritime Shipping*, New York, Routledge, 2006, p. 49 et s.

81) CHARBONNEAU A., « La Convention n° 163 de l'OIT concernant le bien-être des gens de mer : fondement à l'action des foyers d'accueil », *ADMO*, 2004, p. 307 et s., « Les nouvelles normes sur le bien-être des marins dans la convention du travail maritime, 2006 », in FOTINOPOULOU BASURKO O. (dir.), *Derechos del hombre y trabajo marítimo: los marinos abandonados, el bienestar y la repatriación de los trabajadores del mar*, Servicio Central de publicaciones del Gobierno Vasco, 2009, p. 91 et s. ; voir aussi, concernant le mouvement social impliqué dans le bien-être des marins, la bibliographie réalisée par KENNERLEY A., « Writing the History of Merchant Seafarer Education, Training and Welfare: Retrospect and Prospect », *The Northern Mariner*, Avril 2002, p. 1 et s.

Un autre exemple de fragilisation de l'action syndicale concerne l'institutionnalisation d'une garantie contre le risque « abandon des gens de mer ». L'intégration dans le corps de la MLC, 2006, de la résolution A 930(22) de l'OMI, préconisant la mise en place d'un système de sécurité financière pour prévenir les cas d'abandon et indemniser les marins des conséquences dommageables d'un abandon (essentiellement les risques rapatriement, subsistance et créances salariales impayées), a été prévue dès 2006 ; le groupe de travail mixte OMI/OIT, réuni périodiquement à Genève sur ce sujet, a achevé ses travaux en 2009⁸². Les amendements ont été examinés en détail et adoptés à la suite d'un vote à l'unanimité (1 abstention), le 11 avril 2014, par 400 participants à la première réunion de la commission tripartite spéciale, établie en vertu de la Convention de 2006. Le 11 juin 2014, recourant à la voie de la révision simplifiée de Convention⁸³, les délégués des gouvernements, des employeurs et des travailleurs à la Conférence internationale du Travail (CIT), lors de la 103^{ème} réunion annuelle de l'Organisation internationale du Travail (OIT), ont voté massivement en faveur de l'approbation des amendements⁸⁴.

Les acteurs portuaires, associatifs et syndicaux, sont confrontés régulièrement aux conséquences de l'abandon d'équipage, ceci depuis le début des années quatre-vingt-dix⁸⁵. L'identification d'une situation d'abandon d'équipage et la mise en œuvre de moyens de première urgence réclament, en général, la collaboration du syndicat et de l'association portuaire d'accueil. Les marins se confient plus facilement à ces visiteurs bénévoles, souvent marins retraités ou femmes de marins, pour briser le silence et révéler qu'ils ne sont plus payés depuis plusieurs mois. De fait, le bénévole pourra orienter le marin hésitant vers l'inspecteur ITF ou attirer discrètement l'attention de ce dernier sur un navire qu'il faudrait inspecter, voire suivre sur plusieurs escales. En cas d'abandon, l'association d'accueil s'occupe de la prise en charge sociale de l'équipage tandis que l'inspecteur ITF cherchera par le dialogue à résoudre la situation auprès de l'armateur ou de son représentant.

82) Rapport final du groupe mixte OMI/OIT d'experts sur la responsabilité et l'indemnisation pour les créances en cas de décès, de lésions corporelles et d'abandon des gens de mer, réuni à Genève, 2-6 mars 2009, document ILO/IMO/WGSP/9/2009/10 et Document PTMLC/2010, *Preparatory Tripartite MLC, 2006, Committee*, Genève, 20-22 septembre 2010.

83) Article XV de la MLC, 2006.

84) CHARBONNEAU A. et CHAUMETTE P., « Premiers amendements à la convention du travail maritime de l'OIT de 2006. Garanties financières en matière d'abandon des gens de mer et de responsabilité des armateurs en cas de décès ou de lésions corporelles », *Droit social* 2014, n° 10, pp. 802-810 ; NIFONTOV D., « Seafarer Abandonment Insurance: A System of Financial Security for Seafarers », in LAVELLE J., *The Maritime Labour Convention 2006 – International Labour Law Redefined*, Informa Law, Routledge, 2014, pp. 117-134 - Sur la mise en œuvre de ces dispositions en Espagne, FOTINOPOULOU BASURKO O., « El Convenio refundido sobre trabajo marítimo y el abandono de marinos en puertos extranjeros », *Revista del Ministerio de Trabajo e Inmigración*, Madrid, n° 82, 2009, pp. 219-244.

85) CHARBONNEAU A., « Les foyers d'accueil des marins à l'origine d'une action normative en faveur des marins abandonnés », *Droit Maritime Français* 2003, p. 638 et s.

L'investissement d'ITF aux côtés des équipages abandonnés a pour finalité de responsabiliser les armateurs ou propriétaires de navires défaillants, en usant notamment de la menace de la saisie conservatoire du navire. Il s'agit, à défaut de conciliation, d'obtenir la condamnation des auteurs et le recouvrement des créances salariales. Le maintien de l'équipage sur le navire participe de cette lutte, puisqu'il permet de sensibiliser la communauté portuaire et d'assurer l'entretien du navire, déterminant pour que celui-ci conserve sa valeur dans le cadre d'une procédure qui peut aboutir à sa vente.

« L'abandon des gens de mer », comme « la lutte contre les pavillons de complaisance », constitue, en l'état actuel du droit, moins une qualification juridique qu'une appellation disponible aux acteurs syndicaux et caritatifs, fédérative, pour organiser leurs actions et communiquer sur elles. Ainsi, il est de « bonne guerre » de dénoncer, sous l'angle de l'abandon d'équipage, des situations qui ne satisfont pas exactement à la définition retenue par la résolution A 930 (22) de l'OMI⁸⁶. L'action syndicale se trouverait, sinon, liée à une approche restrictive de l'abandon et contrainte par cette sélectivité⁸⁷.

Un autre argument doit être envisagé. Les affaires des marins abandonnés ont montré qu'elles ne s'arrêtaient pas aux portes des aéroports, par un rapatriement, mais que les marins supportaient souvent, chez eux, les conséquences des mouvements sociaux dans lesquels ils avaient été engagés. Les acteurs syndicaux et associatifs, à la faveur du contact noué et des liens d'amitié qui se tissent durant les longues périodes d'immobilisation du navire, sont les seuls à pouvoir maintenir une attention sur le marin et sa famille, à son retour. Une étude sociologique sur les conséquences à long terme de l'abandon de gens de mer a été conduite par Erol Kahveci, du Seafarers International Research Center (SIRC) de Cardiff. Elle porte sur le cas de l'*Obo Basak*⁸⁸, immobilisé à Dunkerque entre juillet 1997 et mars 1998. L'auteur montre qu'au retour des marins chez eux, ceux-ci ont trouvé leurs familles en

86) L'abandon y est défini comme la situation « caractérisée par la rupture des liens entre le propriétaire du navire et le marin », lorsque « le propriétaire du navire manque à certaines de ses obligations fondamentales envers le marin concernant son rapatriement rapide et le paiement de la rémunération due, la fourniture des produits de première nécessité, notamment une nourriture, un logement et des soins médicaux appropriés, etc. ». Le projet d'amendement à la MLC, 2006, précise que le non-versement du salaire doit concerner une période d'au moins deux mois pour que le marin soit considéré comme abandonné.

87) Domingo GONZÁLEZ JOYANES a développé une étude sur le recensement des cas d'abandons en Espagne. Sur les 50 cas répertoriés par lui, à partir de témoignages syndicaux et d'organisations caritatives, un seul figure sur la base OIT destinée à répertorier ces situations. Voir sa contribution, « Los Abandonos de Tripulaciones en Espana, Periodo 2000-2005. Aspectos Sociales y Procesos Legales », aux *Journées marseillaises 2006 de l'Observatoire des droits des marins*, Nantes, 2006, p. 209 et s. La base est accessible à l'adresse suivante : http://www.ilo.org/dyn/seafarers/seafarersbrowse.home?p_lang=fr.

88) Voir notamment KAHVECI E., « Neither at sea nor ashore: the abandoned crew of the Obo Basak », *A.D.M.O.*, 2006, p. 281 et s.

difficulté⁸⁹. N'ayant pas perçu de rémunération pendant plusieurs mois, les familles ont dû s'endetter pour survivre et éventuellement financer le prix d'un voyage jusqu'au port d'abandon. Le marin de retour se trouve, par conséquent, en prise avec des créanciers, ce qui pose le problème particulier des pays où se pratiquent encore des formes de servage pour dettes. L'appauvrissement peut s'avérer durable, en particulier lorsque les marins font l'expérience temporaire ou permanente des listes noires qui participent à leur isolement social et économique. L'effectivité de la garantie financière de l'abandon de marins, laquelle est en réalité déjà prévue par nombre de législations regardées comme complaisantes⁹⁰, ne dépend pas seulement d'un contrôle public de sa mise en œuvre, mais aussi d'un travail social et syndical d'accompagnement, seul susceptible d'assurer que ce mécanisme ne se limite pas à un simple « nettoyage » des zones portuaires occupées.

La loi française n° 2013-619 du 16 juillet 2013 a rappelé l'interdit ancestral de l'abandon de l'équipage, à travers une infraction pénale⁹¹, sans réduire l'obligation de rapatriement à un simple risque assurable dans la gestion du navire⁹². La mise en œuvre de la Convention de 2006 apparaît ainsi comme une grande aventure pour les institutions étatiques et les partenaires sociaux⁹³.

89) Les conclusions d'Erol KAHVECI sont rapportées dans l'ouvrage d'ALDERTON T. et al., *The Global Seafarer. Living and working conditions in a globalized industry*, Genève, OIT, 2004, p. 180 et s.

90) L'exemple du Libéria est parlant. La Maritime Regulation MR 10.342, «Liability Insurance, Repatriation Costs» prévoit cette garantie.

91) Articles L. 5571-1 à L. 5571-3 du Code des transports.

92) CHAUMETTE P., « La ratification et la transposition de la Convention OIT du travail maritime (MLC 2006) », *Droit social* 2013, pp. 915-924.

93) CHARBONNEAU A., dir., *La mise en œuvre de la Convention du travail maritime de l'OIT : Espoirs et Défis*, Rev. de Droit Comparé du Travail et de la Sécurité Sociale, COMPTRASEC, Bordeaux 2013/2 et English Electronic Edition 2013/3 <http://comptrasec.u-bordeaux.fr/revue-de-droit-compare-du-travail-et-de-la-securite-sociale> - ATTARD A. & GONZI P., «Increased Seafarer Protection under the Maritime Labour Convention 2006: A Maltese Flag Perspective», in J. LAVELLE, *The Maritime Labour Convention 2006 – International Labour Law Redefined*, Informa Law, Routledge, 2014, pp. 19-44.



CHAPTER 11

The ILO's *Seafarers' Identity Documents Convention (Revised), 2003 (n° 185)* after more than a decade: Ahead of its time or case of good intentions gone wrong?¹

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Résumé : Ce chapitre examine la Convention de l'OIT (révisée), (n° 185) de 2003, relative aux pièces d'identité des gens de mer, ainsi que le contexte politique et de sécurité frontalière en vertu duquel elle a été rapidement élaborée et adoptée. Il fournit également un aperçu des exigences de la Convention et son champ d'application et l'impact des propositions examinées en 2016, en vue de sa mise à jour, afin d'aligner la pièce d'identité des gens de mer (PIM) ou Seafarers' Identity Documents (SID) plus étroitement avec les normes internationales en vigueur pour les documents de voyage et passeports. Le chapitre explore la question de savoir pourquoi plus de dix ans après son adoption enthousiaste en 2003, la convention n° 185 n'a pas réussi à attirer plus de ratifications, notamment de la part des États du port. Malgré les bonnes intentions, les obstacles à l'application étendue de la Convention sont dans une large mesure attribuables à la dynamique de la fragmentation institutionnelle au niveau international et national. Dans le même temps, malgré une sécurité renforcée dans les pratiques de contrôle des frontières, dans la plupart des cas, il semble que les marins se voient toujours accorder des facilités dans les ports étrangers en vue de leur débarquement et de leurs transits terrestres et aériens, en vue de leurs déplacements professionnels, sans mise en œuvre

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généralisée de la convention n° 185. Une mise à jour du système complexe et coûteux établi en vertu de la convention n° 185 est nécessaire ; une carte d'identité fiable des marins, universellement reconnue et les facilités accordées à ses porteurs par les États du port, demeure un élément essentiel de l'expédition internationale et, surtout, du bien-être des gens de mer.

Abstract: *This chapter considers the ILO's Seafarers' Identity Documents Convention (Revised), 2003 (No. 185), and the heightened political and border security agenda under which it was rapidly developed and adopted. It also provides an overview of the Convention requirements and the potential areas and impact of proposals, to be considered in 2016, to update it to align the Seafarers' Identity Documents (SID) more closely with current international standards for travel documents and passports. The chapter explores the question of why, more than a decade after its enthusiastic adoption in 2003, Convention No. 185 has not succeeded in attracting widespread ratifications, particularly by port States. It is argued that, despite good intentions, the problems the Convention faces are to a large extent attributable to the dynamics of institutional fragmentation at the international and national levels. At the same time, despite enhanced security in border control practices, in most cases it appears that seafarers are still being granted facilities in foreign ports for shore leave and for transit for professional movements, without widespread implementation of Convention No. 185. This chapter argues that, while there may be a question as to whether, even if updated, the elaborate and costly system established under Convention No. 185 is, in fact, necessary, some form of reliable universally recognized seafarers' identity card and the facilities accorded to its bearers by port States remains essential to international shipping and, importantly, to seafarers' well-being.*

1. Introduction and Background

International shipping is essential to the functioning of international trade and the economy of all countries, and it also has an important economic impact because of increasingly international ocean resource exploitation and recreation/tourism industries. The maritime sector and its work force – the seafarers, without whom ships could not operate or provide these commercial services – are frequently described as "globalized". This term captures the core features of the industry: the shipowners/employers and the seafarers and the clients or customers are drawn from across the globe and, the site of work – the ship – is itself mobile. Because these elements commonly operate outside the territorial and legal jurisdiction of any single State, this is an industry which, historically,² has had a very high degree of regulation at the international level, in part to ensure a level of uniformity and predictability. As discussed at length in chapter 5,³ this includes international instruments establishing minimum standards for the working and living conditions of this mobile workforce. International shipping depends on the fact that seafarers both live and work on board ships, usually for months at a time as ships voyage to ports in different countries to load or unload cargo or passengers. International shipping today relies on the possibility of seafarers being able to quickly join or leave ships in these ports, which usually are not in their home countries. In addition to their transit for professional movement, seafarers have enjoyed what is sometimes described as a "right" to shore leave, that is they go ashore for short periods of time when in a foreign port and if seafarers are sick or injured, they have usually been able to go ashore quickly in foreign countries and receive medical care, as explained by the representative of an organization advocating for seafarers' rights and well-being:

Shore leave is an ancient and cherished seafarers' right that should not be denied except for compelling reasons. [...]

Seafarers' Right to Shore Leave: For as long as mariners have gone to sea on merchant ships, shore leave has been a cherished right — but it is not an absolute right. Like most individual rights, shore leave must be balanced against other interests such as the vessel's operational schedule and safety requirements. Merchant mariners' right to shore leave existed in customary maritime law long before articulation in the earliest written maritime codes of the Middle Ages. The traditional rule is that a ship's master has the discretion to grant or deny shore leave. The decision to grant shore leave should not be at the master's personal whim, nor should a master deny shore leave as a punishment. The law recognizes

2) Dating back to the 12th century early maritime codes to facilitate merchant shipping and trade such as the *Code of Wisby*, (Articles XVII and Article XXX.) and (Article XX) and, earlier, the *Rolls of Oleron*. See: <<http://www.admiraltylawguide.com/documents/oleron.html>>

3) Chapter 5 of this book: "A delicate balance: The seafarers' employment agreement, the system of the Maritime Labour Convention, 2006 and the role of flag States."

the necessity of shore leave for maintaining a mariner's health and for the safe and efficient operation of the vessel.⁴

However, while access to shore is a "right", albeit subject to the ship's operational needs *vis-à-vis* the ship's master,⁵ as the above points out, under international law this access is still a privilege *vis-à-vis* the port and the country in question. It is clear⁶ that all countries exercise border control over their territories and, unless they have accepted treaty obligations modifying this position, they may, as a matter of general international law, refuse to admit aliens as an aspect of State sovereignty. As a matter of practice, this privilege was granted to seafarers with few or no formalities until the 1950s. However the emergence of a large number of new flag States with no or few restrictions on the nationality of the crew on their ships combined with the

4) Stevenson, D.B. (2005) "Restrictions on Shore Leave: Any movement on this issue?" Presentation to Marine Log's Maritime and Port Security 2005, Washington, D.C., February 2, 2005.

Available at: <<http://www.marinelog.com/DOCS/PRINTMMV/MMVmarstev1.html>>

The author, an international advocate for seafarers' rights, is the Director, Center for Seafarers' Rights, Seamen's Church Institute of NY & NJ, goes on to note:

The United States Supreme Court decided in the 1943 case of *Aguilar v Standard Oil Company* that:

"The assumption is hardly sound that the normal uses and purposes of shore leave are 'exclusively personal' and have no relation to the vessel's business. Men cannot live for long cooped up aboard ship without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it may move smoothly. No master would take a crew to sea if he could not grant shore leave, and no crew would be taken if it could never obtain it. Even more for the seaman than for the landsman, therefore, 'the superfluous is the necessary...to make life livable' and to get work done. In short, shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion." 318 US 724, 87 L Ed 1107, 63 S Ct 930, 143 AMC 451.

5) It is now contained in the *Maritime Labour Convention, 2006* (MLC, 2006) <<http://www.ilo.org/global/standards/maritime-labour-convention/lang-en/index.htm>>

Regulation 2.4, which is directed to flag States, provides that:

2. Seafarers shall be granted shore leave to benefit their health and well-being and consistent with the operational requirements of their positions.

The provision has been misunderstood by some commentators as directed to port States however it is clear that this is a flag State obligation. The complementary provisions relating to port State obligations to allow access are set out in other provisions in the MLC, 2006 relating to facilitating repatriation (Regulation 2.1) and providing access to medical facilities (Regulation 4.1) and shore-based welfare facilities (Regulation 4.4).

6) As noted in the ILO report *Improved Security of Seafarers' Identification, Report VII (1), International Labour Conference, 91st Session*. Geneva: ILO, 2003 at p 6 "Under customary international law, the reception of aliens is a matter of discretion, and every State is, by reason of its territorial sovereignty, competent to exclude aliens from the whole, or any part, of its territory." citing L. Oppenheim: *Oppenheim's International Law* (London and New York, Longman, 1996), 9th edition, pp. 897-898. The Report is available at:

<<http://www.ilo.org/public/english/standards/reim/ilc/ilc91/pdf/rep-vii-1.pdf>>

This is despite some questions in the last few years in connection with refusals to allow access to ports as a place of refuge when a ship has had an accident.

political tensions after World War II gave rise to increased border control concerns, including greater control over access to their ports and port areas, by many States. This created problems for seafarers and shipowners, particularly in connection with visa requirements for entry as voyage routes were not always predictable and visas often took time to obtain. The result was that, in the 1950s, the idea of creating an officially recognized international document for border control confirming the *bona fides* of a seafarer as a seafarer for the purpose of accessing on-shore privileges or facilities was proposed. As noted in an ILO report in 2003:⁷

The idea of creating an international identity document for seafarers was first put forward by the International Transport Workers' Federation (ITF) and the United Kingdom Navigators' and Engineer Officers' Union in 1954. ITF wanted the introduction of an international identity document for seafarers, under ILO auspices, which could serve various useful purposes in helping to establish the status of bona fide merchant seafarers in foreign countries.

In 1954, the Navigators' and Engineer Officers' Union "Conference" adopted a resolution which was also submitted to the 1955 session of the Joint Maritime Commission, referring to "the difficulties being experienced with immigration and security regulations in foreign countries" and calling for the introduction of "an internationally recognized seafarer's passport or similar document designed to establish a seafarer's identity as such" and "which would be recognized instantly by immigration officials" worldwide.

The instrument which finally emerged — Convention No. 108 — fell short of the expectations of its sponsors. Instead, the Convention as adopted set uniform international standards for the issuance and content of seafarers' national identity documents and provided for their reciprocal recognition

Despite the above noted concerns Convention No. 108, which was adopted in 1958, has, as of February 2016, been ratified by 64 States.⁸ As a result of further support

7) *Ibid*, note 6 at p. 2.

8) *Seafarers' Identity Documents Convention, 1958* (No.108). Available at: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312253:NO>

Interestingly it has only been denounced by eight States as a result of their ratification of Convention No.185 (Azerbaijan, Brazil, France, India (will be denounced as of 9 April 2016), Luxembourg, Moldova, Russian Federation, Spain) (Lithuania appears to be counted as "ratified" (of the 31 States that have ratified Convention No. 185 as of February 2016) but only provisionally applies Convention No.185 and remains bound by Convention No. 108.) This means that 23 States ratified Convention No.185 but did not ratify No. 108 (Bahamas, Bangladesh, Bosnia and Herzegovina, Congo, Croatia, Georgia, Hungary, Indonesia, Jordan, Kazakhstan, Kiribati, Republic of Korea, Luxembourg, Madagascar, Maldives, Marshall Islands, Nigeria, Pakistan, Philippines, Turkmenistan, Vanuatu, Yemen.

See: <http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312330>

Conversely it means the following 56 * of the 64 States that had ratified Convention No. 108 have not

by the industry for these concerns the IMO *Convention on the Facilitation of International Maritime Traffic (FAL Convention)*,⁹ which deals with a wide range of topics in connection with uniform practices and documents for the arrival and departure of ships from ports in order to facilitate easier movement of goods and people by sea, also included provisions directed to port States with respect to permitting shore leave/port access to seafarers with identification as seafarers. The combination of these two instruments, both of which had high ratification levels, means that, in general, seafarers were, and still are, granted the necessary access to "facilities" by port States.

It is well known that the terrorist actions which resulted in the destruction of the World Trade Centre in the city of New York in the United States of America altered border control and security practices around the world dramatically and rapidly. This included, in particular, concerns about providing security in the international transportation sector (aviation and maritime). The result can only be described as a

moved to Convention No.185: Algeria, Angola, Antigua and Barbuda, Barbados, Belarus, Belize, Bulgaria, Cameroon, Canada, Cuba, Czech Republic, Denmark, Djibouti, Dominica, Estonia, Fiji, Finland, Ghana, Greece, Grenada, Guatemala, Guinea-Bissau, Guyana, Honduras, Iceland, Islamic Republic of Iran, Iraq, Ireland, Italy, Kyrgyzstan, Latvia, Liberia, Lithuania* (provisionally applies C185 but remains bound by C108), Malta, Mauritius, Mexico, Morocco, Norway, Panama, Poland, Portugal, Romania, Saint Lucia, Saint Vincent and the Grenadines, Seychelles, Slovenia, Solomon Islands, Sri Lanka, Sweden, Tajikistan, Tanzania (Tanganyika), Tunisia, Turkey, Ukraine, United Kingdom, Uruguay. One as yet unresolved question which will need to be considered by the ILO supervisory system relates to the reporting obligations of ILO Members that have ratified the *Protocol 1996 to the Merchant Shipping (Minimum Standards) Convention, 1976* as it lists Convention No.108 as one of the Conventions to be implemented. The Protocol is not revised by Convention No.185. The issue was discussed at the International Labour Conference in 2003 when it adopted Convention No.185, see: ILO Doc. *Provisional Record No.20, (Part II)*, International Labour Conference, 91st Session, paragraphs 721 and 722, Available at <<http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/pr-20p2.pdf>>

721. The Government member of Greece referred to Article 10 in connection with the final clauses relating to the entry into force of the Convention for a member State and the consequent automatic denunciation of Convention No. 108. The Protocol of 1996 to the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), included Convention No. 108 in Part B of its Supplementary Appendix. The ratification of the new instrument, while implying the automatic denunciation of Convention No. 108, would not, however, relieve a country from the obligation under the 1996 Protocol to submit reports on Convention No. 108, as required under article 22 of the Constitution of the ILO. He asked whether this question had been dealt with by the Drafting Committee.

722. The Legal Adviser explained that it was difficult to solve this problem. In principle, the only solution would be the revision of the 1996 Protocol. However, a practical solution could be to bring this question to the attention of the ILO Committee of Experts on the application of Conventions and Recommendations with the understanding that no report concerning Convention No. 108 should be requested from member States who were parties to the 1996 Protocol in case they had ratified the new instrument...

9) Adopted in 1965 the FAL Convention (see: <http://www.imo.org/en/OurWork/Facilitation/Pages/Home.aspx>) has been ratified by 115 States representing 91.45 per cent of the world merchant fleet based on GT. (as at 11 February 2016) <<http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>>

phenomenon. In a two-year period, a number of international organizations mobilized in order to quickly develop and adopt international standards for enhanced security and border control. In December 2002 the IMO held a Diplomatic Conference on Maritime Security and moved to adopt stringent requirements for security practices for ships and for port areas in the form of amendments to one of the most ratified of its maritime Conventions.¹⁰ The International Civil Aviation Organization¹¹ (ICAO) also took action to further develop its technical standards to ensure more secure passports and other travel documents.¹² Not surprisingly the question of seafarer

10) A new chapter XI-2 was added to the International Convention for the Safety of Life at Sea (SOLAS), 1974 as amended. The chapter was on special measures to enhance maritime security and also included adoption of International Ship and Port Facility Security (ISPS) Code. They were adopted by the IMO Conference on SOLAS in December 2002 and entered in force on 1 July 2004. This security regime like other IMO Conventions is based on inspection and certification of ships. SOLAS has been ratified by 162 States representing 98.53 per cent of the world merchant fleet based on GT. (as at 11 February 2016 <<http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>>

11) As explained in ICAO Doc No. TAG-MRTD/17-WP/16 (6/1/07) (Version 1) at p. 6, Presented by the New Technologies Working Group (NTWG), *Machine Readable Travel Documents (MRTDs): History, Interoperability, and Implementation*, available at: <http://www.icao.int/Meetings/TAG-MRTD/Documents/Tag-Mrtd-17/TagMrtd17_WP016.pdf> ICAO was created

... in 1946 as a specialized agency under the United Nations. ICAO's mandate to develop standards and specifications stems from the *Convention on International Civil Aviation* (Chicago Convention) of 1944 which created ICAO. The Organization promotes the safe and orderly development of international civil aviation throughout the world. It sets standards and regulations necessary for aviation safety, security, efficiency and regularity, as well as for aviation environmental protection. ICAO has grown to an organization with, at the time of this writing, 190 Contracting States. It provides the forum whereby requirements and procedures in need of standardization may be introduced, studied, and resolved. ICAO's mandate to develop travel document standards is provided by Articles 13 (*Entry and Clearance Regulations*), 22 (*Facilitation of formalities*), 23 (*Customs and immigration procedures*), and 37 (*Adoption of international standards and procedures*) of the Chicago Convention, which oblige Contracting States to develop and adopt international standards for customs, immigration, and other procedures to facilitate the border-crossing processes involved in international air transport.

191 States are members of ICAO, see: <<http://www.icao.int/about-icao/Pages/default.aspx>>

12) However it is important to note that a move to international uniformity - "global interoperability" and the use of modern technology including the development of machine readable travel documents and also biometrics was already underway in ICAO well before 2001. As explained in the ILO report to the Conference in 2003, *ibid* note 6, p. 5:

Work on developing a new generation of machine-readable travel documents (MRTDs) started in 1968 at the International Civil Aviation Organization (ICAO) with the establishment of a Panel on Passport Cards. This Panel developed recommendations for a standardized passport book or card that would be machine-readable to accelerate the clearance of passengers through passport controls. The technology retained was optical character reading (OCR). In 1980 ICAO published *A passport with machine-readable capability* (ICAO Document 9303 [Ed.Note. This was the first edition. As of 2015 there are now seven editions], which became the basis for the issuance of machine-readable passports by Australia, Canada and the United States. The ICAO technical specifications were endorsed by the International Organization for Standardization (ISO) as ISO Standard 7501, which is now the international reference for machine-readable travel documents.

ICAO: *Machine readable travel documents — Technical report— Selection of a globally interoperable biometric for machine-assisted identity confirmation with MRTDs* (2001), p. 3.

access to port areas and expedited professional movement through national borders was raised. In the context of the IMO preparatory work for the December 2002 Conference, the view was taken that either the ILO needed to rapidly update¹³ Convention No.108 to provide for enhanced security or else the necessary requirements for verifiable seafarer identification would be adopted under the auspices of the IMO.¹⁴ In March 2002 the ILO agreed to move forward more rapidly and made

For a summary historical background see also ICAO Document 9303, *Machine Readable Travel Documents*, Seventh Edition, (2015) at p1. Available at: <<http://www.icao.int/publications/pages/publication.aspx?docnum=9303>>

The standards set out in ICAO Document 9303 now covers "a family of MRTDs. Now included in that family are Passports (ID-3 size), Visas in Format A (sized to fit in an ID-3 Passport), Format B Visas (ID-2 size), Travel Document 1 Cards (ID-1 size), and Travel Document 2 Cards (ID-2 size)." See: ICAO Doc No. TAG-MRTD/17-WP/16 (6/1/07) (Version 1) at p. 7, Presented by the New Technologies Working Group (NTWG), *Machine Readable Travel Documents (MRTDs): History, Interoperability, and Implementation*, available at: http://www.icao.int/Meetings/TAG-MRTD/Documents/Tag-Mrtd-17/TagMrtd17_WP016.pdf

13) Although national seafarer identity cards issued under Convention No. 108 were widely accepted there were a number of specific border security related concerns that came to the forefront especially after 2001. The issues were summarized as follows in the ILO Working Paper *Seafarers' Identity Documents Convention (Revised), 2003 (No. 185) – Harmonisation and Collaboration with ICAO*, submitted to an ICAO meeting. TECHNICAL ADVISORY GROUP ON MACHINE READABLE TRAVEL DOCUMENTS (TAG/MRTD) TWENTIETH MEETING, Montréal, 7 to 9 September 2011, ICAO Doc No. TAG-MRTD/20-WP/15 at page 5. Available at: <http://www.icao.int/Meetings/TAG-MRTD/Documents/Tag-Mrtd-20/TagMrtd-20_WP015_en.pdf>

The 1958 Convention No. 108 sets out few standards that give a proper assurance that the SIDs issued under it are authentic or that their holders are legitimate seafarers. Also no uniformity is required with respect to the size or form of the document. This lack of uniformity can make it difficult for the authorities in the countries of entry, presented with diverse national SIDs, to immediately find the information they need to see. In addition, under Convention No. 108, countries can issue SIDs, not just to their own nationals, but also to foreign seafarers serving on ships registered in their territory or to foreign seafarers registered at employment offices in their territory, thus reducing even further the reliability of the SID issued to those seafarers. There are no requirements for SIDs to include modern security features and there is no means (other than visual inspection of the photograph (or signature) on the document) to verify that the individual presenting the document is the seafarer to whom it was originally issued. There are also no international requirements or even guidelines on the security or quality of the issuance process. The goal in revising the Convention was to address all of these issues in a single update.

14) As noted in the ILO Report to the Conference in 2003, *ibid*, note 6 at p 1:

The ILO has been actively participating in the relevant meetings of the IMO, starting with a working group established in February 2002 on the initiative of the IMO Assembly, since one of the issues considered crucial for improving maritime security is ensuring that seafarers have documents enabling their "positive and verifiable identification" — "positive" meaning that the document holder is the person to whom the document was issued and "verifiable" implying the validation of the authenticity of the document by reference to a source. The kinds of measures involved in properly implementing this concept go beyond the requirements of the relevant ILO Convention, namely the Seafarers' Identity Documents Convention, 1958 (No. 108). Seafarers are directly involved in the international transport of goods, including dangerous goods, as well as in the carriage of passengers. They also have access to ports, including restricted areas. While there was a proposal that this issue also be handled by the IMO, it has been agreed in the various competent IMO bodies and in the ILO Governing Body that it could more appropriately be dealt with by the ILO, on the expectation that

use of an expedited procedure to update the requirements in Convention 108 with a view to adoption of the instrument by June 2003.

The urgency of the issue and timelines involved for all three organizations was articulated by a G8¹⁵ Summit in Canada in June 2002¹⁶ which adopted the following action plan:

Cooperative G8 Action on Transport Security

The terrorist attacks on September 11, 2001 illustrated the critical yet fragile nature of the international transport system. For the global economy to flourish, this system must continue to provide safe, secure, efficient and reliable services to travellers and customers in all parts of the world.

We have therefore agreed on a set of cooperative actions to promote greater security of land, sea and air transport while facilitating the cost-effective and efficient flow of people, cargo, and vehicles for legitimate economic and social purposes. The G8 will:

People

- Implement as expeditiously as possible a common global standard based on UN EDIFACT for the collection and transmission of advance passenger information (API).
- Work towards granting reciprocal bilateral access, on a voluntary basis, to departure and transit lounges, including timely implementation of a pilot project.
- Work towards agreement by October 2002 on minimum standards for issuance of travel and identity documents for adoption at ICAO, and by June 2003 on minimum standards for issuance of seafarers' identity documents for adoption at the ILO.

Implementation

In order to ensure timely implementation of this initiative, we will review progress every six months, providing direction as required to G8 experts. G8 experts

the new ILO instrument on the subject could be brought into application in the near future. The IMO bodies have made it clear that if the ILO is unable to meet this expectation, provisions covering the seafarers' identity document will be included in SOLAS, 1974, as amended, and brought rapidly into effect under the simplified amendment procedure provided for in that Convention.

15) "Group of 8". Since 1975 various configurations involving heads of state or government of the major industrial democracies have met annually to consider economic and political issues facing their domestic societies and the international community as a whole. The Group of 8 now comprises Britain, Canada, France, Germany, Italy, Japan, the United States, Russian Federation (suspended in 2014), and the EU See: <http://www.g8.utoronto.ca/what_is_g8.html>

16) Kananaskis, June 26, 2002, Available at: < <http://www.g8.utoronto.ca/summit/2002kananaskis/transport.html>>

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will pursue these priorities and will promote policy coherence and coordination in all relevant international organizations (ICAO, IMO, WCO, ILO), in partnership with industry.

One year later the G8 Summit in France reported¹⁷ on progress:

We, the G8 Leaders, are determined to strengthen our joint efforts to curb terrorist threats against mass transportation. We shall continue to implement the Action Plan we agreed at Kananaskis to ensure safe, secure, efficient and reliable transportation world-wide. We have made important progress in implementing the plan and also have taken a number of new measures.

[...]

People

3.1. We have developed guidelines for the implementation of international standards governing the use of biometrics to verify the identity of travellers and have forwarded them to the ICAO. We endorse the "G8 Roma and Lyon Groups Statement on Biometric Applications for International Travel" and are resolved in our continued support for the ongoing work within ICAO.

3.2. We also agree to develop a secure, verifiable seafarer identity document at the International Labour Organisation (ILO) and are working together towards agreeing on seafarers and port workers security requirements compatible with trade facilitation at the International Maritime Organisation (IMO) and the ILO.

By the end of 2003, a remarkably short time frame for action to be taken by UN organizations, all three international organizations had moved quickly to develop and adopt or were close to adopting international standards which significantly changed security requirements and border controls and practice including the treatment of maritime transport. A key aspect of these efforts was an agreement in May 2003 by G8 senior officials to develop and implement "biometrics", which was described in 2003 as "new biology-based technologies to prevent forgeries of passports and other travel documents."¹⁸

17) *Enhance Transport Security and Control of Man-Portable Air Defence Systems (MANPADS): A G8 Action Plan*, Evian, June 2, 2003; Available at: <http://www.g8.utoronto.ca/summit/2003evian/transport_en.html>

18) As noted in a press release in May 2003, "G-8 Countries Urge Use of Biometrics in Fight Against Terrorism" regarding the "G8 Roma and Lyon Groups" (emphasis added). Available at: <<http://iipdigital.usembassy.gov/st/english/texttrans/2003/05/20030508104242ikceinawza0.7209436.html#ixzz3ldEBRqRb?>>

Ministers of Justice and Internal Affairs from the Group of Eight (G-8) countries said that biometric technologies "open up new possibilities in the fight against the use of fraudulent documents for criminal or terrorist purposes," especially in the transportation sector. Biometric techniques for identifying persons rely on computerized recognition technologies linked to databases loaded with

records of such information as fingerprints, measures of hand geometry, or iris and retinal scans. The G-8 ministers announced the establishment of a high-level working group on biometric technologies co-chaired by the United States and France in a final statement issued May 5 at the end of their meeting in Paris. They said that the ultimate objective of this initiative is the development of a common framework and standards within competent international bodies to ensure "perfect" technical interoperability and reliability...[...]

In fact significant discussion and work on technical standards had been underway within ICAO technical working groups since 1995 to incorporate biometric information in travel documents. See: ICAO Doc No. TAG-MRTD/17-WP/16 (6/1/07) (Version 1) at p., Presented by the New Technologies Working Group (NTWG), *Machine Readable Travel Documents (MRTDs): History, Interoperability, and Implementation*, p.10. Available at: < http://www.icao.int/Meetings/TAG-MRTD/Documents/Tag-Mrtd-17/TagMrtd17_WP016.pdf, where it was noted with respect to Document 9303,

Part 1, Volume 2 contains additional specifications for a globally interoperable system of biometric identification and associated data storage utilizing a contactless IC. Its specifications were drawn up following a detailed study carried out over several years by the TAG/MRTD's NTWG, beginning in 1998. The study examined the different biometric identification systems, concentrating on their relevance to traveler facilitation in applying for and obtaining a biometrically enabled passport and in using that passport for travel between States. Additionally, the NTWG examined very carefully the storage media available to most effectively carry both biometric as well as biographic information. Privacy laws applied by States around the world and the requirement for the biometric to be acceptable to the MRP holder strongly favored the use of the holder's face as the globally interoperable biometric, as the face, in the form of a photograph in a passport, is universally accepted as a means of identification.

It is of interest, in terms of the development of ILO Convention No.185 which chose fingerprints as the biometric, to note that the decision to choose facial recognition as the primary /preferred form of biometric was the subject of an ICAO technical working group decision as early as June 2002 when technical working group meeting were also underway at the ILO to develop a new form for a seafarers' identity document that would include a biometric. As noted in ICAO Doc No. TAG-MRTD/17-WP/16 (6/1/07) (Version 1) at p., Presented by the New Technologies Working Group (NTWG), *Machine Readable Travel Documents (MRTDs): History, Interoperability, and Implementation*, p.15 (emphasis added). Available at: <http://www.icao.int/Meetings/TAG-MRTD/Documents/Tag-Mrtd-17/TagMrtd17_WP016.pdf In the **Berlin Resolution** of June 2002, the NTWG unanimously supported its preference for the use of facial recognition as the globally interoperable biometric, noting that

"ICAO TAG-MRTD/NTWG endorses the use of face recognition as the globally interoperable biometric for machine assisted identity confirmation with MRTDs. ICAO TAG-MRTD/NTWG further recognizes that Member States may elect to use fingerprint and/or iris recognition as additional biometric technologies in support of machine assisted identity confirmation."

[....]

Though facial recognition is the primary globally interoperable biometric element, the NTWG recognized that some States would wish to use more than one biometric element. For example, many States have extensive fingerprint databases, which they might wish to employ to verify the identity of a traveler. Iris recognition was also identified as a reliable method of identification. Though technically commendable, fingerprint and iris recognition each involve a rather more invasive and time-consuming collection of data, both at the original enrollment and at a port of entry. The NTWG therefore decided that it would recommend that fingerprint and iris data should be optional and secondary means of biometric identification.

In addition this information and the view of an ICAO TAG/MRTD recommendation following the Berlin Resolution was also presented by ICAO during the 91 ILC 2003 discussions to adopt the text of Convention No. 185.

See: ILO Doc. No. *Provisional Record 20, Part 1, 91 ILC 2003, para.139*

Available at: <<http://www.ilo.org/public/english/standards/relm/ilc/ilc91/records.htm>>

139. The May 2003 TAG/MRTD meeting had developed a four-part recommendation intended for States that would be using biometrics for passports and other MRTDs. Firstly, it had recommended facial recognition as the globally interoperable biometric for machine- assisted identity confirmation with machine-readable travel documents. Secondly, the storage medium

In 2003 shortly after the *Seafarers' Identity Documents Convention (Revised), 2003* (No.185)¹⁹ was adopted by the 91st Session of the International Labour Conference (ILC),²⁰ a key official of the ILO who was closely involved in the development of the text and subsequent follow-up, commented²¹ on the significance of this instrument:

The Convention was adopted with 392 votes in favour, no votes against and 20 abstentions. The significance of that Convention lay in the balance it achieves between the current concerns for enhanced security, the facilitation of international commerce and the facilitation of seafarers' professional movements as well as their basic rights. It reflects the ILO's response to the increased threats to global security, in particular the need for security on ships and in ports. It ensures for seafarers their ability to pursue their profession, take shore leave and ensure that the industry continues to attract and retain trained and qualified seafarers as well as a maritime skill-base in all maritime countries. For shipowners, whose business is international trade, it is important that their ships are not subject to unnecessary delay. For governments, it gives them the security they need in order to accept and meet the commitments to allow seafarers the essential facility of shore leave as well as the facility necessary for them to perform their professional tasks.

The author concluded²² optimistically:

Throughout the preparatory work on Convention No.185, there was a strong consensus that the new instrument needed to be widely ratified to attain the desired impact. Special care was therefore given to achieving the widest possible

on MRTDs should be high-capacity, contactless integrated circuit (IC) chips. Thirdly, a specially developed logical data structure (LDS) should be used as the framework for programming data to ensure interoperability of MRTDs. Fourthly, a modified public key infrastructure (PKI) scheme should be used to provide security of data stored in the IC chip against unauthorized alteration or access.

19) *Ibid*, note 8 for the text of the Convention. Additional information relating to follow up meetings and documents can be found on the website for the *Maritime Labour Convention, 2006* at: <<http://www.ilo.org/global/standards/maritime-labour-convention/lang-en/index.htm>> under the "latest news" and also under the "Events" menu which contains links to Convention No.185 implementation documents: <http://www.ilo.org/global/standards/maritime-labour-convention/events/WCMS_301223/lang-en/index.htm>

20) ILC 2003 91st session <<http://www.ilo.org/public/english/standards/relm/ilc/ilc91>>

21) Doumbia-Henry C. (2003) " Current Maritime Labour Law Issues– An Internationally Uniform Identity Document for Seafarers" *WMU Journal of Maritime Affairs*, 2003, Vol. 2, No.2, 129 at p. 130. Available at: <http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-normes/documents/publication/wcms_088012.pdf>

This article prepared almost contemporaneously with the finalization and adoption of the Convention combined with the relevant *travaux préparatoires* provides an excellent insight into the concerns and views of the constituents at that time about the Convention when it was adopted. It is also one of the few substantive articles published on the topic and contains important key references, many of which are no longer easily located on the internet or are archived in secondary locations.

22) *Id*, pp. 146-147.

acceptability. The new Convention not only embodies the views of the majority, but also takes into account strong minority positions. This consensual approach should allow for fast and wide ratification of the Convention. In order to achieve speedy and wide ratification, certain countries that are not parties to the present 1958 Convention (No.108) need to make adjustments to their legislation in order to be able to ratify the new Convention. Adjustments of this kind are usually necessary to make ratification possible; the difference here is that they are to be made in the sensitive area of national security. The strong and positive attitude taken by a number of countries is encouraging. The Evian G8 statement on transport security also provided specific endorsement for the new ILO Convention.

As these comments clearly indicate there was strong support for this new instrument²³ (Convention No. 185) not only by governments but also importantly by the international representatives of workers and employers – the seafarers and shipowner – at the ILO. In addition there was significant interaction between ICAO and ILO at the meetings to develop the technical requirements for the new biometric-based seafarer identity document and issuing systems under Convention No.185. In principle, with such clear recognition of the need for coordinated action and a high level of interaction among organizations that were operating, essentially in parallel, the result should have been a seamless approach to the issue, with complementary requirements adopted by ICAO, ILO and IMO.

However, even though Convention No. 185 entered into force in 9 February 2005, albeit with only two ratifications, more than a decade later it still has relatively little uptake,²⁴ particularly by developed economy and port State countries.²⁵ This is despite continued promotional efforts and urging by the ILO and by the international Seafarers' and Shipowners' organizations and the IMO. At the same time it appears that seafarers have for the most part²⁶ continued to benefit from recognition of seafarers' identity documents irrespective of whether the document is issued by a country operating

23) Initially envisaged as a Protocol to Convention No.108, it eventually took the form of a new revising Convention to allow for the automatic denunciation of Convention No.108 by countries agreeing to the new instrument.

24) 31 States (Lithuania has indicated under Article 9 of Convention No. 185 that it provisionally applies Convention No. 185) ratified as of February 2016 seven of which ratified after 2010. See list at <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312330:NO>
See also footnote 8 *supra*.

25) Only two of the G8 Governments that called for it have ratified- France and the Russian Federation.

26) The United States of America is the main exception. However where visas are required for professional movement seafarers from some countries have encountered difficulties obtaining visas in a timely manner to allow for their transit to join ships. This not purely a border control issue, in some cases for economic reasons some countries have closed consulates or embassies in a number of countries, which means seafarers must travel to other countries to obtain the necessary visas for travel to work.

under the 1958 Convention No. 108 or by a country that has implemented Convention No. 185. From a legal point of view this makes sense given the high level of ratification of Convention No. 108 and the FAL Convention, both of which require that ratifying countries to provide facilities to seafarers with a valid seafarers' identity document.

The ILO has, to the extent possible with limited resources,²⁷ promoted ratification and implementation of Convention No. 185²⁸ and since 2010 has held international expert meetings including a key meeting in 2015²⁹ which concluded³⁰ *inter alia* that (emphasis added):

1. The Tripartite Meeting of Experts was convened to provide advice to the

27) *Technical background paper for discussion at the Meeting of Experts concerning Convention No. 185* (Geneva, 4–6 February 2015), ILO. Doc. No. MESICD/2015. Available at: <http://www.ilo.org/global/standards/maritime-labour-convention/events/WCMS_329890/lang-en/index.htm>, states (references removed):

8. When the Convention was adopted in 2003, the participants at the International Labour Conference (ILC) realized that the more technical aspects would need to be developed before the Convention could be fully operational. In a resolution adopted with Convention No. 185, the ILC noted that the success of the Convention would "depend upon the availability in each ratifying Member of the necessary technology, expertise and material resources for the preparation and verification of the new, secure seafarers' identity document, established by the Convention, and for the related database and issuance processes". The resolution not only referred to the use of the Organization's technical cooperation programme, but, in particular, urged ILO Members "to agree among themselves on measures of cooperation which would: (a) enable them to share their technology, expertise and resources, where appropriate, (b) provide for countries with advanced technology and processes to assist Members that are less advanced in those areas". The Office has undertaken numerous technical missions to assist countries interested in ratifying and/or implementing Convention No. 185, but it has not had sufficient budget to provide the type of assistance required by many emerging economy countries that are also home to the world's seafarers, to help them with the expense of deploying the complex and secure document issuance systems required to issue SIDs in accordance with the requirements of Convention No. 185.

28) In fact the ILO took what might seem an unusual step for a UN organization of carrying out testing and approving particular equipment/companies to produce the biometric element of the SID under Convention No. 185: For a summary of these technical activities and various tests related to interoperability over a number of years see ILO Working Paper 2011 *ibid*, note 13, section 1.3. See also : 2008 - *List of the biometric products as the results of the testing for the Standard adopted under the Seafarers' Identity Documents Convention (Revised) (No. 185), 2003*.

Available at: http://www.ilo.org/wcmsp5/groups/public/-ed_dialogue/-sector/documents/publication/wcms_191713.pdf

See also *inter alia*: *ILO Seafarers' Identity Documents Biometric Testing Campaign Report (Part I)*. Available at: <http://www.ilo.org/wcmsp5/groups/public/-ed_dialogue/-sector/documents/publication/wcms_191709.pdf>

29) *Final report*. Available at:

http://www.ilo.org/global/standards/maritime-labour-convention/events/WCMS_407638/lang-en/index.htm

30) See: *Outcome of the Meeting of Experts concerning the Seafarers' Identity Documents Convention (Revised), 2003 (No. 185)* (Geneva, 4–6 February 2015), ILO Doc. No. GB.323/LILS/4, Appendix "General conclusion of the Tripartite Meeting of Experts on Convention No. 185". Available at: http://www.ilo.org/gb/GBSessions/GB323/lils/WCMS_346449/lang-en/index.htm

Governing Body on cost-effective technical and administrative solutions to overcome problems that had arisen in the implementation of the Seafarers' Identity Documents Convention (Revised), 2003 (No. 185) and to encourage further ratification of the Convention as well as participation in the implementation of the Convention by all ILO Members with maritime interests.

2. The Meeting noted that now, nearly 12 years after the adoption of the Convention, only 30 Members had ratified the Convention or were provisionally applying it, and that this number included few port States. Consequently, countries that had made the considerable investment to properly implement Convention No. 185 could count on only a few countries to recognize the seafarers' identity documents (SIDs) issued under it. The Meeting noted that many other Members, especially those that had ratified Convention No. 108, were prepared to give due consideration to SIDs validly issued under Convention No. 185, but that the authentication of those SIDs was hampered by the fact that the fingerprint technology required for the Convention No. 185 biometric in Annex I to the Convention was not used by the border authorities of the countries concerned because, since 2003, the International Civil Aviation Organization (ICAO) standards for travel documents had been exclusively based on the facial image in a contactless chip as the biometric rather than a fingerprint template in a two-dimensional barcode.
3. It was noted, furthermore, that the fingerprint technology and biometric products developed for the implementation of Convention No. 185 were out of date and, in some cases, not easy to obtain. In fact, only a few countries that had ratified Convention No. 185 were in a position to actually issue SIDs conforming to the Convention.
4. A notable exception was the Russian Federation, which was implementing the Convention. The Government expert of the Russian Federation stated that his country was willing to provide free of charge, to Members requesting it the necessary technology for implementing the biometric requirement for the SIDs to be issued in accordance with Convention No. 185.
5. Having carefully considered the offer from the Government of the Russian Federation, a clear majority of experts at the Meeting concluded that the most feasible way forward was for the Conference to amend Annex I to the Convention and, as necessary, the other Annexes to it, in order to align the biometric under Convention No. 185 with the ICAO standards that were now universally followed for travel and similar documents, but with a suitable transitional period for countries that were already implementing Convention No. 185.
6. The Meeting reiterated the importance of cooperation between ILO Members, especially with respect to assistance by technologically advanced countries to less advanced countries that are establishing their national infrastructure for the issuance or verification of SIDs under Convention No. 185.

As a result of the advice of the experts at the meeting in 2015, an "Ad hoc tripartite maritime body" was constituted by the ILO's Governing Body and met in February 2016 to consider changes that may be necessary to ensure that this Convention No.185 achieves the ambitious goal of a secure globally recognized international identity document for seafarers.³¹ Specifically, the meeting in 2016 considered and adopted amendments based on the recommendations in 2015 to change the technical and national infrastructure requirements of the Convention, essentially aimed at aligning it with the current ICAO document practices and standards if or international travel documents such as passports.³² This recommendation to amend, if adopted, the ILO in June 2016 is expected to result in more ratifications and national implementation and ultimately enhanced security for SIDs and for countries with a maritime interest.

However given the proposal in 2015 by the meeting of experts and the outcome of the meeting in 2016 to move to align with ICAO biometrics and its document issuance and verification practices, and the current level of acceptance of SIDS under Convention No. 108, a question might be asked about the reasons for moving forward on Convention No.185, beyond the obvious interest by the ILO in seeing Conventions that have been developed and adopted succeed in terms of ratification and implementation. This chapter suggests there are important interests in the maritime sector in having special recognition of the still relatively unique situation of seafarers and their need for facilitated border-crossing facilities. Certainly, as explained in section 2 below, it has some important and for its time and, arguably, even ahead of its time, approaches to achieving security in document issuance practices, albeit within an institutional and regulatory regime that increasingly appears "unimplementable" for most countries for reasons related to cost and technological

31) The meeting was attended by 64 representatives appointed by the Governing Body, 32 of whom designated by the Governments; 16 by the Shipowners' group and 16 by the Seafarers' group. See: <http://www.ilo.org/global/standards/maritime-labour-convention/events/WCMS_411197/lang-en/index.htm>

32) *Ibid*, note 30, see:

Recommendation 1: The International Labour Office should prepare a preliminary draft of a revised Annex I and Annex II of Convention No. 185 where the biometric is changed from a fingerprint template in a two-dimensional barcode to a facial image stored in a contactless chip and where the national electronic database is required to contain only the public keys required to verify the digital signatures defined for the contactless chip by ICAO Document 9303. All references to technical standards other than ICAO Document 9303 are to be eliminated, as all of the ISO standards required would now already be referenced within ICAO Document 9303. The references to ICAO Document 9303 should refer to that document, including subsequent amendments of it, so that the Annexes will not require changing in the future as ICAO issues new versions of ICAO Document 9303 and as ePassport technology moves forward. If any of the changes to Annex I and Annex II need to be reflected in changes to the processes and procedures outlined in Annex III (such as, for instance, a need to ensure the quality of the photograph of the seafarer), then these changes may have to be reflected in a preliminary draft of a revised Annex III.

change and also, perhaps most importantly, also national departmental roles and responsibilities.³³ The latter problem arises because border control matters are not usually dealt with at the national level by either labour departments or maritime administrations, either of which would probably have issued SIDs under Convention No.108. Equally, questions of who is genuinely a "seafarer" and verifying this question for purposes of a professional identification document and international queries is not a matter that border control agencies would usually address. In addition, the biometric requirements under Convention No. 185 require products that are no longer available due to a lack of market demand because the biometric and verification system adopted by ILO in Convention No. 185 is based on fingerprint technology and the conventions' issuance and verification system. While not in conflict, it does not follow the contemporary facial recognition biometric and the document verification system adopted by ICAO and its member States, which are usually represented in ICAO by national border control agencies.³⁴ As noted above, this has created a disincentive to ratification and, if a State has ratified, to take the costly steps to implement the Convention.

33) These recommendations for amendments to Annexes I, II and III were considered by the Ad Hoc Committee meeting in February 2016 and have been submitted to the International Labour Conference for adoption in accordance with Article 8 of Convention No.185. See: "Proposals for amendments to Annexes I, II and III of the Seafarers' Identity Documents Convention (Revised), 2003 (No. 185). In addition two resolutions were adopted by the meeting, one related to entry into force and a transitional period (Resolution on the implementation of the Convention No. 185, and entry into force of the proposed amendments to its Annexes, including transitional measures, <http://www.ilo.org/global/standards/maritime-labour-convention/events/WCMS_451725/lang-en/index.htm>, and the other to facilitation of access to shore and transit (Resolution on the facilitation of access to shore leave and transit of seafarers) <http://www.ilo.org/global/standards/maritime-labour-convention/events/WCMS_451726/lang-en/index.htm>

34) ILO *Technical background paper 2015, ibid*, note 27 at paragraph 9, states (reference removed):
 9. From 2004 to 2008, the Office commissioned tests of biometric products developed in accordance with this ILO technical standard. Twelve biometric products from 11 different sources were found to meet the requirements of the technical standard. As a result of changes in technology and the development of border security control standards since the last test of products in 2008, most of the products on the list are no longer available and several of the listed companies no longer exist as independent entities.

See also the conclusions and recommendations of the meeting, *ibid*, note 30, Appendix,

Recommendation 3: In conjunction with the development of the revised Annexes to Convention No. 185, the International Labour Office should prepare a guidance document explaining the impact of the changes and the necessity for SID issuers to now work with the ePassport issuers in their respective countries so that they can share the same certificate authority to manage the signing of the ePassport and the SID. The potential cost savings from sharing a single issuance system for both ePassports and SIDs should be explained. This document should be drafted and circulated along with the draft of the revised Annexes.
 [...]

Recommendation 5: The International Labour Office should review its liaison relationship with ISO/IEC JTC-1 SC 37 1 and pursue a closer liaison with ICAO, since all the ISO standards used for the implementation of Convention No. 185 will now be referenced through ICAO Document 9303.

The remainder of this chapter provides an overview of the key requirements of the Convention No. 185. It then considers the implications of the current proposals to amend the technical aspects of the Convention to align them with the ICAO passport and other travel documents requirements.

2. Overview and the Key Requirements of Convention No. 185

Unlike most maritime Conventions, including its predecessor, Convention No. 185 is not directed to States in their role as flag States³⁵ with responsibility for regulating ships and shipowners. The majority of the substantive obligations in the Convention are directed to States in what can be called their labour supplying role - that is, the State of nationality or permanent residence of a seafarer. It deals with the obligation to provide these seafarers with a seafarers' identity document (SID) which conforms to the Convention requirements using an issuance and verification/response system to question document validity which also follows the requirements of the Convention.

The Convention also contains one article providing for obligations on ratifying States in their role as port States or a State of potential transit for seafarers to recognize seafarers identity documents issued by other ratifying States by providing the enumerated facilities to foreign seafarers on ships entering its ports or a seafarer needing to undertake professional movement – that is, to transit the State's borders to travel to join or leave a ship either in its ports or in the port of another State. As this indicates the Convention is dealing with an issue relevant mainly to seafarers working outside their state of nationality and to ships engaged in international voyages. For shipowners, although they have no role in implementation, there is an interest in ensuring that seafarers have these facilities.

35) Although as practical matter Article 7 paragraph 1 which provides that the SID to "remain in the seafarer's possession at all times" is usually understood as a "right" of seafarer rather than an obligation placed on the seafarer. See the comment regarding draft Article 8 (now Article 7) in ILO report *Improved Security of Sea farers' Identification, Report VII (2B), International Labour Conference, 91st Session*. Geneva: ILO, 2003 at p. 9.

Available at: <<http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-vii-2b.pdf>>

This provision would therefore seem to be a matter for the flag State concerned since the newly added flexibility in Article 7 paragraph 2 to the Convention No. 108 provision (Article 3), allows for a ship's master to hold it for safekeeping with a seafarer's permission, is not matter (if viewed as right on the part of the seafarer) that the issuing State can enforce except if it is a flag States and *vis a vis* ships/shipowners under its flag.

2.1 The key requirements of Convention No. 185

2.1.1 Overview

Viewed from a structural perspective as explained by Cleopatra Doumbia-Henry,³⁶

Convention No.185 contains 18 Articles and three Annexes. The Annexes are an integral part of the Convention. The Articles contain matters of principle that are expected to remain valid for many years. The Articles contain provisions relating to: definition and scope; the issuance procedures (who can issue seafarers' identity documents and to whom); the content and form of the identity document; national electronic database requirements; quality control and evaluation requirements; facilitation of shore leave, transit and transfer of seafarers; continuous possession and withdrawal of the identity document; amendment procedure for the Annexes; and transitional provisions. Nine of the 18 articles deal with the final clauses (procedural provisions) of the Convention. The three Annexes contain technical details, which could be the subject of more regular updating and deal with:

- the model for the seafarers' identity document;
- the electronic database; and
- requirements and recommended practices concerning the issuance of seafarers' identity documents.

While of some importance in 2003 as an "innovation", the possibility of "more regular updating" of "technical Annexes" is now proving to be essential to the success – perhaps even the survival – of Convention No.185. Although the main body of the Convention, the Articles, is subject to usual lengthy ILO Convention revision procedures if they need to be updated, the three technical Annexes can be updated more quickly through a "simplified amendment" procedure set out in Article 8. This procedure is based on the "tacit acceptance" procedure employed by the International Maritime Organization (IMO) and later adopted by the ILO in 2006 in the Maritime Labour Convention, 2006 (MLC,2006), which was under negotiation in the ILO at the same time as the Convention No. 185.³⁷ While the amendments would still take

36) *Ibid*, note 21 p.135.

37) Doumbia-Henry C., *ibid*, note 21 at p. 145 explains:

Article 8 of Convention No.185 introduces a simplified amendment procedure for the three Annexes to the Convention. It provides for amendments to be made to these Annexes by the International Labour Conference, acting on the advice of a duly constituted tripartite maritime body of the ILO. The decision needs to be taken by a two-thirds majority vote at the Conference, including at least half of the countries that have ratified the Convention. The amendments adopted will not require ratification but a provision is included permitting a member State that has ratified the Convention to opt out or to delay entry into force with respect to it. Such notification must be given within six months of the date of adoption of the amendment. This feature enables the details of the Convention to be easily updated in order to keep pace with constantly changing technologies.

time to be developed and considered and require a vote by the International Labour Conference (ILC), a central feature of this approach is that the amendments will then be binding on entry into force on all States that have ratified, unless the State has given written notification to the ILO that it does not agree to be bound. This reduces the problem of a potential "patchwork" in application because of the pace of ratification of the amendments. It may also reduce the time required at the national level to implement amendments as in many cases they may not be required to go through the same legal process and consideration as a new Convention that would need to be ratified. As noted in section 1 above, proposals to significantly amend the Annexes will be considered in February 2016.³⁸

The 18 Articles can be understood as falling into three substantive categories. Aside from the scope (Article 1) and the articles relating to amendments to the Annexes, transitional arrangements and the final provisions dealing with entry into force (Articles 8-18), the core substantive provisions are articles 2-7 dealing with the obligation to issue a SID, the content and form of the SID, control of the issuance procedure and provisions for facilities to be given by port/transit States. These provisions are also tied to the three Annexes and the more rapid amendment procedure for the Annexes set out in Article 8. The following table provides a quick overview of the main content and connections between the Articles and the Annexes and the more simplified (rapid) amendment procedure. It also notes the areas where proposals to amend the Annexes were considered and recommended for adoption by the meeting in 2016. These connections are important to be aware of because, as noted above, the Articles, which can only be changed through a new (revising) Convention, establish the core legal obligations and rights and de facto (and in one case expressly) establish constraints on the extent and nature of the amendments that can be made to update the Annexes.

The legal basis for this amendment procedure is that legislators concerned are not required to set out all the details of the norms they are establishing, but can leave such provisions to be developed through a simpler procedure or subsidiary legislation. The procedure is in accordance with the Constitution, since control remains with the International Labour Conference, as required by Article 19 (2) of the ILO Constitution. This simplified amendment procedure is inspired by provisions, which are to be incorporated in the Consolidated Maritime Labour Convention under discussion and were based on international instruments such as SOLAS 1974.

See also comment *infra*, note 43 regarding Article 14 paragraph 3.

³⁸) See *supra* footnotes 29 to 34 and the related discussion.

| Article Number | Subject of Article | Connection to Annex | Simple/rapid amend procedure under Art 8 applies |
|------------------|---|---|--|
| Article 1 | Scope - includes one definition - re 'a seafarer'. | - | - |
| Article 2 | Issuance of SID - obligation on State to issue SID | - | - |
| Article 3 | Content/Form - sets out the parameters for the SID - not a passport but a «stand-alone» document - includes particulars to be included on the SID - includes «preconditions» with respect to the nature of the biometric to be included in the SID, including privacy considerations, seafarers' ability to view the data included in biometric, equipment to provided and verify SIDs is «user friendly» and available at a low cost. | Annex I- «Model for SID» (Art 3, para.1) - described as a «model» but is a detailed description of the specific form and content of the SID - a «template or other representative of biometric of seafarer which meets the specifications in Annex I ...and satisfies the listed «preconditions» (Art. 3, para. 8) - SID content and form to take account of international standard referred to in Annex I (Art 3, para. 10). | Yes. Art 3, para. 1 - permits amendments to Annex I, including setting the entry into force date for amendments, so long the amendments are «consistent» with para. 2-11 of Art 3. - in 2016 amendments to replace all of the current text of this Annex with text aligned with ICAO Doc 9303 Seventh Edition 2015 or subsequent publications were considered and proposed for adoption. |
| Article 4 | National Electronic Database - sets out a procedure for national records regarding the SIDS that have been issued and privacy considerations. -also establishes obligation to respond to inquires from other States about validity and authenticity of SIDs. | Annex II «Electronic Database» - lists the 8 points divided into sections 1 and 2 of information that the database is restricted to (Art 4, para. 2). | Yes. Art 4, para. 2 - permits amendments to Annex II. - in 2016 amendments to each line of the current text to align it with ICAO Doc 9303 Seventh edition 2015 or subsequent publications were considered and proposed for adoption. |

| | | | |
|------------------|---|--|---|
| Article 5 | Quality Control and Evaluations - sets minimum procedures for issuance of SIDs - set out requirements for «international oversight» (an independent evaluation of administration of system every 5 years and reported (without prejudice to the ILO supervisory system national implementation reports that are also required) to the ILO to be available to all States - ILO Governing Body to approve a list of States that meet these system requirements. ³⁹ | Annex III Requirements and recommended procedures concerning the issuance of SIDs (Art 5, para. 1) Two part Annex - Part A. «Mandatory results» - results to be achieved by issuance system including the database and quality control relating to security and privacy Part B.» Recommended Procedures and Practices» – to be given «full consideration». ⁴⁰ | Yes. Art 5, para. 3 - permits amendments to Annex III - in 2016 amendments to the introductory part to require observation of mandatory aspects of the ICAO Document 9303 Seventh Edition 2015 and subsequent publications were considered and proposed for adoption. |
| Article 6 | Facilitation of Shore Leave and Transit and Transfer of Seafarers - obligations port States and States of possible transit of seafarers to provide «facilities» to seafarers with a valid SID - seafarers usually | Annex II, section 1 (Article 6, para. 3) - information set out in Annex II, section 1 to be included in the notice by ship of arrival re holders SID to port State when requesting entry of seafarers for shore leave to allow for verifi- | Amendment possibility not expressly referenced but implicit because of potential amendments under Article 4 (see above) that may affect the information in sections 1 and/ or 2 of Annex II - in 2016 amendments to each line of the cu- |

39) As of February 2016 only one State, the Russian Federation, is on this list. It was approved in June 2015. See: ILO Doc. GB.324/INS/7/2, "Report of the Director-General. Second supplementary report: Inclusion of the Russian Federation in the list to be established under Article 5, paragraph 6 of the Seafarers' Identity Documents Convention (Revised, 2003 No.185)". Available at: http://www.ilo.org/gb/GBSessions/GB324/ins/WCMS_373533/lang-en/index.htm.

In 2005 the ILO Governing Body adopted ILO Doc. No. GB. 292/LILS/11, "Arrangements and procedures under Article 5, paragraphs 6-8, of the Seafarers' Identity Documents Convention (Revised), 2003 (No. 185)". Available at: <http://www.ilo.org/public/english/standards/relm/gb/docs/gb292/pdf/lils-11.pdf> or for the published report dated January 2005.

See: http://www.ilo.org/wcmsp5/groups/public/—ed_dialogue/—sector/documents/publication/wcms_191714.pdf.

40) Dombia-Henry C., *ibid*, note 21 at footnote 26 comments: "The non-binding nature of Part B of Annex III was confirmed by the Legal Adviser of the Conference. See, *Provisional Record* No.20, (Part II), International Labour Conference, 91st Session. Geneva: ILO, 2003, paragraph 719."

XI. The ILO's Seafarers' Identity Documents Convention

| | | | |
|------------------|--|--|---|
| | <p>provided entry based on SID without a visa (some possibility for refusal on specific grounds).</p> <ul style="list-style-type: none"> - provides for transit for joining or leaving a ship with a SID supplemented by a passport. Not expressly addressed but could perhaps be also asked for a visa (some possibility for refusal on specific grounds). | <p>ation by port State.</p> | <p>urrent text of Section 1 to align it with ICAO Doc 9303 Seventh edition 2015 or subsequent publications were considered and proposed for adoption.</p> |
| Article 7 | <p>Continuous Possession and Withdrawal</p> <ul style="list-style-type: none"> - seafarer's «right» (rather than obligation) to have continuous possession with an exception for safe-keeping - provides for withdrawal by issuing State if person no longer meets conditions for holding a SID. | - | |
| Article 8 | <p>Amendment of Annexes</p> <ul style="list-style-type: none"> - establishes procedure require a «duly constituted maritime body» to recommend amendments to Annexes - the ILC to vote on recommended amendments- allows a ratifying State to give notice saying amendments will enter into force for them or indicate a later date. | <p>Linked to Articles 3, 4, 5 (see above), 14 and 16 and Annexes I, II, III.</p> | |

| | | | |
|------------------------------|--|--|--|
| <p>Article 9</p> | <p>Transitional Provision - allow a State that has ratified Convention No. 108 but not yet ratified Convention No. 185 to have its SIDS accepted as Convention No. 185 SIDS if taking measures to implement and apply Articles 2-5 and State accepts SIDS from other States (provisional application)⁴¹</p> | | |
| <p>Articles 10-18</p> | <p>Final Provisions - essentially standard provisions⁴² for ILO Conventions adjusted for particulars of the Convention No.185.</p> | | |

As this foregoing overview illustrates, the technical Annexes are frequently referenced in the three Articles which set out the main obligations regarding the SIDS and its issuance systems and are, as a legal matter, essential to the implementation of the Convention, particularly with respect to the SID and the SID issuance system. At the same time the Articles, which, as explained earlier, set out core obligations for States intended to address both the security concerns of governments and the concerns of the shipping industry with respect to facilitating access to shore and transnational movement of seafarers, also reflect concerns about seafarers' rights, particularly

41) As of February 2016 only one State has applied under article 9 – Lithuania. See comments, *supra* footnote 8.

42) Namely: expressly revises Convention No. 108 (Art 10); ratification to be communicated to Director-General (DG) of ILO for registration (Art 11); enters into force 6 months after 2 registered ratifications, and thereafter 6 months after registered ratification for each State (Art 12); denunciation possible for one year after 10 years after first entry into force date (e.g., 2015) (Art 13); obligation on DG of ILO to notify all States of ratifications, declarations and registration of any amendments and notifications under Art 8 (Art 14); DG of ILO to communicate ratifications to Secretary-General of UN (Art 15); when necessary ILO Governing Body to present a report on the working of Convention to the ILC and to examine desirability of placing on its agenda revision in whole or part taking account of Article 8 (Art. 16); if a new/ revising Convention is adopted then Convention No. 185 is automatically denounced on ratification of new Convention and closed to further ratifications but remains binding on State that have ratified it and not ratified the new Convention (Art 17); authoritative languages (English and French) (Art 18).

with respect to the nature and use of biometrics, and the database and privacy issues. Where some interests were difficult to reconcile, they were to the extent possible in 2003 with the expedited procedure used to develop and adopt the Convention, "resolved", in the "technical" annexes. This means that the two parts of the Convention, the Articles and the Annexes, must be read together to fully understand the obligations and rights. Thus the proposal for significant amendments to the Annexes is related to updating to address technological changes, it also appears to reflect a change in views and concerns that directed the solutions adopted in 2003.

Articles 1, 2, 3, 6 and 7, repeats the existing basic obligations under Convention No.108 to provide seafarers (as defined) upon application with an identity document which meets fairly minimal requirements as to form and content and to permit entry to seafarers with valid seafarer identity documents for temporary shore leave when a ship is in port and also facilitate professional movement subject to some conditions. However, Convention No. 108 also leaves many issues regarding the form and content of the document and also acceptance of them for professional movement to be decided nationally. Convention No. 185 both in the Article and the Annexes elaborates on all these matters and is clearly aimed at reaching the objective of a universal card with this standardization a high level of international recognition and security.

The following sections 2.1.2 to 2.1.5 highlight the specific elements and obligations in the Articles taking account of the Annexes and the *travaux préparatoires* leading up to the adoption of the Convention No. 185 and also refer, where relevant, to subsequent reports and meetings.⁴³

2.1.2 Who is entitled to a SID? Who has to issue it? (Articles 1 and 2)

Article 1 although entitled "scope" contains a single definition – that for a "seafarer" who is "any person who is employed or engaged or works in any capacity on board a vessel, other than a ship of war, ordinarily engaged in maritime navigation". This

43) For the purposes of this paper the final numbering and order of Articles in the Convention is used, however it is important to be aware when reviewing, in particular, ILO background papers submitted to the Conference and the *Provisional Records* of the discussion at the ILC when it was adopted that Articles in the draft text under consideration at the Conference were significantly adjusted and reordered with the Articles 11-18 not appearing in the draft Convention text and not the subject of discussion at the ILC but were presumably added by the Drafting Committee working with the Convention text. There does not appear to be a record, explaining, for example, Article 14 para. 3, which refers to "registration of any amendments". It is not clear what is expected since the Convention does not appear to envisage a procedure leading to registration of an amendment by the Director-General, and since amendments to the Annexes are not subject to ratification and registration of the ratification by the Director-General. The ILO's (revised 2011) *Manual for Drafting Legal Instrument*, also do not appear to explain this wording, see, *inter alia*, para. 85. Available at: <<http://www.ilo.org/public/english/bureau/leg/download/man.pdf>>

definition is essentially the same definition as that set in Convention No. 108 (Art. 1, para. 1) and is also similar to the definition of seafarer found in the MLC, 2006 (Art. 2 para. 1(f)). The main change from 1958 is that by 2003 it was increasingly accepted in the sector that a much wider range of workers, many not involved in navigational or related duties on the ship, were also seafarers, particularly, for example, people working in passenger/hotel service jobs in the cruise ship industry. Given this broader understanding, it is of interest to note the recommendation in Annex III, Part B, with respect to the proof that could be expected to be provided by an individual that she or he is a seafarer, as it mainly refers to documents that a seafarer engaged in navigational or related duties would have but others – (e.g. musicians or other entertainers) may not have:

3.10. The proof that the applicant is a seafarer, within the meaning of Article 1 of this Convention should at least consist of:

- 3.10.1. a previous SID, or a seafarers' discharge book; or
- 3.10.2. a certificate of competency, qualification or other relevant training; or
- 3.10.3. equally cogent evidence.

3.11. Supplementary proof should be sought where deemed appropriate.

Although the terms "vessel" and "ship" are not defined and, indeed, are used interchangeably in the text even within the same sentence, in light of the lengthy debates during the development and adoption of the MLC, 2006 as to whether it applies to mobile offshore drilling units (MODUs), it is of interest to note that following views (which were not contradicted) in the official record of the ILC in 2003 regarding the assumed application of the Convention to workers on board MODUs as seafarers for purposes of holding SIDs:⁴⁴

102. The Worker and the Employer Vice-Chairpersons preferred to retain the term "vessel". Many vessels, particularly in the offshore support sector, were in fact referred to as "vessels" and not "ships", and the amendment would remove coverage for seafarers on such vessels.

Article 1 also follows the usual ILO approach, which is also found in Convention No. 108, and provides for national tripartite consultation "in the event of any doubt as to whether any categories of persons are to be regarded as seafarers for purposes of this Convention". Article 1, paragraph 3 also provides for the possibility of applying

44) ILO Doc. No. *Provisional Record 20*, Part 1, 91 ILC 2003.

Available at: <<http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/pr-20p1.pdf>>

Although the worker and employer groups were largely the same composition for the discussions on both Convention No. 185 and the MLC, 2006, which was under development at the same time, this view as to terminology was not repeated in the MLC, 2006 context. The MLC, 2006 uses "ship" as does the major predecessor Convention (Convention No. 147) which expressly envisages application to MODUs

the Convention to commercial maritime fishing after consultation with representatives of fishing vessel owners and persons working onboard fishing vessels.⁴⁵ This was not part of Convention No. 108 but recognizes the growth since 1958 in distant water fishing fleets and the fact that workers on those vessels are often in the same position as seafarers in terms of the need for shore-leave or transit. Although addressed in Article 2 paragraph 6 rather than Article 1, it should be noted that the Convention is expressly "without prejudice to obligations of each Member under international arrangement relating to refugees and stateless persons".

As mentioned earlier, in section 1, Article 2 introduced a key change from Convention No. 108 which had also permitted flag States and States where a seafarer is registered at an employment service in its territory to issue SIDS to seafarers that were foreign nationals. The State⁴⁶ that can issue a SID is now limited to the State of nationality of the seafarer and, with some additional limitations, also the State of permanent residence of a seafarer. The latter was controversial and concerns were ultimately resolved by requiring that permanent residents issued with SID "shall in all cases travel in conformity with the provisions of Article 6 paragraph 7," that is the SID must be supplemented by a passport.⁴⁷

Under paragraph 1 of Article 2, issuance of a SID is not automatic as the seafarer is required to apply with a right to an administrative appeal if rejected.⁴⁸ After some debate at the 91 ILC, it was clarified that the requirement for an application did not prevent a State from imposing a requirement on seafarers to have a SID.⁴⁹ In the flag State context the view was that a flag State could also require that all seafarers on its ship have a SID, in which case foreign seafarers would have to request a SID

45) This paragraph was proposed by the workers/seafarers spokesperson at the ILC. One of the reasons for this wording is that the Employer/Shipowners' spokesperson was of that view that they did not represent fishing vessel owners but could agree to this wording. See: paras. 127-128, *ibid* note 44.

46) The Convention does not address the question of which department of a government is responsible. This is one of the more difficult issues that came to the fore in the 2016 discussion with respect to amendments to align with the ICAO standards and practices. The departments representing governments at the ILO were mainly labour departments and for maritime issues also maritime administrations and not the border control departments engaged with ICAO.

47) *Ibid* note 44, para. 200-236. There were many different concerns articulated.

48) Article 7, para. 2. also provides with respect to withdrawal:

2. The seafarers' identity document shall be promptly withdrawn by the issuing State if it is ascertained that the seafarer no longer meets the conditions for its issue under this Convention. Procedures for suspending or withdrawing seafarers' identity documents shall be drawn up in consultation with the representative shipowners' and seafarers' organizations and shall include procedures for administrative appeal.

49) *Ibid*, note 44, paras. 172-182 and specifically.

182. The representative of the Secretary-General confirmed that a member State that ratified the Convention would retain the right to impose on all of its seafarers a requirement to hold a SID in conformity with the Convention, in order to be able to exercise their profession.

from their country of nationality or permanent residence.⁵⁰

The SID is to be issued without "undue delay". However the question of whether seafarers or shipowners could be required to pay the cost of the SID is not addressed in Convention No. 185, other than in Article 6, paragraph 2, which deals with costs related to verification when a request of entry for shore leave or transit is made.⁵¹

This shift to focus on the State of nationality combined with Articles and Annexes regarding the system for issuance and record keeping to allow for verification makes sense and is laudable from an enhanced security point of view. However, with the world's seafaring force increasingly drawn from developing or emerging economy countries, often with various problems of capacity to implement, the cost of the system,⁵² partly as it diverged from the ICAO system, proved to be the major barrier to the success of the Convention. These issues of capacity and cost were clearly

50) The potential problem of the State of nationality not being party to Convention No. 185 or even Convention No. 108 does not appear to have been considered.

51) *Ibid*, note 44, paras. 183-195. The issue was extensively debated but a decision was made during the 91 ILC not to address the question as national practice varied and some cost recovery as is the case with passports was a consideration for many governments. If all costs were allocated to governments with no possibility for charging a fee for a SID then it was seen as a possible barrier to ratification. The issue arose again in connection with development of the MLC, 2006 because until 2004 there had still been a possibility that a general requirement relating having a SID would be included in the MLC, 2006. The MLC, 2006, Standard A1.4, paragraph 5 (b), provides in connection with regulation of private seafarer recruitment and placement services and the fees that can be charged to seafarers for gaining employment that:

(b) require that no fees or other charges for seafarer recruitment or placement or for providing employment to seafarers are borne directly or indirectly, in whole or in part, by the seafarer, other than the cost of the seafarer obtaining a national statutory medical certificate, the national seafarer's book and a passport or other similar personal travel documents, not including, however, the cost of visas, which shall be borne by the shipowner; ...

Although there was some confusion during the Technical Committee discussion of this in 2004, it was understood that the even though the question of whether a SID is a travel document was not unclear, the phrase "other similar personal travel documents" was meant to refer to SIDS, see: *Report of Technical Committee 2*, Preparatory Technical Maritime Conference, 2004, *Record of Proceedings 5*, ILO Doc. No. PTMC/ 04/3-2/ paragraphs 157-176 and paragraphs 210-233. Available at: <<http://www.ilo.org/public/english/standards/reim/ilc/ilc94/ptmc/pdf/ptmc-04-3-2.pdf>>

52) As noted in the *Technical background paper* in 2015, *ibid*, note 27, 76. Many of the less-developed economy countries do not have the technical expertise to build their own SID issuance system or the available finances to purchase one from a commercial supplier. Especially if they have a small number of seafarers, the cost per seafarer to fully implement all the requirements of Convention No. 185 can be very high.

A complete SID issuance system typically costs anywhere from a few hundred thousand to a few million dollars, depending on the number of seafarers and the number of issuance and enrolment sites. Even after the system is developed or purchased, there are additional costs for training staff and for ongoing operations, which include not just the services to register and enrol seafarers, but the cost of maintaining a continuously available focal point and national electronic database. For many ILO Members, these costs and the associated technical complexity of building and maintaining such a system make ratification of Convention No. 185 very difficult.

understood in 2003 when the ILC adopting the Convention, also adopted a "Resolution concerning technical cooperation relating to seafarers identity documents"⁵³ which provided;

Noting that the success of the Convention will depend upon the availability in each ratifying Member of the necessary technology, expertise and material resources for the preparation and verification of the new, secure seafarers' identity document, established by the Convention, and for the related database and issuance processes;

1. Urges Members to agree among themselves on measures of cooperation which would:
 - (a) enable them to share their technology, expertise and resources, where appropriate,
 - (b) provide for countries with advanced technology and processes to assist Members that are less advanced in those areas,
2. Invites the Governing Body to request the Director-General to give due priority, in the use of resources allocated to the Organization's technical cooperation programme, to assisting countries with respect to the said technology, expertise and processes.

However, as noted above,⁵⁴ this level of resources necessary was not forthcoming, perhaps because governments were also working to implement other general border security enhancement requirements in their own countries, with the lead on these initiatives taken by departments other than labour or maritime administrations.

2.1.3 The nature of the SID and its form and content

Article 3 deals with the content and form of the SID and, in that respect, revises the content of Article 5 of Convention No.108. However, as explained earlier, the level of detail, particularly with the incorporation by reference of Annex I and the detailed description it contains – "a model" – of the format and content of the SID, was intended to significantly narrow national discretion on these questions in the interests of providing a universally recognizable, more secure physical document as well as improving, through biometrics and the related requirements for issuance procedures, a document with more reliable verifiable content.⁵⁵

- (b) As indicated in the table set out in section 2.1.1, Article 3 paragraph 1 permits

53) *Ibid.* note 44, page 108.

54) *Supra* note 27.

55) As noted in 2011, *ibid.* note 13 at p.13-14 in connection with the problems with a SID based on the requirements under Convention No. 108 relative to the changes made in Convention No.185.

The SID could be combined with a passport or issued as a separate identity document and could

the amendment of Annex I, "in particular, to take account of technological developments," and indeed, significant changes are to be proposed for Annex 1 in 2016, as also explained earlier, to align the SID and the related system for verification with the current and future ICAO standards and system. However Article 3 also includes some important parameters and constraints reflecting the balance struck between enhanced security goals and concerns about seafarers' privacy and also financial impact on governments.

In terms of physical format,⁵⁶ Article 3 paragraph 2 follows the wording under Convention No. 108 (Art. 4) in that it requires that the SID be "designed in a simple manner, be made of durable materials" and addresses concerns about alteration or tampering.

However it also adds the requirements that it be "machine readable" and "be generally accessible to governments at the lowest cost possible," consistent with reliably achieving the purpose of preventing tampering or falsification and easy detection of alterations. Annex 1 provides further details on the physical/security features that are required, namely:

- The seafarers' identity document, whose form and content are set out below, shall consist of good-quality materials which, as far as practicable, having regard to considerations such as cost, are not easily accessible to the general public.
- The data page(s) of the document indicated in bold below shall be protected by a laminate or overlay, or by applying an imaging technology and substrate material that provide an equivalent resistance to substitution of the portrait and other

even be issued to foreign nationals serving as seafarers on board vessels registered in a particular country. Many different types and styles of documents were issued under Convention No. 108, making it very difficult for authorities at borders and at port authorities to determine if a particular SID was a legitimate document. There were also no specific requirements relating to security features and no means to link the seafarer to their document, except for visual comparison of a photograph, which was easy to substitute in a document with minimal or no security features.

[...]

Another important improvement made by defining the content and form of the Seafarers' Identity Document [in Convention No. 185] was that it allowed the data provided on the SID to be constrained. This was intended to eliminate the difficulties caused in authenticating an SID when it could be provided as a stand alone document, as part of a seafarers' passport or even combined with medical information or job qualifications as part of a seaman's book. This is why Annex 1 also contains the following statement:

Data to be entered on the data page(s) of the seafarers' identity document shall be restricted to: ...

56) Doumbia-Henry C., *ibid*, note 21, p. 137 explains (notes removed):

During the discussions at the Conference, different models were envisaged and scrutinised. Two options were examined. One was a smart card with an embedded integrated circuit (IC), which would enable information to be accessed without the use of physical contacts (e.g. induction) the other was for a more traditional document (without IC). The solution favoured was for a more traditional-type document.

biographical data.

The materials used, dimensions and placement of data shall conform to the International Civil Aviation Organization (ICAO) specifications as contained in Document 9303, Part. 3 (2nd edition, 2002) or Document 9303, Part. 1 (5th edition, 2003).

- Other security features shall include at least one of the following features:

Watermarks, ultraviolet security features, use of special inks, special colour designs, perforated images, holograms, laser engraving, micro-printing, and heat-sealed lamination.

Despite these security requirements, the background paper⁵⁷ considered by the ILO Tripartite Meeting of Experts regarding Convention No.185 in 2015, noted that:

42. During the development of ISO/IEC 24713-3:2009, one issue that was noted by the technical experts of SC 37 was that the current SID is not as secure as many other identity documents, such as an ePassport, because it relies entirely on physical security and has no digital security. It also does not have a high level of physical security, making it relatively easy at the present time to produce a SID which will be indistinguishable from a validly issued SID. This has been a perennial problem for passports and has historically resulted in a continuous struggle between document issuers and forgers as ever more elaborate physical security features were introduced. For example, the ePassport was designed to eliminate this problem by relying on the security of digital cryptography which has a known algorithm strength and therefore provides a known (very high) level of security and resistance to forging.

Article 3, paragraph 4 requires that the SID be no larger than a "normal passport" while Annex I elaborates that: "[t]he document shall have no more space than is necessary to contain the information provided for by the Convention." Despite this vague wording, as noted by Doumbia-Henry:⁵⁸

Annex I of the Convention allows either of two formats: passport format or card-type format [...] The seafarers' identity document must therefore conform to international standards for machine-readable travel documents (MRTDs), which are contained in Document 9303, Part. 3 (2nd edition, 2002) or Document 9303, Part. 1 (5th edition, 2003).

Unlike Convention No. 108 which did not set a period of validity for a SID, Article 3,

⁵⁷) *Ibid*, note 27 at para. 42.

⁵⁸) *Ibid*, note 21, p. 137.

paragraph 6, while allowing national flexibility on the specific period chosen sets outside parameters, that it "shall in no case exceed ten years, subject to renewal after the first five years."⁵⁹

The SID is required to have specified mandatory information which is set out in the Article 3, paragraphs 5, 7 and 8 and further explained in Annex I, relating to the issuer of the document, the identification of the seafarer, as well two statements relating to the status of the document to indicate that it is a SID under Convention No. 185 and "is a stand-alone document and not a passport." With respect to last two statements, which are repeated in Annex I, the concern was avoid any confusion with travel documents falling under the auspices of ICAO, by emphasizing the document was related only to the individual's profession as a seafarer. However there was at the Conference some uncertainty over this matter and some questioning of the need for a stand-alone document.⁶⁰

Article 3 paragraph 7 sets out the particulars with respect to the information about

59) *Ibid*, note 44, paras. 344-358. The ICAO recommendation for passports was 10 years but Government generally preferred five years for security reasons. After extensive discussion the following proposal by the Workers was accepted.

355. The Worker Vice-Chairperson recognized that the majority view of Government members was for a period of five years. Whatever decision was taken it should apply to all issuing authorities and not vary among States. He suggested a subamendment "ten years, subject to renewal after five years." That would help to cut costs, as the document could more easily be renewed (with an annotation to the effect that it was a renewal) than reissued.

60) See discussion regarding costs, *supra* note 51. See also *ibid*, note 44, paras. 313-343. The following proposal, which is envisaged in Convention No. 108, was not accepted.

313. The Government member of the United Kingdom introduced an amendment (D.44), submitted by the Government members of Italy, Sweden and the United Kingdom, to add the following new paragraph: "As an alternative to issuing a separate document, a Member may, after consulting the shipowners' and seafarers' organizations concerned, incorporate the seafarers' identity document, by means of a secure sticker, into the national passport, provided that the features required under this Convention are met. A passport so endorsed shall have the same effect as a seafarers' identity document for the purposes of this Convention. The seafarers' identity document so incorporated into the national passport shall conform to the model set out in Annex I." The purpose was to provide a possible alternative to a stand-alone SID. This could provide important flexibility to member States. It was not in contradiction to the concept that the new SID should simply be an identity document. A travel document would still be required. The SID would be incorporated within the passport by means of a sticker. This should only be seen as an additional option, which could alleviate concerns about cost or paperwork and bureaucracy. The amendment would retain the existing option in Article 2 of Convention No. 108 for a member State to issue a passport with the indication that the holder is a seafarer. It was also in agreement with the IMO's FAL Convention. The proposal could therefore be considered as updating and extending this provision into the new instrument. The Government members of Italy and Sweden added that it was a simpler, less costly option.

314. The Worker Vice-Chairperson said his group opposed the amendment for several reasons. Firstly, seafarers carried their SIDs when going ashore, usually leaving their passports safe onboard. Secondly, it was unclear whether such a provision would lead to decreased cost for member States. Thirdly, it was a matter of concern that the seafarer's occupation would appear on his or her passport, even if it were being used for other purposes, such as private travel. Fourthly, seafarers who were permanent residents of one State would be required to use the passports issued by their home

the seafarer to be set out in the SID. An interesting shift in tone from 1958 when the equivalent provision uses the term "include" while, as noted above, in 2003 the wording is "restricted to" the following:

- (a) full name (first and last names where applicable);
- (b) sex;
- (c) date and place of birth;
- (d) nationality;
- (e) any special physical characteristics that may assist identification;
- (f) digital or original photograph; and
- (g) signature.

This list plus issuance related information and the biometric information referred to in the "notwithstanding" paragraph 8 of Article 3, is reiterated with more specific detail in Annex 1 which addresses matters such as language/translations, use of Roman alphabet, order of stated names and the way to express dates (i.e. two digit Arabic numerals to refer to day/month/year), in order to help ensure more uniformity.

The required information in paragraph 7 mainly replicates Convention No. 108 and is not controversial. It also recognizes social changes since 1958 in that it adds in the additional item "sex" to include the possibility that a seafarer may be either a man or a woman.

The most difficult provision and the central concern with Annex I and now central aspect of the amendments to be considered in 2016, is set out in paragraphs 8 and 9 of Article 3. They reveal the political tension and uncertainty in 2003 with respect to biometrics and technology and their use or potential misuse.

8. Notwithstanding paragraph 7 above, a template or other representation of a biometric of the holder which meets the specification provided for in Annex I shall also be required for inclusion in the seafarers' identity document, provided that the following preconditions are satisfied:

- (a) the biometric can be captured without any invasion of privacy of the persons concerned, discomfort to them, risk to their health or offence against their dignity;
- (b) the biometric shall itself be visible on the document and it shall not be possible to reconstitute it from the template or other representation;⁶¹
- (c) the equipment needed for the provision and verification of the biometric is

country, and this might create problems.

⁶¹) This is a legal constraint which, in principle, may raise a question for amendments to move to chip technology and facial recognition that will be considered in 2016. The Technical background paper

- user-friendly and is generally accessible to governments at low cost;
- (d) the equipment for the verification of the biometric can be conveniently and reliably operated in ports and in other places, including on board ship, where verification of identity is normally carried out by the competent authorities; and
- (e) the system in which the biometric is to be used (including the equipment, technologies and procedures for use) provides results that are uniform and reliable for the authentication of identity.

9. All data concerning the seafarer that are recorded on the document shall be visible. Seafarers shall have convenient access to machines enabling them to inspect any data concerning them that is not eye-readable. Such access shall be provided by or on behalf of the issuing authority.

The views of Shipowners and, importantly in the ILO context, the Seafarers on this matter were summarized in the Report to ILC in 2003⁶² (emphasis added):

SHIPOWNERS' AND SEAFARERS' VIEWS

considered by the Tripartite Meeting of Experts in 2015, *ibid* note 34, notes:

49. One other element which was included as a possibility in ISO/IEC 24713-3, but which was not fleshed out in detail, was the concept of including a contactless chip in the SID. The main issue with this option is that Article 3(9) of Convention No. 185 states that "All data concerning the seafarer that are recorded on the document shall be visible." Since the information contained in a contactless chip is only visible through electronic means, the use of a chip could be understood to be inconsistent with this requirement. The solution, however, is to ensure that the chip only contains information about the seafarer which is visible elsewhere on the document. The chip then simply provides a copy of that information which is easier to read at the border using the existing infrastructure designed for ePassports.

[...]

62. There is a legal question that would also need to be considered. Article 3(8)(b) of Convention No. 185 provides that "the biometric shall itself be visible on the document and it shall not be possible to reconstitute it from the template or other representation". The facial image is clearly visible on the document since paragraph 7(f) of that Article requires a "digital or original photograph". The question is whether or not a facial image would also satisfy the requirement that "it shall not be possible to reconstitute it from the template or other representation". Currently, the SID uses a fingerprint minutiae template. While it is possible to reverse engineer a minutiae template to create a synthetic fingerprint which is very similar to the seafarer's fingerprint and which will successfully match with the seafarer's fingerprint, it is not a perfect representation of the seafarer's fingerprint as it will be missing pores and scars and other information unrelated to the minutiae and which will make the difference easily detectable by a human expert or a biometric system with liveness detection. A facial image, considered in the same manner as the fingerprint template, is a two-dimensional representation of a seafarer's face and while it does allow a printed picture which is very similar to the seafarer's face to be generated, it does not permit a proper three-dimensional representation of the seafarer's face to be generated. A printed mask would therefore be distinguishable from the seafarer's actual face by any human observer or by a biometric system with liveness detection. Before accepting the option to replace a fingerprint in a bar code with the facial image in a contactless chip, it is therefore important to consider whether or not a facial image can satisfy the requirements of Article 3(8)(b) of Convention No. 185.

62) *Ibid*, note 6, p. 17.

At the Consultation Meeting, both Shipowners and Seafarers insisted on the importance of the visa waiver provision of an internationally standardized and recognized seafarers' identity document. As previously mentioned, the Shipowners' views were submitted as a paper (Annex III, Appendix 3), to which reference has been made. Their concern, however, was that the lack of an identity document should not constitute grounds for ship detention.

The Seafarers' group recognized that there were legitimate concerns regarding security, and agreed that positive identification and verification — nothing more and nothing less — was all that was necessary. They expressed a number of concerns, not least of which was that people whose working and living conditions were already very difficult should be made to feel as if they were criminals (based on the kind of information required for their identity documents), and that the identity document might not facilitate shore leave without, for example, security guard escorts.

There was particular concern regarding data protection and privacy rights. The Seafarers wanted an identity document which was machine-readable, of an international standard format, with no data storage in bar codes, chips or magnetic strips. A national database should be available for checking individual documents in compliance with privacy legislation. The document should be issued by the State of nationality or, in exceptional cases, the State of residence. The Seafarers considered that the purpose of the document was for shore leave, transit and repatriation and the information on the document should be limited to that in Convention No. 108. As to quality control and oversight, the Seafarers felt that the ILO should be able to set up a "White List" audit comparable to the IMO and an oversight system comparable to ICAO.

These views for the most part governed the solution developed on this question of biometric and data in 2003. The following reflection by Doumbia-Henry,⁶³ who at that time was the key ILO official involved in the development and adoption of Convention No.185, provide an instructive insight into the rationale and solutions adopted (footnotes removed, emphasis added).

The issue of a biometric in the seafarers' identity document was one of the most controversial issues discussed and agreed upon. A biometric is an electronic recording of a unique physical identifier allowing immigration authorities to automatically match the document and its bearer. The question was whether the identity document should contain any biometric other than a photograph and if it did whether such a requirement would be mandatory or optional. The Conference discussions had the assistance of experts from ICAO and the G8 Roma and Lyon Group on biometric applications for international travel documents. It also

63) *Ibid*, note 21, pp.136-137.

had cognisance of the G8 communiqué on the issue as well as the decision taken in May by the ICAO Technical Advisory Group on Machine Readable Travel Documents (TAG/MRTD) and the ICAO Council's Air Transport Committee (ATC) in May 2003 to adopt a global harmonized blueprint for the integration of biometric identification information into passports and other machine-readable travel documents. It had recommended facial recognition as the globally interoperable biometric preferred option.

Taking into account strongly voiced concerns of the seafarers and to provide transparency for the end user, the International Labour Conference decided upon adopting a biometric template based on a fingerprint printed as numbers in a bar code conforming to standards to be developed. It was agreed that this option would enable correct identification, while at the same time keeping production costs for the cards low and ensuring the widest possible adherence to existing standards.

As regards the contents of a seafarers' identity document, all possible data entries are restricted to an exhaustive number of particulars provided for in Article 3, paragraph 7 and Annex I of Convention No. 185. [...] Thus, while most data to be contained in the seafarers' identity document is identical to that of a usual passport, the inclusion of biometric data is groundbreaking. This is the first time such a requirement is being made mandatory at the international level. As indicated by the representative of ICAO during the discussions in the Conference Committee, at present, the ICAO specifications are technical blueprints and have the force of recommendations. The International Standards Organization (ISO) normally endorses them as standards.

The Conference Committee took into account all the elements and advice available to it as well as the concerns of seafarers who opposed the inclusion of a magnetic strip or a chip on the grounds that it could be misused against the seafarer by the inclusion of hidden data. It is for this reason that Article 3, paragraph 9 specifically provides that all data concerning the seafarer that are recorded on the document have to be visible and that where such information is not eye-readable, seafarers are to have convenient access to machines to enable them to inspect the data. Article 3, paragraph 8 of the Convention concerning the biometric was given effect to in Annex I. Section III (k) of that Annex provided for a "biometric template based on a fingerprint as numbers in a bar code conforming to a standard to be developed."

At the time of the adoption of the Convention, no global interoperable standard had as yet been developed for the biometric chosen. In ICAO, work was ongoing on the technical specifications for a facial recognition biometric. The ILO choice of the fingerprint template was favoured due to considerations on transparency, reliability and production costs.

In order to give effect to the biometric chosen, the International Labour Conference adopted a Resolution concerning the development of the global interoperable bio-metric. The resolution took note of the on-going work of ICAO in the field and stressed the need for the ILO to develop guidelines on standards of the technology

to be used which will facilitate the use of a common international standard. It invited the ILO Governing body to request the Director-General "to take urgent measures for the development by the appropriate institutions of a global interoperable standard for the biometric template adopted in the framework of the Seafarers' Identity Documents Convention (Revised) 2003, particularly in cooperation with the International Civil Aviation Organization."

Without going into the detail of the later development of the technical requirements for an interoperable biometric standard, as noted earlier, the International Labour Office followed up and after testing, and in cooperation with the ISO, developed an interoperable standard (which was also revised) for the biometric. However, unfortunately, as explained in the *Technical Background Paper* considered by the Tripartite Meeting of Experts in 2015⁶⁴ (emphasis added):

17. The Office has also worked with the International Civil Aviation Organization (ICAO), since Convention No. 185 specifies in Annex I that "[t]he materials used, dimensions and placement of data shall conform to the International Civil Aviation Organization (ICAO) specifications as contained in Document 9303 Part 3 (2nd edition, 2002) or Document 9303 Part 1 (5th edition, 2003)." Although the ICAO secretariat was very supportive of this concept and initially offered to assist governments implementing Convention No. 185 by checking that SIDs were fully compliant with the ICAO Document 9303 specifications; subsequently, the resources were not available to offer this service. Unfortunately, when new editions of ICAO Document 9303 Part 1 and Part 3 were released in 2006 and 2008, respectively, the versions specified in Annex I to Convention No. 185 were withdrawn and are now no longer available to governments seeking to implement Convention No. 185.

18. The Office contacted the ICAO Secretariat to resolve these issues, but did not have the support of the New Technologies Working Group (NTWG) of the ICAO Technical Advisory Group on Machine Readable Travel Documents, which controls the content of ICAO Document 9303.

[...]

27. One issue related to the changes in technology since 2003, which has already been mentioned, is that all of the external standards for technical requirements referenced in both Convention No. 185 and in the related technical documents such as ILO SID-0002 which were available and in use in 2003 and 2004, are produced by other organizations (the ICAO and the ISO). The documents containing these technical standards have been revised over the past decade and are no longer available for use. For example, Annex I to Convention No. 185 requires that "[t]he materials used, dimensions and placement of data shall conform

64) *Ibid* note 34.

to the International Civil Aviation Organization (ICAO) specifications as contained in Document 9303 Part 3 (2nd edition, 2002) or Document 9303 Part 1 (5th edition, 2003)." As these versions of Document 9303 are no longer available from the ICAO, it is difficult for Members deploying a SID system to know if they are properly compliant with the Convention's technical requirements. Similarly, the fingerprint template encoded in the two-dimensional bar code, which is specified in ILO SID-0002, is based on a draft version of the standard ISO/IEC 19794-2:2005. The final published version of the standard is slightly different from the draft and since 2005 it has had multiple amendments and corrigenda and in 2011 was replaced by a completely new version of the standard, ISO/IEC 19794-2:2011. The other ISO standards which are referenced in ILO SID-0002, such as the draft version of ISO/IEC 19784 used for the Biometric Application Programming Interface (BioAPI) encoding of the fingerprint template, have also been extensively updated in recent years. The current SID technical standards for Convention No. 185 are outdated as they are no longer in line with the current international standards in use for other biometric and identity document systems.

2.1.4 The SID Issuance system and International Oversight

The area where, from a legal point of view, there is perhaps the most change between Convention No. 108 and Convention No. 185 is the introduction of two Articles (and related Annexes) dealing with the national system for issuing a SID. These have a high level of detail in the Articles and the two Annexes which are related to record keeping (the national database, Article 4 and Annex II) and the national SID issuance and the international oversight system (Article 5 and Annex III). Interestingly they are however, likely to be subject to essentially consequential changes to align with the ICAO Doc. 9303, if the amendments to Annex I to comply with the current (Seventh Edition, 2015) and future ICAO Doc. 9303 requirements relating to chip technology and the biometric (although the related security/verification system and use of the Public Key Directory (PKD) were not accepted by the 2016 Ad hoc Committee meeting) are adopted as recommended in 2016 to the international Labour Conference. The main difficulties with the system under Convention No. 185, aside from the earlier noted issues relating to equipment and the technical standards, is that it requires the institutional commitment to establish the system, including a "permanent focal point" in connection with the national database for SIDs, that can be contacted for authentication/verification requests by any State as well as the need to develop a database with relevant protection to meet privacy and other security concerns. The system under Article 4 is a costly system and, while experience is limited to date as relatively few States have implemented all these elements, may not operate well in practice, at least in terms of responding to requests for verification. The *Technical background paper* considered at the Tripartite Meeting of Experts in 2015.⁶⁵

68. If the national electronic databases as described in Convention No. 185 are to be effectively used, there needs to be a convenient way for the relevant

competent authorities to access them. If, for instance, a border agent encounters a seafarer bearing a SID and has doubts about its authenticity, they will need a way to contact the relevant focal point to validate that SID. Annex I to Convention No. 185 requires that the SID contain the telephone number, email address and website corresponding to the links to the focal point. If a border officer sends an email, however, this may take some time and the seafarer will need to be held at the border until a response email is received. This raises a number of practical problems. For example, if the border agent calls the phone number, there may be a significant difficulty relating to language differences. If they go online and access the website of the focal point, they may gain some information, but there then exists a significant issue about how much information they should be able to receive from a website when they are accessing it as an anonymous user since the seafarer's privacy rights must also be protected. There is also the general problem that if a border officer doubts the authenticity of a particular SID, there is no reason for them to trust the information they receive from a telephone number, email address or website that they only know about because these details are printed on that SID.

69. It should be noted that Article 4(4) also states that "[d]etails of the permanent focal point shall be communicated to the International Labour Office, and the Office shall maintain a list which shall be communicated to all Members of the Organization." This does provide a mechanism for border officers or other agents of competent authorities to know how to contact the relevant focal point to verify a SID. The problem in practice, however, is that a list of information with phone numbers, websites and email addresses for the focal point of every ILO Member which has ratified Convention No. 185 will be quite lengthy and it is unlikely that such a list will be available to every border officer around the world and at every port where seafarers may present their SID.

70. Practically, the best way to make such a system work would be to have a central focal point coordination centre which would be able to respond to inquiries concerning a SID's authenticity and validity that could emanate from any border agent, visa officer or other competent authority. Preferably, such a focal point coordination centre could be available online, as it could then easily be available at all times and in multiple languages to serve the needs of competent authorities from different countries. The ILO would then provide the contact details of the focal point coordination centre to every ILO Member, which would consist of a single website and phone number. Each national focal point under Article 4 of Convention No. 185 would remain responsible for the accuracy of the information provided by the focal point coordination centre, with respect to the SID data stored in its national electronic database

65) *Ibid*, note 34. See also *supra* note 52.

and would need to be available on a permanent basis to respond to any inquiries that were not taken care of by the focal point coordination centre. The national focal point would, to a considerable extent, be relieved of the significant burden of immediately providing responses from anywhere in the world at any time and in conditions that respected the privacy of the seafarer concerned. [...]

72. The cost of establishing a focal point coordination centre would be significant (probably \$1-2 million to develop the software and set up the initial infrastructure) and its ongoing operational costs would be significant (possibly several hundred thousand dollars annually) as it would require 24/7/365 staffing and a very significant security infrastructure to protect seafarers' data and make sure that only queries from authorized entities were accepted.

However, if, as recommended by the Tripartite meet of Experts in 2015,⁶⁶ an electronic signature is included in the SID, then the ICAO system using a Public Key (PKD) could be used for less cost, in particular for countries that are already subscribers to the ICAO PKD system. Although this approach may also have some difficulties depending on which department of government has, or is given the authority to deal with this issue. Interestingly at the Ad hoc meeting in 2016 in light of information provided by the ICAO representative there was a decision to leave aside the question of PKD participation.

The independent evaluation requirement and related international oversight under Article 5 paragraphs 4-8 is the heart of the oversight system.⁶⁷ As explained earlier,⁶⁸ it required the ILO Governing Body to adopt arrangements for the tripartite review of

66) *Ibid* note 30 p.3-4 (emphasis added).

Recommendation 1: The International Labour Office should prepare a preliminary draft of a revised Annex I and Annex II of Convention No. 185 where the biometric is changed from a fingerprint template in a two-dimensional barcode to a facial image stored in a contactless chip and where the national electronic database is required to contain only the public keys required to verify the digital signatures defined for the contactless chip by ICAO Document 9303. All references to technical standards other than ICAO Document 9303 are to be eliminated, as all of the ISO standards required would now already be referenced within ICAO Document 9303. The references to ICAO Document 9303 should refer to that document, including subsequent amendments of it, so that the Annexes will not require changing in the future as ICAO issues new versions of ICAO Document 9303 and as ePassport technology moves forward. If any of the changes to Annex I and Annex II need to be reflected in changes to the processes and procedures outlined in Annex III (such as, for instance, a need to ensure the quality of the photograph of the seafarer), then these changes may have to be reflected in a preliminary draft of a revised Annex III.

It is noted that the reference to "details specified in section 1 of Annex II" in connection with the information that must be included in the advance notice of arrival of a seafarer in a port to request shore leave, under paragraph 3 of Article 6, means that the database may need to contain more information than envisaged in this recommendation.

67) It was developed working group at the Conference. See *ibid* note 44, paras. 526 -541. Paragraph 526 sets out the Chairperson's summary of the intentions behind the text proposed by the Working Party.

526. The Government member of Denmark, speaking as the Chairperson of the Working Party on

these evaluations, which are to be carried out at "least every five years". This independent evaluation is also essential to the ILO's supervisory system review of the national reports on implementation of the Convention because it would be difficult for a committee comprised of jurists appointed mainly for their expertise in labour law (lawyers, judges) to ascertain whether the many technical and system requirements are met. However as very few countries have actually developed the system and, as mentioned earlier,⁶⁸ so far only one has filed an independent evaluation for review to be placed in list of countries approved as "fully meet the minimum requirements" referred to in Article 5 paragraph 1 for processes and procedures to

Article 6, acknowledged the dedication of the participants and introduced the results of their work for consideration by the Committee contained in document D.210. The aim of the Working Party had been to ensure that reliable evaluation procedures and quality control systems were in place so that SIDs were secure. The Working Party had considered all of the amendments submitted on Article 6 (D.68, 94, 95, 62, 114, 60, 61, 96, 89, 90, 113, 77, 97, 66, 48, and 98) and had examined a consolidated document prepared by the Government member of Japan. Based on the agreement of the social partners, they had then proceeded to work on the basis of the Office text. A heading "Evaluation and Control" had been accepted based on D.68. Paragraph 1 based on the Office text and D.94 concerned the minimum requirements considering processes and procedures for the issue of the SID that must be achieved by Members in the administration of their systems, as set out in Annex III. The mandatory results to be achieved are summed up in paragraph 2. It was considered essential to include them in the Convention where they would not be subject to a simplified amendment procedure. Paragraph 3 provided for the possibility of amending Annex III through a simplified amendment procedure giving enough time to Members to make the necessary revisions in their processes and procedures. Paragraph 4 was based on the Office text as well as amendments D.95, D.60, D.61 and D.114. It established that there should be independent evaluations of the administration of the system for issuing SIDs no less than every five years. Three elements considered essential were flexibility with regard to means (hence evaluations, rather than audits were required), integrity (based on the independence of the evaluation) and periodicity of evaluation to ensure regular opportunities to detect and correct shortcomings. Special reporting requirements in addition to those under article 22 of the Constitution were agreed. Paragraph 5 stated that the reports should be made available to other Members by the Office as agreed by the Working Party on Annex III. With regard to paragraph 6, the speaker drew the Committee's attention to the issue of tripartite examination of reports from Members on their evaluations of issuance systems. As those in the maritime sector wished to be judged by their peers, some special arrangements might need to be made by the Governing Body to involve governments, shipowners and seafarers in the approval of such a list. One possible solution might be the establishment of a tripartite maritime body and a resolution to this effect had been drafted. As such a decision would have financial implications, advice on this matter was sought from the Legal Adviser. According to paragraph 7, the list should be available to Members at all times and updated as information was received. Procedures to deal with a Member's contested inclusion on or possible exclusion from the list were covered in paragraphs 7 and 8. The final paragraph made clear the consequences to seafarers in the event of non-compliance of a Member with the minimum requirements. In closing, the speaker emphasized the need for governments and the social partners to inform the members of the Governing Body of the importance they attached to the establishment of a tripartite maritime body to approve the list of Members and to urge their representatives to support it. She reminded the Committee that the need to create such a body had already been discussed in the High-level Tripartite Working Group on Maritime Labour Standards.

68) *Ibid*, note 39. As mentioned earlier only the Russian Federation has gone through a review.

69) *Id*.

issue SIDs, it is difficult to comment beyond noting that, in principle, it seems to present a good approach to providing some form of a periodic external technical review, essentially an "audit", of the system.

It is important be aware that this system of oversight and validation of the reliability of the national SID issuance system is at the heart of the recognition of a SID under Convention No.185 and, in that respect, indeed the central point of the entire Convention.⁷⁰ Article 5, paragraphs 1 and 9, state (emphasis added):

1. Minimum requirements concerning processes and procedures for the issue of seafarers' identity documents, including quality-control procedures, are set out in Annex III to this Convention. These minimum requirements establish mandatory results that must be achieved by each Member in the administration of its system for issuance of seafarers' identity document.

9. The recognition of seafarers' identity documents issued by a Member is subject to its compliance with the minimum requirements referred to in paragraph 1 above.

2.1.5 Recognition and facilitation

As pointed out above, the heart of the Convention and the *raison d'être* for the SID is recognition by other governments, especially port States, for purposes of shore leave or transit by seafarers. In that respect, despite all the elaborate technical requirements for cards and systems set out in the Article and the Annexes, Article 6, which for the most part reproduces the same provision (also numbered Article 6) in Convention No. 108, is, arguably the most important Article in the Convention No. 185.

Although Article 6 contains a few more details with respect to questions of the cost of verification and grounds for refusal of entry, the main provisions in terms of facilities to be afforded seafarers regarding shore leave and transit remains very similar to the provisions in Convention No. 108.

In the table in section 2.1.1 above, it was noted that Article 6 is only indirectly connected to an Annex and any amendments that may be made in that advance notice of arrival of a seafarer and a request for shore leave must "include the details specified in section 1 of Annex II" (which list the information that can be contained in the national electronic database).

Despite the fact that shore leave and these facilities have been granted to seafarers

⁷⁰) It is interesting that despite the fact that only one of the States that ratified the Convention is on the list of countries that have been approved, it appears that seafarers with SIDs are in fact usually allowed ashore for leave and also for transit, perhaps because of the provisions in the FAL Convention and under Convention No. 108. See comments *supra* notes 8 and 9.

since the medieval period and under Convention No. 108 for nearly 50 years (in 2003), it is of interest to note the recollection of Doumbia-Henry.⁷¹ that this was the most controversial of issues at the Conference in 2003 when Convention No. 185 was adopted.⁷²

The question of facilities to be accorded to seafarers was certainly the most controversial of the issues on which agreement had to be reached. The issue of facilitation of the professional movements was central of the provisions of Article 6 of the Convention No.185. It sought on the one hand to maintain the facilities provided for in Article 6 of Convention No.108, and on the other, to strengthen the provisions by taking account of the basic security concerns. The question was whether the Convention should expressly provide for the admission to shore leave without a visa as is required by Section 3.45 of the IMO's Convention on Facilitation of International Maritime Traffic, 1965 (FAL), or whether, there should be some relaxation where member States requiring visas granted them promptly and without charge. The balance sought was one that retained the principles of Convention No.108 regarding the facilities to be granted to seafarers and would at the same time accommodate those States which had not been able to ratify Convention No.108 due to security concerns.

71) *Ibid* note 21, pp. 141-142.

72) Since there were numerous amendments proposed to the draft text a Working Party was also struck to deal with this provision. See *ibid*, note 44, paras. 557-566. The following summary by the Chairperson of the Working Party indicates the intentions of the Working Party with respect to the proposed text:

557 The Government member of Greece, speaking as the Chairperson of the Working Party on Article 7, informed the Committee that the Working Party had considered each of the 27 amendments (D.132, D.166, D.180, D.181, D.173, D.182, D.164, D.174, D.168, D.163, D.169, D.147, D.183, D.184, D.185, D.145, D.170, D.167, D.186, D.158, D.187, D.162, D.161, D.146, D.153, D.188, and D.157) proposed to Article 7 in the Office text as well as ideas generated in the course of their deliberations. Through a process of negotiation, they had developed the text (D.211) placed before the Committee. The aim of the Working Party had been to facilitate the task of the Committee and to move its work forward, rather than to make decisions. Because the SID was not a passport, but a stand-alone identity document, the Working Party considered it useful to distinguish clearly between the minimum advance notice period to facilitate shore leave and the arrival processing procedures for the purpose of transit. These were dealt with separately in paragraphs 3 and 4. A new subparagraph following subparagraph 3(3) stipulated that seafarers would not be required to hold a visa for the purpose of shore leave. Moreover, the Working Party agreed on wording to allow member States that could not meet this requirement to ensure that national laws and regulations or practice would provide substantially equivalent arrangements. With regard to paragraph 7, the Working Party recognized the need for heightened maritime security. It also acknowledged that the fear of detention of a ship was prevalent in the maritime industry. However, it considered that the failure of a seafarer to hold a valid SID was not linked to the welfare of the ship nor of other seafarers on board and therefore did not constitute grounds for detention of the ship in question. Hence, the Working Party agreed not to pursue amendment D.188. Moreover, it recommended the deletion of paragraph 7. The speaker concluded by stressing again that the agreed text was a carefully balanced package. He considered it an honour to have chaired the Working Party and thanked its members for their willingness to move ahead and reach agreement.

Article 6 therefore distinguishes between shore leave and transit or transfer. In the case of shore leave, Article 6, paragraph 3 requires advance notice to be given prior to the holder's arrival. This allows member States to do the necessary verification and any related enquiries and formalities, thus enabling immigration authorities to expeditiously process the request for entry and to grant shore leave on arrival of the ship in port unless there were clear grounds for doubting the authenticity of the seafarer's identity document or for reasons of public health, public safety, public order or national security. Article 6, paragraph 6 states that the seafarer shall not be required to hold a visa for purposes of shore leave. The same provision however recognizes that certain countries may not be in a position not to require visas. In such cases, the Convention adopted the concept of "substantial equivalence" found in the ILO's Merchant Shipping (Minimum Standards) Convention, 1976 (No.147) and in the draft of the new consolidated Maritime Labour Convention. Paragraph 6 therefore continues: "Any Member which is not in a position to fully implement this requirement shall ensure that its laws and regulations or practice provide arrangements that are substantially equivalent." Such a provision suggests that visa requirements for seafarers' entry could be considered compatible with the Convention's aims, if visas allowing entry were granted promptly and without charge to holders of the seafarers' identity document. This formulation specifically preserved practices in some member States relating to crew list visas or visa-waiver programmes.

Unlike the provisions for a minimum advance notice to facilitate shore leave, the arrival processing procedures do not foresee such notice for transit or transfer. It was considered that joining a ship, transit and transfer could normally be planned. Article 6, paragraph 7 provides for the expeditious handling of requests for entry for these purposes, but requires that the seafarers' identity document be supplemented by a passport. Paragraph 9 permits the Member State to require satisfactory evidence, including documentary evidence of the seafarer's intention and ability to carry out that intention. As indicated earlier, seafarers who hold identity documents issued by their country of permanent residence are also required to be in possession of their national passports at all times, including for the purposes of shore leave.

Having reviewed both sets of provisions under Article 6, there is one common thread between them. This relates to the one of the main purposes of the seafarers' identity document, which is undoubtedly to confirm that the bearer is a genuine seafarer. The facilities accorded by the provisions of article 6 are based on this principle. Article 6, paragraph 1 creates the bridge between the two sets of provisions by providing that the holder of a valid seafarers' identity document is to be recognized as a seafarer unless there are clear grounds for doubting the authenticity of the seafarers' identity document.

As the foregoing extract indicates, as was the case with Convention No. 108,⁷³ a

distinction is drawn between facilities for shore-leave and transit for professional movement.⁷⁴ In part, because in most cases transit would also include other forms of travel (e.g. air, rail, road) and probably crossing the border at another location for either arrival in or departure from the country to join or leave ship or passing in transit to another country to join a ship or for repatriation. This may also involve more time spent in the country than that envisaged by "temporary shore leave". Thus, as noted in the extract above, paragraph 9 of Article 6 reproduces the provision found in Convention No. 108 (Article 6 para. 3) with respect to documentary evidence that that may be requested as well the possibility of limiting the period of the stay in the country.

An interesting point that is not clear in the Convention is whether a visa may also be required as well as the SID and the passport for transit. One legal reading is that, since visas are expressly not required for shore leave (paragraph 6) except for cases of substantial equivalence and the Convention is silent with respect to visas and transit under paragraph 7, then a visa could also be required. Applying the same approach to the question of whether a passport could be required for shore leave, the Convention expressly provides for SID "supplemented by a passport" for transit under paragraph 7 but makes no reference to it under paragraphs 3-6 in connection with shore leave; it appears then that a passport could not be required.⁷⁵ However it should be noted that Article 6 was the subject of a Working Party, which developed

73) Albeit with differing requirements, i.e. Article 6, para. 2 of Convention No.108 refers to permitting entry for transit "If the seafarers' identity document contains space for space for appropriate entries" (e.g., more akin to a passport).

74) The Report considered by the ILC in 2003, *ibid*, note 6, p.13ff, explains the distinction drawn by some countries in the context of European Regulations for the regional visa arrangements.

Article 5, paragraph 2, of Schengen requires that aliens who do not meet all immigration conditions must be refused entry, unless a Contracting Party considers it necessary to derogate from that principle due to, inter alia, international obligations. Such would be the case for States parties to Convention No. 108 or FAL. Of the 15 States in the Schengen zone, all are parties to FAL and 11 have ratified Convention No. 108 Council Regulation (EC) No. 539/2001 of 15 March 2001 lists the third countries whose nationals must be in possession of visas and those exempt from the visa requirement when crossing external borders. Article 4(1)(b) and (d) allow visa waivers—regardless of nationality—for civilian air and sea crew and civilian crew of ships navigating in international waters. In practice, these texts are the legal basis for granting visa waivers to seafarers on active service status entering the Schengen zone. The EC Regulation, however, is permissive: it *allows* Schengen States to grant facilities, but does not require them to do so, nor does it create rights for individuals. In legal terms, it facilitates facilitation. If granted, the visa waiver can be for all or some of the facilities set forth in Convention No. 108 or FAL—at the discretion of the receiving State. The Netherlands, for example, grants a visa waiver for shore leave to seafarers who are nationals of States normally requiring a visa, but requires a Schengen visa for transit and/or repatriation. This further illustrates the exceptional character of shore leave as opposed to "entry" or "immigration admission".

75) This appears to be the understanding of those attending the ILC in 2003. For example, see *supra*, note 60, para. 314 as set out in the footnote; and *ibid*, note 44, para. 563 in connection with the text proposed by the Working Party for what is now Article 6.

the text substantially from the draft prepared by the International Labour Office, and despite being "controversial" it was in fact the subject of very little comment other than the Chairperson's report in the Official Record of the Conference.⁷⁶

3. Conclusion: (Re-) Alignment - a way forward?

This chapter has set out the context in which Convention No. 185 was adopted so rapidly, as a result of significant government pressure. It has also explored the question of why more than a decade later it has not yet been a successful Convention in that it has not achieved widespread ratification, particularly by port States. Although 31 States have ratified or agreed to apply it, in fact, most have not made the institutional and economic investments necessary to implement it. This chapter has also provided an overview of the key requirements of the provisions of this Convention which can appear intimidating. This is largely because of the level of detail in the Annexes and the inclusion of technical requirements and references to other technical documents related to biometrics and electronic methods to ensure document and data security, topics that are not usually dealt with by persons concerned with labour or maritime law.

The chapter has highlighted the fact that, despite the push for a seamless approach between ILO, IMO and ICAO in developing standards for enhanced security in the transport sector, there were in fact some differences in timing between ICAO process and the ILO and, perhaps more importantly, the composition of the delegations to each organization. Convention No. 185 adopted an approach which, despite referring to ICAO requirements, in fact diverged significantly from them, particularly as technology and the ICAO requirements evolved after 2003. Convention No. 185, in developing a biometric standard and a system for validation, although citing the then current editions (2002 and 2003) of ICAO Document 9303, did not follow the emerging approach to biometrics with the use of facial recognition and chip technology and was not integrated with the emerging system for verification under ICAO (the use of an electronic signature and the participation in the use of a public key-PKD). While not an explanation in itself, the fact that some governments appear to have provided views contrary to the direction under development in ICAO, the tripartite dynamics of the ILO with the strong voice for worker/seafarers, and their then very serious concern about use or potential abuse of chip technology, was clearly influential. The seafarers

563. The Government member of Australia, though generally supportive of the proposed text, emphasized that subparagraph 3(4) did not satisfy Australia's new migration clearance procedures which, as from November 2003, would require all seafarers, including those entering the country on shore leave, to present a valid passport, appropriate seafarers' identification and documentation that linked them to employment on a specific vessel.

76) *Ibid.* note 44, paras. 557-566.

preferred fingerprint non-chip technology that could be viewed by the seafarer. As mentioned in section 1, since ICAO, as of the Berlin Resolution of 2002 and clearly by mid 2003 and 2004, had gone in another direction, this created problems for governments. While ostensibly consistent, especially as Convention No. 185 explicitly states that a SID is a stand-alone document and not a passport,⁷⁷ it still diverged at the level of technology and infrastructure system.

From a legal point of view, what has proved to be a difficult issue stems from the reference in the mandatory text of an international convention to specific editions of a technical document under the auspices of another organization (ICAO). The Convention, while clearly recognizing the possibility of updating or amending the technical requirements in the future, including the International Labour Office developing an interoperable biometric template, this also «locked» the Convention to what proved to be rapidly outdated technical specifications that were under the control of other organizations (ICAO and ISO). This meant that even with the «simplified» amendment process, any update required the decision by its members that the ILO should undertake the costly process of international meetings to develop the text of amendments and then placing this very specialized – even esoteric – topic on the agenda of the International Labour Conference. There are also equity and transition issues for the States that have ratified Convention No. 185, many of which are less developed or emerging economies, and have already taken steps to implement.

This chapter has also noted that this focus on labour-supplying States and the elaboration of both the form and content of the SID to create a standard international document though the issuance and verification system is both its strength as a security instrument but, viewed from a decade later, is perhaps also proving to be its weakness. The majority of the world's seafarers on ships engaged in international trade are drawn from less developed or emerging economies, including countries where there may be concerns about terrorism. In addition, the fact that implementation obligations and costs – again, unlike most maritime conventions – falls on governments not on private actors, the shipowners, provided a barrier to ratification and implementation. That fact that the technical standards which Convention No. 185 references are linked to border control agencies and ICAO also poses difficulties for governments in determining which department of government should address this issue.⁷⁸

77) Article 3 paragraph 5 (b) and Annex I.

78) *High Level Tripartite Working Group on Maritime Labour Standards (third meeting)*. Final Report, ILO Doc. TWGMLS/2003/10 (emphasis added). It is available at:

<<http://ilo-mirror.library.cornell.edu/public/english/dialogue/sector/techmeet/twgmls03/twgmls-r-10.pdf>>

321. The representative of the Government of Japan Responding to the intervention by the Shipowners and the delegate of Denmark, he indicated, regarding the possible incorporation of Convention No. 185 into the Consolidated Maritime Convention, that Japan highly considered new Convention No. 185 as a "delicately crafted masterpiece of package agreement", and a great

Although the predecessor Convention No. 108 was similarly focused on governments issuing SIDs, it allowed flag States to issue them to foreign seafarers on their ships or registered in an employment agency. Under Convention No. 108 the cost to issue a SID was relatively small and was in some cases combined with other documents such as competency records or discharge books.

There are also other issues apart from the impact of changes in technology. As mentioned above, at the national level it is not clear which department should issue the SIDs under Convention No. 185 and which expertise and systems should apply. The issue is sensitive in the context of border control and national security. This is a problem of national fragmentation and which, unfortunately, is reproduced at the international /UN agency level through the composition of delegations, often despite best effort by secretariats to cooperate.

As discussed above and earlier in this chapter, the seafarers group had a strong voice in the ILO meetings with respect to Convention No. 185 and clearly influenced the final decisions as to the technical aspects of the SID. Since that time, discussions have been held and efforts made, particularly since 2010,⁷⁹ regarding potential

achievement. He indicated that Japan would make every sincere effort toward ratification as, no doubt, would many other governments. However, he strongly advised against the inclusion of the new Convention No. 185 into the Consolidated Maritime Convention for a number of reasons. He considered Convention No. 185 as substantially different, by nature, from the components of the Consolidated Maritime Convention. Moreover, he objected that Convention No. 185 contained critical elements directly related to immigration policies, which most maritime authorities could not handle easily. He also observed that, whilst the Consolidated Maritime Convention was designed to ensure that flag States would discharge their responsibilities regarding seafarers' employment and living conditions in compliance with the Convention requirements, and that port States would verify this compliance through port state control, Convention No. 185 was designed to have a totally different structure of responsibilities. He remarked, for example, that flag States would not be entitled to issue seafarers' identification documents for seafarers with nationalities different from the ship's flag. He also recalled that, in the discussion of revising Convention No. 108, it was agreed, after a long debate, that port state control would not be required to arrest a ship in the case of absent or deficient seafarers' ID....He finally observed that the incorporation of Convention No. 185 into the Consolidated Maritime Convention could put at risk a wide ratification and enforcement of the new Convention.

79) The report on the consultations in 2010 is to be found in CSID/C.185/2010/4. Available at: <http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/meetingdocument/wcms_150402.pdf> The *Technical background paper* to the Meeting of Experts in 2015, *ibid*, note 34 commented (references removed):

12. In order to consider how best to respond to the content of ISO/IEC 24713-3:2009, and also to understand why the general pace of ratification of Convention No. 185 had been comparatively slow, the Governing Body made a decision to hold tripartite consultations with governments from Members that had ratified Convention No. 185, or which were seriously considering ratification, and with the international organizations of shipowners and seafarers. These consultations took place in September 2010.
13. The consensus of these consultations included suggestions to accept minor technical changes to the content of the SID, as recommended in ISO/IEC 24713-3:2009, and also some more

changes that could be considered to move the Convention's technical requirements closer to the ICAO standards. It appears likely that, in 2016, text will be adopted to amend the Annexes of Convention No. 185 to align the Convention requirements regarding the SID with the current ICAO, including use of chip technology and facial recognition and electronic signatures. However as also mentioned earlier, at the same time it appears that perhaps a result of the FAL Convention and the large number of States that remain bound by Convention No. 108, seafarers are, with a few exceptions, still benefitting from facilities for shore leave and transit.

A question might well be asked as to whether ratification of Convention No. 185 is important beyond the more institutional ILO concern about the cost to develop and adopt an international Convention.

Unless operating practices change significantly in the shipping sector then a universally recognized document or some other method, irrespective of format, that will ensure seafarers are given important facilities to access shore for reasons related to their well-being and also for the professional movement that is essential to the industry, remains necessary. With the increased use of e-passports and related e-travel cards it seems likely that the SIDs will in the future need to have similar features, including being machine readable. Whether the particulars of the system under Convention No. 185 are required is, however, a different question.

Will the 2016 proposed amendments to the Annexes to align or re-align Convention No. 185 and the SID with travel documents under ICAO Document 9303 (in its current and future form) solve the problems with Convention and result in more ratifications and implementation?

significant changes to help make the international system of SIDs that were issued and verified by different countries more secure and simpler to implement. The suggestions included:

- (a) an updating of certain details in the two-dimensional bar code on the SID;
 - (b) the modification of the bar code so as to include a digital signature;
 - (c) the establishment of an international centre to coordinate the national focal points or to provide secure access to the national electronic databases referred to in Article 4 of Convention No. 185;
 - (d) with respect to fingerprint data: agreement that, although national databases could only include the biometric template provided for in the Convention, fingerprint images could be stored separately at the request of the seafarer concerned to simplify re-enrolment;
 - (e) the optional addition to the SID of a microchip to allow it to be interoperable with standard ePassport readers; and
 - (f) the development of an international procurement procedure to establish a list of qualified vendors of elements of a low-cost SID issuance system, which might be conducted or facilitated by the Office.
14. The Office attempted to find mechanisms to implement these suggestions, and eventually brought them once again to the attention of the Governing Body.

Again the answer has to be a cautious «perhaps».




The system developed for issuance and oversight under the Convention is, in principle, a very good system if national resources can be allocated to support it. However, many governments, through their border control agencies, are already implementing similar systems, even if subject to the same international tripartite oversight to address ICAO requirements relating to border control and travel documents and passports. Perhaps these agencies can also issue and authenticate SIDs or have an arrangement to do so in cooperation with their maritime or labour administrations. However, the question is whether a close – even dependent – relationship between two UN agencies with differing constituencies, expertise and mandates can be developed and maintained. The same question would be raised at the national level.

In conclusion, although Convention No. 185 has many good ideas with important objectives, it is difficult to see a way forward, even if amendments are adopted, as there will still be problems of national departmental fragmentation and a lack of capacity. Nonetheless, it seems necessary to move forward in some way since, as noted above, even if as a result of other Conventions, SIDs are currently accepted, it seems likely that this will not remain the case in the future, and easy access to shore for, as a minimum, temporary shore leave, is essential to seafarers' well-being, and ultimately, to ship safety and security.⁸⁰

80) While it points to a particular situation that Convention No. 185 does not itself solve, the underlying concern expressed in the report considered by the ILC in 2003, *ibid* note 6, p. 9, about the human rights and well-being of the seafarers and the impact of being trapped on a ship for extended periods is relevant:

The most extreme scenario resulting from denial of shore leave has already been seen and was documented in 1955 in an article by the United Nations High Commissioner for Refugees, published in the *International Labour Review*: G.J. Van Heuven Goedhart: "Refugee seamen," in *International Labour Review* (Geneva, ILO), 1955, Vol. LXXII, Nos. 2-3. The article refers to case records of refugee seafarers who had no papers or expired papers and for more than three years never left their ship until their dramatic circumstances finally came to the attention of the Office of the United Nations High Commissioner for Refugees (UNHCR). The danger of prolonged confinement on board ship ultimately inspired the drafting of Article 9 of the 1957 Hague Agreement relating to Refugee Seamen. While not equating the exceptional and extreme circumstances of refugee seafarers with the distress of seafarers denied shore leave now or in the future, the dangerous situation of prolonged confinement on board ship cannot be ignored in the search for a global solution to the facilitation question.

Article 9: "No refugee seaman shall be forced, as far as it is in the power of the Contracting Parties, to stay on board a ship if his physical or mental health would thereby be seriously endangered."




CHAPTER 12

Normes sociales à bord des navires sous pavillons Bis européens : Vers le retour des Etats côtiers ?


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Abstract: *The choice of the flag guides the applicable legislation applicable on board ships. The requirement for a genuine link between the ship and the Flag State is the only means to fight against law shopping, which is used by shipowners to benefit from the less restrictive social, tax and environmental legislations offered by flags of convenience. To level the playing field, traditional maritime powers have created second registers. Competition between these European second registers now prevails, whatever the shipping lines, goods or cruises, cabotage or not. To limit social dumping in Europe, the principle of social responsibility may be imposed on board second-register vessels, through the application of the social legislation of the Port State, leaving control to States that are the more diligent for social issues.*



Résumé : *Le choix du pavillon guide la législation applicable à bord des navires. Exiger un lien substantiel entre le navire et l'État du pavillon est le seul moyen de lutter contre le law shopping pratiqué par les armateurs pour bénéficier des législations sociales, fiscales et environnementales les « moins disantes » offertes par les pavillons de complaisance. Afin de les concurrencer, les puissances maritimes traditionnelles ont créé des pavillons de second registre. La concurrence intra-communautaire entre ces pavillons bis règne désormais, quelles que soient les lignes de transport maritime, marchandises ou croisières, cabotage ou non. Pour limiter les pratiques de dumping social en Europe, le principe de responsabilité sociale peut s'imposer à bord des navires sous pavillon bis, par l'application de la législation sociale de l'État du port, laissant le contrôle aux États les plus diligents en matière sociale.*



XII. Normes sociales à bord des navires sous pavillons Bis européens:

Arborer des pavillons étrangers à bord des navires est une pratique courante des armateurs, motivée depuis le milieu des années soixante-dix par des considérations économiques jugées difficiles¹. La concurrence exacerbée en mer les incite à profiter de la liberté du pavillon offerte par le droit international² et à élire pavillon dans des pays plus complaisants³. De cette façon, les armateurs échappent aux charges sociales et aux sujétions fiscales supportées par les marines marchandes traditionnelles.

Le pavillon français ne fait pas exception à cette évolution : l'un des trois plus grands transporteurs mondiaux, établi sur le territoire français, dispose de 430 navires dont seulement 22 battent pavillon français, avec 450 personnels navigants à bord⁴. Au sein de l'Union européenne, les pavillons chypriote, maltais ou anglo-normand sont arborés par des compagnies qui desservent quasi exclusivement des ports européens. Certaines compagnies, comme la Compagnie Condor Ferries, préfèrent même le pavillon bahaméen, traditionnellement classé parmi la complaisance, pour réaliser les liaisons maritimes entre Jersey, Guernesey, Cherbourg et Saint-Malo. Cette compagnie profite par ailleurs, pour les employés français, de la fiscalité sur le travail de Jersey, lieu où elle est basée.

La recherche d'une immatriculation à bas coût et d'une affiliation aux normes sociales les moins disantes a conduit certains États européens à développer des stratégies fiscales et administratives destinées à attirer les navires étrangers, avec des contrôles locaux allégés. D'autres, comme les puissances maritimes traditionnelles, telles la France, le Danemark ou le Royaume-Uni, ont choisi, pour relancer l'attractivité de leur pavillon et maintenir la compétitivité de leur flotte, de mettre en place des pavillons de second registre, dits pavillons *bis*.

La France s'est ainsi dotée, dès 1986, d'un second pavillon dans les TAAF : aux îles Kerguelen pour les navires de marine marchande et à Wallis et Futuna pour les navires de croisière⁵. Par souci de clarification et de promotion du pavillon français,

1) Depuis la crise pétrolière, les flottes européennes se retrouvent en surcapacité et en 1976 par ex. 40 % de la flotte allemande passe sous pavillon chypriote : Rapp. d'information du Sénat, n° 450, 10 avril 2014, par BOCQUET E., spéc. p. 66.

2) La Convention sur la Haute mer, dite de Genève, adoptée en 1958, exige un lien substantiel entre le navire et l'État du pavillon ; principe repris par la Convention de Montego Bay sur le droit de la mer, signée en 1982. La Convention de la CNUCED adoptée le 7 février 1986, sur l'immatriculation des navires, pose la nécessité du lien économique entre le navire et l'État du pavillon, mais n'est jamais entrée en vigueur.

3) V. CORNIER, G., Le règne de la libre immatriculation, sur l'Atlas économique de la mer, Le Marin, 2016, spéc. p. 87-88.

4) V. l'exemple de la CMA-CGM dans le rapport d'information du Sénat, n° 450, 10 avril 2014, par BOCQUET E., spéc. p. 67.

5) Permettant d'appliquer le Code du travail de l'Outre-mer à bord des navires. Sur l'utilisation des pavillons d'Outre-mer, v. parmi de nombreux art. sur cette question : BEURIER J.-P. (1990), *Les pavillons*

ces pavillons ont été remplacés par le registre international français créé en 2005⁶, destiné à séduire les navires armés au commerce au long cours, au cabotage international, ainsi que la grande plaisance⁷. Avec le nouveau registre international français, la différenciation du travail à bord des navires est organisée. Au côté d'un quota minimal de marins forcément issus de l'Union européenne⁸, l'effectif à bord est généralement complété par la main-d'œuvre prêtée par les sociétés de *manning*⁹. Pour cette main-d'œuvre, les règles sociales sont en principe celles du lieu d'établissement de la société prestataire, par référence à la loi choisie par les parties pour les gens de mer résidant hors de France, sous réserve des dispositions plus favorables éventuellement contenues dans des accords internationaux pour les non-résidents¹⁰. Ces conditions d'emploi, d'engagement, de travail et de vie à bord doivent depuis peu, au minimum, respecter les dispositions résultant de la Convention de travail maritime de 2006 ratifiée par la France¹¹.

C'est à ce prix que la flotte française se trouve stabilisée en volume¹² ; mais le système des pavillons *bis* a également permis aux autres pays européens de maintenir leur compétitivité. Consécutivement, l'existence de seconds registres dans les pays européens voisins concurrence directement les compagnies maritimes nationales sur des lignes où le choix du registre international français n'est pas autorisé. Mieux, ce système a conduit à l'émergence de nouvelles flottes, battant pavillon d'États sans côte ni marin, comme le Luxembourg.

d'outre-mer : havres ou écueils ?, in *La communauté européenne et la mer*, Economica, p. 683 et s. ; CHAUMETTE P., *Le statut du marin naviguant sur un navire immatriculé aux Kerguelen ou la République des manchots*, Dr. soc. 1987, p. 115 et s. ; CHAUMETTE P., *Loi du pavillon ou statut personnel ? Du navire comme lieu habituel de travail*, Dr. soc. 1995, p. 997 et s.

6) Loi n° 2005-412 du 3 mai 2005 *relative à la création du registre international français* et son décret d'application n° 2006-142 du 10 février 2006 *relatif à la création du guichet unique*.

7) Le champ d'application du RIF comprend les navires de plaisance de plus de 24 mètres hors-tout, c'est-à-dire la plaisance méditerranéenne not. Sont exclus les navires transporteurs de passagers assurant des lignes régulières intracommunautaires, le cabotage national, la pêche professionnelle ou encore les navires d'assistance portuaire (art. L. 5611-2 et L. 5611-3 C. Transp.). Du coup, l'immatriculation TAAF est réservée aux seuls navires de pêche et le registre de Wallis et Futuna est maintenu.

8) Quota fixé à 35 % pour les vaisseaux disposant d'une aide fiscale à la mise en navigation et à 25 % pour les autres. Il est calculé sur la base de la fiche d'effectif du navire, et non pas sur l'effectif des marins présents à bord : v. art. L. 5612-3 C. Transports.

9) Sociétés dont l'objet consiste à recruter et placer des personnels de mer pour les mettre à disposition des armateurs.

10) Art. L. 5621-7 C. Transports.

11) Art. L. 5621-8 C. Transports, tel que modifié suite à la Convention du travail maritime (dite CTM) de l'Organisation internationale du travail de 2006, entrée en vigueur le 20 août 2013 - V. CHARBONNEAU A. et CHAUMETTE P., *Premiers amendements à la Convention du travail maritime de l'OIT de 2006*, Dr. soc. 2014, pp. 802-810.

12) Rapport d'information du Sénat, n° 450, 10 avril 2014, par BOCQUET E., spéc. p. 69.

XII. Normes sociales à bord des navires sous pavillons Bis européens:

Pour prendre un exemple bien connu, la compagnie Corsica Ferries, propriété d'une *holding* suisse inscrite au second registre italien¹³, profite de l'extra-territorialité des lois sociales liée au second registre italien. Pour les traversées entre Nice, Toulon, Marseille et la Corse, elle embarque des marins à bord dont les conditions de travail relèvent du lieu de leur résidence. Si les marins résidant en Italie sont bien rémunérés, dans des conditions proches des conventions collectives françaises, le recours aux sociétés de *manning* pour le recrutement de membres d'équipage, ressortissants européens ou non, permet de les rémunérer aux conditions de leur pays d'origine. Ces conditions, bien en-deçà du SMIC maritime, exposent la société de transport maritime française¹⁴, proposant les mêmes dessertes, à une concurrence insoutenable.

La France a décidé de mettre fin à cette situation de dumping social à bord des navires immatriculés sur les différents registres intra-communautaires pour le cabotage entre ports français. Sur ces lignes, l'ensemble des personnels à bord, quel que soit le pavillon, est soumis aux conditions sociales de l'État d'accueil depuis la loi du 28 mai 2013¹⁵ et son décret d'application du 1^{er} août 2014¹⁶. En conséquence, pour la navigation dans les eaux territoriales françaises ou le cabotage entre îles françaises, les règles sociales applicables sont celles de l'État du port¹⁷. La rémunération du personnel à bord doit répondre au salaire minimum interprofessionnel de croissance maritime en vigueur en France et la couverture sociale doit être choisie parmi les législations applicables dans les États membres de l'Union européenne. Autrement dit, en cas de cabotage, la législation à bord ne peut méconnaître les exigences sociales de l'État du port (I).

En dehors du cabotage, il reste avantageux pour les États¹⁸, sans armateur ni pavillon traditionnel important, d'attirer les pourvoyeurs de main-d'œuvre maritime en facilitant l'installation de sociétés de *manning* sur leur territoire. Ce modèle économique, reposant sur l'optimisation sociale, trouve comme seule limite les dispositions de la Convention de travail maritime de 2006¹⁹, laquelle met à la charge des États signataires

13) Mis en place par la loi 30/98 du 27 février 1998.

14) SNCM.

15) Loi du 28 mai 2013 *portant diverses dispositions en matière d'infrastructures et de services de transports*.

16) Décret n° 2014-881 du 1^{er} août 2014 *pris pour l'application des dispositions du titre VI du livre V de la cinquième partie du code des transports et relatif aux conditions sociales du pays d'accueil*, entré en vigueur le 1^{er} septembre 2014 et intégralement le 1^{er} janvier 2015.

17) V. le règl. CE n° 3577/92 du 7 décembre 1992 *concernant l'application du principe de libre circulation des services aux transports maritimes à l'intérieur des États membres (relatif au cabotage maritime)* et le décret n° 99-195 du 16 mars 1999, *relatif à l'application des conditions de l'État d'accueil conformément au Règlement CEE du Conseil n° 3577/92* (annexe art. 4), abrogé par le décret n° 2014-881 du 1^{er} août 2014.

18) Au sein de l'Union européenne comme la Bulgarie ou la Croatie, ou au-delà, à l'image des Philippines.

19) Objet du titre V de la *CTM* (Convention du travail maritime) de 2006, entrée en vigueur le 20 août

la surveillance des sociétés de *manning* établies sur leur territoire. Les pavillons *bis* européens peuvent ainsi se contenter de respecter les minima sociaux envisagés par la Convention de travail maritime de 2006 (II).

1. Le choix de la législation sociale de l'État du port en cas de cabotage

La concurrence loyale en mer s'appuie sur la valorisation du principe du lien substantiel entre le navire et l'État du pavillon, tel qu'exposé par la Convention des Nations Unies sur le droit de la mer de 1986, en évitant le recours aux pavillons de complaisance ou en réduisant le recours aux pavillons *bis*. Bien que les pavillons de second registre ne correspondent pas exactement à la définition des pavillons de complaisance²⁰, la Fédération internationale des travailleurs du transport classe tout de même les pavillons *bis* français, allemand et anglais, entre autres, parmi cette catégorie²¹.

S'il est impossible d'imposer le pavillon français du premier registre à tous les navires opérant dans les eaux françaises en vertu du principe de la libre immatriculation, il reste néanmoins envisageable, en cas de cabotage, de restreindre l'accès aux navires immatriculés sous des seconds registres d'un État européen pour les activités de transport de marchandises et de croisière (A). D'une manière socialement plus ambitieuse, certains États, dont la France, ont fait le choix d'imposer les règles sociales de l'État d'accueil pour la législation applicable à l'équipage à bord des navires pratiquant le cabotage (B).

A. La restriction de l'accès au cabotage pour les navires battant pavillon bis

Telle que définie dans le cadre européen, la notion de cabotage maritime²² vise aussi bien le transport dans les eaux intérieures que celui dans les eaux territoriales de l'État²³. En termes d'évolution des trafics par cabotage, trois États - l'Espagne, le

2013, loi n° 2013-619 du 16 juillet 2013 (JO p. 11890) et décret n° 2014-615 du 13 juin 2014, portant publication de la CTM (ensemble quatre annexes) adoptée à Genève le 7 février 2006.

20) Au sens où la propriété réelle des navires et leur contrôle se situent dans un pays autre que celui des pavillons choisis pour leur immatriculation : v. *flags of convenience campaign* sur <http://itf-live.zone-preview.co.uk/>. - V. le rapport d'information du Sénat, n° 450, 10 avril 2014, par BOCQUET E., spéc. p. 68 *in fine* et 69.

21) V. le rapport d'information du Sénat, n° 450, 10 avril 2014, par BOCQUET E., spéc. p. 68 *in fine* et 69.

22) Les activités de navigation de plaisance sont exclues du règlement européen sur le cabotage maritime : arrêt de la Cour du 27 mars 2014 (*Alpina River Cruises et Nicko Tours*) : C-17/13, EU : C2014-191.

23) Arrêt de la Cour du 9 mars 2006 (*Commission c/ Espagne*), C-323/03 EU : C2006-159.

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Royaume-Uni et l'Italie - continuent à dominer les activités de transport de marchandises. Pour les activités de croisière²⁴, ces marchés présentent la particularité d'un fort niveau de concentration entre les pavillons grecs, italiens et espagnols.

Les États membres de l'Union européenne autorisent, sans aucune restriction, tous les navires immatriculés dans leur premier registre à assurer des services de cabotage. Ces navires ont, par conséquent, un accès illimité au cabotage, continental ou insulaire, dans les autres États. En pratique, d'après les observations de la Commission européenne dans son cinquième rapport²⁵, les navires sous premier registre réalisent surtout du cabotage de passagers.

Concernant les navires sous second registre, il suffit qu'un navire remplisse toutes les conditions requises au cabotage dans l'État membre où il est immatriculé pour être admis au cabotage dans tout autre État membre. Pour essayer de dresser un état des lieux, il est nécessaire de séparer les États autorisant les pavillons des seconds registres au cabotage dans leurs eaux territoriales de ceux où existent des restrictions d'accès ; leur situation étant variable d'un pays à l'autre.

D'un côté, il y a les États qui offrent aux navires sous second registre un accès illimité au cabotage. Seuls l'Espagne et le Portugal autorisent la pratique du cabotage à la fois pour les navires de passagers et de marchandises immatriculés au second registre. Précisément, les navires du registre espagnol spécial des îles Canaries (REC), du registre portugais de Madère (MAR) et de Gibraltar ont un accès sans réserve au cabotage. La position du Danemark est partagée, distinguant les navires marchands du registre international des navires danois (DIS), qui ont un accès illimité au cabotage, des navires à passagers du registre DIS dont l'accès est interdit.

De l'autre côté, il y a les États qui autorisent, de manière limitée, le cabotage des navires sous pavillon *bis*, avec des restrictions plus ou moins importantes. Certains États n'ont accordé qu'un accès limité au cabotage pour les navires immatriculés sous leurs seconds registres respectifs, comme la France et l'Italie. Ainsi, en France, les navires sous pavillon RIF disposent d'un accès limité au cabotage de marchandises, sous réserve que leur exploitation ne concerne pas uniquement des itinéraires de cabotage. En Italie, les navires de second registre sont admis à assurer soit des services de cabotage dans la limite de six trajets par mois²⁶, soit un nombre indéterminé de trajets, à condition qu'ils soient réalisés au-delà des cent milles nautiques²⁷. D'autres

24) C'est-à-dire lorsque des passagers sont embarqués et débarqués dans l'État membre dans lequel s'effectue la partie en cabotage.

25) V. le 5^e rapport de la Commission au Conseil (2014/231 final) *sur l'exécution du règl. 3577/92 concernant l'application du principe de la libre circulation des services au cabotage maritime (2001-2010)* en date du 22 avril 2014, spéc. p. 3.

26) Loi n° 289 du 27/12/2002.

27) Loi n° 326 du 24/11/2003.

États, enfin, comme l'Allemagne ou la Finlande, ont préféré accorder un accès au cas par cas à leurs navires sous second registre. En effet, les navires au registre international des navires allemands (ISR) et les navires à marchandises du commerce international de la Finlande, ont accès au cabotage, ligne par ligne et navire par navire, sans toutefois pouvoir donner lieu à un cabotage régulier.

En conclusion, il arrive souvent qu'un navire battant pavillon *bis* d'un État de l'Union européenne pratique le cabotage continental ou inter-îles dans un autre État membre. D'une manière paradoxale, les navires de second registre de ce même État ne peuvent pas toujours accéder à ces lignes. Il en résulte une curieuse distorsion de concurrence intra-communautaire au détriment des navires au premier registre.

B. Les conditions sociales françaises sur tout navire cabotant entre ports français

Pour favoriser des règles de concurrence loyale, au niveau social, entre les entreprises maritimes opérant sur les mêmes lignes, ou secteurs d'activités, dans les eaux territoriales, certains États de l'Union européenne ont clairement fait le choix de privilégier la législation de l'État d'accueil.

La diversité des approches nationales du Règlement européen, sur le cabotage maritime, n'a pas échappé à la Commission européenne dans son cinquième rapport²⁸. L'article 3 dudit règlement dispose que «pour les navires pratiquant le cabotage continental et les navires de croisière, toutes les questions relatives à l'équipage relèvent de la responsabilité de l'État dans lequel le navire est immatriculé (État du pavillon), à l'exception des navires jaugeant moins de 650 tonnes brutes qui peuvent se voir appliquer les conditions de l'État d'accueil»²⁹. En découle l'application des règles de l'État d'accueil à l'équipage des navires jaugeant moins de 650 tonnes brutes et des navires pratiquant le cabotage insulaire, à l'exception des navires marchands jaugeant plus de 650 tonnes brutes, lorsque le voyage concerné suit ou précède un voyage à partir ou à destination d'un autre État³⁰. La Cour de justice a précisé, courant 2004, la portée dudit article 3 en ce qui concerne les navires de

28) V. le 5^e rapport de la Commission au Conseil (2014/231 final) *sur l'exécution du règlement 3577/92 concernant l'application du principe de la libre circulation des services au cabotage maritime (2001-2010)* en date du 22 avril 2014, spéc. p. 4 à 6.

29) Al. 1 de l'art. 3 du règlement CEE du Conseil n° 3577/92 du 7 décembre 1992 *concernant l'application du principe de la libre circulation des services aux transports maritimes à l'intérieur des États membres (cabotage maritime)*.

30) En 2006, la CJCE a précisé la définition du « voyage qui suit ou précède le cabotage ». Il s'agit de tout voyage à destination ou à partir d'un autre État, que le navire transporte ou non des marchandises : v. affaire C-456/04, (*Agip Petrolí SpA contre Capitaneria di porto di Siracusa et autres*), Rec. [2006] p. I-03395.

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croisière³¹ : toutes les questions relatives à l'équipage des navires jaugeant plus de 650 tonnes brutes, qu'ils pratiquent le cabotage continental ou insulaire, relèvent de la responsabilité de l'État du pavillon. Consécutivement, les règles de l'État d'accueil ne peuvent s'appliquer qu'aux navires jaugeant moins de 650 tonnes brutes pour les navires pratiquant le cabotage inter-îles³².

La difficulté ici réside sur la délimitation de l'étendue des règles rentrant dans la législation relative à l'équipage³³. À l'instar de seulement cinq autres États membres, l'Italie, l'Espagne³⁴, le Portugal³⁵, la Grèce³⁶ et la Bulgarie³⁷, lesquels appliquent les règles de l'État d'accueil avec des différences d'approche, la France a fait ce choix.

À défaut de précisions réglementaires sur le domaine des questions relatives à l'équipage, la compétence des États d'accueil est plus ou moins étendue. Certains États y englobent «toutes les règles concernant l'équipage», alors même que l'approche plus restrictive de la Commission européenne amène à en limiter le domaine «afin de sauvegarder le principe de libre prestation de services auquel cette compétence déroge»³⁸. L'idée est de conférer compétence aux États d'accueil pour déterminer la proportion requise de ressortissants communautaires à bord des navires et exiger que les marins à bord aient une couverture sociale dans l'Union européenne. Pour ce qui est des conditions de travail, cette compétence les autorise à imposer le

31) Affaire C-288/02, (*Commission des Communautés européennes contre République hellénique*), Rec. [2004] p. I-10071.

32) Al. 2 de l'art. 3 du règlement CEE du Conseil n° 3577/92 du 7 décembre 1992 *concernant l'application du principe de la libre circulation des services aux transports maritimes à l'intérieur des États membres (cabotage maritime)*. Comp. avec l'al. 3 : « toutefois, pour les navires de transport de marchandises jaugeant plus de 650 tonnes brutes et pratiquant le cabotage avec les îles, lorsque le voyage concerné suit ou précède un voyage à destination d'un autre État ou à partir d'un autre État, toutes les questions relatives à l'équipage relèveront, à partir du 1er janvier 1999, de la responsabilité de l'État dans lequel le navire est immatriculé (État du pavillon) ».

33) En ce sens, RODRIGUES S., *Revue des droits de la concurrence* n° 3-2014, chron. n° 1, spéc. p. 197.

34) L'Italie et l'Espagne appliquaient déjà les règles de l'État d'accueil d'après le quatrième rapport de la Commission au Conseil sur le cabotage maritime : v. le 4^e rapport de la COM (2002) 203 du 24 avril 2002.

35) La règle de l'État d'accueil s'applique aux services de transport réguliers de fret conteneurisé et aux marchandises solides diverses entre le Portugal continental et les territoires insulaires de Madère et des Açores (décret-loi n° 7/2006) : v. le 5^e rapport de la Commission au Conseil (2014/231 final) en date du 22 avril 2014, spéc. p. 4 à 6.

36) Les normes relatives à l'équipage des navires pratiquant le cabotage insulaire sont assujetties à la règle de l'État d'accueil et régies par la législation grecque.

37) Conformément à l'art. 4 de l'Ordonnance n° 10, les navires jaugeant moins de 650 tonnes brutes sont soumis à la réglementation bulgare en matière d'équipage : v. le 5^e rapport de la Commission au Conseil (2014/231 final) en date du 22 avril 2014, spéc. p. 4 à 6.

38) COM (2002) 203 du 24 avril 2002, spéc. point 4.

salaires minimum en vigueur dans le pays d'accueil. Cependant, en matière de sécurité et de formation des personnels³⁹, la Commission européenne considère que «les États membres ne sauraient exiger plus que le respect des normes communautaires ou internationales en vigueur sans restreindre de façon disproportionnée la libre prestation de services»⁴⁰.

La France est allée sans doute plus loin⁴¹ en imposant les conditions sociales nationales à tout personnel navigant en vertu de la loi du 28 mai 2013 ; conditions identiques à celles applicables aux salariés employés par les entreprises de la même branche d'activité établies en France⁴². Pour le cabotage visé à l'article L 5561-1 du Code des transports⁴³, le législateur français oblige l'armateur à respecter le Code du travail en vigueur en France⁴⁴, quel que soit le pavillon du navire⁴⁵. S'inscrivant dans la lignée de la jurisprudence récente de la Cour européenne qui fragilise le rattachement social des gens de mer au seul État du pavillon⁴⁶, la loi du 28 mai 2013⁴⁷ permet d'imposer l'application des règles sociales de l'État d'accueil aux salariés des navires pratiquant le cabotage maritime⁴⁸. Ces dispositions sociales, de nature impérative, concernent neuf points essentiels en matière sociale, dont certaines conditions de travail, les effectifs, la rémunération et la protection sociale⁴⁹. L'idée est d'instaurer les règles

39) Y compris les langues parlées à bord.

40) COM (2002) 203 du 24 avril 2002, spéc. point 4.

41) La France, faisant déjà partie des États ayant fait le choix de la législation de l'État d'accueil, (v. le rapp. de la Commission au Conseil : COM (2002) 203 du 24 avril 2002) a précisé le champ d'application de la législation sociale de manière étendue.

42) Art. L. 5562-1 C. Transp.

43) « 1° Ayant accès au cabotage maritime national et assurant un service de cabotage continental et de croisière d'une jauge brute de moins de 650 ; 2° Ayant accès au cabotage maritime national et assurant un service de cabotage avec les îles, à l'exception des navires de transport de marchandises d'une jauge brute supérieure à 650 lorsque le voyage concerné suit ou précède un voyage à destination d'un autre État ou à partir d'un autre État ; 3° Utilisés pour fournir dans les eaux territoriales ou intérieures françaises des prestations de services ».

44) Art. L. 5541-1 C. Trav.

45) Règl. CEE du Conseil n° 3577/92 du 7 décembre 1992 *concernant l'application du principe de la libre circulation des services aux transports maritimes à l'intérieur des États membres (cabotage maritime)*.

46) V. CJUE 8 juillet 2014 (*Fonship A/S c/ Svenska Transportarbetareförbundet*) : la cour décide de l'absence d'incidence de la nationalité des travailleurs et du navire sur l'applicabilité du droit de l'Union européenne.

47) Loi du 28 mai 2013 *portant diverses dispositions en matière d'infrastructures et de services de transports*.

48) Y compris lorsque le navire remplit des obligations de service public ou relève d'une délégation de service public, ou est utilisé pour fournir une prestation de services réalisée à titre principal dans les eaux territoriales ou intérieures françaises.

49) Sur l'idée d'instaurer dans chaque port de commerce un centre dévolu au bien-être des marins : v. la discussion sur l'art 3 bis devant l'AN du 2 février 2016 XIV^e législature : www.assemblee-nationale.fr

d'une «concurrence loyale» entre les entreprises maritimes opérant sur les mêmes lignes, ou le même secteur d'activités, dans les eaux territoriales françaises.

Pris pour son application, le décret dit «d'État d'accueil», en date du 1^{er} août 2014⁵⁰, a pour but de rendre applicable aux personnels de la navigation maritime commerciale les règles sociales du port français dans lequel les gens de mer exercent régulièrement leurs activités. Le choix est clairement fait d'imposer le respect des règles du droit du travail issues des dispositions législatives ou réglementaires nationales, ainsi que celles issues des accords collectifs de travail applicables aux navires français exerçant la même activité⁵¹. La surveillance de l'application du droit du travail à bord des navires cabotant entre ports français s'opère avant le début de l'activité envisagée par déclaration électronique auprès du Directeur départemental des territoires et de la mer du premier port français touché⁵². Par la suite, le contrôle s'opère au cours d'inspections portuaires en vertu de l'article L. 5241-4-3 du Code des transports⁵³.

Précisément, le fait pour un armateur⁵⁴ de payer aux personnels à bord des salaires⁵⁵, ou accessoires inférieurs à ceux fixés dans la convention collective⁵⁶ applicable aux

50) Décret n° 2014-881 du 1^{er} août 2014 pris pour l'application des dispositions du titre VI du livre V de la cinquième partie du code des transports et relatif aux conditions sociales du pays d'accueil, entré en vigueur le 1^{er} septembre 2014 et le 1^{er} janvier 2015 pour l'utilisation de la langue à bord.

51) Art. L 5562-1 C. Transports : « les dispositions légales et les stipulations conventionnelles applicables aux salariés employés sur les navires mentionnés à l'article L. 5561-1 sont celles applicables aux salariés employés par les entreprises de la même branche d'activité établies en France, pour les matières suivantes : « 1° Libertés individuelles et collectives dans la relation de travail » ; « 2° Discriminations et égalité professionnelle entre les femmes et les hommes » ; « 3° Protection de la maternité, congés de maternité, de paternité et d'accueil de l'enfant, congés pour événements familiaux » ; « 4° Conditions de mise à disposition et garanties dues aux salariés par les entreprises exerçant une activité de travail temporaire » ; « 5° Exercice du droit de grève » ; « 6° Durée du travail, repos compensateurs, jours fériés, congés annuels payés, durée du travail et travail de nuit des jeunes travailleurs » ; « 7° Salaire minimum et paiement du salaire, y compris les majorations pour les heures supplémentaires » ; « 8° Règles relatives à la santé et à la sécurité au travail, âge d'admission au travail, emploi des enfants » ; « 9° Travail illégal ».

52) Envoi soixante-douze heures avant la prestation envisagée. V. pour les conditions pratiques, l'arrêté du 4 septembre 2014 relatif à la déclaration d'activité prévue à l'art. R. 5561-2 C. Transports.

53) En raison de la disparition des inspecteurs du travail maritime en 2009, la question se pose de savoir si cette charge du contrôle peut entièrement reposer sur les personnels chargés du contrôle technique, à savoir de l'inspection du navire ; ceux-ci étant rattachés aux affaires maritimes : sur cette discussion, v. art. 7 AN du 2 février 2016 (www.assemblee-nationale.fr)

54) Conçu extensivement au sens de l'art. L. 5511-1 C. Transports, à savoir toute personne pour le compte de laquelle le navire est armé, mais également le propriétaire du navire ou tout autre opérateur auquel le propriétaire a confié la responsabilité de l'exploitation du navire.

55) Par personnels à bord, il faut entendre ici les « marins », c'est-à-dire les « salariés ou non-salariés exerçant une activité directement liée à l'exploitation du navire », mais aussi les « gens de mer », à savoir « toutes personnes salariées ou non-salariées exerçant à bord d'un navire une activité professionnelle à quelque titre que ce soit » : art. L. 5511-1 C. Transports.

56) Ou accord collectif de travail étendu, soit le SMIC maritime au minimum.

navires arborant pavillon français, est puni d'une amende de quatrième classe pour chaque infraction constatée⁵⁷. Pour la protection sociale cependant, les personnels à bord relèvent du régime adopté par l'un des États membres de l'Union européenne⁵⁸, à condition que le régime social retenu inclue la protection contre les quatre grands risques sociaux encourus par tout salarié⁵⁹.

Ailleurs, il doit n'y avoir, par principe, aucune incidence de la nationalité des travailleurs à bord ou de la nationalité du navire sur l'applicabilité du droit de l'Union européenne⁶⁰. Malheureusement, cette formulation assez large ressemble, à s'y méprendre, à celle retenue pour les travailleurs détachés sur terre⁶¹ ; conduisant souvent à l'application du droit du pays d'origine aux salariés détachés...

2. Des minima sociaux imposés sur les navires battant pavillons *bis* en dehors du cabotage

Environ 75 % des personnels employés sur des navires battant pavillon d'un État communautaire sont issus de pays tiers⁶². La Convention de travail maritime, adoptée dans le cadre de l'OIT en 2006, préconise aux États signataires de mettre en place un système préventif de certification ou d'enregistrement des sociétés de *manning*, mais également un système de contrôle à quai. Ces opérations d'inspection et de surveillance doivent être suffisamment poussées afin de vérifier le respect des standards internationaux applicables aux personnels à bord des navires pour, le cas échéant, et dans la mesure du possible, conduire à sanctionner les sociétés de *manning* ou armateurs. Les modalités pratiques de cette nouvelle régulation demeurent cependant livrées à l'appréciation de chaque État. Autant dire que le dumping social entre les pavillons *bis* européens a encore de beaux jours devant lui... même si les prescriptions de la convention internationale ont été, en partie, transposées dans

57) Art. R. 5566-5 et R. 5566-6 C. Transports.

58) Ou partie à l'accord sur l'Espace économique européen.

59) Selon l'art. L. 5563-1 C. Transports, les risques santé, maternité et famille, emploi et vieillesse.

60) CJUE 8 juillet 2014 (*aff. Fonnship A/S c/ Svenska Transportarbetareförbundet*).

61) Directive 96/71/CE du 16 décembre 1996 (dite Bolkestein) *concernant le détachement de travailleurs effectué dans le cadre d'une prestation de services*, objet d'un compromis à Bruxelles en date du 9 décembre 2013 pour renforcer les contrôles de son application. – V. aussi la Directive du 12 décembre 2006 n° 2006/123/CE modifiant la législation sur le marché des services au sein de la Communauté européenne en simplifiant pour un prestataire de services d'un État membre les conditions dans lesquelles il peut opérer dans un autre État membre. - Art. L. 1261-1 à 1263-2 C. Travail et R. 1261-1 à R. 1264-3 C. Travail.

62) V. le rapport d'information du Sénat n° 450, 10 avril 2014, par BOCQUET E., spéc. p. 73. En ce sens, v. la séance du 2 février 2016, AN discussion de l'art. 10 sur l'Economie Bleue (www.assemblee-nationale.fr).

l'Union européenne par deux directives⁶³.

Si le respect des standards internationaux relève des opérations de contrôle par l'État du port (A), le seul moyen de mettre fin aux distorsions de concurrence entre les pavillons *bis* des différents États membres de l'Union européenne serait de créer un pavillon de second registre européen (B).

A. Les standards internationaux difficilement contrôlés par l'État du port

La Convention de Travail Maritime⁶⁴ introduit des standards internationaux pour les normes sociales applicables à bord des navires immatriculés sous seconds registres comme à ceux battant pavillon de complaisance. Elle met en place un vaste dispositif normatif comprenant un ensemble de droits fondamentaux et une information systématique des personnels «à bord des navires affectés à une activité commerciale»⁶⁵ sur leurs droits en matière d'emploi, de travail et de vie à bord⁶⁶. L'État du pavillon, par sa signature, s'engage à délivrer un certificat de travail maritime⁶⁷ à tout navire dépassant une jauge de 500 tonneaux pour attester des normes de la Convention reprises par le droit interne de l'État. Il revient donc aux armateurs de détailler, auprès de l'État du pavillon, pour chacun de leurs navires, les mesures prises à bord pour assurer l'application des dispositions conventionnelles⁶⁸. Même les pavillons des seconds registres des États signataires, autorisant le recours aux sociétés de service de recrutement et de placement privé pour une proportion des personnels à bord⁶⁹, sont astreints à respecter ces nouvelles règles.

La Convention de 2006 nécessitant une transposition dans les droits internes, certaines

63) Directive 2013/54/UE du 20 novembre 2013 *relative à certaines responsabilités de l'État du pavillon en ce qui concerne le respect et la mise en application de la Convention du Travail maritime de 2006* et directive 2013/38/UE du 12 août 2013 *portant modification de la directive 2009/16/CE relative au contrôle par l'État du port*.

64) Pour mémoire, par décision 2007/431/CE du Conseil, les États membres ont été autorisés à ratifier, dans l'intérêt de la Communauté européenne, la CTM 2006 : JO L 161 du juin 2007, p. 63. La CTM est entrée en vigueur le 20 août 2013. Plus de soixante États l'ont ratifiée début 2015, soit 80% du tonnage mondial (www.oit.org).

65) Définition large des gens de mer à l'art. II-2 et 4 de la CMT (2006), incluant ainsi toutes les personnes affectées à la restauration ou à l'hôtellerie.

66) Notamment l'âge minimal, les conditions de recrutement, la protection sociale ou le paiement des salaires. Il est également mis en place des normes sur le plan social avec un principe de dialogue social à tous les niveaux.

67) Valable cinq ans.

68) « Déclaration de conformité » qui pourra être vérifiée par les autorités portuaires où les navires feront escales.

69) En proportion variable selon les États membres ayant créé ces registres internationaux.

puissances maritimes, dont la France, en ont profité pour encadrer plus strictement⁷⁰ le recrutement de gens de mer pour le compte d'armateurs, ou d'employeurs, ou leur placement auprès d'eux. Par une loi du 16 juillet 2013⁷¹, un registre national est institué pour inscrire les sociétés de *manning* établies sur le territoire français de manière à informer les gens de mer et les armateurs, ou à faciliter la coopération entre l'État du pavillon et l'État du port⁷².

Toute entreprise de travail maritime installée en France⁷³, dont l'activité est la mise à disposition de gens de mer qu'elle embauche et rémunère auprès d'un armateur⁷⁴, doit être agréée par l'autorité administrative avant de mettre ces personnels à bord des navires immatriculés au registre international français ou des navires battant pavillon étranger⁷⁵. L'agrément suppose de justifier d'une garantie financière ou d'une assurance permettant d'indemniser les gens de mer des préjudices subis en cas d'inexécution des obligations prises à leur égard⁷⁶. Un mécanisme de garantie équivalent est exigé pour les sociétés de *manning* établies hors de France.

Dans le même ordre d'idées, l'armateur du navire immatriculé au second registre français, qui recourt à une société de *manning* établie dans un État non signataire de la Convention sur le recrutement et le placement des gens de mer, ni de la Convention de travail maritime, doit s'assurer que l'entreprise de travail maritime en respecte les exigences⁷⁷. En effet, pendant la mise à disposition des personnels à bord du navire inscrit au registre international français, «l'armateur est responsable des conditions de travail et de vie à bord»⁷⁸.

En d'autres termes, la situation des personnels à bord dépend finalement de deux critères : la signature de la Convention de travail maritime, ou non, par l'État du lieu d'établissement de l'agence de *manning* et la ratification, ou non, de la convention par l'État d'immatriculation du navire où les gens de mer travaillent.

70) Les atteintes aux prescriptions de la loi n° 2013-619 en matière de recrutement des gens de mer sont punies d'une peine contraventionnelle de 3 750 euros d'amende par infraction constatée (art. L. 5546-1-9-I).

71) Art. L. 5546-1-1 C. Transports, créé par l'art. 25 (V) de la loi n° 2013-619 du 16 juillet 2013 portant diverses dispositions d'adaptation au droit de l'Union européenne dans le domaine du développement durable (JO 17 juillet 2013, p. 11890 et s.).

72) Art. L. 5546-1-1-I et L. 5546-1-8 C. Transports : l'inscription, suivie d'un agrément, est obligatoire sous peine d'interdiction d'exercice sur le territoire national de ces sociétés.

73) Hors les entreprises de travail temporaire mentionnées à l'art. L. 1251-2 C. Travail.

74) Au sens de la Convention de travail maritime.

75) Il s'agit d'une dérogation à l'art. L. 5321-1 C. Travail.

76) Art. L. 5546-1-5 C. Transports.

77) Transposition de cet aspect de la CTM 2006 pour le RIF à l'art. L. 5621-3 C. Transports.

78) Art. L. 5621-5 C. Transports.

XII. Normes sociales à bord des navires sous pavillons Bis européens:

Pour les navires battant pavillon d'un pays européen, même du second registre, l'État du pavillon conserve la pleine responsabilité de garantir les conditions de vie et de travail des gens de mer exigées par ladite convention⁷⁹. Le dispositif actuel de contrôle des navires, en escale dans les ports français, connu sous le nom de Mémoire d'entente de Paris⁸⁰, permet de veiller au respect de certaines obligations en matière de santé et sécurité à bord particulièrement. Aux inspecteurs du travail⁸¹ revient le contrôle essentiellement de la qualification, de la validité des documents professionnels obligatoires, de l'aptitude médicale des personnels, ainsi que de leur information préalable avant la signature du contrat d'engagement maritime sur leurs conditions de travail⁸².

Pour les immatriculations en dehors de l'Union européenne, si le navire bat pavillon d'un État ayant ratifié la Convention, c'est l'État du pavillon du navire qui est chargé de mettre en œuvre les prescriptions de la Convention de travail maritime relatives au recrutement ou placement de gens de mer pour le compte d'armateurs ou d'employeurs. C'est à l'autorité compétente de l'État du pavillon qu'il appartient de fixer les conditions dans lesquelles un certificat de conformité est jugé acceptable. C'est encore à l'État du pavillon de s'assurer que les inspecteurs des États des ports d'escale pourront accéder aux documents obligatoires pour examiner, lors de leurs visites à bord, les réclamations sociales des gens de mer. Ils devront veiller notamment à ce que toutes les personnes à bord, quel que soit leur recrutement, aient accès à un registre de plaintes, librement consultables au moment des inspections dans l'État portuaire.

Cela étant, quand des gens de mer sont recrutés par des sociétés de *manning* établies dans un pays non signataire pour travailler à bord d'un navire battant pavillon d'un pays qui a ratifié la convention internationale de 2006, l'armateur est seulement tenu de veiller, dans la mesure de ce qui est praticable, à ce que l'entreprise de travail maritime en respecte les exigences...

Demeure, enfin, le sort des gens de mer résidant hors de France, précisément recrutés par des sociétés de *manning* installées dans des pays non signataires et travaillant à bord de navires n'ayant pas ratifié la Convention de travail maritime. Pour les navires

79) Spéc. art. 3 de la directive 2013/54/UE du 20 novembre 2013 *relative à certaines responsabilités de l'État du pavillon en ce qui concerne le respect et la mise en application de la convention de travail maritime, 2006* : JOUE 10 décembre 2013.

80) *Memorandum of understanding* (MOU).

81) Ce contrôle est confié aux inspecteurs ou contrôleurs du travail en France (art. L. 5548-1 C. Transports). Il revient à chaque État de l'Union européenne d'organiser ces contrôles et inspections d'après la directive 2013/38/UE du 12 août 2013 *portant modification de la directive 2009/16/CE relative au contrôle par l'État du port* : JOUE 14 août 2013. À noter : il n'y a plus de corps d'inspection maritime en France depuis 2009.

82) Art. L. 5546-1-4 C. Transports.

accostant en France, la loi du 16 juillet 2013 s'inscrit dans la nouvelle dynamique de régulation sociale instaurée par ladite convention en promouvant un ordre public social tranchant avec le laisser-faire international habituel. Si le contrat d'engagement maritime des gens de mer résidant hors de France reste soumis à la loi d'autonomie⁸³, c'est uniquement sous réserve des dispositions du droit français applicables⁸⁴ et sans préjudice des dispositions plus favorables des conventions ou accords collectifs applicables aux non-résidents, par application de la «clause de traitement non moins favorable»⁸⁵. Cette clause vise à «garantir des règles du jeu égales pour les navires battant pavillon qui ont ratifié la Convention afin qu'ils ne soient pas en situation concurrentielle désavantageuse par rapport aux navires battant pavillon de pays qui ne l'ont pas ratifiée»⁸⁶. Par ce jeu, quelle que soit la loi résultant du choix des parties, le contrat d'engagement maritime devra être établi conformément aux stipulations de la Convention du travail maritime⁸⁷.

Si cette application universelle tend à réduire les distorsions de concurrence avec l'instauration de normes désormais «planchers», cela ne sera sans doute pas suffisant, en l'absence d'un second registre européen, pour assurer la compétitivité de la flotte sous pavillon français, premier ou second registre.

B. Pour la création d'un second registre européen

Le dumping social intra-communautaire explique, en partie, la crise des vocations que connaît le milieu de la mer ces dernières années, alors même que les navires immatriculés dans l'Union européenne représentent près de 20 % de la flotte mondiale. Pour l'endiguer, la mise à niveau des normes sociales à bord sur la norme européenne, admise pour l'ensemble des salariés à terre, est aujourd'hui préconisée.

Les directives européennes sur le droit du travail sont appliquées, en règle générale, à tous les secteurs d'activité et à toutes les catégories de salariés, excepté aux gens

83) Par application du règlement dit « Rome I ». –V. pour la détermination du lieu habituel de travail, not. CJUE 17 janvier 2012 (*Sademink*) ; CJUE 29 juin 1994 (*Aldewereldla*) et 7 juin 2012 (*Bakker c/ Min. van Financiën*) ; CJUE 15 décembre 2011 (*Jan Voogsgaerd c/ Navimer*).

84) Par exemple, les gens de mer résidant hors de France sont rapatriés dans des conditions au moins équivalentes à celles des stipulations de la Convention du travail maritime de l'Organisation internationale du travail relatives au rapatriement des gens de mer : art. L. 5621-16.-I. C. Transports.

85) Spéc. art. V, § 7 MLC 2006 : cet art. ne vaut que pour le contrôle par l'État du port visé à la règle 5.2.1 de la Convention, c'est-à-dire les cas où un navire peut être immobilisé par le fonctionnaire inspecteur du port. Il y a deux situations : lorsque les conditions à bord présentent un danger évident pour la sécurité, la santé ou la sûreté des gens de mer ; lorsque la non-conformité constitue une infraction grave ou répétée aux prescriptions de la Convention, y compris à propos des droits des gens de mer.

86) *Ibidem*.

87) Art. L. 5621-72.-I C. Transports.

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de mer qui peuvent être exclus pour six d'entre elles, sans aucune justification⁸⁸. La situation sociale des personnels à bord, dans les différents États, ne permet donc pas de garantir les conditions de concurrence égales sur le marché européen. Des sociétés installées dans certains États membres se trouvent, en effet, exemptées d'une grande partie des obligations que des concurrentes, établies dans d'autres États, supportent vis-à-vis des personnels navigants qu'ils recrutent⁸⁹.

L'idée de créer un pavillon de second registre européen - à l'image de la citoyenneté européenne ou de la société européenne - permettrait d'adopter des critères juridiques uniques et communs à tous les États, définis par l'Union européenne. L'intérêt serait ici de rendre inutiles les pavillons des seconds registres des différents États membres, lesquels exposent leurs marines marchandes à des distorsions de concurrence critiquables, tant en matière sociale que fiscale, empêchant l'indispensable mouvement de convergence et sapant le principe même de solidarité européenne.

Trois avantages au moins pourraient être tirés, à terme, de cette proposition de promotion d'un pavillon *bis* européen : facilité, accessibilité et convergence.

Premièrement, la facilité : battre pavillon *bis* européen serait possible dans n'importe quel État membre, tout en conservant l'immatriculation du navire dans cet État. Arborer le second registre européen aurait simplement pour effet et intérêt de gommer le lieu d'immatriculation du navire.

Deuxièmement, l'accessibilité : le fait de recourir à un pavillon commun soutiendrait l'activité de transport maritime opérée par les navires au sein de l'espace de l'Union européenne en évitant les accès limités au cabotage continental ou inter-îles entre ports de certains États membres.

Troisièmement, la convergence : promouvoir le pavillon *bis* européen aurait pour résultat de faire accepter un socle de normes sociales, fiscales et environnementales identiques dans tous les États membres pour les navires arborant ce pavillon. Si l'harmonisation des règles sociales, et surtout fiscales, peut paraître lointaine, une convergence peut s'opérer, dans un premier temps, avec des minima imposés et contrôlés ; conjuguée, s'il le faut, à des renvois, pour certaines questions limitées, au droit national de l'État membre d'immatriculation du navire. À titre d'exemple, une

88) Directive 2008/94/CE dite « directive sur l'insolvabilité de l'employeur » ; directive 2009/38/CE dite « directive sur le comité d'entreprise européen » ; directive 2002/14/CE dite « directive sur l'information et la consultation des travailleurs » ; directive 98/59/CE dite « directive sur les licenciements collectifs » ; directive 2001/23/CE dite « directive sur le transfert d'entreprises » et directive 96/71/CE dite « directive sur le détachement de travailleurs ».

89) En ce sens, v. la proposition de directive du 18 novembre 2013 du Parlement européen et du Conseil relative aux gens de mer modifiant les directives 2008/94/CE, 2009/38/CE, 2002/14/CE, 98/59/CE, 2001/23/CE et 96/71/CE, spéc. p. 3.

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position commune pourrait se dégager sur le quota de personnels à bord pouvant être recrutés par le recours à des sociétés de *manning* installées dans l'Union européenne et hors zone. Pour celles établies sur le territoire communautaire, leur soumission à des conditions d'agrément communes à l'ensemble des États membres se ferait sous la responsabilité de l'armateur, qui veillerait au respect des conditions de travail et de vie à bord, telles que les États auraient entendu communément les définir. Pour celles établies hors zone, des minima sociaux communs à l'ensemble des pays européens pourraient concerner l'ensemble des gens de mer naviguant sous ce second registre européen.

Soutenu par un cadre réglementaire respectueux des droits sociaux consacrés par la Charte des droits fondamentaux de l'Union européenne, le second registre européen aurait ainsi le mérite d'attirer des ressortissants européens dans les activités offertes par le secteur maritime. Les gens de mer obtiendraient enfin des droits et conditions de travail équivalents aux travailleurs restés à terre.

Malheureusement, l'application de règles communes sur le détachement des personnels navigants ne semble pas une priorité de l'Union européenne dans le cadre de sa politique d'amélioration des conditions de travail et de vie en mer⁹⁰. Cette question essentielle semble, en effet, avoir été purement et simplement reportée *sine die*, si l'on a bien compris l'esprit de la proposition de directive européenne du 18 novembre 2013 ayant pour objet l'alignement des droits sociaux des gens de mer sur ceux des salariés à terre⁹¹...

90) Cette question est mise de côté par la proposition de directive du 18 novembre 2013 du Parlement européen et du Conseil relative aux gens de mer visant à modifier les directives 2008/94/CE, 2009/38/CE, 2002/14/CE, 98/59/CE, 2001/23/CE et 96/71/CE, spéc. p. 8 et s.

91) Par ex, l'art. 27 de la Charte des droits fondamentaux de l'Union européenne sur le droit à l'information et à la consultation des travailleurs au sein de l'entreprise et l'art. 31 proclamant le droit à des conditions de travail justes et équitables.



CHAPTER 13

L'Union Européenne et le droit international du travail des gens de mer

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Résumé : *Dans la continuité du travail engagé depuis longtemps conjointement avec l'Organisation Internationale du Travail (OIT), l'Union européenne a contribué activement à l'élaboration, au sein de l'Organisation, du droit international du travail des gens en mer, alors même qu'elle ne bénéficie pas du statut de membre de l'OIT. Dans ce contexte, l'étude du rôle joué par l'Union européenne en vue de l'adoption de la Convention du travail maritime ainsi que de la Convention sur le travail dans la pêche, révèle l'existence d'un imbroglio juridique dont l'analyse conduit à une meilleure compréhension de l'action externe de l'Union européenne.*



Les gens de mer¹ appartiennent à une catégorie socioprofessionnelle particulièrement exposée aux risques d'accidents du travail et de maladies professionnelles². Depuis une vingtaine d'années, ce risque est accru par la pression de plus en plus forte exercée sur ces travailleurs. Les recours fréquents des armateurs aux sociétés de *manning*, qui mettent à disposition les navigants, qui les embauchent et les rémunèrent, conduisent à une mise en concurrence des gens de mer. En 2014, un rapport d'information, fait au nom de la Commission des affaires européennes, met en exergue le fort *dumping social* dans le secteur du transport maritime entre États de l'Union européenne et États tiers mais aussi entre États membres de l'Union européenne³. Le droit international du travail n'est pourtant pas resté muet face à la pénibilité du travail des gens de mer. L'Organisation internationale du Travail (OIT) a adopté, depuis 1920, pas moins d'une quarantaine de conventions pour améliorer leurs conditions de travail. Toutefois, cette prolifération normative n'a pas eu l'effet escompté, les États ne ratifiant pas l'ensemble des textes, les différences de traitement des gens de mer en fonction de leur nationalité s'accroissant alors. Face à ce constat, en 2001, sous l'impulsion de la Commission maritime paritaire⁴, s'engagent à l'OIT, au sein d'un groupe de travail tripartite de haut niveau, des discussions en vue de l'élaboration d'un texte rassemblant les normes de l'OIT relatives au travail des gens de mer⁵. Cinq ans plus tard, le texte voit le jour. La Convention du travail maritime est adoptée le 23 février 2006, à Genève, à l'occasion de la 94^{ème} session de la Conférence internationale du travail. Selon l'OIT, « [l]a nouvelle convention a été conçue pour devenir le « quatrième pilier » de la réglementation internationale du transport maritime, en complément des conventions fondamentales de l'Organisation maritime internationale (OMI) »⁶. La Convention apparaît alors comme un véritable

1) Nous entendons par l'expression « gens de mer », tout marin ou toute autre personne exerçant à bord d'un navire une activité professionnelle liée à son exploitation.

2) La synthèse des pathologies d'origine professionnelle chez les marins survenues ou reconnues au cours de l'année 2013, réalisée pour le ministère de l'Écologie, du développement durable et de l'énergie, montre qu'en France, même si le nombre d'accidents s'est stabilisé depuis 2012, il reste plus élevé que dans les autres branches du transport. Or, la France est un des États qui offrent un régime juridique parmi les plus protecteurs aux gens de mer. Synthèse disponible à l'adresse suivante : http://www.developpement-durable.gouv.fr/IMG/pdf/Bilan-accidents-marins-2013_web.pdf

3) « Le droit en soute : le dumping social dans les transports européens », Rapport d'information n° 450 (2013-2014) de M. Éric Bocquet, fait au nom de la commission des affaires européennes, déposé le 10 avril 2014.

4) Résolution concernant l'examen des instruments maritimes pertinents de l'OIT, adoptée lors de la 29^{ème} session de la Commission paritaire maritime réunie à Genève du 22 au 26 janvier 2001, Rapport final, JMC/29/2001/14.

5) L'expression « gens de mer » désigne, selon l'article 1 de la Convention de l'OIT n° 163 sur le bien-être des gens de mer de 1987, « toutes les personnes qui sont employées, à quelque titre que ce soit, à bord d'un navire de mer, de propriété publique ou privée, autre qu'un navire de guerre ». La Convention sur le travail maritime de 2006 reprend presque mot pour mot cette définition en son article II, § 1.

6) OIT, « Adoption d'un instrument consolidé regroupant les normes du travail maritime », Rapport I (1A) de la Conférence internationale du Travail, 94^e session (maritime), 2006.

code du travail maritime venant tout à la fois asseoir et renforcer l'acquis en la matière et ouvrant aussi des perspectives de renforcement du seuil de protection des droits sociaux des travailleurs en mer⁷. Le droit international du travail des gens de mer a été, dans le même temps, complété par un texte consacré à une catégorie particulière de travailleurs, les pêcheurs, dont l'activité est qualifiée par le préambule de la Convention d'« activité dangereuse par rapport à d'autres », ce qui justifie le régime juridique spécifique qui leur est consacré. La Convention (n° 188) sur le travail dans la pêche a ainsi été adoptée le 14 juin 2007, mais elle n'est toujours pas entrée en vigueur. La Convention du travail maritime, de son côté, est entrée en vigueur le 20 août 2013. Toutefois, à peine était-elle dotée de force contraignante, que son texte faisait déjà l'objet de propositions d'amendements soumises conjointement par le groupe des armateurs et le groupe des gens de mer conformément à l'article XV, § 2, de la Convention⁸. Les amendements proposés tendent à la création d'un dispositif de garantie financière en vue de prêter assistance aux gens de mer en cas d'abandon. Dans l'ensemble, ces propositions ont bien été accueillies par les États membres⁹, même si des modifications ont pu être apportées. Les amendements ont ainsi été approuvés par la conférence générale de l'OIT, lors de sa cent troisième session, tenue à Genève le 11 juin 2014.

Quelques mois après l'adoption de la Convention de l'Organisation internationale du Travail sur le travail maritime, qui met en place un corpus de normes sociales, la Commission européenne déclare qu'elle « [...] considère indispensable de mobiliser les moyens adéquats de mise en œuvre de la Convention, tant au niveau communautaire que national »¹⁰. La volonté de la Commission d'œuvrer pour l'effectivité du texte est alors palpable et s'inscrit dans la continuité du travail engagé,

7) Sur le contenu de la convention voir notamment : Doumbia-Henry C. (2004), "The Consolidated Maritime Labour Convention: A marriage of the traditional and the new", in Javillier J.-C. et Gernigon B. (dir.), *Les normes internationales du travail : un patrimoine pour l'avenir, Mélanges en l'honneur de Nicolas Valticos*, Genève, OIT, 319-334 ; Marin M. et Charbonneau A. (2007), « La Convention du travail maritime 2006 : vers une codification du droit du travail maritime international ? », *Droit Maritime Français*, 110-116 ; Charbonneau A. et Chaumette P. (2010), "The ILO Maritime Labour Convention 2006 (MLC, 2006): An example of innovative normative consolidation in a globalized sector", *European Labour Law Journal*, vol. 1, n° 3, 332-345 ; Chaumette P. (2012), « La Convention OIT du travail maritime en mouvement », *Droit Maritime Français*, n° 732, 52-57.

8) Article XV, § 2 : « Un amendement au code peut être proposé au Directeur général du Bureau international du Travail par le gouvernement d'un Membre de l'Organisation, par le groupe des représentants des armateurs ou par le groupe des représentants des gens de mer nommés à la commission visée à l'article XIII. Un amendement proposé par un gouvernement doit avoir été proposé ou être appuyé par au moins cinq gouvernements de Membres ayant ratifié la convention ou par le groupe des représentants des armateurs ou des gens de mer susvisés ».

9) Seules l'Estonie et la Suisse s'y sont opposées fermement au stade du recueil, par le Directeur général, des observations et suggestions des membres sur les propositions d'amendements.

10) Communication de la Commission au titre de l'article 138 paragraphe 2 TCE sur le renforcement des normes de travail maritime, Bruxelles, le 15 février 2006, COM(2006) 287 final.

depuis longtemps, conjointement entre l'Organisation Internationale du Travail (OIT) et l'Union européenne. Même si institutionnellement, l'OIT et l'Union européenne sont deux organisations internationales distinctes¹¹, l'une dite à vocation technique, l'autre dite d'intégration, les deux enceintes ont établi des relations étroites de coopération. Comme ni l'Union européenne ni l'OIT ne sont ouvertes à l'adhésion de membres non étatiques¹², la coopération interinstitutionnelle est apparue comme le seul moyen d'interaction entre ces deux enceintes. L'article 220, § 1, du TFUE (ex-articles 302 à 304 TCE) invite d'ailleurs « [l']Union [à établir] toute coopération utile avec les organes des Nations unies et de leurs institutions spécialisées ». Or, l'OIT est une institution spécialisée des Nations Unies avec laquelle l'Union européenne a ressenti très tôt le besoin de coopérer. La coopération entre organisations internationales, si elle se manifeste de manière spontanée, peut revêtir aussi un caractère plus formel à travers l'envoi réciproque d'observateurs participant à la vie de l'organisation. Ce *modus operandi* constitue aujourd'hui encore la règle classique de collaboration entre organisations internationales¹³. Dès 1958, l'OIT et la Communauté économique européenne ont conclu un accord de coopération afin de faciliter les consultations mutuelles, l'échange d'informations et l'assistance technique de l'OIT au bénéfice de la Communauté économique européenne¹⁴. L'accord a été complété, par la suite, par trois séries d'échanges de lettres. En 1961, un Comité permanent de contact a été créé en vue de la coordination des liaisons et de la collaboration entre les deux institutions¹⁵. Puis, en 1989¹⁶ et en 2001¹⁷, l'OIT et

11) L'affirmation selon laquelle l'Union européenne est une organisation internationale a pu faire l'objet de controverses dans la doctrine. Sans ignorer ces débats doctrinaux, nous nous rallions à la position selon laquelle, malgré ses spécificités, l'Union européenne peut être rattachée à la catégorie juridique des organisations internationales. Voir notamment sur cette question : Leben C. (1991), « À propos de la nature juridique des Communautés européennes », *Droits*, n° 14, 61-72 ; Simon D. et Rigaux A. (2013), « Chapitre 4 : Les communautés et l'Union européenne comme organisations internationales », in Lagrangre E. et Sorel J.-M. (dir.), *Traité de droit des organisations internationales*, Paris, L.G.D.J./Lextenso, 114-141.

12) Rares sont encore les organisations internationales qui admettent en tant que membres d'autres organisations internationales. Certaines organisations admettent uniquement l'adhésion des organisations dites d'intégration. L'Union européenne est, par exemple, membre de l'Organisation mondiale du Commerce, de l'Organisation pour l'alimentation et l'agriculture ou encore d'organisations régionales de gestion des pêches telles que la Commission internationale pour la conservation des thonidés de l'Atlantique.

13) Voir Dupuy R.-J. (1960), « Le droit des relations entre les organisations internationales », *RCADI*, vol. 100, 469.

14) Accord concernant la collaboration entre l'Organisation internationale du Travail et la Communauté économique européenne du 7 juillet 1958, *Bulletin officiel* du BIT, Vol. XLI, 1958, n° 8.

15) *Échange de lettres en date des 5 octobre et 2 novembre 1961 entre le Président de la Commission de la Communauté économique européenne et le Directeur général du Bureau international du Travail*, *Bulletin officiel* du BIT, Vol. XLIV, 1961, n° 7.

16) *Échange de lettres en date du 21 décembre 1989 entre le Président de la Commission de la Communauté économique européenne et le Directeur général du Bureau international du Travail* *Bulletin officiel* du BIT, Vol. LXXIII, 1990, série A, n° 3.

17) *Échange de lettres en date du 14 mai 2001 entre la Commission des Communautés européennes*

L'Union européenne ont défini de plus en plus étroitement les domaines prioritaires de coopération et ont détaillé les modalités de celles-ci. Tout en reprenant les fondations établies en 1958 – consultations mutuelles, échange d'informations et assistance technique –, les deux organisations prévoient en sus une représentation de l'Union européenne par la Commission aux réunions de la Conférence internationale du travail et du conseil d'administration et, à l'inverse une représentation de l'OIT par les représentants du bureau international du travail aux réunions des services de l'Union européenne portant sur des questions sociales et de l'emploi. L'Union européenne et l'OIT ont ainsi tissé des liens très serrés¹⁸ de sorte qu'à l'aube du travail de consolidation des normes relatives au travail maritime engagé à l'OIT, il ne faisait aucun doute que l'Union européenne participerait activement à ces travaux. Tout au long des négociations, qui ont mené à l'adoption des deux Conventions et des amendements à la Convention sur le travail maritime de 2006, l'Union européenne a ainsi participé aux discussions et est apparue comme un acteur majeur de l'élaboration du texte par le biais de ses États membres. Son rôle ne s'est d'ailleurs pas cantonné à l'enceinte de négociations puisque, en interne, l'Union européenne s'est assurée que ces textes se voient non seulement dotés de force contraignante mais qu'ils trouvent aussi écho dans le droit de l'Union. L'Union européenne a ainsi joué un rôle moteur, aux côtés de l'OIT, pour promouvoir les conditions de travail décentes des gens de mer alors même qu'elle ne pouvait pas devenir partie au texte.

À l'occasion de l'entrée en vigueur de la Convention sur le travail maritime de 2006, un numéro de la *Revue de droit comparé du travail et de la sécurité sociale* intitulé « La mise en œuvre de la Convention du travail de l'OIT : Espoirs et Défis » a été consacré à cet évènement¹⁹. Parmi les contributions, celle d'Anne Devouche a particulièrement attiré notre attention dans la mesure où l'auteure, qui a pu suivre les négociations depuis l'intérieur, s'est penchée sur le rôle joué par l'Union européenne dans l'adoption et l'application de la Convention sur le travail maritime de 2006²⁰. Elle nous livre ainsi des éléments de terrain précieux pour analyser les rapports entre les deux organisations internationales au moment de l'adoption de la

et le Directeur général du Bureau international du Travail, *Journal officiel des Communautés européennes*, C 165/23 du 8 juin 2001.

18) Pour une étude plus globale des relations entre l'Union européenne et l'OIT voir notamment : Johnson A. (2009), "EU-ILO Relations: Between Regional and Global Governance", in Orbie J. and Tortell L. (eds), *The European Union and the Social Dimension of Globalization: How the EU influences the World ?*, New York, Routledge, 81-97. ; Riddervold M. (2009), "Making a common foreign policy EU coordination in the ILO", RECON Online Working Paper 2009/18, Reconstituting Democracy in Europe. Available at : <http://www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers2009.html>

19) « La mise en œuvre de la Convention du travail de l'OIT : Espoirs et Défis », *Revue COMPTRASEC*, 2013, n° 2.

20) Devouche A. (2013), « L'Union européenne et le droit du travail maritime : De l'adoption à l'application de la CTM 2006 », *Revue COMPTRASEC*, n° 2, 58-64.

Convention sur le travail maritime et réfléchir sur l'action de l'Union européenne dans la promotion de la mise en œuvre de ce texte. Un an plus tard, nous nous proposons de poursuivre et d'élargir la réflexion ainsi engagée sur l'implication de l'Union européenne dans le renforcement des normes du travail des gens de mer d'un point de vue plus théorique. Nous nous attacherons à développer les aspects procéduraux des rapports entre l'Union européenne et l'OIT en les illustrant à la lumière des développements en la matière cristallisés par l'adoption, en 2007, de la Convention (n° 188) sur le travail dans la pêche et par l'adoption, en 2014, des amendements à la Convention sur le travail maritime de 2006. L'analyse comparative de l'implication de l'Union européenne dans les négociations et la mise en œuvre de ces trois textes permettra de mesurer l'étendue de sa compétence externe dans ses relations avec l'OIT. La situation de l'Union européenne au sein de l'OIT crée une tension juridique forte dans la mesure où, d'un côté, l'Union européenne ne dispose que d'un statut d'observateur au sein de l'OIT et, d'un autre côté, elle bénéficie en interne de compétences exclusives dans certains domaines, ôtant par là-même aux États membres leurs compétences en la matière. Il convient alors de déterminer le plus clairement possible comment se répartissent les compétences entre l'Union européenne et ses États membres dans les domaines qui relèvent de la Convention sur le travail maritime de 2006, de ses amendements de 2014 et de la Convention sur le travail dans la pêche de 2007 et comment ces derniers les mettent en œuvre au sein de l'OIT pour pouvoir comprendre les enjeux qui ont sous-tendu les négociations de ces textes (1). Cette première phase de la réflexion est d'autant plus nécessaire qu'une fois adoptées, les conventions de l'OIT doivent, selon la procédure solennelle de conclusion des traités, faire l'objet d'une ratification avant leur mise en œuvre par les États. Or, la question de la répartition des compétences entre l'Union européenne et ses États membres est là aussi cruciale dans la mesure où elle apparaît tout à la fois comme un frein puis un moteur à la mise en œuvre des conventions sur le droit du travail des gens de mer (2).

1 – Le rôle de l'Union européenne dans les négociations des conventions de l'OIT relatives au travail des gens de mer

L'Union européenne entretient des relations étroites avec l'OIT qui la conduisent notamment à participer, en tant qu'observateur, aux négociations. Si ce type de concours de l'Union européenne aux activités de l'OIT semble des plus classiques, il reste que, lors des négociations à l'OIT, cette intervention vient s'ajouter à celles de ses États membres. Les États membres de l'Union européenne participent, quant à eux, en tant que membres à part entière de l'OIT, dotés donc d'un droit de vote. Leurs interventions, lors des négociations à l'OIT, devraient ainsi être analysées comme des prises de positions individuelles. Toutefois, la configuration des négociations commandée par la présence de l'Union européenne dans l'enceinte conduit à se demander si les États membres défendent leurs positions nationales ou s'ils défendent une position commune, définie au préalable au sein de l'Union

européenne (B.). Ce questionnement est d'autant plus présent lorsque les textes négociés contiennent des dispositions relevant d'un domaine de compétence de l'Union européenne comme ce fut le cas pour la Convention sur le travail maritime et ses amendements ainsi que pour la Convention sur le travail dans la pêche (A.).

A. Les compétences de la Commission lors des négociations des conventions de l'OIT relatives au travail des gens de mer

S'interroger sur le fondement juridique du rôle de la Commission dans les négociations à l'OIT oblige à déterminer, dans un premier temps, la nature des compétences de l'Union européenne dans les domaines couverts par les trois textes relatifs au droit international du travail des gens de mer pour, dans un second temps, parvenir à définir l'étendue de sa compétence lors des négociations de ces textes.

En matière de politique sociale, conformément à l'article 153 du TFUE (ex-article 137 TCE), « l'Union soutient et complète l'action des États membres ». L'Union européenne dispose ainsi d'une compétence restreinte. Cette compétence est une simple compétence d'appui, ce qui réduit le rôle de l'Union européenne puisqu'elle ne peut en aucun cas remplacer la compétence étatique en ce domaine. L'article 153 du TFUE (ex-article 137 TCE) énumère les domaines – notamment l'amélioration du milieu de travail pour protéger la santé et la sécurité des travailleurs, les conditions de travail, la sécurité sociale et la protection sociale des travailleurs, la protection des travailleurs en cas de résiliation du contrat de travail ou encore l'information et la consultation des travailleurs – dans lesquels le Parlement européen et le Conseil peuvent adopter, par voie de directives, des « prescriptions minimales applicables progressivement ». Cette disposition a ainsi amené l'Union européenne à adopter un certain nombre de règles minimales concernant le travail des gens de mer, avant même l'adoption de la Convention sur le travail maritime de 2006 et de la Convention sur le travail dans la pêche de 2007. Ainsi, l'Union européenne a dégagé des exigences minimales en ce qui concerne les conditions d'emploi des gens de mer – notamment le temps de travail par la directive 1999/63/CE du Conseil²¹ –, la protection de la santé et la prévention des accidents de travail – notamment par la directive 89/391/CEE du Conseil²² – ou encore en mettant en place un contrôle par

21) Directive 1999/63/CE du Conseil du 21 juin 1999 modifiée concernant l'accord relatif à l'organisation du temps de travail des gens de mer conclu par l'Association des armateurs de la Communauté européenne (ECSA) et la Fédération des syndicats des transports dans l'Union européenne (FST), *Journal officiel*, n° L 167 du 2 juillet 1999, p. 0033. La directive a été modifiée, suite à l'adoption de la Convention sur le travail maritime de 2006 par la Directive 2009/13/CE du Conseil du 16 février 2009 portant mise en œuvre de l'accord conclu par les Associations des armateurs de la Communauté européenne (ECSA) et la Fédération européenne des travailleurs des transports (ETF) concernant la convention du travail maritime, 2006, et modifiant la directive 1999/63/CE, *Journal officiel de l'Union européenne*, n° L 124 du 20 mai 2009, p. 0030.

22) Directive 89/391/CEE du Conseil du 12 juin 1989 concernant la mise en œuvre de mesures visant

l'État du port des conditions de travail à bord des navires²³. La Convention sur le travail maritime de 2006 ainsi que la Convention sur le travail dans la pêche de 2007 ont ainsi pour objet des domaines relevant en grande partie de la compétence des États membres mais dans lesquels l'Union européenne avait mis en place, avant même l'adoption de ces textes, des prescriptions minimales. Par ailleurs, un point précis de ces conventions relève, quant à lui, d'une matière pour laquelle l'Union européenne dispose d'une compétence exclusive : la coordination des régimes de sécurité sociale. Selon l'article 48 TFUE (ex-article 42 TCE), « [l]e Parlement européen et le Conseil, statuant conformément à la procédure législative ordinaire, adoptent, dans le domaine de la sécurité sociale, les mesures nécessaires pour l'établissement de la libre circulation des travailleurs, en instituant notamment un système permettant d'assurer aux travailleurs migrants salariés et non-salariés et à leurs ayants droit : a) la totalisation, pour l'ouverture et le maintien du droit aux prestations, ainsi que pour le calcul de celles-ci, de toutes périodes prises en considération par les différentes législations nationales ; b) le paiement des prestations aux personnes résidant sur les territoires des États membres ». En 2007, le Conseil de l'Union européenne, se fondant juridiquement sur cette disposition, affirmait à propos de la Convention sur le travail maritime de 2006 que « certaines dispositions de la convention relatives à la coordination des régimes de sécurité sociale relèvent de la compétence exclusive de la Communauté »²⁴. Le même constat est fait quelques années plus tard par le Conseil en ce qui concerne la Convention sur le travail dans la pêche²⁵. Dès lors, d'un côté les États ne peuvent pas s'engager sur la scène internationale à l'égard des dispositions relatives à la coordination des régimes de sécurité sociale, de l'autre l'Union européenne ne peut pas devenir partie aux conventions de l'OIT qui ne sont ouvertes qu'aux seuls États. Cet imbroglio juridique, dans lequel l'Union européenne ne peut pas devenir partie à ces textes alors même que ces derniers portent en partie sur des domaines relevant de sa compétence exclusive, a déjà conduit la Cour de justice des Communautés européennes à se prononcer sur l'étendue

à promouvoir l'amélioration de la sécurité et de la santé des travailleurs au travail, *Journal officiel des Communautés européennes*, n° L 183 du 26 juin 1989, p. 001.

23) Directive 95/21/CE du Conseil du 19 juin 1995 concernant l'application aux navires faisant escale dans les ports de la Communauté ou dans les eaux relevant de la juridiction des États membres, des normes internationales relatives à la sécurité maritime, à la prévention de la pollution et aux conditions de vie et de travail à bord des navires (contrôle par l'État du port), *Journal officiel des Communautés européennes* n° L 157 du 07 juillet 1995, p. 001. Cette directive a été refondue, suite à l'adoption de la Convention sur le travail maritime, par la Directive 2009/16/CE du Parlement européen et du Conseil du 23 avril 2009 relative au contrôle par l'État du port, *Journal officiel de l'Union européenne*, n° L 131 du 28 mai 2009, p. 0057.

24) Décision du Conseil du 7 juin 2007 n° 2007/431/CE autorisant les États membres à ratifier, dans l'intérêt de la Communauté européenne, la convention du travail maritime, 2006, de l'Organisation internationale du travail, *JOUE*, L.161 du 22 juin 2007, p. 63.

25) Décision n° 2010/321/UE du Conseil du 7 juin 2010 autorisant les États membres à ratifier, dans l'intérêt de l'Union européenne, la convention sur le travail dans la pêche, 2007, de l'Organisation internationale du travail (*convention n° 188*), *JOUE*, L 145 du 11 juin 2010, p. 12.

respective de la compétence externe de l'Union européenne et de ses États membres lors de la négociation de tels textes.

La question de la répartition des compétences entre l'Union européenne et ses États membres lors de la négociation d'accords avec des États tiers ou des organisations internationales est posée à la Cour, dès 1971, dans le célèbre arrêt AETR²⁶. Plutôt que d'entrer dans les débats doctrinaux qui ont succédé cet arrêt, qui n'en restent pas moins très éclairants pour une théorie sur les compétences externes de l'Union, nous aimerions développer notre analyse à partir de l'avis 2/91 de la CJCE²⁷ qui, tout en s'appuyant sur la jurisprudence antérieure de la Cour, concerne plus spécifiquement une convention de l'OIT, la Convention n°170 sur la sécurité dans l'utilisation des produits chimiques au travail²⁸. Cet avis est riche d'enseignements en ce qui concerne la répartition des compétences entre les États membres et l'Union européenne lors de négociations à l'OIT. La Cour dégage l'ensemble des principes applicables dans la situation particulière de l'Union européenne à l'OIT. Ces principes peuvent être résumés de la sorte. En premier lieu, les États ne peuvent pas conclure d'accords dans les domaines qui relèvent, selon les dispositions du Traité ou en raison des mesures prises par l'Union dans ces domaines²⁹, de la compétence exclusive de l'Union européenne³⁰. Ainsi, les États membres n'ont pas de compétence pour négocier, dans leur intérêt propre, et pour adopter les dispositions de la Convention sur le travail maritime de 2006 et celles du travail dans la pêche de 2007 relatives à la coordination des régimes de sécurité sociale. En second lieu, l'Union européenne ne dispose pas d'une compétence exclusive automatique dans les domaines dans lesquels elle a adopté seulement des prescriptions minimales en raison du caractère partagé de sa compétence³¹. Dès lors, les États membres ont

26) CJCE, *Commission des Communautés européennes contre Conseil des Communautés européennes. Accord européen sur les transports routiers (AETR)*, Arrêt de la Cour du 31 mars 1971, Affaire n° 22-70, *Rec.* 1971, p. 00263. Cet arrêt a fait couler beaucoup d'encre, nous nous contenterons de vous renvoyer à l'un des multiples commentaires : Kovar (R.), « L'affaire de l'A.E.T.R. devant la Cour de Justice des Communautés européennes et la compétence internationale de la C.E.E. », *A.F.D.I.*, 1971, vol. 17, pp. 386-418.

27) CJCE, *Avis rendu en vertu de l'article 228, paragraphe 1, deuxième alinéa, du traité CEE - Convention n. 170 de l'Organisation internationale du Travail concernant la sécurité dans l'utilisation des produits chimiques au travail*, Avis de la Cour du 19 mars 1993, Avis n° 2/91, *Rec.* 1993, p. I-0106.

28) Convention n° 170 de l'OIT sur la sécurité dans l'utilisation des produits chimiques au travail, adoptée le 25 juin 1990 et entrée en vigueur le 4 novembre 1993.

29) CJCE, *Avis rendu en vertu de l'article 228, paragraphe 1, deuxième alinéa, du traité CEE - Convention n. 170 de l'Organisation internationale du Travail concernant la sécurité dans l'utilisation des produits chimiques au travail*, Avis de la Cour du 19 mars 1993, Avis n° 2/91, *Rec.* 1993, point 22.

30) CJCE, *Avis rendu en vertu de l'article 228, paragraphe 1, alinéa 2, du traité CEE*, Avis de la Cour du 11 novembre 1975, Avis n° 1/75, *Rec.* 1975, p. 01355.

31) La Commission soutenait que la libre appréciation laissée aux États, pour évaluer si une disposition de l'OIT est plus protectrice ou non que celle de l'Union, pouvait conduire à ce que les États écartent l'application du droit de l'Union alors même que celui-ci offrait des standards de protection plus élevés.

compétence pour négocier, dans leur intérêt propre, et pour adopter les dispositions de la Convention sur le travail maritime de 2006 et celles du travail dans la pêche de 2007 autres que celles relatives à la coordination des régimes de sécurité sociale. Toutefois, si l'Union européenne a adopté dans ces domaines des règles qui vont au-delà de simples règles minimales, les États perdent leur compétence pour négocier, dans leur intérêt propre, et pour adopter les accords sur ces domaines. Cette hypothèse pourrait être celle des amendements de 2014 à la Convention sur le travail maritime car l'Union européenne avait en 2014 largement couvert ce domaine pour mettre en œuvre la Convention³². En somme, la négociation et l'adoption de la Convention sur le travail maritime de 2006 et de ses amendements et de la Convention sur le travail dans la pêche de 2007 relèvent en partie de la compétence des États membres et en partie de la compétence de l'Union européenne. La complexité de la répartition des compétences opérée au sein de l'Union européenne rejaillit alors avec d'autant plus d'intensité dans les rapports de l'Union européenne avec le droit international car, si en théorie, la distinction peut sembler claire comment se traduit-elle en pratique lorsque l'Union européenne ne peut pas être partie aux accords internationaux ?

Selon la Cour, dans son avis, une telle situation nécessite « (...) d'assurer une coopération étroite entre ces derniers et les institutions communautaires tant dans le processus de négociation et de conclusion que dans l'exécution des engagements assumés (...). En l'espèce, la coopération entre la Communauté et les États membres est d'autant plus nécessaire que la première ne peut pas, en l'état actuel du droit international, contracter elle-même une convention de l'OIT et qu'elle doit le faire par l'intermédiaire des seconds »³³. Ainsi, il est nécessaire, au sein de l'OIT, que les États membres et l'Union européenne coopèrent lors de l'adoption d'accords relevant à la fois de la compétence des uns et de l'institution européenne afin d'harmoniser au mieux leurs positions. Par ailleurs, la Cour explique en filigrane que les États, dans les domaines qui relèvent de la compétence exclusive de l'Union européenne, ne défendront plus leurs intérêts propres au sein de l'enceinte de négociation de l'OIT mais bien la position commune dégagée à l'échelle européenne. Du point de vue procédural, la position commune des États membres dans les domaines qui

La Cour a rejeté cette interprétation : §§13 à 21 de l'avis de 1993.

32) Sur la mise en œuvre de la Convention sur le travail maritime par l'Union européenne voir : Fotinopoulou Basurko O. (2013), « La mise en œuvre effective de la CTM 2006 dans les États membres : dépendra-t-elle du rôle normatif joué par l'UE en la matière ? », *Revue COMPTRASEC*, n°2, 66-77. Et sur la mise en œuvre de la Convention dans le droit français voir : Chaumette P. (2013), « La ratification et la transposition de la convention OIT du travail maritime (MLC 2006) - Loi n° 2013-619 du 16 juillet 2013 portant diverses dispositions d'adaptation au droit de l'Union européenne dans le domaine du développement durable, titre II, chapitre III », *Droit social*, 915.

33) CJCE, *Avis rendu en vertu de l'article 228, paragraphe 1, deuxième alinéa, du traité CEE - Convention n. 170 de l'Organisation internationale du Travail concernant la sécurité dans l'utilisation des produits chimiques au travail*, Avis de la Cour du 19 mars 1993, Avis n° 2/91, Rec. 1993, point 37.

relèvent de la compétence exclusive de l'Union européenne, est ainsi définie par une décision du Conseil fondée sur l'article 218, § 9, du TFUE (ex-article 300 TCE)³⁴. La question de la répartition des compétences entre l'Union européenne et les États membres doit ainsi être posée en amont de toute négociation par les États membres d'un accord avec un tiers ou une autre organisation internationale, afin que le Conseil puisse définir, sur proposition de la Commission, la position commune à défendre lors des négociations.

B. La sauvegarde de l'acquis communautaire lors des négociations des conventions OIT relatives au travail des gens de mer

Les directives de négociation, adoptées par le Conseil de l'Union européenne, à l'occasion des négociations relatives à la Convention sur le travail maritime et à ses amendements et des négociations relatives au travail dans la pêche, ont pour objet de sauvegarder l'acquis communautaire dans les matières relevant de la compétence exclusive de l'Union. Alors même que l'avis n° 2/91 de la Cour appelle à une telle coopération des États membres et de l'Union européenne, du côté des partenaires sociaux est née « la crainte de voir amoindris le rôle et l'influence qu'ils exercent directement sur les gouvernements en vertu de la Convention sur les consultations tripartites au niveau national »³⁵. Par ailleurs, certains États membres³⁶ ont contesté le fondement même d'une décision du Conseil relative aux directives de négociation des dispositions d'un projet de Convention. Considérant que lorsque l'Union européenne ne peut pas être partie à un accord, l'article 218, § 9, du TFUE sur lequel le Conseil fonde sa décision n'est pas applicable. La Cour a rendu un arrêt, à l'automne 2014, sur cette question³⁷ dans lequel elle réaffirme que l'article 218, § 9, du TFUE tend à permettre à l'Union européenne de dégager une position commune avec ses États membres même si l'Union n'est pas membre de l'organisation dans laquelle l'accord est négocié³⁸. Dans cette affaire, l'Allemagne demandait l'annulation

34) Article 218, § 9, du TFUE (ex-article 300 TCE) : « Le Conseil, sur proposition de la Commission ou du haut représentant de l'Union pour les affaires étrangères et la politique de sécurité, adopte une décision sur la suspension de l'application d'un accord et établissant les positions à prendre au nom de l'Union dans une instance créée par un accord, lorsque cette instance est appelée à adopter des actes ayant des effets juridiques, à l'exception des actes complétant ou modifiant le cadre institutionnel de l'accord ».

35) Maupain F., Kohiyama T. (2006), « L'organisation internationale du travail », *Répertoire de droit international*, (mis à jour en mars 2014), section 3 – article 3.

36) La République fédérale d'Allemagne soutenue par la République tchèque, le Luxembourg, la Hongrie, le Royaume des Pays-Bas, la République d'Autriche, la République slovaque, et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord.

37) CJUE, Grande Chambre, *République Fédérale d'Allemagne c/ Conseil de l'Union européenne*, arrêt du 7 octobre 2014, affaire n° C 399/12.

38) Dans l'affaire précitée, il s'agissait aussi de savoir si une telle position commune pouvait être prise pour l'adoption de recommandations au sein de l'Organisation internationale de la vigne et du vin. La

de la décision du Conseil de l'Union européenne établissant la position à adopter au nom de l'Union européenne en ce qui concerne certaines résolutions devant être votées dans le cadre de l'Organisation internationale de la vigne et du vin au motif que l'article 218, § 9, du TFUE ne serait applicable que dans le contexte d'accords conclus par l'Union, ce qui n'était pas le cas en l'espèce. La Cour va affirmer que peu importe que l'Union soit partie ou non à l'accord ayant créé l'instance, dès lors que cette instance est appelée à adopter des actes ayant des effets juridiques dans un ou plusieurs domaines relevant de la compétence de l'Union européenne, le Conseil, sur proposition de la Commission, adopte une décision établissant les positions à prendre au nom de l'Union. Le Conseil va ainsi, même si l'Union européenne n'est pas membre de l'OIT, procéder de la sorte en ce qui concerne les Conventions relatives au travail des gens de mer.

Dans la première directive de négociation adoptée par le Conseil, en 2005, à l'occasion des négociations sur la Convention sur le travail maritime, le Conseil met l'accent sur la préservation de l'acquis communautaire en matière de coordination des régimes de sécurité sociale. Il cible ainsi plus particulièrement les dispositions du règlement (CEE) n° 1408/71 du Conseil du 14 juin 1971, relatif à l'application des régimes de sécurité sociale aux travailleurs salariés et à leur famille qui se déplacent à l'intérieur de la Communauté, étendu aux ressortissants de pays tiers par le règlement 859/2003 et sur les dispositions du règlement (CE) n° 44/2001 du Conseil du 22 décembre 2000 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale, entre les États membres. Pour définir la position commune des États membres de l'Union européenne, la Commission a été assistée d'un comité spécial. Au début des discussions au sein de l'Union, certains États membres – Chypre, la Grèce et Malte – étaient relativement opposés à l'adoption de la Convention sur le travail maritime alors que le Danemark et le Royaume-Uni s'interrogeaient sur la possibilité d'articuler le droit international et le droit de l'Union sur ces questions. Finalement, malgré ces réticences étatiques, une position commune a pu être dégagée. Toutefois, durant les négociations, l'Union européenne n'a pas toujours eu gain de cause sur ses positions malgré la définition d'une position commune avec ses États membres. L'Union européenne a tenté, au maximum, d'éviter les conflits entre la Convention et le droit communautaire. Elle a ainsi réussi dans son entreprise notamment en matière de coordination des systèmes de sécurité sociale³⁹. Le droit de l'Union prévoit que les lois applicables aux gens de mer qui se déplacent à l'intérieur de l'Union européenne sont celles de l'État du pavillon. Le texte de la norme A 4.5 du projet de Convention sur le travail maritime prévoyait,

Cour a donc dû déterminer si de telles recommandations avaient des effets juridiques au sens de l'article 218, § 9, du TFUE. La Cour conclut que ces recommandations ont de tels effets et que c'est à bon droit que le Conseil s'est fondé sur l'article 218, § 9, du TFUE pour adopter sa décision.

39) Voir sur ce point : Devouche A. (2013), « L'Union Européenne et le droit du travail maritime : De l'adoption à l'application de la CTM 2006 », *Revue COMPTRASEC*, n°2, 61.

quant à lui, un partage des responsabilités entre l'État du pavillon et l'État de résidence. Après d'intenses négociations, l'Union européenne s'est finalement vue reconnaître au paragraphe 4 de la norme A 4.5 un droit dérogatoire de coordination. La proposition d'ajout de ce paragraphe a été faite par les membres gouvernementaux de l'Allemagne, de la Belgique, du Danemark, de la Grèce et des Pays-Bas⁴⁰ afin de sauvegarder l'acquis communautaire. L'Union européenne a, toutefois, dû aussi faire des compromis pour éviter de bloquer les négociations. Ces compromis ont reçu l'aval de la Commission et de la présidence de l'Union qui ont assuré une étroite collaboration avec les États membres tout au long des négociations. Le Royaume-Uni, s'exprimant au nom des États membres de l'Union européenne, a ainsi pu indiquer que le paragraphe 3 de la norme A1.4 du projet de Convention relative au recrutement et au placement était contraire aux obligations des États membres de l'Union européenne mais que malgré ce conflit de droit, les États membres de l'Union européenne ne s'opposeraient pas à l'introduction de ce paragraphe dans la convention afin que les négociations puissent avancer⁴¹. L'Union européenne a ainsi négocié à travers la voix de ses États membres dans le cadre de ses compétences au sein d'une organisation dans laquelle elle ne dispose pas du statut de membre. L'Union européenne apparaît alors comme un observateur particulier au sein de l'OIT qui dispose certes de moins de droits que les membres mais qui a aussi davantage de moyens d'action que les observateurs traditionnels. Si la mécanique de répartition des compétences, lors de la prise de position des États membres au sein des négociations, semble bien huilée, elle n'apparaît, en revanche, pas toujours aussi clairement en pratique aux yeux des participants.

Il n'est, en effet, pas toujours aisé pour les États non membres de l'Union européenne, le groupe des armateurs ou encore celui des travailleurs, de distinguer quelle position est défendue : la position commune de l'Union européenne et des États membres ou bien la position nationale de chaque État membre. Cette confusion est notamment accentuée lorsque le représentant de l'État, habilité à parler au nom des États membres de l'Union européenne, expose une position nationale. Les autres participants aux négociations demandent alors parfois que le représentant précise s'il présente la position coordonnée des États membres de l'Union européenne ou une position nationale⁴². La prise de parole au nom de l'Union européenne est normalement déléguée lors de la réunion de coordination à un seul représentant d'un État membre. Toutefois, la technicité d'une question peut conduire l'Union européenne à demander

40) OIT, *Rapport de la commission n° 3* soumis à la Conférence technique maritime préparatoire tenue à Genève du 13 au 24 septembre 2004, doc n° PTMC/04/3-3, §§ 355-358.

41) OIT, *Rapport du Comité plénier*, in *Compte-rendu provisoire de la quatre-vingt-quatorzième session (maritime) de la Conférence internationale du travail*, tenue à Genève du 7 au 23 février 2006, § 370.

42) Le groupe des armateurs a d'ailleurs interpellé les Pays-Bas sur ce point lors des négociations afin de savoir si la proposition d'amendement était une proposition coordonnée des États membres de l'Union européenne ou non. *Ibid.*, § 316.

à un autre représentant d'un État membre de s'exprimer en son nom. La coordination interne est ainsi claire mais l'absence de transparence de celle-ci et de communication avec les autres participants sur les spécificités de l'action européenne, lors des négociations, peut conduire à des situations confuses. L'Union européenne et les États membres n'y ont pourtant pas intérêt du point de vue des rapports de force qui s'opèrent dans de telles enceintes car si sur une question, la voix de l'Union européenne est considérée comme primordiale, sur d'autres elle est regardée avec défiance. Certains États membres ont aussi entretenu cette confusion en s'exprimant en lieu et place de l'Union européenne, sans notifier qu'ils présentaient une position commune et sans d'ailleurs qu'il s'agisse vraiment d'une position déterminée comme telle en interne. Ainsi, Chypre s'est, par exemple, opposée, en son nom, à un amendement présenté par le groupe des travailleurs visant à mettre à la charge de l'État du pavillon le contrôle non seulement des conditions de travail et de vie des gens de mer mais aussi de la protection en matière de sécurité sociale. Selon cet État, une telle règle obligerait certains États à mettre en place un système distinct de sécurité sociale pour les gens de mer, ce que le droit de l'Union européenne ne permet pas. Aucun État ne s'est, par la suite, exprimé au nom de l'Union européenne sur cet amendement alors même qu'il portait sur une compétence exclusive de l'Union européenne. Cet amendement n'a finalement pas été adopté⁴³. Malgré la position commune dégagée en amont des négociations à l'OIT au sein de l'Union européenne, celle-ci nécessite, comme nous venons de le constater, d'être ajustée au fur et à mesure des négociations. L'Union européenne se doit ainsi de garder en permanence un œil sur les travaux pour coordonner l'action de ses États membres afin de préserver l'acquis communautaire. Les enjeux, importants notamment en raison de la refonte d'un grand nombre de textes de l'OIT qui entouraient l'adoption de la Convention sur le travail maritime, transparissent lors des négociations au sein desquelles la position de l'Union européenne a été fermement défendue par les États. Ainsi, alors qu'elle ne dispose que d'un simple statut d'observateur à l'OIT, l'Union européenne a été omniprésente durant les négociations de la Convention sur le travail maritime à travers les voix de ses États membres. Lors des négociations de la Convention du travail dans la pêche et des amendements à la Convention sur le travail maritime, même si le discours de l'Union européenne a de nouveau innervé l'ensemble des négociations, la position commune défendue était sensiblement différente.

La stratégie des États membres de l'Union européenne a été quelque peu différente lors des négociations de la Convention sur le travail dans la pêche et des amendements de 2014 à la Convention sur le travail maritime. Dans la directive de négociation, adoptée par le Conseil en 2014, la position commune de l'Union exprimée consistait à soutenir sans réserve les amendements à la Commission proposés par la Commission tripartite spéciale, établie par le Conseil d'administration conformément

43) *Ibidem*, § 894.

à l'Article XIII de la convention du travail maritime. De la même manière, lors des négociations de la Convention sur le travail dans la pêche, le représentant de l'Allemagne, s'exprimant au nom des États membres de l'Union européenne, a soutenu dans son discours d'ouverture sans réserve l'adoption de la Convention sur le travail maritime en estimant qu'il s'agissait d'un texte abouti. Au fil des discussions relatives aux propositions d'amendements du projet de Convention, la position de l'Union européenne s'est éclaircie. Il s'agissait avant tout, pour les États membres de l'Union, de s'assurer, dans l'intérêt de l'Union européenne, de la conformité de ce texte avec la Convention sur le travail maritime. La position commune consistait à soutenir les amendements conformes à des dispositions similaires de la Convention de 2006 et, à l'inverse, à s'opposer aux amendements non conformes à celle-ci ou trop éloignés de la Convention de 2006. L'Union européenne et ses États membres se sont alors positionnés non seulement comme les garants de l'acquis communautaire mais aussi, et peut-être surtout, comme les garants de l'acquis de la Convention sur le travail maritime de 2006. Toutefois, ces positions ne sont absolument pas contradictoires, ni étonnantes en 2007. L'Union européenne avait, à cette date, déjà engagé un travail en interne pour intégrer, dans son droit, le droit découlant de la Convention sur le travail maritime de 2006. Dès lors, en se positionnant comme garant de l'acquis de la Convention sur le travail maritime de 2006, l'Union européenne et ses États membres préservaient, par ricochet, le « futur acquis » communautaire. Là encore, l'Union européenne a fait œuvre d'une influence bien plus importante que celle dont disposent généralement les observateurs lors de ce type de négociations, et ce afin de promouvoir les normes de la Convention sur le travail maritime. L'Union européenne a, suite à l'adoption de ces textes, déployé des efforts considérables pour permettre une effectivité des Conventions de l'OIT relatives au droit des gens de mer à l'échelle européenne.

2. Le rôle de l'Union européenne dans la mise en œuvre des conventions OIT relatives au travail des gens de mer

Lors des négociations de la Convention sur le travail maritime, de ses amendements de 2014 et de la Convention sur le travail dans la pêche, une position commune a été défendue par les États membres de l'Union européenne pour les dispositions des textes portant sur des domaines relevant de la compétence exclusive de l'Union. Toutefois, au moment de l'adoption du texte, l'Union européenne ne jouit pas d'un droit de vote, seuls ses États membres peuvent s'exprimer de la sorte. Pourtant, lors de la phase de formulation de leur engagement à être lié par les textes, les États membres sont limités dans leur action, dans la mesure où ils ne peuvent pas s'engager définitivement sur la scène internationale sans une autorisation en ce sens de l'Union européenne. L'expression de leur consentement à être lié par le texte international est ainsi soumise à l'adoption préalable d'un acte communautaire (A.). D'un autre côté, ne pouvant elle-même ratifier les conventions de l'OIT, l'Union européenne ne peut accélérer l'entrée en vigueur des textes. Toutefois, l'Union européenne s'est

attachée à intégrer, au plus vite, dans son corpus normatif, l'ensemble des normes contenues dans les conventions de l'OIT relatives au droit du travail des gens de mer, faisant alors fi de la distinction entre les dispositions relevant de sa compétence exclusive et les autres. Pour ce faire, l'Union européenne s'est appuyée sur les partenaires sociaux afin d'asseoir dans le droit de l'Union, le droit international du travail des gens de mer (B.).

A. L'autorisation de ratification des conventions de l'OIT relatives au travail des gens de mer

L'identification des domaines de compétences relevant respectivement de l'Union européenne et des États membres, au sein de la Convention sur le travail maritime de 2006, de ses amendements et de la Convention sur le travail dans la pêche de 2007, permet de déterminer la position commune des États membres lors des négociations sur les questions relevant de la compétence de l'Union européenne. Par ailleurs, une fois le texte adopté, reste qu'il est nécessaire, pour son entrée en vigueur, qu'il recueille suffisamment de ratifications. Or à ce stade, la complexité de la répartition des compétences au sein de l'Union vient de nouveau alambiquer la procédure. Dans le prolongement de la logique retenue par la Cour de justice de l'Union européenne dans les arrêts et avis sus-cités, les États membres n'ont pas la compétence pour ratifier un accord avec un État tiers ou une organisation internationale dont certaines dispositions relèveraient de la compétence exclusive de l'Union européenne. La ratification partielle du texte n'est pas non plus une possibilité offerte par la Convention de Vienne sur le droit des traités, l'engagement de l'État ne pouvant être limité que par le mécanisme des réserves⁴⁴. Dans le cas présent, il n'y a cependant pas d'absence de volonté des États de s'engager sur une partie du traité mais une incompétence de ces derniers pour le faire. Dès lors, les États membres de l'Union européenne ne pouvaient pas ratifier la Convention sur le travail maritime de 2006 et la Convention sur le travail dans la pêche de 2007 sans l'accord préalable de l'Union⁴⁵. Le Conseil a donc autorisé par deux décisions distinctes, les États membres à ratifier la Convention sur le travail maritime de 2006 – décision du Conseil du 7 juin 2007 n° 2007/431/CE⁴⁶ – ainsi qu'à ratifier la Convention sur le travail dans la pêche – décision n° 2010/321/UE du Conseil du 7 juin 2010⁴⁷.

44) À l'OIT, une pratique d'*opting-out* s'est développée qui a pu être considérée par une partie de la doctrine comme un mécanisme de réserves même si l'OIT se défend d'une telle pratique voir : *Annuaire de la Commission de droit international*, 52^{ème} session, 2000, vol. 1, pp. 167-176.

45) En ce qui concerne les amendements de 2014 à la Convention sur le travail maritime, ils entrent en vigueur selon les modalités prévues à l'article XV de la Convention.

46) Décision du Conseil du 7 juin 2007 n° 2007/431/CE autorisant les États membres à ratifier, dans l'intérêt de la Communauté européenne, la convention du travail maritime, 2006, de l'Organisation internationale du travail, *JOUE*, L.161 du 22 juin 2007, p. 63.

47) Décision n° 2010/321/UE du Conseil du 7 juin 2010 autorisant les États membres à ratifier, dans

Deux observations peuvent être faites sur cette procédure qui consiste à déléguer aux États une compétence de l'Union elle-même fondée sur un transfert de souveraineté des États.

En premier lieu, il est manifeste que « [cette] intervention des institutions européennes dans le processus de négociation et de ratification des conventions internationales n'a évidemment rien de neuf : dans tous les domaines où la compétence de l'Union s'est affirmée, l'adhésion des États aux accords pris à l'échelle internationale dépend de l'intervention des institutions de l'Union. Que la compétence interne détermine une compétence externe de l'Union est une solution bien ancrée »⁴⁸. Toutefois, durant ces dix dernières années, la procédure d'autorisation de ratification par les États membres d'accords avec des tiers ou des organisations internationales a été utilisée moins d'une vingtaine de fois dont cinq fois pour des conventions adoptées dans le cadre de l'OIT⁴⁹ et autant pour des conventions adoptées dans le cadre de l'OMI. Cette utilisation modérée de cette procédure peut s'expliquer d'un côté par la participation, en tant que membre, de l'Union européenne à un certain nombre d'organisations traitant des domaines dans lesquels l'Union européenne a une compétence exclusive telles que l'Organisation mondiale du commerce ou l'Organisation des Nations Unies pour l'alimentation et l'agriculture et, de l'autre, par la possibilité pour l'Union européenne d'être partie à certains traités sans forcément être membre de l'organisation sous les auspices de laquelle ceux-ci sont adoptés comme, par exemple, en ce qui concerne la Convention sur la diversité biologique. À la lumière de ce constat, les rapports entre l'OIT et l'Union européenne apparaissent aujourd'hui comme relativement désuets. L'importance renforcée au sein de l'Union européenne des questions sociales, notamment par la référence dans l'article 151 TFUE (ex-article 136 TCE) à la Charte sociale européenne de 1961 et à la Charte communautaire des droits sociaux fondamentaux des travailleurs de 1989,

l'intérêt de l'Union européenne, la convention sur le travail dans la pêche, 2007, de l'Organisation internationale du travail (*convention n° 188*), *JOUE*, L 145 du 11 juin 2010, p. 12.

48) Robin-Olivier S. (2013), « Deux illustrations de la procédure préalable à la ratification des Conventions de l'OIT par les États membres », *RTD Eur.*, 387.

49) Décision 2005/367/CE du Conseil du 14 avril 2005 autorisant les États membres à ratifier dans l'intérêt de la Communauté européenne la convention de l'Organisation internationale du travail sur les pièces d'identité des gens de mer (Convention n° 185) ; Décision 2007/431/CE du Conseil du 7 juin 2007 autorisant les États membres à ratifier, dans l'intérêt de la Communauté européenne, la convention du travail maritime, 2006, de l'Organisation internationale du travail ; Décision 2010/321/UE du Conseil du 7 juin 2010 autorisant les États membres à ratifier, dans l'intérêt de l'Union européenne, la convention sur le travail dans la pêche, 2007, de l'Organisation internationale du travail (convention n° 188) ; Décision du Conseil 2014/51/UE du 28 janvier 2014 autorisant les États membres à ratifier, dans l'intérêt de l'Union européenne, la convention de l'Organisation internationale du travail de 2011 concernant un travail décent pour les travailleuses et travailleurs domestiques (convention n° 189) ; Décision 2014/52/UE du Conseil du 28 janvier 2014 autorisant les États membres à ratifier, dans l'intérêt de l'Union européenne, la convention de l'Organisation internationale du travail de 1990 concernant la sécurité dans l'utilisation des produits chimiques au travail (convention n° 170).

nécessiterait de moderniser la nature des rapports entre l'OIT et l'Union européenne. Actuellement, la relation triangulaire entre États membres, Union européenne et OIT se nourrit de la complexité procédurale qui découle des rapports entre l'Union européenne et ses États membres. La ratification des conventions de l'OIT par les États membres de l'Union européenne ne peut être que ralentie par la lourdeur procédurale qui leur est imposée. En plus d'obtenir l'autorisation de ratification du Conseil de l'Union européenne, certains États membres, comme la France en ce qui concerne la Convention sur le travail maritime et la Convention sur le travail dans la pêche, doivent, en effet, accomplir aussi leurs procédures internes d'autorisation de ratification. Les méandres de la procédure imposée aux États membres deviennent un frein à l'entrée en vigueur rapide des conventions internationales, malgré les efforts faits par l'Union européenne.

À la lecture des deux décisions d'autorisation de ratification, relatives pour l'une à la Convention sur le travail maritime et pour l'autre à la Convention sur le travail dans la pêche, la volonté de l'Union européenne de ne pas offrir, par l'ajout de cette procédure, à ses États membres un argument pour retarder leur ratification des textes internationaux apparaît nettement. Pour la Convention sur le travail maritime de 2006, le Conseil adopte sa décision un peu plus d'un an après l'adoption de la Convention à l'OIT et il demande aux États membres de la ratifier, dans la mesure du possible avant le 31 décembre 2010. Pour la Convention sur le travail dans la pêche de 2007, le Conseil adopte sa décision trois ans après l'adoption de la Convention et il demande aux États membres de la ratifier, dans la mesure du possible avant le 31 décembre 2012. Il faut donc en moyenne quatre ans pour qu'une Convention, relevant à la fois de la compétence de l'Union européenne et de la compétence des États membres, puisse être ratifiée par ces derniers lorsque l'Union européenne ne peut pas être partie au texte. Ce délai, s'il est respecté, est très raisonnable étant donné la pratique internationale en la matière. Cependant, l'ambition du Conseil était bien plus grande que la volonté ou les possibilités des États membres. La Convention sur le travail maritime n'a toujours pas été ratifiée par six États de l'Union Européenne⁵⁰ et dix-huit autres l'ont ratifiée après la date fixée par la décision du Conseil. La Convention sur le travail dans la pêche connaît, quant à elle, un succès beaucoup plus limité puisqu'un seul État membre de l'Union européenne, la France le 28 octobre 2015, a, à ce jour, déposé ses instruments de ratification auprès du directeur général du Bureau international du travail, de sorte que la Convention n'a toujours pas pu entrer en vigueur. Reste à espérer que les autres États membres de l'Union européenne suivent la voie française pour donner force contraignante au texte, car l'article 48 de la convention prévoit qu'elle n'entrera en vigueur que 12 mois après les ratifications de dix membres de l'OIT comprenant dix États côtiers.

50) Autriche, Estonie, Portugal, République Tchèque, Slovaquie et Slovénie.

La complexité de l'exercice de sa compétence externe par l'Union européenne a ainsi pour conséquence d'alourdir les procédures de négociation et de ratification de certains textes internationaux. Le droit international conventionnel, à qui l'on reproche souvent sa lenteur, se voit ainsi assené d'un nouveau coup qui ralentit son élaboration et son application. Pourtant, le droit international du travail des gens de mer a très vite trouvé sa place au sein du corpus normatif de l'Union européenne. La lenteur procédurale semble avoir été contournée, ce qui atteste de la volonté marquée de l'Union européenne de renforcer les normes dans ce domaine afin de garantir des conditions de travail décentes aux gens de mer.

B. La consolidation des normes relatives au travail des gens de mer

L'Union européenne avait à cœur de rendre rapidement effective la Convention sur le travail maritime de 2006, notamment pour des raisons économiques. L'absence de norme minimale de travail à l'échelle internationale et européenne dans le domaine maritime a entraîné un dumping social puissant. Même si la plupart des régimes juridiques européens restent plus protecteurs que les standards minimums posés par la Convention sur le travail maritime, l'intégration de la Convention dans le corpus normatif européen pourrait permettre d'endiguer en partie le phénomène de *dumping social*, du moins celui qui s'est développé entre les ressortissants des États membres de l'Union européenne.

Les aspects matériels de l'intégration du droit de la Convention sur le travail maritime dans le droit de l'Union européenne ont été largement développés par ailleurs⁵¹ de sorte qu'il conviendra ici de broser assez rapidement l'arsenal juridique mis en place. D'un point de vue procédural, l'article 154 du TFUE (ex-article 138 TCE) impose à la Commission, avant de présenter des propositions dans le domaine de la politique sociale, de consulter les partenaires sociaux sur l'orientation possible d'une action de l'Union⁵². Cette disposition du Traité n'est pas sans rappeler l'organisation tripartite de l'OIT. Toutefois, en ce qui concerne la Convention sur le travail maritime, les partenaires sociaux⁵³ ont devancé la Commission, en l'informant, dès le 29 septembre 2006, de leur volonté d'engager des négociations conformément à l'article

51) Voir en ce sens la contribution très complète de : Fotinopoulou Basurko O. (2013), « La mise en œuvre effective de la CTM 2006 dans les États membres : dépendra-t-elle du rôle normatif joué par l'UE en la matière ? », *Revue COMPTRASEC*, n°2, 66-77, ainsi que les contributions en ce sens dans le présent ouvrage.

52) Sur le rôle des partenaires sociaux au sein de l'Union européenne voir notamment : Le Barbier-Le Bris M. (2010), « Le rôle des partenaires sociaux dans l'intégration européenne », in Flaesch-Mouglin C., Lebullenger J. (dir.), *Regards croisés sur les intégrations régionales : Europe, Amérique, Afrique*, Bruxelles, Bruylant, 273-306. ; Mazuyer E. (2007), « Les instruments juridiques du dialogue social européen : état des lieux et tentative de clarification », *Droit social*, 476-487.

53) En l'espèce, il s'agissait des Associations des armateurs de la Communauté européenne (ECSA) et de la Fédération européenne des travailleurs des transports (ETF).

154, § 4, du TFUE (ex-article 138 TCE). Un accord a alors été conclu le 19 mai 2008 qui vise, d'un côté, à réformer la directive 1999/63/CE du Conseil du 21 juin 1999 modifiée concernant l'accord relatif à l'organisation du temps de travail des gens de mer conclu par l'Association des armateurs de la Communauté européenne (ECSA) et la Fédération des syndicats des transports dans l'Union européenne (FST) et, de l'autre, à mettre en œuvre l'essentiel des dispositions de la Convention sur le travail maritime de 2006. Cet accord annexé à la directive 2009/13/CE du Conseil du 16 février 2009⁵⁴ a permis d'incorporer les quatre premiers titres de la Convention internationale sur le travail maritime au droit de l'Union européenne, à l'exclusion de la règle 4.5 touchant à la coordination des régimes de sécurité sociale, domaine qui relève de la compétence exclusive de l'Union, et de mettre en place certaines normes plus protectrices que celles prévues dans la Convention notamment en matière de sécurité et de santé⁵⁵. Le neuvième considérant de la directive prévoyait par ailleurs que cette directive entrerait en vigueur simultanément avec la Convention, soit le 20 août 2013. À partir de cette date, les États membres de l'Union européenne ont été liés par les normes de la Convention contenues dans l'accord des partenaires sociaux, alors même que pour certains, ils n'avaient pas encore ratifié cette dernière. La France, par exemple, n'a ratifié la Convention que le 28 février 2013, ce qui reportait d'un an l'entrée en vigueur à son égard. Pourtant, par la loi du 16 juillet 2013, la France a intégré les dispositions de la directive 2009/13/CE du Conseil du 16 février 2009 en droit interne et a ainsi conféré par ricochet à la Convention sur le travail maritime toute sa force juridique dans l'ordre juridique français. L'intervention des partenaires sociaux dans le processus décisionnel a incontestablement permis une mise en œuvre plus rapide et plus homogène des normes internationales du travail des gens de mer au niveau européen.

Par ailleurs, comme l'accord des partenaires sociaux n'abordait pas la question du contrôle par l'État du port et l'État du pavillon, car ils n'ont pas compétence pour agir en ce domaine, trois directives sont venues compléter le dispositif communautaire et ainsi asseoir davantage la Convention sur le travail maritime : la directive 2009/21/CE du Parlement européen et du Conseil du 23 avril 2009 concernant le respect des obligations des États du pavillon⁵⁶ ; la directive 2013/54/UE du Parlement

54) Directive 2009/13/CE du Conseil du 16 février 2009 portant mise en œuvre de l'accord conclu par les Associations des armateurs de la Communauté européenne (ECSA) et la Fédération européenne des travailleurs des transports (ETF) concernant la convention du travail maritime, 2006, et modifiant la directive 1999/63/CE, *JOUE*, L 124 du 20 mai 2009, p. 30.

55) Titre 1. Conditions minimales requises pour le travail des gens de mer à bord d'un navire ; Titre 2. Conditions d'emploi ; Titre 3. Logement, loisirs, alimentation et service de table ; Titre 4. Protection de la santé, soins médicaux, bien-être et protection en matière de sécurité sociale.

56) Directive 2009/21/CE du Parlement européen et du Conseil du 23 avril 2009 concernant le respect des obligations des États du pavillon, *JOUE*, L 131 du 28 mai 2009. La directive met en place un système de certification et d'audit.

européen et du Conseil du 20 novembre 2013⁵⁷ relative à certaines responsabilités de l'État du pavillon et la directive 2013/38/UE du Parlement européen et du Conseil du 12 août 2013 relative à certaines responsabilités de l'État du port⁵⁸. Enfin, la Commission a proposé, fin 2013, l'adoption d'une directive visant à étendre la champ d'application *ratione personae* de cinq directives – la directive sur l'insolvabilité de l'employeur, la directive sur les comités d'entreprise européens, la directive sur l'information et la consultation, la directive sur les licenciements collectifs, la directive sur le transfert d'entreprises – aux gens de mer⁵⁹. Les gens de mer, et plus particulièrement les pêcheurs, sont exclus du champ d'application de ces directives en raison des spécificités de leurs activités. Toutefois l'Union européenne désire désormais offrir les mêmes garanties aux gens de mer qu'aux gens de terre. L'Union européenne met ainsi tout en œuvre pour permettre un renforcement des normes de travail des gens en mer par l'insertion de l'ensemble des dispositions de la Convention sur le travail maritime de 2006 dans le droit de l'Union. Cependant, le droit de la Convention sur le travail maritime est éclaté dans une multitude de textes européens alors même qu'au niveau international, l'ambition était de produire un seul texte réunissant l'ensemble des normes relatives au travail des gens de mer. Cet éclatement normatif, s'il s'explique par l'existence préalable de normes minimales dans ce domaine au sein de l'Union, peut ralentir néanmoins la mise en œuvre au niveau national de la Convention, affaiblissant ainsi les efforts de célérité déployés à l'échelle européenne et l'endigement du *dumping social* entre les États membres.

En ce qui concerne la Convention sur le travail dans la pêche, le 21 mai 2012, les partenaires sociaux⁶⁰ ont adopté un accord visant à garantir la transposition en droit de l'Union européenne de la Convention. Cet accord, amendé le 8 mai 2013, est le résultat de négociations engagées depuis 2010 entre les partenaires sociaux. L'accord reprend dans l'ensemble les dispositions de la Convention sur le travail dans la pêche en y ajoutant quelques dispositions. Les partenaires sociaux ont ainsi précisé qu'ils entendaient par l'expression « opérations de pêche » « *means catching, or catching and processing, of fish or other living resources of the sea* », étendant ainsi la Convention aux opérations liées à la pêche telles que le transbordement ou encore la mise en cage. De la même manière, les partenaires sociaux ont ajouté une définition des « *private employment agencies* » afin de les distinguer des services de

57) Directive 2013/54/UE du parlement européen et du conseil du 20 novembre 2013 relative à certaines responsabilités de l'État du pavillon en ce qui concerne le respect et la mise en application de la convention du travail maritime, 2006, *JOUE*, L 329 du 10 décembre 2013.

58) Directive 2013/38/UE du Parlement européen et du conseil du 12 août 2013 portant modification de la directive 2009/16/CE relative au contrôle par l'État du port, *JOUE*, L 218 du 14 août 2013.

59) Proposition de directive du Parlement européen et du Conseil relative aux gens de mer, modifiant les directives 2008/94/CE, 2009/38/CE, 2002/14/CE, 98/59/CE et 2001/23/CE, transmise par la Commission le 18 novembre 2013, COM(2013) 798 final.

60) ETF et Europêche-Cogeca.

recrutement et de placement. En revanche, l'accord ne reprend pas les dispositions de la Convention relatives au paiement des pêcheurs. Ces dispositions – articles 23 et 24 de la Convention – renvoient à la compétence des États pour la détermination des modalités de paiement des pêcheurs tout en exigeant que ces derniers non seulement soient payés à intervalles réguliers mais aussi qu'ils aient les moyens de faire parvenir à leurs familles les paiements reçus. La Convention sur le travail maritime prévoit, quant à elle, dans sa norme B2.2.4, qu'un montant mensuel minimum du salaire sera fixé par la Sous-commission sur les salaires des gens de mer de la Commission paritaire maritime⁶¹. Enfin, l'accord opère des renvois systématiques aux directives pertinentes de l'Union européenne dans les domaines déjà couverts par des textes et rappelle qu'il formule des normes minimales et que les États ou les acteurs du secteur ont donc la possibilité de prendre des mesures plus protectrices. Cet accord, qui n'a par ailleurs pas encore été adopté par le Conseil, n'entrera selon son article 39 en vigueur que lorsque la Convention elle-même entrera en vigueur. Pour les partenaires sociaux, cet accord a pour ambition de systématiser l'acquis social dans ce domaine. Ainsi, la Convention sur le travail dans la pêche, de part sa nature d'accord spécial, en ce sens qu'elle vient renforcer et adapter les dispositions de la Convention sur le travail maritime de 2006 à l'égard d'une catégorie particulière de travailleurs, intégrera le droit de l'Union européenne par le biais d'un texte unique. La mise en œuvre au niveau national de cette convention devrait donc permettre de fixer plus aisément des normes minimales dans le domaine du droit du travail des pêcheurs dans les États membres de l'Union européenne. Il est intéressant de constater que l'institutionnalisation de la participation des partenaires sociaux au processus décisionnel met en place une ébauche de système *bottom up* dans lequel l'adoption des normes résulterait non plus d'une initiative publique mais bien d'une initiative privée. Dans une interprétation très stricte des textes, nous pourrions considérer que le rôle joué par les partenaires sociaux résulte de la volonté des États membres de leur conférer un tel rôle et est, par ailleurs, très encadré par les textes. Toutefois, la pratique laisse entrevoir un levier d'action intéressant pour une Europe sociale.

La dynamique instaurée entre l'Union européenne et l'OIT offre des perspectives prospères pour un renforcement des droits sociaux au sein de l'Union européenne. Malgré une physionomie institutionnelle peu engageante pour travailler conjointement, les deux organisations ont su exploiter les mécanismes offerts par le droit pour tisser

61) En février 2014, la Sous-commission a fixé les salaires mensuels minimums suivants pour les matelots qualifiés : 585 dollars à 592 dollars à dater du 1^{er} janvier 2015, et 614 dollars à dater du 1^{er} janvier 2016. Il est évident que ces salaires minimums sont bien en deçà de ceux pratiqués dans la plupart des États européens et que le dumping social entre États membres de l'Union européenne et États tiers ne pourra pas être atténué par cette mesure.

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des liens étroits. L'OIT a ouvert le plus largement possible ses portes à l'Union européenne qui, telle une vigie dans un nid-de-pie, veille sur les négociations. De son côté, l'Union européenne a développé une véritable stratégie dans sa politique externe avec l'OIT, en coordonnant l'action de ses États membres. Même si le va-et-vient de délégations de compétences entre les États membres et l'Union européenne alourdit considérablement les procédures, en agissant par le biais de ses États membres, l'Union européenne s'offre la possibilité d'être un moteur dans la mise en œuvre des normes de l'OIT. De plus, le dialogue avec les partenaires sociaux, prévu dans le traité de Lisbonne, répond à la logique de construction des normes de l'OIT et permet ainsi à ces dernières de circuler entre les enceintes. La réception des normes de l'OIT par les partenaires sociaux, avant leur introduction dans le droit de l'Union, permet une intégration en douceur des normes d'un système juridique vers un autre. Les partenaires sociaux jouent ainsi un rôle d'interface entre les deux systèmes juridiques et de moteur dans la mise en œuvre des normes sociales au niveau européen. Il faut toutefois garder à l'esprit que la démarche de l'Union européenne n'est pas aussi philanthropique qu'elle ne pourrait paraître, les enjeux économiques qui sous-tendent la question du droit du travail des gens de mer ne doivent en aucun cas être éludés.



CHAPTER 14

Les fournisseurs de main-d'œuvre maritime et le droit de l'Union européenne

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Abstract: *To optimize their operating costs, many shipowners resort to manning agencies, intermediaries between them and the cosmopolitan crew of their ships, usually sailing on the open registers advocating "absolute minimum" in social matters. This economic model based on the search for a lowering of the social cost on board ships must now reckon with the entry into force of the 2006 Maritime Labour Convention ("MLC, 2006"), which requires Member States to respect new obligations as to control of companies subleasing employees. Partly incorporated in the Community system, this new international social regulation nevertheless illustrates the difficulties facing the European Union in developing a common response to the widespread international practice of social dumping at sea. If the principle of social responsibility of States with regard to manning agencies is enshrined in the MLC, 2006, the absence of Community regulation of this activity leaves the control of maritime labour companies to the sole discretion of the more diligent States in social matters.*

Résumé : *Soucieux d'optimiser leurs coûts d'exploitation, nombre d'armateurs recourent aux agences de manning, intermédiaires entre eux et l'équipage cosmopolite de leurs navires, qui naviguent, le plus souvent, sur les registres de libre immatriculation prônant le « minimum minimorum » en matière sociale. Ce modèle économique qui repose sur la recherche d'un abaissement du coût social à bord doit désormais compter avec l'entrée en vigueur de la Convention du travail maritime de 2006 (« CTM 2006 ») qui impose aux États membres de nouvelles obligations en matière de contrôle des sociétés de prêts de main-d'œuvre. Intégrée pour partie dans l'ordre communautaire, cette nouvelle régulation sociale internationale illustre néanmoins les difficultés de l'Union européenne à concevoir une réponse commune à une pratique internationale généralisée de dumping social en mer. Si le principe de la responsabilité sociale des États à l'égard du manning est posé par la CTM 2006, l'absence de régulation communautaire de cette activité laisse le contrôle des entreprises de travail maritime à la seule appréciation des États les plus diligents en matière sociale.*



Partenaires stratégiques des armateurs, comme peuvent l'être les sociétés de *shipmanagement*¹, les agences de *manning* ou entreprises de travail maritime ont connu ces dernières décennies une progression fulgurante. Implantées à proximité des viviers de main-d'œuvre « bon marché », nombre d'entre elles sont situées en Asie, dont plus de 400 pour les seules Philippines ; d'autres au sein de l'Union européenne, en Bulgarie, Croatie ou Roumanie. Offrant leurs services aux armateurs en matière de recrutement et de gestion du personnel au moyen de contrats de mise à disposition², elles sont mandatées par l'armateur pour embaucher et rémunérer une partie importante des personnels à bord des navires.

L'utilité économique de l'entreprise de travail maritime réside dans sa capacité à proposer une main-d'œuvre internationale³ liée par ses propres contrats d'engagement maritime, optimisés selon le lieu de son établissement, les registres⁴ ou encore les lieux supposés de résidence ou d'embauche des personnels prêtés. L'efficacité de la prestation repose sur la recherche systématique d'abaissement des coûts sociaux, en puisant classiquement dans les ressorts du *law shopping*. Il s'agit de choisir les systèmes juridiques les moins contraignants ou exigeants en matière d'application des normes sociales.

Les agences de *manning* prospèrent ainsi sur l'éparpillement international des droits sociaux en mer et l'impossibilité pour les États d'empêcher – notamment au sein de l'Organisation Mondiale du Commerce – le *dumping social*. Pour le plus grand profit des armateurs, elles imposent à leurs employés des conditions de travail, jugées critiquables ou indignes, notamment en ce qui concerne la rémunération ou l'alternance périodes en mer et repos, mais perçues inversement, dans le pays d'origine, comme d'authentiques aubaines. Malgré des salaires et une protection sociale bien moindres pour des postes équivalents, ces offres d'emploi permettent, par exemple, aux navigants philippins⁵ de bénéficier d'un niveau de vie supérieur à un emploi sur terre, renforçant leur motivation et leur attrait pour le métier⁶.

1) Les sociétés de *shipmanagement*, spécialisées dans le recrutement, l'exploitation technique et commerciale du navire, sont regroupées au sein de l'*Intermanager (International Ship Manager Association)*. On en dénombre 20 localisées en Europe, 7 en Asie et 2 en Amérique du Nord.

2) Dans lequel les conditions de l'engagement de la main-d'œuvre à bord, la rémunération, la protection sociale ou les organismes gérant les risques seront précisées.

3) Les sociétés de *manning* peuvent fournir en théorie l'ensemble des personnels maritimes. En pratique, dans la catégorie des personnels navigants, ce sont le plus souvent les officiers subalternes et les personnels non officiers qui sont ainsi recrutés.

4) Le principe de libre immatriculation du navire est un facteur démultiplicateur de l'optimisation du droit social, en ce qu'il permet à son exploitant de l'immatriculer dans des États juridiquement peu exigeants, sans lien véritable avec l'exploitation du navire. L'exemple du Luxembourg, État sans marin et sans côte, devenu pavillon de complaisance, illustre les dérives de ce principe.

5) Les deux tiers des gens de mer dans le monde seraient issus de ce pays.

6) À titre de comparaison, le premier registre français impose l'affiliation des navigants à la sécurité

À la fois réceptacle et amplificateur de la dérégulation sociale dans le secteur des transports maritimes, les agences de *manning* provoquent, outre des écarts de salaires très importants, des différences de traitement social assez inexplicables à bord et, en tout cas, peu compatibles avec les exigences de sécurité. À l'extrême, mais sans exagération, se glisse, le spectre connu de l'équipage multilingue, seul à la manœuvre, réduit en nombre et sans formation assurée, alors même que le facteur humain, la fatigue particulièrement, est l'une des premières causes d'accident en mer. Comment contenir de tels navires où sévissent laisser faire et laisser aller social et qui paraissent bien peu armés pour répondre aux normes minimales de sûreté en mer ; un des principaux objectifs de la politique de l'Union européenne ? Confrontée à une crise sévère des vocations maritimes en Europe, due notamment aux excès de l'internationalisation de la main-d'œuvre maritime, celle-ci entend bien, en réaction, promouvoir l'amélioration des conditions de vie et de travail des gens de mer. Cette orientation, plus que louable, se heurte pourtant au constat actuel que l'on peut faire du marché international du travail en mer. Nombre des personnels maritimes travaillent aujourd'hui en Europe à bord de navires battant pavillon d'un pays extracommunautaire et résident souvent, à titre habituel, dans des États tiers.

En décidant d'intégrer dans le droit communautaire l'essentiel de la Convention du travail maritime 2006⁷, entrée en vigueur le 20 août 2013⁸, l'Union européenne a semblé franchir un cap décisif. Réponse normative internationale applicable à une industrie mondialisée, cet instrument fondamental et unique, intégrant l'essentiel des normes et standards figurant dans les conventions et recommandations internationales du travail maritime en vigueur, ouvre la voie d'une nouvelle régulation mondiale⁹. Sont dorénavant fixés les standards juridiques internationaux minimums préservant le droit de tous les gens de mer à des conditions de vie et de travail décentes¹⁰. Est également instaurée une certification sociale obligatoire pour tout navire de plus de 500 tonneaux effectuant une navigation internationale¹¹. Les

sociale (ENIM), offre des salaires « élevés » à l'équipage et des conditions de travail proche des employés à terre (35 heures, durée des congés, fort coefficient de relève), tout cela contribuant objectivement à en faire un registre « onéreux » pour l'armateur confronté à la concurrence internationale.

7) Dénommée ci-après « CTM 2006 », appelée encore *Maritime Labour Convention* ("MLC") 2006.

8) La CTM 2006 entrant en vigueur le 20 août 2013, la directive 2013/38/UE du 12 août 2013 portant modification de la directive 2009/16/CE relative au contrôle par l'État du port est, elle-même, selon le choix de ses rédacteurs, entrée en vigueur à la même date que la CTM 2006.

9) Par décision 2007/431/CE du Conseil, les États membres ont été autorisés à ratifier, dans l'intérêt de la Communauté européenne, la CTM 2006, ainsi que les principes fondamentaux énoncés dans d'autres conventions internationales du travail : JOUE L 161 du 22.6.2007, p. 63.

10) Sur la CTM 2006, v. tout particulièrement, CHARBONNEAU A., *Marché international du travail maritime – Un cadre juridique en formation*, thèse Nantes, 2008, PUAM, coll. Berthold Goldman, Aix-Marseille, 2009, 675 p.

11) En principe, la CTM 2006 s'applique à l'égard de tous les navires, quel que soit leur tonnage ou le type de voyages qu'ils effectuent, à l'exception de ceux naviguant exclusivement dans les eaux intérieures ou

directives 2013/38 du 12 août 2013¹² et 2013/54 du 20 novembre 2013¹³ modifient en conséquence, lorsque nécessaire, le droit de l'Union¹⁴, en tenant compte des avancées significatives apportées par la CTM 2006. Le contrôle des navires par l'État du port¹⁵ comporte désormais plusieurs aspects¹⁶, dont un propre aux conditions de vie et de travail à bord¹⁷.

Les États fournisseurs de main-d'œuvre, y compris en Europe, rechignent pourtant à l'idée de nouvelles obligations sociales, alors même que le rôle et les pratiques des agences de *manning* ne cessent d'interroger¹⁸. C'est sans doute pourquoi l'Union européenne a choisi, en raison de réserves de certains États¹⁹, de ne pas inclure le titre 5 de la CTM 2006 traitant spécifiquement du *manning*. En attendant que la Commission européenne fasse – peut-être – le choix futur de son intégration dans le droit de l'Union européenne, assurant la généralisation de règles sociales minimales aux travailleurs en mer, le droit positif communautaire reste faiblement contraignant pour les nombreux armateurs qui ont recours à des services de recrutement et de placement de gens de mer basés dans des pays ou des territoires à l'égard desquels la convention n'est pas appliquée. Embauchés par les agences de *manning* réfugiées sur des territoires dépourvus d'État et de lois sociales, les personnels prêtés peuvent-ils seulement trouver dans le droit communautaire des moyens de s'opposer à la violation des règles sociales maritimes internationales ?

Si l'entrée en vigueur de la CTM 2006 constitue une étape décisive dans la promotion d'un droit social maritime international, la régulation des agences de *manning* ne

de zones où s'applique une réglementation portuaire. Cependant, l'article II, paragraphe 6, confère à l'autorité compétente un certain pouvoir de décision dans ce domaine.

12) Directive 2013/38/UE du 12 août 2013 portant modification de la directive 2009/16/CE relative au contrôle par l'État du port : JOUE L 218 du 14 août 2013.

13) Directive 2013/54/UE du 20 novembre 2013 relative à certaines responsabilités de l'État du pavillon en ce qui concerne le respect et la mise en application de la convention du travail maritime, 2006 : JOUE L 329 du 10 déc. 2013.

14) Déjà, COM (2006), 287 final, 15 fév. 2006, Communication de la Commission au titre de l'art. 138, § 2, TCE sur le renforcement des normes de travail maritime.

15) Par exemple, directive 95/21/CE du 19 juin 1995 relative au contrôle des navires par l'État du port : JOUE L 157 du 7 juillet 1995, p. 1 ; directive 2009/16/CE du 23 avril 2009 relative au contrôle par l'État du port.

16) Notamment, la lutte contre les catastrophes et les pollutions en mer.

17) CHRISTODOULOU-VAROTSI I., *Les défis du bien-être des marins dans le nouveau contexte de la Convention du travail maritime consolidée de l'OIT*, Annuaire de Droit Maritime et Océanique, Université de Nantes, t. XXV, 2007, pp. 141-156.

18) *Le dumping social dans les transports européens*, Rapport d'information n° 450, Commission des affaires européennes du Sénat (avril 2014), spéc. p. 73, <http://www.senat.fr/rap/r13-450/r13-45015.html>.

19) On songe à la Pologne, la Roumanie ou encore la Bulgarie, qui fournissent des marins embarqués, pour nombre d'entre eux, sous pavillons étrangers.

relève toujours pas de l'ordre communautaire (1). En l'absence de règles communes à l'Union européenne, le contrôle des entreprises de travail maritime reste notoirement insuffisant, reposant pour l'essentiel sur une logique de contrôle social de l'État du port (2).

1. La régulation du *manning* dans l'Union européenne : une mise en veille de la CTM 2006 ?

Les membres de l'Union européenne, signataires de la CTM 2006, sont tenus par un principe de responsabilité sociale des États à l'égard du *manning*, même si celui-ci n'est pas intégré en droit communautaire (A). Les fournisseurs de main-d'œuvre sont également visés par l'affirmation d'un devoir de vigilance à leur charge (B).

A. Le principe de responsabilité sociale des États à l'égard du *manning*

C'est le titre 5 de la CTM 2006 – dont l'intégration en droit communautaire n'est pas acquise – qui précise l'applicabilité de la nouvelle régulation sociale en mer à l'égard du *manning*²⁰. Couvrant trois domaines²¹, il précise que chaque membre doit s'acquitter des responsabilités lui incombant en matière de recrutement, de placement et de protection touchant à la sécurité sociale des gens de mer, qu'ils soient ses nationaux, des résidents ou des personnes domiciliées sur son territoire, sans préjudice du principe de sa responsabilité concernant les conditions de travail et de vie des gens de mer à bord des navires battant son pavillon.

Qu'ils soient du port ou du pavillon, les États sont désormais tenus de réglementer tout service privé de recrutement et de placement des gens de mer²² opérant sur leurs territoires. Ils doivent veiller à la mise en place d'un système de protection, sous la forme d'une assurance ou d'une mesure équivalente, pour indemniser les gens de mer ayant subi des pertes pécuniaires pour le cas où la société de prêts de main d'oeuvre ou l'armateur auraient manqué à leurs obligations au titre du contrat

20) Sur la singularité de l'architecture normative de la CTM 2006, v. DOUMBIA-HENRY Cl., *The Consolidated Maritime Labour Convention : a marriage of the traditional and the new, Les normes internationales du travail : un patrimoine pour l'avenir*, Mélanges en l'honneur de N. VALTICOS, Genève, OIT, 2004, p. 319 et s.

21) D'après la CTM 2006, la Règle 5.1 porte sur les responsabilités de l'État du pavillon, la Règle 5.2 porte sur celles de l'État du port et la Règle 5.3 porte sur la responsabilité du fournisseur de main-d'œuvre.

22) L'article II, paragraphe 1 h), de la CTM 2006, définit le service de recrutement et de placement des gens de mer comme « toute personne, société, institution, agence ou autre organisation du secteur public ou du secteur privé s'occupant du recrutement de gens de mer pour le compte d'armateurs ou de leur placement auprès d'armateurs ».

d'engagement maritime²³. Les États membres ont également à leur charge l'organisation d'un système d'inspection et de surveillance pour s'acquitter de leurs responsabilités en tant que fournisseurs de main-d'œuvre, dès que le placement des gens de mer s'établit à partir de leur territoire.

C'est envisager une nouvelle ère maritime préconisant une compétition économique dans laquelle la concurrence n'est loyale qu'à la condition d'observer, pour tous, l'application des règles sociales internationales reposant sur un socle minimal commun. Une des avancées les plus notables de la CTM 2006 est, en effet, de fixer des normes relatives au travail maritime pour tous les gens de mer, indépendamment de leur nationalité et du pavillon des navires à bord desquels ils servent. Ainsi, lorsque les marins travaillent à bord d'un navire battant le pavillon d'un pays qui n'a pas ratifié la CTM 2006, s'applique, conformément à l'article V paragraphe 7 de celle-ci, la clause dite du « traitement non moins favorable »²⁴. Son objet consiste à garantir des règles du jeu égales entre navires battant pavillon de pays ayant ratifié la convention et ceux battant le pavillon de pays ne l'ayant pas ratifiée.

Le contrôle des navires battant pavillon d'États, n'ayant pas ratifié la convention, qui font escale dans le port d'un pays l'ayant ratifiée, s'en trouve renforcé²⁵. Les États membres doivent tout mettre en œuvre pour se conformer aux procédures et pratiques prévues par la CTM 2006, du moins pour les éléments relevant de la compétence de l'Union. Tout navire faisant escale dans leurs ports et leurs mouillages, quel que soit l'État du pavillon, doit être en capacité de transmettre le certificat de travail maritime ou la déclaration de conformité du travail maritime, voire le registre des plaintes des marins. Les conditions de travail et de vie à bord de ces navires peuvent faire l'objet d'inspections approfondies. Ce dispositif nouveau, qui s'inscrit dans la logique du *Port State contro*²⁶, généralise la certification de conformité aux normes sociales internationales²⁷, d'inspection et de recours, là où les textes antérieurs ne prévoyaient d'obligations de cette nature qu'à la charge des États du pavillon en matière de sécurité²⁸.

23) Norme A1. 4, paragraphe 5, de la CTM 2006.

24) Un tel dispositif existe en matière de contrôle technique des navires faisant escale dans les ports d'États ayant ratifié la Convention MARPOL de 1973. Le Mémoire de Paris de 1982 (*Memorandum of understanding*, dénommé « MOU ») impose aux navires le respect des conventions de l'OMI.

25) V. règle 5.2.1 CTM 2006.

26) Sur le développement du contrôle social de l'État du port, v. CHAUMETTE P., *De l'évolution du droit social des gens de mer – Les marins sont-ils des salariés comme les autres ? Spécificités, banalisation et imbrication des sources*, Annuaire de Droit Maritime et Océanique, Université de Nantes, 2009, t. XXVII, spéc. pp. 471-499.

27) Rappr, en droit interne, art. L. 5514-1.-I. C. Transports : « pour prendre la mer, tout navire jaugeant 500 ou plus et effectuant des voyages internationaux (...), est doté d'un certificat de travail maritime en cours de validité ».

28) À l'exception notable de la Convention OIT n°147 sur la marine marchande de 1976 (*Convention*

Les fournisseurs de main-d'œuvre internationale, eux-mêmes, font l'objet de prescriptions particulières distinguées de celle des États. Les sociétés de *manning* établies sur le territoire d'un État signataire et fournissant les services d'un marin à un armateur sont, en effet, explicitement visés par la CTM 2006²⁹.

B. Le devoir de vigilance à la charge des fournisseurs de main-d'œuvre

Les services privés de recrutement et de placement des gens de mer se voient investis, en qualité d'opérateurs de prêts de la main-d'œuvre maritime, d'obligations propres inscrites dans la CTM 2006. Elle laisse cependant perplexe l'interprète, aussi bien sur la forme que sur le fond.

Sur la forme, tout d'abord, il paraît assez singulier d'associer à une convention internationale les entreprises de travail maritime, simples opérateurs de droit privé. Dans l'architecture des normes de la CTM 2006, elles sont pourtant présentées, selon le titre 5, comme responsables, au même titre que l'État du pavillon ou celui du port, du respect et de la mise en application du droit social maritime international. C'est en quelque sorte asseoir les agences de *manning* au même rang que les États, laissant penser qu'elles engagent une responsabilité équivalente à celle des États, sans préciser la nature de celle-ci.

Outre cette figure juridique contestable, il semble tout aussi insolite de vouloir intégrer ainsi, sur un mode consensuel, ceux qui, précisément en raison de la nature même de leur activité, exploitent méthodiquement les failles et les insuffisances des droits étatiques. S'est-on à ce point résigné sur la place désormais prépondérante des sociétés de *manning* dans l'armement pour les assurer sitôt d'une sorte de droit à autorégulation ?

Reste ensuite à mesurer l'ampleur des obligations créées par la CTM 2006 à l'encontre des entreprises de travail maritime, lesquelles n'ont d'ailleurs pu y consentir... que par la ratification des États membres où elles ont fixé leur siège... Où qu'elles se trouvent, les sociétés de prêts de main-d'œuvre maritime « devraient être tenues de s'engager à veiller au respect par l'armateur des termes des contrats d'engagement maritime conclus avec les gens de mer »³⁰.

concernant les normes minima à observer sur les navires marchands) et de son Protocole de 1996. - Comp. en matière de sécurité et de prévention environnementale : directive n° 2009/21/CE du 23 avril 2009 concernant le respect des obligations des États du pavillon.

29) CTM 2006, Titre 5, Principe directeur B5.3 – « Responsabilités du fournisseur de main-d'œuvre ».

30) Principe directeur B5.3 – Responsabilités du fournisseur de main-d'œuvre.

La formule – conditionnelle – scelle en réalité le sort des gens de mer intérimaires. Inscrits dans une relation triangulaire où leur propre contrat de travail pèse d'un moindre poids économique que le contrat de mise à disposition unissant armateur et agence de *manning*, ils se retrouvent dans une situation guère enviable. Le devoir de vigilance, à la charge de l'entreprise de travail maritime, quant à la bonne exécution des contrats d'engagement maritime³¹ est, en effet, difficilement conciliable avec le coût social de l'armement, âprement négocié dans un secteur fortement concurrentiel. Cela forme naturellement obstacle, au moment de la conclusion du contrat de mise à disposition, à l'application de ce classique *duty of care*. La société de *manning*, prestataire de la fourniture de main-d'œuvre maritime auprès de l'armateur client, embauche et rémunère les gens de mer qu'elle prête à ce dernier. « Tenue de s'engager à veiller au respect par l'armateur » des termes du contrat l'unissant avec ses propres salariés, elle n'a plus qu'à s'en remettre aux bonnes pratiques de l'utilisateur. Ce dernier n'a-t-il pas fait le choix de s'exempter de cette partie sociale du contrat en recourant, précisément, à un fournisseur de main-d'œuvre ?

Certes, formellement, le contrat de mise à disposition mentionne les conditions générales d'engagement. L'armateur est alors en mesure de vérifier qu'aucune pratique prohibée n'y figure comme, par exemple, l'absence d'honoraires ou autres frais mis à la charge des gens de mer pour leur recrutement, leur placement ou l'obtention d'un emploi³². S'agissant pourtant des clauses particulières se rapportant à la protection sociale et à la législation applicable, il ne pourra que constater que le droit applicable reste, dans bien des cas, celui du pays d'origine du marin ou celui du lieu d'établissement de l'agence de *manning*. Quand bien même le souhaiterait-il, comment pourrait-il connaître l'étendue exacte des obligations sociales liant chaque personnel à bord avec son employeur ? C'est bien le fournisseur de main-d'œuvre qui dispose, seul, de la maîtrise des contrats d'engagement maritime en qualité de débiteur principal des obligations sociales.

Ainsi placé sous la « surveillance » de l'agence de *manning*, tout concourt à ce que l'armateur se retranche derrière sa méconnaissance réelle ou supposée « des termes de l'engagement maritime » en cas de conflit entre l'entreprise de travail maritime et la main-d'œuvre prêtée. Quant au fournisseur de la main-d'œuvre, lors de l'inspection sociale par l'État du port – notamment dans le cas d'un traitement à terre des plaintes en mer – il n'a plus qu'à se décharger sur l'armateur ou encore sur l'État du pavillon

31) Rappr. art. L. 5542-1 C. Transports : « Tout contrat de travail, conclu entre un marin et un armateur ou tout autre employeur, ayant pour objet un service à accomplir à bord d'un navire est un contrat d'engagement maritime ». - Sur les mentions obligatoires : art. L. 5542-3.-I. C. Transports.

32) En dehors du coût que les intérimaires maritimes doivent accepter pour obtenir un certificat médical national obligatoire, le livret professionnel national et un passeport ou autre document personnel de voyage similaire (excepté le coût des visas, qui doit être à la charge de l'armateur) : Norme A1.4, paragraphe 5, de la CTM, 2006.

en invoquant, là encore, son ignorance des pratiques à bord. Sans réelle consistance juridique, le devoir de vigilance de la société de *manning* à l'endroit de l'armateur permet, au final, à chacun de s'affranchir mutuellement à l'égard des gens de mer prêtés, spécialement lorsqu'ils sont non nationaux ou non résidents de l'État du port ou du pavillon. Pour ceux-ci, il n'y a plus de responsables clairement identifiés en cas de manquement aux obligations sociales, ni à bord, ni sur terre.

Responsables des activités de services de recrutement et de placement des gens de mer établis sur leurs territoires, les États membres sont également tenus de contrôler le *manning*.

2. Le contrôle du *manning* en l'absence de règles communes dans l'Union européenne : le renvoi à la législation sociale du port ?

Certaines puissances maritimes européennes, peu nombreuses il est vrai, ont fait le choix de dépasser le cadre inachevé du droit communautaire relatif au *manning* pour promouvoir, dans leur ordre interne, un contrôle des sociétés de prêts de main-d'œuvre. Tel est le cas de la France (A). Confrontés au risque d'une nouvelle forme de distorsion de la concurrence en Europe, l'harmonisation de ce contrôle paraît toutefois préférable pour les États (B).

A. Le contrôle des agences de *manning* par l'État du port : l'exemple français

En dépit d'une économie maritime mondialisée où sévit une concurrence exacerbée entre opérateurs, le législateur français³³, soucieux de coller tant à la lettre qu'à l'esprit de la CTM 2006³⁴, a choisi d'encadrer le recrutement par les sociétés de service de placement privé³⁵. Cette préoccupation française répond d'ailleurs à certaines exigences exprimées par les partenaires sociaux, eux-mêmes, en Europe³⁶.

Suivant l'article L. 5546-1-1.-I. du Code des transports, tout service de recrutement

33) Tel est également le choix opéré par le législateur espagnol où neuf agences de *manning* sont installées en Espagne et ont été certifiées par la direction générale de la marine marchande locale : *Le dumping social dans les transports européens*, Rapport d'information n° 450, préc., p. 73.

34) En ce sens, v. CTM 2006, art. V, paragraphe 5, à la règle 1.4, paragraphe 2, et à la règle 5.3, paragraphe 1.

35) Art. L. 5546-1-1 C. Transports, créé par l'art. 25 (V) I. n° 2013-619 du 16 juillet 2013, p.11890 et s.

36) Une partie substantielle des normes de la CTM 2006 était déjà mise en œuvre dans le droit de l'Union au moyen de la directive 2009/13/CE du Conseil du 16 février 2009 portant mise en œuvre de l'accord conclu par les Associations des armateurs de la Communauté européenne (ECSA) et la Fédération européenne des travailleurs des transports (ETF).

et de placement privé de gens de mer³⁷ établi en France est obligé de s'inscrire sur un registre³⁸, à fin d'information des personnels et des armateurs et de manière à faciliter la coopération entre État du pavillon et celui du port³⁹. Les entreprises de travail maritime doivent faire l'objet d'un agrément par l'autorité administrative, impliquant de justifier d'une garantie financière, d'une assurance ou de tout autre dispositif équivalent⁴⁰. Elles doivent être en mesure d'indemniser les gens de mer des préjudices subis en cas d'inexécution de leurs obligations à leur égard⁴¹. Elles ne sont autorisées à mettre à disposition des gens de mer qu'à bord des navires immatriculés au registre international français ou de navires battant pavillon autre que français⁴².

Les agences de *manning* se voient, en outre, imposées plusieurs autres obligations. Elles doivent adresser à l'administration compétente un bilan annuel de leur activité et tenir à disposition, aux fins d'inspection, un registre à jour de tous les gens de mer recrutés ou placés par leur intermédiaire⁴³. Elles doivent s'assurer, quel que soit le lieu de leur établissement⁴⁴, de la qualification, de la validité, de l'aptitude médicale et des documents professionnels obligatoires de leur personnel et leur fournir une information préalable avant la signature du contrat d'engagement maritime⁴⁵. Elles sont également tenues d'examiner et de répondre à toute réclamation concernant leurs activités, lors des visites à bord du navire; l'inspecteur ou le contrôleur du travail pouvant se faire accompagner par le ou les délégués de bord ou délégués du personnel, si ces derniers le souhaitent⁴⁶.

S'agissant des gens de mer résidant hors de France, recrutés et placés par l'entreprise de travail maritime, l'ordre public social français a vocation à s'imposer. Si le contrat d'engagement maritime reste soumis à la loi d'autonomie, certaines dispositions du droit français sont applicables⁴⁷, sans préjudice de dispositions plus favorables⁴⁸ des

37) Hors les entreprises de travail temporaire mentionnées à l'art. L. 5546-1-6 C. Transports.

38) Art. L. 5546-1-8 C. Transports.

39) Le législateur a choisi d'assortir son dispositif de sanctions pénales, même si elles semblent peu dissuasives : v. art. L. 5546-1-9.-I : les manquements sont punis d'une peine contraventionnelle de 3 750 euros d'amende.

40) L'armateur, l'employeur ou les gens de mer intéressés peuvent exiger de l'agence de *manning*, établie hors de France, qu'elle justifie d'un mécanisme de garantie équivalent.

41) Art. L. 5546-1-5 C. transport.

42) Il s'agit d'une dérogation aux dispositions de l'art. L. 5321-1 C. Trav.

43) Art. L. 5546-1-1 C. Transports.

44) Art. L. 5546-1-3 C. Transports.

45) Art. L. 5546-1-4 C. Transports.

46) Art. L. 5548-1 C. Transports.

47) Par exemple, les gens de mer résidant hors de France sont rapatriés dans des conditions au moins équivalentes à celles des stipulations de la convention du travail maritime, 2006, de l'Organisation

conventions ou accords collectifs applicables aux non-résidents. Quelle que soit la loi résultant du choix des parties, ce contrat devra être établi conformément aux stipulations de la CTM 2006⁴⁹.

La singularité du dispositif français tient pourtant dans le rôle assigné à l'armateur. Si l'agence de *manning* s'abrite sur le territoire d'un État non signataire de la CTM 2006, c'est à l'armateur de s'assurer que l'entreprise de travail maritime en respecte les exigences⁵⁰. Le législateur français considère, en effet, qu'il est responsable, à l'égard de l'ensemble des gens de mer travaillant à bord, du respect des règles sociales, indépendamment de la responsabilité de chacun des employeurs⁵¹. D'ordre public⁵², cette solution conduit en cas de défaillance de l'entreprise prestataire à faire supporter par l'utilisateur les conséquences financières des manquements constatés. Il sera ainsi substitué à l'entreprise de travail maritime pour le rapatriement et le paiement des sommes qui sont, ou restent dues, aux organismes d'assurance sociale et aux gens de mer résidant hors de France⁵³. Il est d'ailleurs tenu de contracter une assurance ou de justifier de toute autre forme de garantie financière de nature à couvrir ce risque de défaillance.

Contrairement à la CTM 2006, la loi française fait peser sur l'armateur un principe de responsabilité destiné à couvrir les mauvaises pratiques du fournisseur de main-d'œuvre; trop « éloigné », quant à lui, pour rendre compte. L'armateur n'est certes pas co-employeur des navigants intérimaires. Cela étant, les principes conjugués de proximité du lieu de travail et de réalité du lien de subordination conduisent à faire de celui-ci non plus, un simple utilisateur ayant sollicité la prestation d'une agence de *manning*, mais bel et bien un mandataire présumé de celle-ci pour l'exécution effective des contrats d'engagement. Ce dispositif tranche considérablement avec l'idée suivant laquelle la responsabilité des armateurs et des propriétaires de navires doit être, par principe, limitée en raison de l'exposition aux risques de mer⁵⁴.

internationale du travail relatives au rapatriement des gens de mer : art. L. 5621-16.-I. C. Transports.

48) Art. L. 5621-7-I. C. Transports, « le contrat d'engagement maritime des gens de mer résidant hors de France est soumis à la loi choisie par les parties, sous réserve des dispositions du présent chapitre et sans préjudice de dispositions plus favorables des conventions ou accords collectifs applicables aux non-résidents. II. - Quelle que soit la loi résultant du choix des parties en application du I, le contrat d'engagement maritime est établi conformément aux stipulations de la convention du travail maritime, 2006 (...) sans préjudice de dispositions plus favorables ».

49) Art. L. 5621-72.-I C. Transports.

50) V. art. L. 5621-3 C. Transports.

51) Art. L. 5612-6.-I. C. Transports.

52) Art. L. 5612-6.-II. C. Transports : « toute clause prévue dans les contrats conclus entre un armateur et le ou les employeurs de gens de mer à bord d'un navire exploité par cet armateur, qui a pour effet de faire échec aux dispositions d'ordre public du présent article, est nulle (...) ».

53) L. 5621-17 C. Transports.

54) v. DELEBECQUE Ph., *La limitation de responsabilité dont bénéficient les armateurs, et spécialement*

Dans le contexte d'internationalisation du travail maritime, les armateurs les moins vertueux choisiront-ils finalement de se détourner des ports nationaux pour contourner ce modèle français, contribuant ainsi à leur perte d'attractivité⁵⁵ ? Le défaut d'intégration du titre 5 de la CTM 2006 dans le droit communautaire n'ouvre-t-il pas la voie à une nouvelle forme de concurrence déloyale entre les États européens eux-mêmes ? La nécessité d'une communautarisation du contrôle des agences de *manning* reste posée

B. L'harmonisation du contrôle des agences de *manning*, une étape obligée dans l'Union européenne ?

Le principe du « lien substantiel » – préconisé dans la Convention des Nations unies sur le droit de la mer de 1986 – n'ayant cessé de reculer devant celui de libre immatriculation, la promotion des droits fondamentaux pour les travailleurs en mer, telle que dégagée par la CTM 2006, se heurte classiquement au *law shopping* pratiqué par les sociétés de prêts de main-d'œuvre internationale.

Nonobstant son rayonnement, la CTM 2006 ne saurait avoir pour effet d'interdire aux gens de mer établis dans des pays qui ne l'ont pas ratifiée d'être employés à bord de navires battant le pavillon d'un État qui l'a ratifiée. D'ailleurs, la différenciation des régimes sociaux à bord n'a-t-elle pas été encouragée par les puissances maritimes traditionnelles aux moyens des pavillons *bis*, aux côtés de ceux de complaisance ? Si l'on envisage le cas des pavillons français, quoi de commun en matière de prise en charge des risques sociaux entre navigants résidant en France, affiliés à l'Etablissement National des Invalides de la Marine, et navigants résidant hors de France, soumis à un régime de protection sociale issue d'une loi « choisie » par les parties, c'est-à-dire imposée aux gens de mer non-résidant, en raison de son moindre coût économique ?

Si le recours à la loi d'autonomie choisie ne devrait certes pas avoir pour objet ou pour effet de priver le salarié de la protection accordée par la loi objectivement applicable, pas plus qu'elle ne devrait porter atteinte à la primauté de dispositions collectives du travail plus favorables⁵⁶, nul n'est réellement assuré du respect des

les plaisanciers, n'est pas contraire aux exigences constitutionnelles, D. 2014, p. 2557, spéc. nos 1 et 7, qui considère que la limitation de responsabilité des armateurs et propriétaires de navires est « l'une des institutions les plus essentielles du droit maritime ».

55) Ce qui serait à tout le moins paradoxal, si l'on songe à l'importance stratégique de la façade maritime française, comme l'illustre, par exemple, la Manche – autoroute maritime surchargée – qui assure, à elle seule, un quart du trafic maritime mondial. Sur ce « boulevard européen de la croissance chinoise » : v. SEAMON F., Ouest-France, 2 décembre 2014.

56) Selon l'art. L. 5631-3 C. Transports, le régime de protection sociale des gens de mer résidant hors de France est soumis à la loi choisie par les parties. La protection sociale ne peut être moins favorable que

obligations sociales par l'agence de *manning* ; surtout lorsqu'elle est établie à l'étranger pour des salariés ayant eux-mêmes des nationalités et des lieux de résidences hétéroclites. Sitôt quitté le rattachement – par le pavillon, par le lieu d'établissement ou de résidence – à l'espace du droit communautaire, partout où les États n'ont pas encore donné de substance au titre 5 de la CTM 2006, l'éloignement territorial de l'entreprise de travail maritime pose le problème du contrôle réel du *manning*.

Devant la difficulté de préciser le lieu effectif du travail ou simplement le lieu de résidence habituel, les salariés d'entreprise de travail maritime ne peuvent que redouter l'éparpillement des règles de contrôle du *manning*, dispersées selon les différents systèmes juridiques. L'agence de *manning*, quant à elle, ne peut être que tentée de se décharger de ses obligations sociales à l'égard de ses propres salariés en s'en remettant aux diligences supposées de l'armateur ; *a fortiori* si elle est basée dans un pays qui n'a pas ratifié la convention. Ainsi abritée sur ce territoire, elle paraît juridiquement hors d'atteinte. Un tel système de neutralisation de sa responsabilité ne peut être sérieusement maintenu au regard des pratiques constatées⁵⁷, sachant que les trois quarts des marins employés sur des navires communautaires sont issus des pays tiers. Cela paraît même parfaitement incompatible avec la volonté des autorités européennes d'appliquer aux gens de mer le droit commun social⁵⁸ sur le marché européen. Le seul renvoi à l'État social du port, comme toute réponse communautaire, paraît bien insuffisant, voire potentiellement générateur de futures distorsions de la concurrence dans le secteur des transports maritimes. Prime risque alors d'être donnée par les armateurs aux États les « moins disants » en matière de contrôle du *manning*.

Schématiquement, deux obstacles juridiques paraissent devoir être surmontés pour trouver une solution commune aux membres de l'Union européenne : le rattachement social à l'État du pavillon ou au lieu d'établissement du fournisseur de la main-d'œuvre d'une part, et l'absence d'un régime de responsabilité commun entre armateur et société de *manning*, d'autre part.

celle résultant des conventions de l'Organisation internationale du travail applicables aux gens de mer et ratifiées par la France.

57) V. tout particulièrement, le sort réservé au marin malgache travaillant sur des navires câbliers, placés sous pavillon RIF, de la société FT Marine, filiale du groupe Orange qui embauche ses marins par le biais du *manning* régional : *Le dumping social dans les transports européens*, Rapport d'information n° 450, préc.

58) La Commission européenne a ainsi présenté le 18 novembre 2013 (COM (2013) 798) une proposition de directive éliminant la majeure partie des dérogations au droit social de l'Union européenne (cinq directives européennes) appliquées aux gens de mer – c'est-à-dire à 345 455 personnes auxquels s'ajoutent les 157 561 pêcheurs au sein de l'Union européenne – les estimant contraires à la Charte des droits fondamentaux de l'Union européenne.

Dans le premier cas, le critère de rattachement au droit du pays du port dans lequel les gens de mer exercent régulièrement leur activité pourrait être systématisé⁵⁹, aussi bien en matière d'accès au juge⁶⁰, que pour la détermination de la loi sociale. Si l'extrême mobilité des gens de mer conduit à ce qu'ils soient aujourd'hui rattachés en Europe en matière de coordination des régimes nationaux de sécurité sociale à la loi de l'État du pavillon⁶¹, ce critère de rattachement⁶² devrait parfois, pour les personnels prêtés, pouvoir laisser place à celui du lieu habituel de travail ; critère trop peu mobilisé⁶³. La notion de « port d'affectation » faciliterait, par exemple en Europe, l'application des droits du travail et de la sécurité sociale aux marins et navigants, indépendamment du lieu de leur résidence ou de leur embauche⁶⁴. Les conditions d'emploi, de travail, de rémunération seraient alors rattachées au lieu d'exploitation réel du navire, c'est-à-dire au port d'armement du navire.

Dans le second cas, sauf à décider de restreindre le prêt de main-d'œuvre internationale aux seules entités établies dans les États parties à la CTM 2006, l'Union européenne n'a d'autre choix que de dépasser l'aporie actuelle que constitue le principe de conflit de responsabilités entre armateur et agence de *manning*. Un mécanisme de responsabilité solidaire visant armateurs et entreprises de travail maritime pourrait être, sans doute, mis en place. Déjà, une clause de responsabilité

59) Sur le rattachement vers le lieu d'exploitation réel du navire, CHAUMETTE P., « *Quel lieu habituel de travail pour le marin international ?* », obs. sous Cass. soc., 31 mars 2009, Sté Luxembourgeoise Four Winds Charter c/ M. Latoja, navire Ontario : Droit soc. 2009, n° 6, pp. 733-735 ; DMF 2009, n° 707, note PROUTIERE-MAULION G., pp. 835-843. - Également, CJUE, 4^{ème} chambre, 15 décembre 2011, C-384/10, Jan Voogsgeerd c/ Navimer SA : DMF 2012, n° 734, pp. 219- 233 ; Dr. soc. 2012, n° 3, pp. 315-317.

60) Comp. art. L5621-18 C. Transports – Sur la compétence juridictionnelle française, v. art. R 1412-1 C. Trav. : Cass. soc. 29 avril 2003, navire Wedge One : Dr. soc. 2003, p. 893 ; DMF 2003, pp. 960-966, obs. CHAUMETTE P. - Cass. soc. 28 juin 2005, M. Bobinet c/ Sté Taiphon Ltd, navire Nan Shan, Bull. civ. V, n° 216 ; DMF 2006, pp. 35-42. - Sur le reflux de la clause attributive de compétence : Cass. soc. 29 septembre 2010, Mme X. c/ Royaume du Maroc, Dr. soc. 2011, n° 2, pp. 212-214.

61) En ce sens, art. 13, § 2, sous c), du règlement (CEE) n° 1408/71 du Conseil, du 14 juin 1971, relatif à l'application des régimes de sécurité sociale aux travailleurs salariés, aux travailleurs non-salariés et aux membres de leur famille qui se déplacent à l'intérieur de la Communauté : CJUE, 8^{ème} ch., 7 juin 2012, aff. C-106/11, J. Bakker c/Minister van Financiën, DMF 2012, n° 739, pp. 700-710.

62) Critère essentiel, celui-ci n'est pourtant plus exclusif : v. CJUE, 4^{ème} ch, 19 mars 2015, aff. C-226/13, L. Kik c/Staats secretaris van Financien : CHAUMETTE P., *De l'affiliation sociale des gens de mer en droit européen : extension vers les marins ressortissants européens, expatriés sous pavillon tiers*, 26 mars 2015, <http://humansea.hypothes.org/193>.

63) Par exemple, concernant les travailleurs des plates-formes gazières et pétrolières installées sur le plateau continental des États membres : CJUE, gr. ch., 17 janvier 2012, aff. C-347/10, Saleminck : Dr. Soc. 2012, n° 4, pp. 436-438, DMF 2012, n° 736, pp. 412- 417.

64) Selon la CJUE, la loi d'autonomie contractuelle, imposée par l'employeur au marin, ne saurait priver celui-ci de la protection des dispositions impératives de la loi du lieu habituel de travail ou de celle du lieu de conclusion du contrat. Le critère du lieu habituel de travail prime alors sur l'établissement d'embauchage du salarié : CJUE, 4^{ème} ch., 15 décembre 2011, C-384/10, Jan Voogsgeerd c/ Navimer SA, RDT 2012, n° 2, pp. 115-119, obs. JAULT-SESEKE F.

du donneur d'ordre pesant sur l'armateur, sur le modèle de celle existante dans la directive d'exécution sur le détachement des travailleurs⁶⁵ permettrait de lever utilement l'obstacle formé par l'indétermination des responsabilités des « co-employeurs » de la main-d'œuvre maritime internationale⁶⁶. Comme en droit français, l'utilisateur deviendrait responsable des agissements du fournisseur de la main d'oeuvre. Les deux seraient solidairement obligés de régler les indemnités, charges et rémunérations dues aux gens de mer.

Sans même évoquer la nécessité d'une certification européenne des entreprises de travail maritime, réguler et contrôler le *manning* suppose, en définitive, de bien cerner cette forme particulière de mobilité internationale des travailleurs. L'Union européenne semble cependant renvoyée à ses propres contradictions. Si la libre circulation des travailleurs suppose bien, par principe, la continuité de la protection sociale du pays d'origine, son corollaire, le versement de charges sociales rattachées au pays du salarié impliquerait, surtout, vérification et surveillance effectives du respect des standards juridiques internationaux par les entreprises de prêts de main-d'œuvre. Établie dans un État non membre de la CTM 2006, mais fournissant ses salariés pour des prestations accomplies en Europe, celle-ci devrait être tenue – au minimum – de se faire connaître sur un registre « communautaire » et signaler une représentation sur le territoire européen. En cas de manquements ou d'infractions relevant du travail illégal, loin d'être inatteignable ou inaccessible, comme trop souvent, elle pourrait raisonnablement faire l'objet, comme ailleurs⁶⁷, d'une mise à l'index plus que souhaitable.

65) Le 9 décembre 2013, les ministres du travail des 28 États membres de l'Union Européenne se sont accordés sur un projet de Directive relative à l'exécution de la Directive 96/71 CE concernant le détachement de travailleurs effectué dans le cadre d'une prestation de services. Dans son article 12, le projet institue une responsabilité solidaire des donneurs d'ordre et de leurs sous-traitants en cas d'abus et de fraude dans le seul secteur de la construction.

66) Tel n'est pourtant pas la préconisation des experts sollicités par la Commission de Bruxelles, le 18 nov. 2013 COM (2013) 798 final 2013/0390 (COD) s'agissant de la proposition de directive relative aux gens de mer, modifiant les directives 2008/94/CE, 2009/38/CE, 2002/14/CE, 98/59/CE et 2001/23/CE.

67) Comp. art. L. 8224-3, L. 8224-5, L. 8234-2, L. 8243-2, L. 8256-3 et L. 8256-7 C. Trav. instaurant une liste noire sur internet en matière de répression du travail dissimulé, d'emplois de ressortissants étrangers sans titre de travail, de marchandage et de prêt illicite de main-d'œuvre tels que visés aux art. 131-39 C. Pén.



CHAPTER 15

European Social Law of Seafarers: between common market and substantive law

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Abstract: *EC law built the single European market, on the basis of the economic freedoms and the principle of non-discrimination of EU nationals. It also sometimes sought to harmonize national legislation, for the proper functioning of the European market and a policy of full employment. The freedom of establishment of companies has changed the ship registration conditions; the freedom to provide services applies to maritime transport and the freedom of movement of workers to seafarers. Given the international dimension of maritime activity, a balance between competitiveness and maritime safety has to be found. European law incorporates IMO and ILO conventions on ships and seafarers, pursuant to a sectorial approach. European social law is sometimes applied to maritime armaments companies, like any company, in a joint approach. The European Union seems always in search of a maritime policy, inserted in a global economy.*

Résumé : *Le droit communautaire a construit le marché unique européen à partir des libertés économiques, du principe de non-discrimination des ressortissants communautaires. Il s'est aussi efforcé d'harmoniser parfois les législations nationales, en vue du bon fonctionnement du marché européen et d'une politique de plein emploi. La liberté d'établissement des entreprises a transformé les conditions d'immatriculation des navires ; la liberté de prestation de service s'applique au transport maritime et la liberté de circulation des travailleurs aux gens de mer. Compte tenu de la dimension internationale de l'activité maritime, il s'agit de trouver un équilibre entre compétitivité et sécurité maritime. Le droit européen incorpore les conventions internationales de l'OMI et de l'OIT concernant les navires et les gens de mer, dans une approche sectorielle. Le droit social européen s'applique parfois aux entreprises d'armement maritime, comme à toute entreprise, dans une approche commune. L'Union européenne semble toujours à la recherche d'une politique maritime, insérée dans une économie mondialisée.*



1. Introduction

It may seem trivial to start by stating the obvious: seafarers, or to be more exact¹, the crew members on merchant ships, are a category of workers like any other for legal and employment purposes². There is no doubt that that the same features are met as for the notion of worker, whether in internal law or, in so far as is of interest here, in European Union Law. Despite the above, it is also evident that this group of workers carry out their work in a special context. The undertaking of work on a moving object –a ship– which by definition navigates through various geographical spaces, together with the remoteness and traditional isolation to which crews are subjected, has meant that national laws have introduced special standards adapted to the special circumstances of the activity, as for example in working time regulation and the system for representing the workers. The general physiognomy to which reference has scarcely been made, has not changed in essence. What has really changed, and with great anticipation over the rest of the economic sectors, generating an impact on the living and working conditions of this workers, has been the maritime transport industry itself.

Nobody is unaware that this sector is the most strategic sector of all, since about 80%³ of world trade takes place at sea. As a result of this, and as can easily be imagined, commercial competitiveness in both developed and developing countries, including landlocked countries, is at the expense of not only the effective access of international maritime services but also that the costs of maritime transport are as "tight" or reduced as possible. In a context in which the competition between the economic actors is so high and the underlying interests so relevant, it is by no means unusual that various formulas have been sought to try to "escape" or avoid national regulations, including the employment ones which concern us here, to which maritime

1) It is necessary to specify the notions which will be employed in this contribution, since the seafarers concept in the MLC 2006 is wider than the collective of workers to whose this work is addressed, that is, the merchant navy exclusively.

2) The same question made by Chaumette, P (2009), "Les marins sont-ils des salariés comme les autres?" *Annuaire de Droit Maritime et Océanique*, T. XXVII, 471- 499.

3) If we use the data in Communication COM (2009) 8 final of 21 January 2009 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Regions Committee, Strategic objectives and recommendations for the maritime transport policy of the EU up to 2018. Although in agreement with other, more recent, documents from the European Commission itself, approximately 90% of world trade takes place by maritime means. This is stated in the working document of the Commission's services. Also, it can be observed in the Proposal for a Directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC. Document COM (2013) 798 final, 18 November 2013. In any case, and in relation with the classical difficulties of obtaining data on maritime transport, see Directive 2009/42/EC of the European Parliament and of the Council of 6 May 2009 on statistical returns in respect of carriage of goods and passengers by sea (Recast) (OJ L141, 6 June 2009), later regulation (EU) 1090/2010, 24 November (OJ L325, 9 December 2010).

transport has traditionally been subjected. This leads us to say, as has been stated on other occasions, that maritime transport has changed from being an international sector *per se* to a global one in which a ship's operational factors that were concentrated in a single country are now in a chain in which the ownership and management of the ship may be, and normally are, spread among many countries.

In such a special context as this, the question asked here is precisely that of arriving at an approach made and being made from our nearest regional ambit and regarding the regulations that apply to workers on ships. Recently, it appears that there is an unprecedented regulatory revulsion in the matter, as shown, for example, the set of Directives regarding the adoption of the 2006 ILO CTM 2006, notable among which is Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC⁴, but also, for example, the recently adopted Directive (EU) 2015/1794, of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC as regard seafarers⁵. In addition, and within the same context, there is the signing of the "Athens Declaration,"⁶ arising from the meeting of maritime transport ministers on 7 May 2014 in Athens, the purpose of which is none other than driving and revising European maritime transport policy up to 2018, also taking into account the 2020 horizon, where the situation of the workers in the sector is explicit as the primordial axis to be taken into account.

However, despite the regulatory interventions or mere declarations produced recently, is it possible to state that there is a true regulatory about-face on the employment rights of seafarers? What role does and has the EU fulfilled in their establishment and/or development? Is this a mere "amanuensis" of the regulation issued by the international organisations with competence in the matter or does it go further? Answering these questions becomes a reflexion not without difficulties⁷, given that

4) OJ L124, 20 May 2009.

5) The proposal can be consulted in the Document COM(2013) 798 final, 18 November 2013. The adopted Directive is in OJ L 263, 8 October 2015.

6) The Athens Declaration entitled "Mid-Term Review of the EU's Maritime Transport Policy until 2018 and Outlook to 2020". This can be consulted at the Web site <http://ec.europa.eu/transport/modes/maritime/consultations/doc/2015-mts-review/council-conclusions-on-mid-term-review-of-eu-maritime-policy.pdf>. The reaction – not exactly positive – can also be consulted at [http://www.etf-europe.org/files/extranet/-75/43694/ETF%20Position%20Paper_Mid-term%20review%20of%20the%20EU%20Maritime%20Transport%20Policy%20\(Athens%20Declaration\)_Final.pdf](http://www.etf-europe.org/files/extranet/-75/43694/ETF%20Position%20Paper_Mid-term%20review%20of%20the%20EU%20Maritime%20Transport%20Policy%20(Athens%20Declaration)_Final.pdf).

7) At least for me, since I understand that others have been perfectly capable of addressing the issue in a few lines; for this, see the paper by Chaumette, P. (2015), "L'impact du droit européen sur le droit social des gens de mer", *Neptunus-e.revue*, Centre de Droit Maritime et Océanique, Université de Nantes, vol. 21, number 1. www.cdm.univ-nantes.fr.

tackling the regulation developed in the EU for these purposes cannot be undertaken monolithically. The fact that precisely the construction of a common maritime transport policy has been a highly complex in which the resistance of the states individually to cede sovereignty to the EU has been raised as their *leitmotiv*, provoking the need to approach the object of the study from different dispositions in the treaty and from different policies, whether those specific to transport or those of social policy, without forgetting the regulations on European economic freedoms. In the absence of homogenous and uniform regulations for this specific industrial sector, either for legal difficulties but above all for economic ones or existing policies, it creates –it is insisted– the absolute need to apprehend the regulation of the social rights of the seafarers from diverse dimensions of the supra-national regional law in which we are immersed.

2. European economic freedoms and maritime transport: their impact on seafarers' working conditions

Probably the first thought of anyone reading the title of this section and not familiar with the "complications" of the maritime sector would be of the Viking Line case⁸ and the enormous set of contributions arising about it⁹, from the debate in the confrontation of collective rights against European economical freedoms, whether the freedom of establishment or the free provision of services. Dispensing with this approach for the moment, to which we will return later, this case-law is an example of the freedom of flagging ships over the employment rights of the workers in the sector, given that the objective was none other than to register the ship in Estonia and thus reduce the social and employment costs involved in applying Finnish legislation, presumably higher than those of Estonia. Indeed, we referred succinctly above to the changes

8) Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [OJ C60, 11 March 2006, p. 11; Conclusions of the General Advocate M. Poiares Maduro of 23 May 2007]. Judgement of ECJ of 11 December 2007.

9) It is sufficient to quote, *inter alia*, some of the earliest contributions: Orlandini, G. (2006), *Diritto di sciopero, azioni collettive transnazionali e mercato interno dei servizi : nuovi dilemmi e nuovi scenari per il diritto sociale europeo*, Working Papers, Centro Studi di Diritto del Lavoro Europeo "Massimo D'Antona", WP C.S.D.L.E. "Massimo D'Antona" INT – 45/2006, Facoltà di Giurisprudenza, Università degli Studi di Catania, 1-60; Blanke, T. (2006), "The Viking case", *Transfer*, 2, vol. 12, 251-266; Novitz, T. (2006), "The right to strike and re-flagging in the European Union: free movement provisions and human rights", *Lloyd's Maritime and Commercial Law Quarterly*, LMCLQ, 129-288, 242-256; Björkholm, M. (2007), "Safeguarding EC fundamental freedoms: are ship blockades exempt from the freedom of movement rules?", *Annuaire de Droit Maritime et Océanique*, Université de Nantes, T. XXV, 103-124. Chaumette, P. (2008), "Les actions collectives syndicales dans le maillage des libertés communautaires des entreprises", *Droit Social* number 2, 2008, 210-220. Lo Faro, A. (2008), "Diritti sociali e libertà economiche del mercato interno: consideración minime in margine ai casi Laval e Viking, *Lavoro e Diritto*", *Lavoro e Diritto* number 1, 63-96.

that have occurred in the maritime transport industry and stated that there are phenomena of circumvention of the legal regulations in the states to which the ship owners belong to reduce the operating and social costs of a ship. This happens without much difficulty with recourse to the so-called flags of convenience but also, and as a reaction to the massive fleeing of tonnage to third states, through the registration of ships in the so-called registers *bis*, international registers, second registers¹⁰ created in some European states to offer similar attractiveness than the first mentioned regarding seafarers' conditions, whether by reducing social costs or by introducing the law of origin for the extra-communitarian workers as a way to obtain the same end. However, how has European law approached the flagging or re-flagging of ships in the context of the EU? Or how has coastal transport been liberalised and what is its repercussion on workers on ships? There are several question marks here regarding this matter.

2.1. The registering of ships as an act of exercising freedom of establishment

The European economic integration process and the construction of the internal market were created by, among others, the economic freedom of establishment (articles 49 to 55 TFEU) which includes, without doubt, the right of individuals or organisations to establish themselves in another member state to undertake an economic activity without restrictions for reasons of nationality.

Starting with the above, the viewpoint from which the registering of ships in the EU has been addressed has to date been confined to identifying the flagging of ships as a mechanism for exercising freedom of establishment, as determined in the famous case *Factortame II* on 25 July 1991¹¹. This litigation faced the issue of the competence

10) For an analysis of above mentioned issue, although the arguments are not completely convincing, see Christodoulou-Varotsi, I. (2012), "Flags of convenience or not? Challenging the Flag of Convenience Status of EU Registration States: An introductory contribution to a controversial debate," *Neptunus-e.revue*, Centre de Droit Maritime et Océanique, Université de Nantes, vol. 18, number 2. www.cdmo.univ-nantes.fr.

11) Case C-221/89 "The Queen v Secretary of State for transport, ex parte: *Factortame Ltd and others*." González Giménez, J. (2000), "La aceptación por la Cámara de los Lores de la responsabilidad patrimonial del Reino Unido en el asunto *Factortame* (Comentario a la sentencia de 28 de octubre de 1999, *Regina v. Secretary of State for Transport Ex Parte Factortame*)," *Revista de Derecho comunitario europeo*, number 7, 2000, 95-208. García de Enterría Carande, E. (1998), "El fin del caso *Factortame*: la responsabilidad patrimonial del Reino Unido," *Revista de administración pública* number 145, 117-144. Jiménez Blanco and Carrillo de Albornoz (1990), "De nuevo sobre el asunto *Factortame*," *2 Civitas-Revista española de Derecho administrativo* number 66, 255-258. García de Enterría Carande, E. (1992), "La sentencia *Factortame II* del Tribunal de Justicia de las Comunidades Europeas, de 25 de julio de 1991, sobre el fondo de la compatibilidad con el Derecho comunitario de la Merchant Shipping Act of 1988, inglesa, de reserva de pesca. Derecho estatal de abanderamiento de buques y libertad de establecimiento según el Derecho comunitario," *Civitas-Revista española de Derecho administrativo*

of member states –derived from international law– to set the conditions for attributing the nationality of ships and the right to fly their flags. This is because internal legislations required as conditions for registering ships in their countries¹² that the owners, charterers or operators be nationals of the state and/or that a more or less large percentage of the company capital be in the hands of national individuals or organisations of the member state. In addition, for the debate as to whether or not these internal provisions are compatible with community law, the ECJ will dedicate some lines to state that the registration of a ship is in itself an act of establishment in accordance with the then articles 43 and ff of the EC Treaty.

This finding strengthens the possibility not only of reflagging ships in the EU but also of the increase of intra-European competition, grounded –of course– in the search for those social and employment legislations that are more interesting when reducing costs within the framework of the possibilities open for open registrations created as a contraposition to the flags of convenience in what is one other than another manifestation of business relocation by this means. In fact, this reality is confirmed in the failed attempt to create a community register as an alternative to the flags of convenience, called the EUROS register¹³ through a proposed but never adopted regulation in 1989¹⁴. As with the second, bis and international European registers, this Commission initiative based its strategy on offering a series to advantages for ship owners¹⁵. While this is so, one of the main motives wielded precisely to reject the proposal had to do with the attempt to harmonise on-board social questions at the European level, which convinced neither the ship owners nor the trade unions, whether because the former requested modifications in the proposal regarding the requirements and criteria for crews and the latter because they did not consider that the EUROS register would create more jobs or work positions¹⁶.

number 73, 67-78.

12) The criteria are explained for the attributing of nationality to a ship in accordance with the British *Merchant Shipping Act* of 1988, the basis for the *Factortame* litigation. All these criteria can change in accordance to each domestic law in which the ship is going to be registered, since in relation to this issue, at it is known, it exists the freedom to determine the requirements to concede their flag to a ship.

13) Vid. Churchill, R.R. (1991): "European Community Law and the nationality of ships and crew", *European Transport Law* number 5, 591-617. Vialard, A. (1995), "L'Europe et les pavillons de navires", *Annuaire de Droit Maritime*, t. XIII, 39-50.

14) A future for the community shipping industry: measures to improve the operating conditions of Community Shipping. COM (89) 266 final. 3 August 1989.

15) Some critical comments on the EUROS register and proposals for its improvement are found in the middle of the debate in Heldring, B. (1993), "The EUROS Flag and Related Issues", *Droit Européen des transports*, 46-56 and Brownrigg, M. (1993), "The EUROS Flag and Related Issues", *Droit Européen des transports*, 57-61.

16) Pallis, A.A. (2002), *The Common EU Maritime Transport policy: policy europeanisation in the 1990s*, Aldershot- Ashgate, 74.

In consequence, at the European level it is accepted and assumed that the flagging of ships and the resort of ship owners to the one considered the most attractive cannot suffer excessive restrictions that infringe the freedom of establishment consecrated in European law regulations. Further, they are endorsed and encouraged since despite not creating a homogenous market at the regional level, the underlying economic interests are sufficiently important to allow the existence of intra-community social dumping in this industry¹⁷.

And the chickens have come home to roost. The Viking case or, the most recent, Fonnship, of 2014¹⁸, although relating to the freedom to provide services, to which I will refer immediately, show that collective actions aimed at avoiding reflagging or at increasing the salaries of workers providing services on a Panamanian ship to more dignified ones, collide head-on with community economic freedoms, thus legitimising the resource and existence of the open registers within and outside the EU¹⁹ and –incidentally– putting into question the policy of the ITF against flags of convenience, which would require reformulating to meet the requirements of European regulations. Even so, and as they say, where there's life there's hope, so it is necessary to consider the path opened by the general advocate in the Fonnship judgement, which witnesses or follows a previous ruling²⁰, opening the possibility of considering the

17) This idea is extracted without difficulties from the Sloman Neptun case law. Joined cases C-72/91 and C-73/91, Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG. Judgement of the Court of 17 March 1993. EC Reports-1993-I, pp 887-937 gave the European instance the possibility of pronouncing on the compatibility of German legislation on the second registration of ships with European law. The basis of the litigation was the claim of German trade unions regarding the contracting of extra-community seafarers with no fixed residence in the Community –specifically of Philippine nationalit – to whom lower working conditions were applied (above all salaries) than those guaranteed to Germans employed on ships registered in the GIS (German international register). The reason for the divergence was that German regulations granted ship owners registered in the GIS the possibility of subjecting maritime employment contracts to the regulations chosen by the parties', which coincided with the application of the legislation of the seafarers', in this case the Philippines, presumably cheaper than the German ones. The ECJ was asked regarding the compatibility or otherwise of this regulation with the limitations to the state aid policies established as per the then article 92 EEC Treaty, as well as to determine whether or not the contents of the social dispositions in the GIS were compatible with article 117 EEC treaty, that is, with the precepts of the treaty relating to community social policy. Unlike the Commission's opinion, the ECJ interpreted that the choice of law included in the maritime employment contracts with a non-community national established in the regulation that affects the GIS is perfectly compatible with the system of aids in article 92 EEC Treaty. As a consequence, the court stated that favouring a reduction in taxation, employment and social security charges –allowing the employment of Choice of Law conflict of law criteria to the maritime employment contracts– did not constitute a state aid in the sense of article 92 EEC Treaty, nor in consequence a infringement of the contents of article 117 EEC Treaty.

18) Judgment of the ECJ of 8 July 2014, Case C-83/13, Fonnship.

19) Overwhelmingly, Miranda Boto, J.M. (2014): "La sentencia Fonnship o el extraño incidente del perro por la noche", *Revista de Información Laboral* number 10, 103-119.

20) Specifically the ECJ conclusions of 6 April 2006, Case C-456/04, Caso Agip Petroli SA v Capitaneria di porto di Siracusa.

resort to flags of convenience as an abuse of community law²¹ when the objective is to reduce the social costs that a ship owner must normally assume when artificial conditions are created for the application of community regulations and thus compromising the observance of fair competition among community of EES ship owners.

2.2. The freedom to provide services in maritime transport

The legitimising of open European registers and the resort to flags of convenience cannot be fully understood with referring to the other side of the coin of exercising freedom of establishment, that is, the freedom to provide services. This last community freedom is regulated for maritime transport and after multiple vicissitudes for the configuration of a common transport policy, in –fundamentally– various community regulations. Thus, firstly, it is necessary to refer to Council Regulation (EEC) No 4055/86 of 22 December 1986, applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, modified by Council Regulation (ECC) 3573/94 of December 1990²². This standard applies the principle of the freedom to provide services exclusively in international maritime transport, that is, between member states and between member states and third countries, excluding transport between ports in the same member state²³, excluding cabotage traffic in its ambit of application which, as is known, is the subject of regulation through Council Regulation (EEC) No 3577/92, of 7 December 1992 applying the principle of the freedom to provide services to maritime transport within member states (maritime cabotage²⁴). The liberalising of this form of transport

21) Fundamentally considering 93 and 94 of the opinion of Advocate General Mengozzi presented on 1 April 2014. On the abuse of law, vid. Ionescu, R.N (2012), *L'abus de droit en droit de l'Union européenne*, Bruylant, Brussels.

22) Which was accompanied by Council Regulation (EEC) 4056/86 of 22 December 1986, applying Article 81 and 82 of the Treaty to maritime transport [Council regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services]; Council Regulation (EEC) No 4057/86 of 22 December 1986, on Unfair pricing in maritime transport and Council Regulation (EEC) 4058/86, 22 December 1986, on Free access to ocean trades. All can be consulted in OJ L378 of 31 December 1986. For a study of the above mentioned instruments, Beurrier, J-P. (2014): *Droits Maritimes*, Dalloz, Paris, 186 and ff.

23) In fact, according to article 1.4, "maritime transport services between member states and between member states and third countries" are considered intra-community maritime transport services, that is, the transport of passengers or products by sea between any port in a member state and any port or installation located on the continental shelf of another member state, as well as the traffic with third countries as long as remuneration is made in exchange. This implies the suppression of all existing restrictions on the transport of certain goods and of the restrictions arising from the cargo sharing clauses in the bilateral agreements between some member states and third countries.

24) OJ L364, 12 December 1992.

was the subject of more references²⁵ –if possible– relating to the process of creating an internal market applied to maritime transport. This is because in the EU context, cabotage maritime transport is of important weight from the general economic point of view, which makes it more visible for some states than others where goods and/or passenger traffic in this context is an important source of income²⁶.

Both regulations play a relevant leading role in the framework of the maritime legal and employment relationship, whether because the former regulates and defined who must be considered a community ship owner²⁷, or because –in the latter case– a divergent employment regime is also established with respect to the regulations for the free movement of workers in the framework of posted workers regulation which, as is known, specifically excludes the merchant navy from its ambit of application. This with regard to the concept of ship owner in Regulation (EEC) 4055/86, the fact is that the criteria set in article 1 of this standard allow not only national or shipping companies of member states or of the EEE established in the community but also those outside it as long as they are controlled by nationals of a member state or of the EES to enjoy the freedom to provide services. The important question that for the effects of the notion of establishment included here, the registration of ships is not consubstantial to it, such that it supports the possibility of resorting to flagging to third countries without this involved any difficulty from the point of view of enjoying this economic right²⁸. Stated more clearly, from this perspective the nationality

25) Regulation (EEC) N° 3577/92, applying the principle of freedom to provide services to maritime transport within member states (maritime cabotage) set a process for liberalising cabotage from 1993, although in steps by type of single transport for Spain, France, Portugal, Italy and Greece, opening the market to them all in 1999 except for Greece, whose extension was enlarged until 2004 for regular passenger and ferry transport services and for services undertaken by ships with a gross tonnage of less than 650. In accordance with COM (2014) 231 final Document, Greece liberalised coastal service by Law 2932/2001, published on 27 June 2001. However, Greece applied the regulation fully only in 2011 thanks to the amendments introduced by Ministerial Decision 3323.1/02/08, Presidential Decrees 38/2011 and 44/2011 and Law 3922/2011, 4 March. Greece has liberalised its coastal market to a much greater extent than required by the Regulation, opening it to cruise ships registered in third countries (Law 3872/2010). For this, vid. Mikroulea, A.P. (2009), "Competition and public service in Greek cabotage" in Antapassis, A; Athanassiou, L and Rosaeg, E: *Competition and regulation in shipping and shipping related industries*, Martinus Nijhoff publishers, Netherlands, 185-207.

26) Thus, for example, in the case of goods transport, the market is dominated by the United Kingdom (bulk liquids traffic), Spain (general cargo traffic) and Italy (bulk liquids traffic). For its part, Norway has a special hegemony in the offshore transport of hydrocarbons. In the case of passenger transport, the major markets are Greece and Italy followed by Spain, although both Greece and Spain have suffered an important drop in this traffic due to the economic crisis. This is noted in the Fifth Report of the Council Commission on the application of Regulation 3577/92 applying the principle of free provision of maritime transport services within the member states (cabotage) (2001-2010), COM (2014) 231 final Document, 6-7.

27) Chaumette, P. (2014): "L'armateur communautaire, bénéficiaire de la liberté de provision of services," *Neptunus-e.revue*, Centre de Droit Maritime et Océanique, Université de Nantes, vol. 20, number 3. www.cdmo.univ-nantes.fr

28) Thus, in the contract of a company established in a member state that operates a regular line

of the ship, that is, the flag it flies, is absolutely irrelevant for the ship owners to exercise the right to provide services according to the regulation analysed²⁹. It is clear that this vision, closely connected to a literal interpretation of the standard, contrasts greatly with the classical application of the flagging law as a conflicts of law criterion applicable to seafarers so that while for these latter the flag is relevant for the effects of considering the employment conditions to be enjoyed³⁰, the same would not occur from the viewpoint of the shipping business.

Secondly, the regime applicable to cabotage is designed to regulate gradually (by market segments) the access of European ship owners (article 2) who operate ships registered in a member state or in the failed attempt to create a European register (EUROS) to traffic traditionally reserved to national operators, that is, specifically, to the passenger or goods transport services provided by ship owners in exchange for remuneration³¹ between ports located on the continent or in the main territory of a single and the same member state (mainland cabotage), between any port of a member state and the installations or structures located on the continental shelf of that member state (off-shore supply services) and that provided between ports located on the continental part and one or more islands of a single and same member state (island cabotage)³². As can be imagined, questions relating to the crew, that is, to the

service with its destination in another member state but whose ships are registered in Panama and fly the Panamanian flag, the Court of Justice deduced from the wording of article 1, section 1, of Regulation 4055/86 that this "refers to nationals of member states established in a member state other than the receiver of the services and *not to the registration or flag of the ships operated by the transport company*". Judgment of 17 May 1994, *Corsica Ferries* (C 18/93, I 1783), section 29. The fact that the ships operated by that country were registered in Panama and flew the flag of that country is clear from paragraph 8 of the judgment. See also the Judgment of 18 June 1998, *Corsica Ferries France* (C 266/96, I 3949), section 3.

29) The precision of article 1, section 2, of Regulation 4055/86 reflects what is commonly known as "the Greek exception." Indeed, given that under Greek law Greek nationals established in third countries are authorised to register their ships in the shipping register of that member state does not take into account that this situation would have removed a major proportion of the total tonnage belonging to nationals of EES state from the ambit of application of the Regulation. In this respect, vid. Bredima-Savopoulou A. and Tzoannos J. (1990), *The Common Shipping Policy of the EC*, North Holland, Amsterdam, 176, and Baena Baena P.J. (1995), *La política comunitaria de los transportes marítimos*, Marcial Pons, Madrid, 127.

30) However, it is true that the law of the flag criteria to resolve maritime employment conflict of law issues is in decline. Carbone, S.M: (2010): "Cap. III: La loi applicable aux contrats maritimes. II. Les rapports de travail maritime" in *Conflits de lois en droit maritime*, l'Académie de Droit International de la Haye, 147-202 and very especially in 185, which specifically states that "*En effet, à propos du travail maritime l'article 8, paragraphe 2, ne peut pas jouer parce que, d'une part, la nationalité du navire a perdu la connotation "territoriales" qui précédemment lui était dévolue et, d'autre part, les prestations de travail son exécutées habituellement dans le cadre de trafics que impliquent les intérêts de plusieurs Etats. Ce n'est qu'au cas où le navire est concerné par le trafic de cabotage national, relatif à un Etat spécifique, que la réglementation de ce système pourra être invoquée à titre de lex loci executionis laboris.*"

31) Thus excluding leisure craft from its scope of application.

work factor as a cost of operating a ship, will become a core question for those providing maritime services within the EU who wish to access certain markets in other member states. In fact, this Regulation, designed to equalise the conditions of access to these services for all community ship owners, sets a specific standard to determine which state is competent to apply its legislation to "all questions relating to the crew" (article 3³³).

In this sense, the standard starts by considering that questions relating to the crew are traditionally the competence of the flag states, so that the applicable social and employment regulations will therefore depend on the legislation in which the ship is registered where the discrepancies at the regulator level –as the advanced reader can well imagine– translate into differences in the crew's employment costs. As a consequence, article 3 of this Regulation cannot be understood without considering these extremes since its wording is based on the wish of European institutions to avoid distorting competition and also for social factors, in the most sensitive routes. The Regulation provides that the host member states can impose their own standards for the crews of ships carrying out island cabotage as well as the crew standards applicable to small vessels with a gross tonnage of less than 650³⁴. On the other hand, the standard sets the application of the flag regulations for ships with a gross tonnage of more than 650 if the voyages involved are the continuation of a voyage or

32) Considering for these purposes that the treatment for Ceuta and Melilla is the same as for ports between islands.

33) This disposition states that, "1. For vessels carrying out mainland cabotage and for cruise liners, all matters relating to manning shall be the responsibility of the State in which the vessel is registered (flag state), except for ships smaller than 650 gt, where host State conditions may be applied. 2. For vessels carrying out island cabotage, all matters relating to manning shall be the responsibility of the State in which the vessel is performing a maritime transport service (host State)"

34) Although the Commission presented a failed regulation proposal in compliance with the mandate set in article 3.4 of Council Regulation 3577/92, designed to generalise the responsibility of the flag state with regard to the crew, which was abandoned on 11 December 2001. Thus, article 3 of the regulation stated as amended, "For vessels carrying out cabotage services other than those referred to in paragraph 2, all matters relating to manning shall be the responsibility of the State in which the vessel is registered (flag State), except for ships smaller than 650 gt, where the conditions in force in the State in which the vessel is performing its services (host State) may be applied. For vessels carrying out regular passenger and ferry services, including mixed passenger/cargo services and scheduled cruise services, the rules concerning the required proportion of Community nationals in the crew (namely all staff employed on board) as in force in the host State shall apply. All other matters relating to manning shall be the responsibility of the flag State. Where host States allow non-member-country nationals to be employed on board ships carrying out cabotage services as referred to in paragraph 2, they shall require that those crew members shall be treated in the terms and conditions of their employment as residents of the Member State being the flag State. The host State shall apply its own terms and conditions of employment to non-member-country seafarers on board its national vessels carrying out such services". See, COM (1998) 251 final Document. OJ C213, 9 July 1998, p. 17. In fact, only six member states apply the regime of the host state, France, Italy, Spain and Portugal – where it's applied to regular general cargo or container transport between the continent and the Azores and Madeira [Decree Law 7/2006. Vid. COM (2014) 231 final, p. 4]. In the cases of Greece and Bulgaria, the applicable regime is the Greek or Bulgarian, respectively. Vid. COM (2014) 231 final, p. 4.

come from a destination or origin in another state (consecutive cabotage). The same occurs with ships of more than 650 tonnes carrying out mainland cabotage or cruise ships of more than this gross tonnage. This has led to various questions being raised concerning this disposition, both with regard to the competences of the host state regarding the so-called consecutive cabotage³⁵, and –above all– with regard to the regime applicable to the crews on cruise ships³⁶.

Together with the above mentioned questions, the most important and interesting of them all consists of the analysis of article 3 of this regulation. Thus, the questions subject to approach include the scope of the expression "*all questions relating to the crew*" mentioned in article 3 of the cabotage Regulation, in order to know which social and employment questions are within the scope, whether of the flag state or the host state, although taking into account that this latter state can only apply its own law when it is essential to satisfy the general interest and when this need is not covered by the standards of the origin state³⁷. The expression considered by itself is sufficiently wide as to apply to any type of social and employment condition that applies to seafarers in ships dedicated to European cabotage. However, we cannot forget that this regulation is inserted in the framework of the regulation applicable to the community freedom to provide services, so that requirements cannot be

35) With regard to consecutive cabotage, the ECJ has clarified that the concept of "voyage which continues or comes from a cabotage voyage" must be understood as the voyage from another state or to another state, regardless of whether or not there is cargo on board [Judgment of 6 April 2006, Case C-456/04, *Agip Petroli v Capitaneria di Porto di Siracusa*, 2006-I, pp 3395 and ff]. Thus the standards of the flag state apply not only for ships carrying goods in the international part of the voyage from which they come or following the cabotage part of it but also when the ship sails without ballast.

36) In this regard, the application of article 3 of the Regulation to cruise ships, the ECJ has also had the opportunity to comment, noting that matters relating to cruise ships with a gross tonnage of over 650 that undertake continental or island cabotage are the competence of the flag state, relegating the application of the regulations of the host state to cruise ships with a tonnage less than that mentioned [Judgment of 21 October 2004, Case C-288/02, *Commission of the European Communities/Hellenic Republic*, 2004-I, pp 10071 and ff]. Likewise, we must mention that regarding cruise ships, there is the problem of determining which Regulation is applicable when an international cruise service has cabotage services in one or various member states. Thus, the question debated is when the cabotage regulation or, as relevant, Regulation 4055/86 being analysed, must be applied. In this sense, the ECJ has noted that the cabotage standard applies when there are passengers who boards and disembark in the member state in which the cabotage stage is carried out, which means that if the passengers do not board or disembark in this member state, the regulation relating to the free provision of international maritime transport services will apply [Judgment of the ECJ of 27 March 2014, case C-17/13, *Alpina River Cruises* case].

37) According to the doctrine of the ECJ on the regulations that apply to the freedom to provide services according to which in the case of the freedom to provide services, the offerer can carry out its activity according to the dispositions of the country of origin and the host member state may only apply its own law when this is essential to satisfy the general interest and then this need is not covered by the standards of its country of origin. ECJ Judgment of 17 December 1981, "*Webb*" case, case C-279/80, pp. 3305 and ff. Judgment of 25 July 1991 to the case "*Säger c. Denemeyer & Co. Ltd.*", case C-76/90, 4221 and ff.

established that can obstruct or restrict its exercising, which in all cases would be screened under the application of the principles of proportionality and necessity³⁸. That said, and continuing in this case, what was expressed by the European Commission regarding which issues are the competence of the host states, all questions relating to the proportion or percentage of community nationals who must provide services in these ships the requirements that they have social coverage in the EU or the imposition of the minimum salary in each country will come under the above mentioned expression. With regard to safety and training requirements, the Commission considers that the member states can only require compliance with current EU or international standards (STCW or SOLAS conventions) for preventing the freedom to provide services disproportionately. To the above it is easy to add that the member states may directly or indirectly set the law governing the seafarers' employment conditions³⁹, leading in most assumptions to applying to extra-community works the legislation of their origin, thus encouraging ship owners and shipping companies to greater competitive capacity and at the same time generating social dumping. Not in vain do the second, bis and international registers fail to include any correction for the host states to apply, as relevant, the imperative dispositions that were more favourable to workers, as would occur if Directive 96/71/EC concerning the posting of workers in the framework of the transnational provision of services applied⁴⁰.

Finally, I would not like to end these lines without including, albeit briefly, an aspect I consider to be of certain interest and that concerns the possibility of including social clauses in the conditions documents in the framework of inter-European cabotage transport⁴¹ as regulated in article 4 of the 1992 Regulation. According to this disposition, the member states may sign public service contracts or impose public service obligations, as a condition for the provision of cabotage services on maritime companies that undertake regular services with their destinations or origins in islands

38) Article 9 of Regulation 3577/92, which states that, "*Before adopting laws, regulations or administrative provisions in implementation of this Regulation, Member States shall consult the Commission. They shall inform the latter of any measures thus adopted*", which means as far as it interests us, that any member state that wishes to make use of the possibility of applying its own standards regarding the crew must first consult the Commission, which will study the request individually according to the mentioned principles of necessity and proportionality. For the details, Vid. ECJ of 9 March 2006, caser C-323/03, Commission v the Kingdom of Spain, 2006-I, pp 2161 and ff.

39) In favour of a wide interpretation of article 3 of the Regulation, Basedow, J. (1994), "Política europea en el transporte marítimo, libertad de prestación de servicios y cabotaje marítimo", in Eizaguirre (Coord): *El Derecho del maritime transport internacional*, Donostia, 99-100.

40) Which, as is known, excludes the merchant navy from its scope of application.

41) In application of European Parliament and of the Council Directive 2014/24/UE of 26 February 2014, on public procurement and repealing Directive 2004/18/CE (OJ L94 of 28 March 2014) and European Parliament and of the Council Directive 2014/25/EU of 26 February 2014, on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L94, 28 March 2014).

and between islands. The obligations they may impose or establish include those relating to the crew, fundamentally by the host states, depending on whether or not the island cabotage is undertaken by ships of more or less than 650 gross tonnage. The introduction in the conditions document of, for example, the requirement to pay an equivalent minimum salary for community or extra-community crew members is not free of multiple risks of all types, but here we wish to refer to the danger of the possibility of extending the case-law issued by the ECJ itself regarding the state measures for preventing social dumping in the framework of public procurement to this specific ambit. As is known, the interpretation by the Luxemburg Court is moving towards considering that this type of requirement exceeds or, better said, restricts, the right to the free provision of services regulated in article 56 TFEU. This is clearly expressed in the litigation that gave rise to the Rüffert judgment⁴² and was framed in the context of the application of Directive 96/71/EC on the matter, as in the case of the most recent judgment, *Bundesdruckerei*⁴³, in which no movement of workers occurred in the framework of the transnational provision of services. The case-law panorama, mentioned above, and that exponentially affirms that the introduction of this type of clause unjustifiably obstructs article 56 TFEU enters into open or relative contradiction to the regulatory reality of the receiving countries in the framework of cabotage with its destination or origin in islands or between islands. Not in vain do the legislations of certain states such as Spain⁴⁴ and France⁴⁵ set employment conditions with which these public services must in all cases comply for access to this traffic. This type of imposition, more restrictive in some cases than in others, raises the question of whether or not they contradict the above mentioned economic freedom or if they are covered by the 1992 Regulation itself, which for these purposes requires the member states to guarantee certain services –such as supply and transport to the islands– which would otherwise probably be negatively affected. Certainly it will be necessary to wait until the ECJ decides on the question in the future, if there is a preliminary ruling on the matter. Meanwhile, I think that we can be optimistic in this sense; because of the latest ECJ judgment about this issue of 17 November 2015⁴⁶ seems to bring together two different approaches and regulations of the same issue, that is, maritime and terrestrial in the same way.

42) Judgment of 3 April 2008, Case C-346/06.

43) Judgment of 18 September 2014. Case C-549/13.

44) Article 6 of Royal Decree 1516/2007, 16 November, determining the legal regime of regular cabotage lines and navigations of public interest (Official State Bulletin number 283, 26 November), with which the providers of regular cabotage lines must comply, among others requirements, and with regard to the crew in the Order of the Ministry for Development of 22 July 1999, setting the manning conditions for ships undertaking island cabotage services, whatever the ship's flag (Spanish Official State Bulletin number 182, de 31 July).

45) Vid. article L. 5561-1 of the French Transport Code.

46) Case C-115/14, *RegioPost GmbH & Co KG / Stadt Landau in der Pfalz*.

3. Free movement of seafarers: between maritime safety and competitiveness

If there is one ambit in community regulations to which a certain interest and relevance has been paid in the framework that concerns us, it is without doubt that of regulation aimed at improving the training and qualifications of seafarers and of encouraging employment mobility in European maritime industries, whether by establishing a system for the mutual recognition of diplomas and certificates for providing services on board ships in the European context⁴⁷ or removing the obstacles which, for nationality reasons, are imposed by some national laws for access to the most highly qualified posts on ships, whether the captain or in his place the first officers⁴⁸. In addition, the enormous regulations developed for the purpose result in a type of "mantra" that can be found in numerous Commission communications since the end of the 1980s⁴⁹ and that are concerned with the need to increase the competitiveness

47) Which starts with the now replaced Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, but it was only applicable to merchant navy chief engineering officers, first and second merchant navy engineering officers and to first and second radio officers. This Directive was replaced to enlarge the ambit on numerous occasions. Without trying to be exhaustive in relation to this question, it is sufficient to quote Council Directive 94/58/CE of 22 November, relating to the minimum level of training of seafarers, which incorporated into EU legislation for the first time the International Maritime Organisation Convention on Standards and Training, Certification and Watchkeeping for Seafarers 1978, as amended in 1995 (STCW 78/ 95), later modified by Council Directive 98/35/EC of 25 May 1998 and replaced by Directive 2001/25/EC of 4 April 2001. Directive 2001/25/EC was the subject of two important modifications and finally replaced by Directive 2008/106/EC. This last one has been replaced to introduce the 2010 Manila amendments to the STCW Convention, produced through Directive 2012/35/EU of 21 November, which updated it in the way described without replacing the prior 2008/106.

48) ECJ Judgment of 30 September 2003 (case C-405/01), Spanish Merchant Navy and State Administration Officers' Association. Commented by Björkholm, M. (2004), "Free movement – A threat or an opportunity? A view on nationality requirements for the ship's master," *Marlus-Scandinavian Institute Maritime Law Yearbook*, 183-207. Grimaldi, M. (2004), "Il rapporto tra normativa interna e normativa comunitaria in campo marittimo. Brevi osservazioni sulla situazione italiana," *Il Diritto Marittimo I*, 65-69. Also, Fotinopoulou Basurko, O. (2013), "Cuando lo que importa es un buen capitán de buque; el caso del Colegio de oficiales de la Marina Mercante española," *Revista del Ministerio de Empleo y Seguridad Social* number 102, 165-183. Unfailingly connected to the above mentioned Judgment is the judgment of the same date that answers another preliminary ruling asked in the case of Anker & Co, case C-47/02, in which the Court of Justice found on whether the internal regulations of the member states that set reserves by reason of nationality for ships' captains can be considered as contrary to community law for discrimination. This was a case in which three Dutch seafarers challenged their right of access to the post of captain of fishing vessels registered in Germany. Meanwhile, the question of discrimination for reasons of nationality for the rest of the crew members was shown in the famous Judgment Commission against France of 4 April 1974, case 167/73, Rec. 1974, 359.

49) For example in the document *A future for the Community Shipping Industry: Measures to improve the operating conditions of Community Shipping*, COM (89) 266 final, 3 August 1989 and of course they can be confirmed in the latest published communications. Such is the case of the Communication to the Council, to the European Economic and Social Committee and to the Regions Committee. *Strategic*

of the European shipping companies in the world-wide context by in turn encouraging the mobility of workers in the sector. We start from an incontestable reality, the reduction of maritime jobs in the European countries with the resort to labour from third countries on the one hand, but also –as a core fact– the great concern caused by the fleeing of tonnage from European registers to the flags of convenience, reducing as a consequence the previous hegemony of European fleets in the global panorama.

For its part, this set of regulations gives rise to the need to match community law with international requirements (fundamentally set by the ILO and by the IMO) relating to maritime safety. Since the 1990s, European institutions have shown their concern regarding the economic consequences caused by maritime accidents such as, for example, the cases of the *Erika* in 1999 and the *Prestige* in 2002, both on the maritime industry itself and on the economic sectors that directly or indirectly depend on the sea. Thus, the encouragement of seafarers' training and qualifications cannot be understood without the need to protect maritime and human safety at sea. Not in vain has it been noted that a large part of these accidents is due to human errors. With time and also as a consequence of the above mentioned reality, EU law has adopted a large number of standards that modify –as with their counterparts internationally– the distribution of the governmental powers concerned in the verification of technical, administrative and – as interests us here – social questions regarding ships. This last process, the main bastion of which lies in the incorporation of the contents of the ILO's MLC 06 into the internal regulations of the member states through the clear leadership of the EU in the matter⁵⁰, has had as its purpose the transfer of the social aspects from the flag state⁵¹ to the port states⁵² firstly, in a current reading, to second certain verification competences to the states supplying

goals and recommendations for the EU maritime transport policy up to 2018. COM (2009) 8 final document, which specifically refers once more to the lack of professionals in the maritime sector, facilitating employment mobility and encouraging the training of the workers in the sector

50) COM (2006) 287 final, 15 June 2006, on the strengthening of maritime labour standards, in accordance with article 138, section 2 of the EC Treaty, stating that The Commission considers it essential to reflect on the community legislative framework with regard to the social standards applicable to seafarers in order to develop the competitiveness of the maritime sector, make the seafarer's profession more attractive and, in the long term, conserve the specialised European knowledge in this ambit. This Communication led to the adoption of Council Decision 2007/431/EC of 7 June 2007 authorising member states to ratify, in the interests of the European Community, the Maritime Labour Convention, 2006, of the International Labour Organization (OJ L161 of 22 June 2007).

51) Directive 2013/54/EU of the European Parliament and of the Council of 20 November 2013 concerning certain flag State responsibilities for compliance with and enforcement of the Maritime Labour Convention, 2006 (OJ L329 of 10 December 2013).

52) Directive 2013/38/EU of the European Parliament and of the Council of 12 August 2013 amending Directive 2009/16/EC on port State control (OJ L218 of 14 August 2013). Although the adoption of this standard has not been achieved to date, a 1989 Commission Communication observed the wish of European institutions that the member states ratify the 1976 ILO Convention 147 Merchant Shipping (Minimum Standards) to open the control of the state port to social questions too, a wish that, advanced

maritime labour. In this context, while the relevant Directives on the control of the flag state or port state have already been adopted, it still remains to undertake the relevant standard with regard to labour supplying, which it appears will not occur in the near future⁵³, without our knowing the reasons for the delay.

4. Community social policy and seafarers

We said at the start of these pages that seafarers are a category of workers like any other, while above we also referred to the leading role that EU regulations give to maritime safety. It is possible that in joining both proposals, the community institutions have not considered it necessary to issue specific standards for the workers in the merchant navy⁵⁴ beyond the regulations for the organization of working time of seafarers regulated in Directive 1999/63/EC of 21 June 1999⁵⁵, amended by Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, as well as Council Directive 92/29/EEC, of 31 March 1992 on the minimum safety and health requirements for improved medical treatment on board vessels⁵⁶. This regulation, regarding its legal base in the ambit of occupational health and safety where working time, for example, stands as a highly important factor for avoiding fatigue and thus preventing the accidents referred to above. From the technical point of view, this is a sparse regulation of international origin or source⁵⁷. Not in vain in the

for its time, has delayed – it is insisted – in appearing until the incorporation into European law of the MLC 2006.

53) Note in this sense, article 6.2 of Directive 2013/54/EU which states, "No later than 31 December 2018, the Commission shall submit a report to the European Parliament and to the Council on the implementation and application of Regulation 5.3 of MLC 2006 regarding labour-supplying responsibilities. If appropriate, the report may include proposals for measures to enhance living and working conditions in the maritime sector".

54) Something similar occurs with the maritime/fishing sector where the following specific Directives can be quoted: Council Directive 93/103/EC of 23 November 1993 concerning the minimum safety and health requirements for work on board fishing vessels (thirteenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) (OJ L 307 of 13 December 1993) modified by European Parliament and Council Directive 2007/30/EC of 20 June 2007 (OJ L165, 27 June 2007), Council Directive 97/70/EC of 11 December 1997 setting up a harmonised safety regime for fishing vessels of 24 metres in length and over, amended on various occasions, the last by European Parliament and Council Regulation (EC) 219/2009 of 11 March 2009 (OJ L87 of 31 March 2009).

55) OJ L167, 2 July 1999 accompanied by Directive 1999/95/EC of the European Parliament and of the Council of 13 December 1999 concerning the enforcement of provisions in respect of seafarers' hours of work on board ships calling at Community ports (OJ L014 of 20 January 2000).

56) OJ L113, 30 April 1992, modified on various occasions, the last being through Regulation (EC) 1137/2008 of 22 October 2008.

case of the working time Directive does it do nothing but incorporate ILO Convention 180, now in the MLC 2006, into community law, the situation of the latter reproduced with the annotated 2009 Directive.

Stated clearly, in the framework of the community social policy, the special or different regulation of the situation of workers in the maritime sector, as has traditionally occurred in national rights, has not been considered necessary but neither has the increasing of the protection of workers providing services on board ships with respect to the minimum international standards in the ILO or those of the IMO been considered a priority. But to this somewhat daunting image must be added that seafarers have not seen equality or parity regarding the application of the social Directives with respect to workers in the rest of the sectors. Thus, although in general all the directives apply to them⁵⁸, there are some regulations from which seafarers have been traditionally excluded from their scope of application or states are allowed to exclude them with no apparent specific justification. In these circumstances, it must be noted that among the set of Directives from which seafarers can be excluded is, "curiously", the set of social Directives connected to cases of business or economic crisis. This is the case of Directive 2008/94/EC relating to the protection of employees in the event of the insolvency of their employer⁵⁹, Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies or Directive

57) For example, the situation is clear regarding the regulation of noise and vibration where European Parliament and of the Council Directive 2003/10/EC of 6 February 2003 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise) (Seventeenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), amended by Regulation (EC) 1137/2008 of 22 October 2008, which specifically refers to the Code on noise levels on board ships in IMO Resolution A468(12). To the above must be added that although this Directive recognises the special problems of noise on board ships, it grants the member states a transition period for its application so that in the case, for example, of Spanish regulations, the result has been that the specific regulations on the limits of exposure to noise on board ships has taken years to be applied (eight since the adoption of the Directive and five since the adoption of the Royal Decree transposing it to our country).

58) Vid. the case of the ECJ Judgement of 3 July 2014. Joined cases C-362/13, C-363/13 and C-407/13, *Fiamingo and others v Rete Ferroviaria Italiana SpA*, which interprets the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP included in the Directive 99/70/EC to seafarers.

59) Although in this case there is a finding in which the ECJ condemned Greece for failing to guarantee equivalent protection to seafarers with respect to the rest of the workers in Directive 80/987/EEC. I refer to the judgement of 8 November 1990, *European Communities Commission v Hellenic Republic*, Case 53/88. At the time these lines were started writing, there was a preliminary rule submitted by the *Symvoulio tis Epikrateias (Greece)* on 13 June 2014 — *Elliniko Dimosio/Stéfanos Stroumpoulis and others (Case C-292/14)* which asks the ECJ whether seafarers of a member state who have undertaken maritime work on a ship with the flag of a state not a member of the European Union for the credits unpaid by the company owning the ship, which has its registered office in the third state but its real headquarters in the member state in question, declared insolvency by a court of that member state, applying the law of that member state precisely because it has its real headquarters there, are included in the scope of application of the protecting dispositions of that Directive, in view of its objective and independently of the employment contracts being regulated by the law of the third country and if the member state can require the contribution of the ship's owner from the financing of the guarantee

2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. Likewise, they are or may be excluded from the Directives in matters of representation and participation, such as is the case of Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) .and Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community. Finally, they are absolutely excluded in the case of Directive 96/71/EC about posting of workers⁶⁰.

Currently, the modification of the above mentioned Directives has been done, as we have noticed at the start of this article, but this reality hasn't been easy given that the exhibit positions of the various member states in relation to these changes. Thus while, for example, Greece, Cyprus and the Netherlands were not favourable to the approval of the proposal, other states were more favourable to seeking a point of agreement or convergence that can overcome the existing differing interests, such as Germany, but for example, which preferred to study the proposals⁶¹.

organisation. According to Council Directive 80/987/EEC, is the payment described in article 29 of Law 1220/1981 by Naftiko Apomachiko Tameio (ÍÁÔ) of the retributions up to a maximum of three months for the amount set as basic salaries and compensation determined in the collective agreements for Greek seafarers on ships with the Greek or a foreign flag under agreements with NAT, in accordance with that article, considered equivalent protection, that is, only in the case of abandonment abroad. These questions have been recently answered in the ECJ Judgment of 25 february 2016, Case C-292/14 .

60) Not so in Belgium, since the Belgian transposition standard of Directive 96/71/EC provides its application to the crew and its employers. *Moniteur belge* 86, 13 March 2003, pp 10638-10641. In this sense, it must be noted that in COM (2007) 591, p. 7, the Commission recognised that it was necessary to consider movement situations in the case of the merchant navy. Thus it pointed out that this situation occurs when a worker providing services on board a ship flying one flag is transferred to a ship flying another flag, something that happens very rarely. Recently, and so that the preparatory work for modifying certain social policy Directives relating to the dismissal of groups, bankruptcy, transmission of companies and information and consultation to include seafarers in them, that the group of workers who provide services on board a ship sailing the high seas cannot be considered as workers transferred to the territory of another member state, insofar as the application of the flagging law is based on the notion of the ship's nationality more than on an assimilation of the provision of services in the territory that grants its nationality to the ship. See Document SWD (2013) 462 final of 18 December 2013.

61) The various postures relating to the Directives involved can be read in the report prepared by the Permanent Representative of Spain to the European Union, Department of Employment and Social Security, in relation to the proposal mentioned above based on the meeting of the Social Affairs Group on 23 September 2014. Vid. the Web site Euskadi.net <http://www.ccaa-epssco.com/node/2289>.

5. Conclusion

The EU is constantly concerned with the social and employment regulation applicable to seafarers. The need to tackle the problem of the total or generally occasional exclusion of the maritime sectors from some social Directives has been admitted repeatedly but above all it has understood that it is necessary to tackle the situation of the social and employment conditions of seafarers in order to make maritime work more attractive and to combat the increasing lack of professionals in the sector. Likewise, it has been giving a primordial role to seafarers' training and qualification⁶². Beyond the above, and from the perspective of substantive regulation, the EU has not shown special interest in increasing the protection of these workers by creating regulations that go beyond the minimum prescriptions regulated by the international organisations (notably the ILO and the IMO). This is because although the need to guarantee sufficient levels of protection to seafarers is recognised, at the same time, in all these speeches and arguments, the slogan that this protection cannot involve weakening the shipping companies' competitiveness always stands out. Therein lies the crux of the matter. Even so, and for a touch of optimism, "*Eppur si muove*" as Galileo said.

⁶²) It is clearly a single theme. In addition, in the documents mentioned in other sections of this article, this "mantra" can be followed in the 2006 European Commission Green Book *Towards a future maritime policy for the Union: European perspective of the oceans and seas* and also in the Communication of the European Commission to the European Parliament, the Council, the Economic and social Committee and the Regions Committee on the harmonising between the member states of a common policy in matters of work at sea, Document COM (2007) 591 final.





CHAPTER 16

La construction jurisprudentielle du droit social maritime au travers du concept de lieu habituel de travail

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Abstract: *The international dimension of maritime activity and the high seas status justified connecting the crew to the law of the vessel's flag state; the law of the flag state is in principle the applicable law on board. The link between the ship and the flag state is not always "genuine". The Court of Justice of the European Union has sought to define more real connections between the seafarer and his employer within the scope of private international law. The search for the usual place of work of the sailor, as a mobile worker, strives to ensure access to justice and to labour laws that have real links with maritime employment relationships. This usual place of work of the seafarer may be identified through the port of the actual operation of the vessel. The result is a territorialisation of maritime labour relationships. It is hoped that this European judicial construction may be extended internationally.*

Résumé : *La dimension internationale de l'activité maritime et le statut de la haute mer ont justifié le rattachement de l'équipage à la loi de l'État du pavillon du navire ; la loi du pavillon constitue en principe la loi du bord. Le lien substantiel entre le navire et l'État dont il bat le pavillon n'a pas toujours de substance. La Cour de Justice de l'Union européenne s'est efforcée de définir des rattachements plus réels entre le marin et son employeur dans le champ du droit international privé. La recherche du lieu habituel de travail du marin, pourtant travailleur mobile, s'efforce d'assurer un accès à la Justice et à une législation du travail ayant des liens réels avec la relation de travail maritime. Ce lieu habituel de travail du marin peut être identifié à travers le port de l'exploitation réelle du navire. Il en résulte une territorialisation de la relation de travail maritime. Il faut souhaiter que cette construction jurisprudentielle européenne puisse recevoir un élargissement international.*



Le navire est aujourd'hui le lieu par excellence où les rapports de travail présentent une dimension internationale : immatriculations de fortune, équipages où se côtoient différentes nationalités, éloignement des lieux d'exploitation, nature juridique des eaux traversées qu'il s'agisse d'eaux territoriales, de zones économiques exclusives ou encore de la haute mer. Dans ce contexte, la multiplicité des éléments de rattachement avec tel ou tel ordre juridique rend particulièrement malaisé le choix de la loi applicable et du juge compétent en cas de conflit¹. Face à ces multiples difficultés, le rattachement à la juridiction et à la loi du pavillon du navire apparaît comme une source de simplification et d'unification. Mais force est de reconnaître dans les faits que l'application de ce principe laisse de plus en plus le marin démuné, non seulement pour accéder à une justice dont il maîtriserait la langue et le fonctionnement, mais également pour bénéficier de la protection d'un système juridique soucieux de garantir le respect des droits et de la dignité du salarié.

En France, le droit social maritime a longtemps été un droit précurseur dans le domaine social². Sur la scène internationale, ces dernières décennies ont vu le délitement des conditions de travail à bord des navires. La quête du moindre coût social a conduit les armateurs à négliger les règles de sécurité, la qualification de l'équipage et à offrir aux marins des rémunérations de plus en plus faibles. Ce phénomène s'est exacerbé, dans un contexte de globalisation de l'économie, avec le développement du transport maritime et la banalisation des pavillons de complaisance, ouvrant la voie à une véritable exploitation des marins et rendant plus difficile la possibilité de bénéficier d'une véritable protection juridique, tant en ce qui concerne l'accès à la juridiction compétente, qu'en ce qui concerne la soumission de la relation de travail à un système juridique garantissant le respect d'un minimum de droits sociaux.

Face à ces évolutions, le critère traditionnel rattachant, en cas de conflit de loi ou de juridiction, le navire à la loi du pavillon, perd peu à peu de sa finalité. S'il s'agit toujours d'assurer un rattachement stable du navire, quelles que soient les eaux dans lesquelles il se trouve, celui-ci ne traduit plus guère aujourd'hui l'existence d'un lien substantiel³ entre le navire et l'État dont il bat pavillon. Bien au contraire, le recours à la loi du pavillon comme critère de règlement des conflits de loi et de juridiction est au cœur même du développement des pavillons de complaisance⁴, ce

1) Proutière-Maulion G., (2003), « Le droit pénal national peut-il participer à la police d'une activité de travail international ? » Tribunal correctionnel de Saint-Nazaire, 18 mars 2003, navire Number One. *Droit social*, février 2004, pp 148-154 ; « Détermination du droit applicable et des responsabilités suite au naufrage dans les eaux internationales d'un navire en mauvais état de navigabilité battant pavillon de complaisance », *Droit Maritime Français*, pp. 1068-1092.

2) Chaumette, P. (1993), *Le contrat d'engagement maritime*, CNRS.

3) Kamto, M. (2003), La nationalité des navires en droit international, in *La mer et son droit, Mélanges offerts à L.Lucchini et J.-P. Quéneudec*, Pedone, n° 20, p. 348.

4) Perakis, M. (2011), Modern tendencies towards a disruption of the bond between the ship's flag and the

phénomène résultant justement d'une manipulation des critères de rattachement pour échapper à des législations, notamment sociales, plus contraignantes. La flexibilité des procédures d'immatriculation des navires, l'absence de définition de cette exigence de lien substantiel entre un navire et l'État du pavillon, ont, en effet, favorisé la généralisation en toute légalité de ce qui n'était somme toute qu'une fraude à la loi de grande ampleur, sous couvert de respect d'un consensus international.

Certes, à travers le contentieux du *quota hopping*⁵, la Cour de Justice de l'Union européenne (CJUE) a bien tenté de définir ce qu'il convenait d'entendre par « lien substantiel » en développant le concept de lien économique réel⁶ puis en donnant à celui-ci une certaine matérialité à travers l'exigence d'un établissement stable d'exploitation⁷. Cette jurisprudence est cependant jusqu'à présent restée limitée au domaine de la politique commune des pêches et n'a pas eu d'impact réel dans le cadre de la lutte contre les pavillons de complaisance. Alors que l'internationalisation de cette définition aurait pu permettre de lutter plus efficacement contre ce phénomène, le concept de loi du pavillon a continué d'être détourné et ne permet plus aujourd'hui d'offrir une réelle protection au marin et de lui garantir accès à la justice et respect des droits, y compris même des plus fondamentaux.

Valeur fondamentale de nombreux systèmes juridiques, la dignité de la personne humaine inclut pourtant nécessairement celle du travailleur. Assurer à tout marin un minimum de sécurité et de bien-être implique de lui garantir l'accès à une juridiction correspondant à la réalité géographique de sa relation de travail et donc de lui permettre de bénéficier de la loi applicable sur ce territoire si celle-ci est plus respectueuse de ses intérêts et le protège contre des conditions de travail indignes. La question du rattachement substantiel du navire et du travail maritime doit, en effet, redevenir centrale dès lors que le lieu d'immatriculation du navire est sans lien avec son exploitation.

Or, sur cette voie, l'œuvre interprétative de la CJUE autour des articles consacrés à la relation de travail dans les instruments européens de règlement des conflits de lois et de juridiction, semble ouvrir de nouvelles perspectives. En priorisant les critères de rattachement et en donnant une place première au critère du lieu habituel de travail, la CJUE permet en effet un renouvellement de la territorialité de la protection, y compris en cas de travail mobile, dans un contexte où les acteurs économiques

applicable law, ADMO, Tome XXIX, pp 342-357.

5) Chaumette, P. et Proutière-Maulion G. (2006), Quota hopping et appropriation des ressources halieutiques, ADMO n°23, pp. 309-318.

6) CJCE, 14 décembre 1989, Jaderow, affaire C-216/87, Rec. 1989, p. 04509.

7) CJCE 25 juillet 1991, Factortame II, affaire C 221/89, (www.curia.eu, eur-lex.europa.eu).

devenus transnationaux ont une activité qui s'étend au delà des frontières étatiques⁸. En permettant l'identification d'un lieu habituel de travail, le juge communautaire ouvre la voie à la reconnaissance d'un lien réel entre un navire et un État même si celui-ci n'est pas l'État dont il bat le pavillon. La réalité rattrape ainsi l'apparence et peut vider de toute effectivité le recours à un pavillon de complaisance, même s'il est certain que cela ne sera pas suffisant pour enrayer le phénomène. Il n'en demeure pas moins qu'en cas de saisine du juge, cette interprétation de la CJUE permet la construction d'un corpus normatif créateur d'un nouvel ordre social de référence.

Cette contribution vise donc à s'interroger, à travers la construction du concept de lieu de travail habituel (1) sur la façon dont les instruments européens de conflits de lois et de juridictions peuvent devenir un instrument régulateur des rapports sociaux au sein du monde maritime, y compris en cas de travail mobile (2). Au-delà, il s'agira également de s'interroger sur le vecteur de progrès social que peut constituer l'application de ces instruments et comment ces derniers peuvent être interprétés dans l'optique d'assurer à tout marin un minimum de sécurité et de bien-être dans la construction d'un droit social européen voire international des marins (3).

1. De l'identification d'un lieu de travail habituel en cas de travail mobile

Si dans l'ordre interne, il convient de consulter les règles relatives à la compétence territoriale pour déterminer le tribunal compétent⁹, la détermination de la juridiction internationalement compétente requiert elle, de recourir aux règles de droit international privé ou aux conventions internationales. Concernant le système juridique français, la jurisprudence a transposé les règles de droit interne dans l'ordre international, mais celles-ci doivent s'effacer devant les règles issues de la Convention de Bruxelles du 27 septembre 1968 sur la compétence et l'exécution des décisions en matière civile et commerciale, devenue le règlement n° 44/2001¹⁰, chaque fois que le défendeur est domicilié sur le territoire de l'Union européenne et cela quelle que soit sa nationalité¹¹. Adoptée sur le fondement de l'article 220 du Traité de Rome, cette convention vise à faciliter la détermination du juge compétent ainsi que l'exécution des décisions grâce à une procédure simplifiée de reconnaissance et d'exequatur des décisions de justice de façon à permettre la création d'un espace

8) Moreau, M.A. (2006), Normes sociales, Droit du travail et mondialisation, Dalloz, Paris, 2006, 418 pp., voir également l'ouvrage collectif publié sous la direction de Bercusson B., Estlund C. (2008), *Regulating Labour Law in the Wake of Globalisation*, Hart Publishing, London.

9) V. par exemple l'article R 1412-1 du Code du travail

10) Règl. CE 44/2001, du Conseil, du 22 déc. 2000, JOCE L 12, 16 janv. 2001, p. 1.

11) Ass. Plén. C. Cass. 18 févr. 1994, D. 1995, p. 245, concl. Jéol, note Du Rusquec ; J.D.I 1995, p. 150, obs. Huet.

judiciaire européen. Signée à l'origine par les six États fondateurs de l'Union européenne, elle a été étendue aux pays de l'AELE (Convention de Lugano du 16 septembre 1988) avant d'être modifiée par la Convention de San Sebastian du 26 mai 1989, à la suite de l'adhésion de l'Espagne et du Portugal. Elle a, enfin, été communautarisée avec l'adoption du règlement 44/2001, entré en vigueur le 1^{er} mars 2002¹². À cette occasion, a été apporté un certain nombre de modifications concernant les dispositions relatives au contrat de travail, sans toutefois remettre en cause la compétence de principe reconnue aux tribunaux de l'État contractant où le défendeur a son domicile¹³.

La section 5 du règlement n° 44/2001 concerne désormais spécifiquement la compétence en matière de contrats individuels de travail (art. 18 à 20) et vise à renforcer la protection du salarié¹⁴. L'employeur est considéré comme domicilié dans l'Union européenne dès lors qu'il y exerce une activité au moyen d'une agence, succursale ou autre établissement (art. 18). Le salarié a le choix, en ce qui concerne la saisine du tribunal, entre le domicile de l'employeur, le lieu où le travail a été exécuté¹⁵ ou doit être exécuté habituellement et lorsqu'il n'accomplit pas son travail dans un même pays, le tribunal du lieu de l'établissement d'embauche (art 19). L'employeur, lui, ne peut agir que devant le tribunal du domicile du salarié afin de respecter les exigences de proximité. L'architecture de cet article 19 du règlement 44/2001 est ainsi bâtie autour d'une notion centrale qui est celle de « lieu de travail habituel », dont l'objet vise à assurer une protection adéquate du travailleur en tant que partie faible au contrat, tout en favorisant une organisation utile de la justice. Entendu comme le lieu où le travailleur s'acquitte de ses obligations à l'égard de son employeur, le lieu de travail habituel apparaît logiquement comme étant celui où le travailleur peut à moindre frais s'adresser aux tribunaux et se défendre dans une langue qu'il maîtrise. Le caractère habituel du lieu de travail peut cependant se révéler difficile à déterminer, en cas de pluralité de lieux de travail, voire impossible en cas de travail mobile. En effet, par définition, un personnel navigant ne peut avoir de lieu de travail habituel, le navire ne constituant pas un établissement, ce qui complexifie encore davantage le choix du juge compétent.

En cas de travail dans plusieurs États membres de l'Union européenne, le lieu où l'obligation caractérisant le contrat a été exécutée, est celui à partir duquel le travailleur

12) À l'exception du Danemark et des pays et territoires d'Outre-mer des États membres qui restent régis par la Convention de Bruxelles de 1968.

13) Article 2 de la convention de Bruxelles et du règlement 44/2001.

14) Jault-Seseke, F. (2003), L'action du salarié dans les rapports internationaux de travail, LPA, n° 206.

15) La convention de Bruxelles ne connaissait elle à l'article 5, § 1, que la notion d'obligation servant de base à la demande, interprétée par Cour de Justice comme étant celle qui caractérise le contrat, renvoyant ainsi au juge du lieu habituel d'exécution du travail. CJCE 26 mai 1982, Ivenel, Rec. p. 1891, RCDIP 1983-116, 15 janvier 1987 Shenavai, Rec. p. 239, RCDIP 1987-793, 15 février 1989, Sté Six Constructions Rec. p. 358, RCDIP 1989-555 n. Rodière P.

s'acquiesse principalement de ses obligations à l'égard de son employeur, désormais entendu comme le centre effectif des activités professionnelles du travailleur, du centre d'organisation de son travail¹⁶. Selon la Cour de Justice de l'Union européenne doit ainsi être considéré comme le lieu habituel de travail « *le lieu où le travailleur a établi le centre effectif de ses activités professionnelles. Pour la détermination concrète de ce lieu, il convient de prendre en considération la circonstance que le travailleur accomplit la majeure partie de son temps de travail dans un des États contractants où il a un bureau à partir duquel il organise ses activités pour le compte de son employeur et où il retourne après chaque voyage professionnel à l'étranger* »¹⁷.

Tel est ainsi le cas lorsque le salarié travaille dans les eaux territoriales ou sur le plateau continental de deux États membres, à partir d'une grue flottante. Le juge doit rechercher le lieu habituel de travail, c'est-à-dire l'endroit où, ou à partir duquel, compte tenu de toutes les circonstances du cas d'espèce, il s'acquiesse en fait de l'essentiel de ses obligations à l'égard de son employeur. Dès lors, « *s'agissant d'un contrat de travail en exécution duquel le salarié exerce les mêmes activités au profit de son employeur dans plus d'un État contractant, il faut, en principe, tenir compte de toute la durée de la relation de travail pour déterminer le lieu où l'intéressé accomplissait habituellement son travail, au sens de ladite disposition. À défaut d'autres critères, ce lieu est celui où le travailleur a accompli la plus grande partie de son temps de travail. Si ce lieu n'est pas déterminable, le salarié peut saisir le juge de l'établissement d'embauche* »¹⁸.

En cas de travail mobile, il convient donc de tenir compte de toute la durée de la relation de travail ainsi que du lieu où le travailleur a accompli la plus grande partie de son temps de travail¹⁹. Tel est également le cas pour les travailleurs marins

16) CJCE 13 juillet 1993, Mulox, aff. C-125/92, Rec. p. I-4075, Dr. Soc. 1994-309 n. E. KERCHOVE ; CJCE 9 janvier 1997, Rutten c/ Cross Medical Ltd, aff. C-383/95, Rec. p. I-57, points 12 et 13, RCDIP 1997-336 n. H. Gaudemet-Tallon H. ; CJCE 28 septembre 1999, GIE Groupe Concorde e.a., C-440/97, Rec. p. I-6307, point 14.

17) CJCE 9 Janv. 1997, aff. C-383-95, Rutten, Rec., 1997, I, p. 57.

18) CJCE 27 février 2002, Weber, aff. 37/00, Rec. I-2013, RJS 6/02 n° 759 obs. Moreau M., DMF 2002 pp. 632-648 n. Chaumette P. ; Neptunus, Centre de Droit Maritime et Océanique, Université de Nantes, 2002, Vol. 8/2 (www.droit.univ-nantes.fr/labos/cdmo/nept/nept.htm) ; RTD eur. 2003. 529, chron. Rodière P. ; Moreau M.-A., Compétence juridictionnelle internationale : détermination du lieu d'exécution habituel du travail, RJS 2002. 511 ; F. Buy, Compétence juridictionnelle et pluralité de lieux de travail, Dr. soc. 2002. 967 ; V. aussi antérieurement CJCE, 9 janv. 1997, *Rutten*, aff. C-383/95, RJS 1997. 146 ; JCP E 1997 II 659, note Antonmattei P.-H. ; RCDIP 1997. 341, note Gaudemet-Tallon H.

19) Cass. soc., 31 mars 2009, n° 08-40367, navire Ontario, Sté luxembourgeoise Four Wings Charter c/ M. Latoja, Bull. civ. V, n° 93, DMF 2009, n° 707, pp. 835-843 n. Proutière-Maulion G. ; Dr. soc. 2009, 733, obs. Chaumette P., RDT 2010, n° 1, pp. 63-66 obs. Jault-Seseke F., « La compétence judiciaire internationale dans les rapports de travail » ; Cass. soc. 20 septembre 2006, n° 05-40491, Sté Anterist et Schneider Transport Logistik GmbH, Bull. civ. V n° 277, p. 263, Dr. Soc. 2006, 1200 n. LHERNOULD J.-Ph.

alors même que le travail est cette fois effectué en dehors de tout établissement. Le tribunal du lieu habituel de travail demeure compétent, quand bien même le navire appartient et est exploité par une société hollandaise à partir et dans un port français de la Côte d'Azur et que le navire navigue dans des eaux internationales ou étrangères²⁰. On remarque ainsi une volonté du juge européen non seulement de territorialiser la relation de travail mais également d'éviter des compétences concurrentes en favorisant le choix d'un juge unique, nonobstant le caractère mobile du travail et l'absence d'établissement. Le critère du lieu habituel de travail neutralise dès lors le caractère mobile du travail et apparaît comme servant tant un rattachement objectif qu'un rattachement protectionnel²¹.

2. De la territorialisation de la relation de travail maritime

En rendant sa décision dans l'arrêt Weber en 2002, la Cour de Justice des Communautés européennes (CJUE) avait toutefois ajouté : « *il n'en serait autrement que si, au regard des éléments de fait du cas d'espèce, l'objet de la contestation en cause présentait des liens de rattachement plus étroits avec un autre lieu de travail, cas dans lequel ce lieu serait pertinent aux fins de l'application de l'article 5, point 1, de ladite convention...* ». Il conviendrait donc, à défaut de lieu de travail habituel ou de lieu à partir duquel le salarié accomplit la plus grande partie de son temps de travail, de déterminer le lieu susceptible de présenter des liens plus étroits avec l'objet du litige. Tel est par exemple le cas dans l'affaire de l'*Ontario* : M. X, a été engagé comme marin par la société Four Winds Charter, société de droit luxembourgeois et domiciliée au Luxembourg, en qualité de matelot pour naviguer à bord du navire *Ontario*, battant pavillon luxembourgeois. Il travaille sur un navire réalisant des trajets internationaux, effectue son travail en dehors de tout établissement, ce qui rend malaisé l'identification d'un lieu habituel de travail, d'autant que le navire assure des trajets internationaux entre plusieurs États membres de l'Union européenne (plusieurs mois de l'année entre la France, l'Italie, la Croatie, la Grèce, la Tunisie, l'Espagne, Gibraltar et le Portugal)²². Alors que la cour d'appel d'Aix-en-Provence avait fondé la compétence du Conseil des Prud'hommes de Cannes sur le fait que le salarié avait travaillé à terre, au port Canto à Cannes, entre septembre 2004 et janvier 2005²³, la cour de cassation française a censuré cette

20) Cass. Soc. 29 avril 2003, navire Wedge One, Dr. Soc. 2003-983 obs. Chaumette P.

21) Fallon M. (2008), Le détachement européen des travailleurs à la croisée de deux logiques conflictualistes, RCDIP pp. 781-818.

22) Proutière-Maulion, G. (2009), Quel lieu habituel de travail pour le marin international ? Note sous Cass. Soc. 31 mars 2009, DMF n° 707.

23) « Cette exécution de ses activités durant cinq mois à Cannes, faisait que ce lieu devait être considéré comme le dernier lieu où le salarié avait accompli habituellement son travail, conformément à l'article 19, 2, a, in fine du Règlement 44/2001 ».

décision, considérant erronés non l'attribution de la compétence à un tribunal français mais les motifs utilisés pour fonder cette compétence, laissant ainsi à penser que l'affaire présentait d'autres éléments de rattachement permettant de fonder la compétence d'un juge français. Compte tenu de la nature du travail maritime, la juridiction saisie doit établir dans quel État est situé le lieu à partir duquel le travailleur effectue ses missions de transports, reçoit les instructions sur ses missions, organise son temps de travail ainsi que le lieu où se trouvent ses outils de travail²⁴.

Or effectivement en l'espèce, le marin résidait à Cannes au moment de la rupture de son contrat de travail alors que le navire était également ancré à Cannes, son port d'hivernage. Ces deux éléments pourraient être de nature à permettre de caractériser l'existence de ce lien plus étroit avec la France comme dernier lieu habituel de travail²⁵.

Cette interprétation semble recevable à deux égards. Elle traduit d'abord le souci de garantir au marin un for de proximité, ce qui n'est nullement le cas pour la compétence du tribunal du lieu d'embauche. Quel peut être ici le lien entre la relation de travail et le Luxembourg alors que ni le marin ni le navire ne seront amenés à y séjourner ? Rien ne garantit d'ailleurs que le tribunal compétent soit ici un tribunal luxembourgeois, faute d'informations précises sur les conditions de recrutement du marin, lequel pourrait fort bien avoir été recruté par une société de *manning* établie dans un autre État. Le juge du lieu du port d'attache réel semble donc plus apte à connaître de la rupture d'un contrat d'engagement maritime qui vient d'y intervenir, dès lors que ce lieu coïncide avec la résidence du marin depuis plusieurs mois. Le critère des liens les plus étroits réactive ainsi la question du rattachement substantiel du navire et du travail maritime, laquelle doit devenir centrale dès lors que le lieu d'immatriculation du navire est sans lien avec son exploitation²⁶. Au-delà, cela conduit également à territorialiser une relation de travail dénuée de tout rattachement territorial, alors qu'il aurait pu être recouru au critère du lieu d'embauche pour déterminer la compétence juridictionnelle.

En matière de contrat international de travail maritime, on retrouve donc la même méfiance du juge communautaire à l'égard du rattachement du litige à la compétence du tribunal du lieu d'embauche que celle dont il fait preuve de façon généralisée en matière de conflit individuel lié au contrat de travail, interprétant généralement le critère du lieu d'embauche comme une prise en considération des intérêts de l'entreprise. Il est vrai que consacrer ce critère n'aurait eu que peu d'impact pour

24) Chaumette, P. (2012), De l'établissement d'exploitation du navire et du lieu habituel de travail d'un marin, CJUE 15 déc. 2011, DMF p. 219.

25) Babault-Ballufin, C., préc.

26) Cass. Soc. 31 mars 2009, Sté Luxembourgeoise Four Winds Charter c/ M. Latoja, Dr. Soc. 2009, p. 733, obs. Chaumette P. ; V. également Chaumette P. (2009), Quel lieu habituel de travail pour le marin international? ; Il Diritto Marittimo, Fasc. II, p. 542.

lutter contre les pavillons de complaisance, dès lors que l'embauche a eu lieu dans un pays sans lien avec l'exploitation du navire. Tout au plus permettrait-il dans certains cas de neutraliser les effets d'un changement de pavillon dès lors que celui-ci ne s'accompagne pas d'un changement d'employeur²⁷.

À travers cette construction, le juge européen a donc utilisé le concept de lieu de travail habituel pour identifier un ancrage territorial dans le cadre d'une relation de travail mobile, faisant ainsi primer un rattachement de proximité favorable à la partie faible du contrat. Cette approche reste fidèle à l'esprit même de la Convention de Bruxelles, devenue règlement 44/2001, exprimé à travers l'existence du critère des liens les plus étroits. En adoptant la même démarche en matière de conflit de lois, il contribue à la construction d'un corpus normatif susceptible de réguler un secteur d'activité mondialisé, allant au-delà de la simple sphère d'action du droit européen.

Bien que la détermination de la juridiction compétente soit indépendante de la détermination de la loi applicable, la notion de lieu d'exécution habituel du travail est également centrale dans ce dernier cas et procède d'une méthode générale identique, visant elle aussi à établir un ancrage territorial de la relation internationale de travail maritime.

Le contrat de travail international ouvre un concours entre au moins deux ordres juridiques nationaux, nécessitant de rattacher le contrat à l'un d'eux. La logique de la liberté contractuelle conduit à laisser ce choix aux contractants à travers le concept de loi d'autonomie. Ce choix peut être explicite, express ou seulement implicite. Il appartient alors au juge de rechercher la volonté commune des contractants, de la découvrir à travers des indices ou critères de rattachement. Ce choix ne peut en aucun cas priver le salarié de la protection que lui assurent les dispositions impératives de la loi qui serait applicable à défaut de choix, conformément aux dispositions de l'article 6 de la Convention de Rome du 1^{er} avril 1991 destinée à uniformiser les systèmes de conflits de lois en matière d'obligations contractuelles au sein de l'espace européen²⁸. Cette convention a depuis été communautarisée par le règlement (CE) n° 593/2008 du Parlement européen et du Conseil du 17 juin 2008 sur la loi applicable aux obligations contractuelles, appliqué au 17 décembre 2009 pour les contrats conclus après cette date²⁹, et dont l'article 8 spécifique au contrat de travail dispose désormais que « **le contrat individuel de travail est régi par la loi choisie par les parties conformément à l'article 3. Ce choix ne peut toutefois avoir pour résultat de priver le travailleur de la protection que lui assurent les dispositions auxquelles il ne peut être dérogé par accord en vertu de la loi qui, à défaut de**

27) Fallon M., *op.cit.*

28) Rapport Lagarde, P. et Giuliano, M. (1980) JOCE n° C 282 du 31-10-1980.

29) JOUE n° L 177, 4 juil. 2008, 6.

choix, aurait été applicable selon les paragraphes 2, 3 et 4 du présent article ». L'article 8-2 prévoit quant à lui qu'à « défaut de choix exercé par les parties, le contrat individuel de travail est régi par la loi du pays dans lequel ou, à défaut, à partir duquel le travailleur, en exécution du contrat, accomplit habituellement son travail. Le pays dans lequel le travail est habituellement accompli n'est pas réputé changer lorsque le travailleur accomplit son travail de façon temporaire dans un autre pays ». On retrouve enfin à l'article 8-3 le critère des liens les plus étroits avec un autre pays que celui visé au paragraphe 2 ou 3, qui s'appliquera également en fonctions des circonstances liées à l'exécution du contrat.

Qu'il s'agisse de la détermination du juge compétent ou de la loi applicable, le critère du rattachement du contrat au lieu où le travailleur accomplit habituellement ses fonctions doit être pris en considération de façon prioritaire. Son application exclut la prise en considération du critère subsidiaire du lieu du siège de l'établissement qui a embauché le travailleur³⁰. Sa caractérisation doit, tout comme pour la désignation du juge compétent, reposer sur l'identification du lieu à partir duquel le travailleur effectue ses missions de transport, reçoit les instructions et organise son travail³¹. Dans la droite ligne de la jurisprudence *Koelzsch*³², l'arrêt *Jan Voogsgeerd*³³ étend aux marins l'analyse retenue pour des chauffeurs routiers et consacre définitivement une fixation juridique des travailleurs mobiles³⁴.

La loi d'autonomie n'a donc qu'une vocation conditionnelle à être appliquée puisqu'elle ne peut priver le salarié de la protection que lui accorde la loi du lieu habituel de travail, même en cas de détachement provisoire. Le critère du lieu habituel de travail devient donc là aussi central, alors même que le contrat d'engagement maritime était lui traditionnellement soumis à la loi du pavillon, conduisant la loi du lieu habituel de travail à intervenir comme une loi de police, au-delà de la sphère de l'administration du travail.

30) CJUE 15 mars 2011, Heiko Koelzsch c/ État du Grand Duché de Luxembourg, aff C-29/10, RCDIP 2011, n° 2, obs. Jault-Seseke F. ; Grass E. (2011), Routier polonais et principe de faveur en droit communautaire, Dr. Soc. p. 849.

31) *Ibidem*, point 48 et 49 ; CJUE 15 déc. 2011, aff. C-384/10, Jan Voogsgeerd c/ Navimer SA, De l'établissement d'exploitation du navire et du lieu habituel de travail d'un marin, obs. Chaumette, P., DMF 2012 pp 219-233.

32) CJUE, grande chambre, 15 mars 2011, Koelzsch c/ Luxembourg, aff. C-29/10, D 2011, 941 - RCDIP 2011, n° 2, pp. 438-461 obs. Jault-Seseke F. ; E. Grass, *op. cit.*

33) *op. cit.*

34) CJUE 15 déc. 2011 aff. C-384/10, Jan Voogsgeerd c/ Navimer SA, obs. Chaumette, P., Dr. Soc. 2012, n° 3, pp 315-317.

3. De l'internationalisation souhaitable de la construction jurisprudentielle européenne

Dans un contexte où la mondialisation du transport maritime a conduit au développement de pavillons de complaisance sans lien avec le lieu d'exploitation réel des navires, le critère du lieu habituel de travail apparaît ainsi comme un correctif inattendu rétablissant un certain équilibre au profit du travailleur marin, partie faible du contrat³⁵. Alors même que ces pavillons de complaisance visent à rattacher la relation de travail à une législation sociale plus souple, il conduit à restaurer une certaine justice sociale en garantissant le respect des droits fondamentaux du travailleur. Cette construction conduit également à éluder les analyses doctrinales estimant que la désignation de la loi du lieu d'accomplissement habituel du travail était sans application possible, le navire ne pouvant être assimilé à un territoire³⁶.

Alors que les pavillons de complaisance visaient à utiliser les règles de conflits de lois et de juridictions pour échapper à certaines législations sociales jugées trop contraignantes, on assiste ainsi à travers la construction du concept de lieu habituel de travail par la CJUE à un renversement de paradigme, ces mêmes règles de conflits permettant désormais de contrer les effets desdits pavillons. Les juridictions françaises, italiennes et grecques ne s'y sont d'ailleurs pas trompées en poursuivant ce rattachement de la relation de travail maritime au lieu réel d'exploitation du navire³⁷. Le concept de lieu habituel de travail n'est plus dès lors un simple critère de rattachement. Bien au-delà, il joue désormais un rôle fondamental en conduisant à rechercher le lien substantiel qui rattache le navire à l'ordre juridique normalement applicable en raison de son véritable lieu d'exploitation. Partant, il devient l'élément central d'un dispositif normatif visant à faire en sorte que les législations sociales impératives ne puissent plus être contournées³⁸. Il en résulte inéluctablement un rétrécissement du champ de rattachement à la loi du pavillon, lequel devient alors un critère subsidiaire n'ayant qu'une vocation résiduelle à être appliqué, à défaut de critères plus pertinents.

35) Fotinopoulou Basurko, O. (2008), *El contrato de trabajo de la gente de mar*, Ed. Comares, Granada

36) Lagarde P. (2005), À propos de la loi française n° 2000-412 du 3 mai 2005 créant le registre international français (RIF) des navires, RCDIP, n° 3, 527, sp. p. 531.

37) Carbone S.-M. (2010), *Conflits de lois en droit maritime*, Les Livres de Poche de l'Académie de Droit International de la Haye, ADI-Poche, La Haye, - Cass. soc., 31 mars 2009, n° 08-40367, navire Ontario, Dr. soc. 2009, pp. 733-735, RDT 200910, 55, chr. Rémy, P., Fauerborn, A., Jault-Seseke, F. et. Rönmar, M. ; Droit Maritime Français, 2009, n° 707, pp. 835-843 n. Proutière-Maulion, G. ; Chaumette, P. (2013), Du principe de réalité appliqué aux marins du yachting, obs. sous CA Aix-en-Provence, DMF, n° 750, pp. 716-724.

38) Fotinopoulou Basurko, O. , *op. cit.*

Le rattachement de la relation de travail maritime au lieu de travail habituel permet un rattachement de la relation de travail au lieu d'exploitation réel du navire. Il en est de même dès lors qu'est utilisé comme critère de rattachement celui du pays avec lequel la relation de travail entretient les liens les plus étroits. Qu'il s'agisse de l'un ou de l'autre, il apparaît clairement que les règles de conflits de lois et de juridictions ne peuvent plus être utilisées pour décliner la compétence de la loi qui présente un rattachement réel avec la situation. Immatriculer un navire sous pavillon de complaisance n'est donc plus une garantie d'échapper, en toute impunité, à un cadre juridique jugé trop contraignant, y compris d'ailleurs lorsqu'il s'agit d'affiliation à un régime de protection sociale.

En effet, l'affiliation à un régime de protection sociale dépend en principe du pavillon du navire conformément aux dispositions de l'article 11-4 du règlement 883/2004³⁹ portant sur la coordination des systèmes de sécurité sociale, « *l'activité salariée ou non salariée exercée normalement à bord d'un navire battant pavillon d'un État membre est considérée comme une activité exercée dans cet État membre* ». Le même règlement porte cependant en germe, la possibilité d'occulter ce rattachement à la loi du pavillon en prévoyant que la personne « *qui exerce une activité salariée à bord d'un navire battant pavillon d'un État membre et qui est rémunérée par une entreprise ou une personne ayant son siège ou son domicile dans un autre État membre est soumise à la législation de ce dernier État membre si elle réside dans cet État* ». La loi du pavillon n'est donc plus un critère exclusif de rattachement en matière de sécurité sociale. Elle a désormais vocation à s'effacer dès lors que coïncide la localisation du siège social de l'armement et la localisation de la résidence du marin, marquant ainsi la primauté de l'existence de liens suffisamment étroits avec le territoire de l'UE⁴⁰ sur la primauté traditionnelle de la loi du pavillon.

Le très récent arrêt *Kik* de la CJUE étend aux conflits d'affiliation en matière de régime de sécurité sociale une démarche désormais récurrente en matière de conflits de lois et de juridictions. L'identification d'un lien substantiel entre l'exploitation du navire et le territoire européen, que cela soit à travers la détermination du lieu habituel de travail ou à travers la détermination de liens plus étroits avec le territoire d'un État membre de l'UE, permet désormais de limiter les effets des pavillons de complaisance en restaurant l'application des législations sociales impératives que l'on avait cherché à contourner.

Certes, tel n'était pas l'effet spécifiquement recherché par le juge européen. Les marins bénéficient ici d'une construction jurisprudentielle d'ensemble conforme à

39) JOUE L 166, 30 avr. 2004, p. 1.

40) CJUE, 19 mars 2015, aff. C- 266/13, *Kik*, obs. Chaumette, P. « De l'affiliation sociale des gens de mer en droit européen : extension vers les marins ressortissants européens, expatriés sous pavillon tiers », DMF 2015, n° 769, pp. 401-416.

l'esprit des conventions de Rome et de Bruxelles et à la préoccupation de leurs rédacteurs de protéger le travailleur. Dans un contexte de libre immatriculation des navires, cette construction prend ici une résonance particulière, tant parce qu'elle met à mal ce qui était la loi commune de l'équipage que parce qu'elle se pose en régulateur des rapports sociaux dans le monde maritime. À travers le critère du lieu habituel de travail, tout comme à travers celui des liens les plus étroits, la CJUE donne une matérialité indirecte au concept de lien économique réel, allant au-delà de l'existence d'un établissement stable d'exploitation. Ce faisant, elle initie, là encore de façon indirecte, une remise en cause de la loi du pavillon, comme fondement des relations sociales maritimes, conduisant à une certaine harmonisation internationale des conditions de travail dépassant le caractère mobile du travail maritime. Les instruments de règlement des conflits de lois et de juridictions prennent ainsi une dimension nouvelle, garante du respect des droits sociaux fondamentaux, même si ce qui pourrait apparaître comme un nouvel ordre social de référence reste toutefois conditionné à la compétence d'un juge européen. Si cet ensemble ne peut pour l'instant agir que comme un correctif *a posteriori*, il porte cependant en germe un espoir de normalisation des rapports sociaux dans le monde maritime permettant de lutter contre un dumping social généralisé à bord. L'internationalisation de la relation de travail maritime jointe à la flexibilité des critères permettant de déterminer la compétence du juge européen permet en effet à ce dernier de connaître d'une multitude de situations irrigant bien au-delà du seul territoire communautaire, nonobstant la nationalité du marin.

Par ailleurs, quand bien même cette construction jurisprudentielle resterait limitée à l'échelle régionale, le droit européen trouve ainsi une fonction substantielle d'unification, vecteur de diffusion de la norme juridique, tant européenne, qu'internationale.

Garantir des conditions de travail décentes à bord des navires n'est pas, en effet, une problématique réservée aux pays pauvres. La lutte contre les pavillons de complaisance et le respect de la dignité du travailleur sont au contraire deux thèmes universels qui, en Europe comme dans le reste du monde, ne peuvent être assurés que par le respect des normes juridiques. Au-delà du prisme des règlements de conflits de lois et de juridictions, la construction jurisprudentielle de la cour européenne rejoint également l'œuvre normative de l'Organisation Internationale du Travail. En permettant l'application des lois sociales impératives, la Cour ouvre, en effet, la voie à un plus grand respect des conventions internationales ratifiées, concourant ainsi, à travers la construction d'un droit social européen à la construction d'un droit international des gens de mer. Sur cette voie, le juge européen a fait du lieu habituel de travail un vecteur de progrès social dont il ne soupçonnait probablement pas les implications.







