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Laura Carballo Piñeiro

International Maritime Labour Law

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This study strives to state the law as of 28 February 2015.

Santiago de Compostela, Spain Laura Carballo Piñeiro
March 2015

Abbreviations

ADCo	Anuario de Derecho Concursal
ADM	Anuario de Derecho Marítimo
ADMO	Annuaire de Droit Maritime et Océanique
AEDIPr	Anuario español de Derecho internacional privado
ArbG	Arbeitsgericht
ArbRB	Arbeitsrechtsberater
AS	Aranzadi Social
BAG	Bundesarbeitsgericht
BB	Betriebs-Berater
BGH	Bundesgerichtshof
BOE	Boletín Oficial del Estado
Bull. Civ. V	Bulletin des arrêst de la Cour de Cassation. Chambres Civiles. No. V
BVerfG	Bundesverfassungsgericht
BYIL	The British Yearbook of International Law
Cass. Soc.	Cassation social
Cass. civ.	Cassation civil
CDT	Cuadernos de Derecho Transnacional
Ch. com.	Chamber of commerce
Ch. civ.	Chamber civil
Chr. D. S. -Soc. Kron.	Chroniques de droit social/Sociaalrechtelijke kronieken
CJ	Court of Justice of the European Community/European Union
CJEU	Court of Justice of the European Union
Clunet	Journal de droit international
CMLR	Common Market Law Review
Comp Lab L & Pol'y J	Comparative Labour Law & Policy Journal
Cour. Cass.	Cour de Cassation
CYELS	Cambridge Yearbook of European Legal Studies

Dir. Com. Int.	Diritto del Commercio Internazionale
DMF	Le Droit Maritime Français
DirMar	Il Diritto Marittimo
EBLR	European Business Law Review
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EEA	European Economic Area
EIR	Regulation (EC) No. 1346/2000, of 29 May 2000, on insolvency proceedings
EJLL	European Journal of Labour Law
E L Rev	European Law Review
E T L	European Transport Law
EuZA	Europäische Zeitschrift für Arbeitsrecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EWCA	England and Wales Court of Appeals
GEDIP	Groupe europeén de droit international privé/European Group of Private International Law
German L J	German Law Journal
Hous J Int'l L	Houston Journal of International Law
ICJ	International Court of Justice
IJCLLIR	The International Journal of Comparative Labour Law and Industrial Relations
ICLQ	International and Comparative Law Quarterly
ILO	International Labour Organization
IMO	International Maritime Organization
Int'l Lab Rev	International Labour Review
Int'l Trade L J	International Trade Law Journal
IPRax	Praxis des internationalen Privat- und Verfahrensrecht
IPRspr	Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts
ITF	International Transport Workers' Federation
JIML	The Journal of International Maritime Law
J Mar L & Com	Journal of Maritime Law & Commerce
J Priv Int L	Journal of Private International Law
JUR	Jurisprudencia Aranzadi
LAG	Landesarbeitsgericht
L M C L Q	Lloyd's Maritime and Commercial Law Quarterly
LNTS	League of Nations Treaty Series
LOPJ	Ley Orgánica del Poder Judicial
MLR	The Modern Law Review
NIPR	Nederlands Internationaal Privaatrecht
NJ	Nederlandse Jurisprudentie
NVwZ	Neue Zeitschrift für Verwaltungsrecht

N Y U L Rev	New York University Law Review
Nw J Int'l L & Bus	Northwestern Journal of International Law & Business
NZA	Neue Zeitschrift für Arbeitsrecht
NZS	Neue Zeitschrift für Sozialrecht
NZV	Neue Zeitschrift für Verkehrsrecht
OJ	Official Journal of the European Community/European Union
OLG	Oberlandesgericht
RabelsZ	Rabels Zeitschreift für internationales Privatrecht
RCP	Revista de Derecho Concursal y Paraconcursal
RdA	Recht der Arbeit. Zeitschrift für die Wissenschaft und Praxis des gesamten Arbeitsrechts
RCDIP	Revue critique de droit international privé
RDCE	Revista de Derecho Comunitario Europeo
RDC-TBH	Revue de droit commercial belge
R des C	Recueil des Cours
RDIPP	Rivista di diritto internazionale privato e processuale
REDI	Revista española de derecho internacional
RGD	Revista General del Derecho
RGDE	Revista General de Derecho Europeo
RGDTSS	Revista General de Derecho del Trabajo y de la Seguridad Social
RGLPS	Rivista Giuridica del Lavoro e della Previdenza Sociale
RHDI	Revue Hellénique de Droit International
Riv. dir. int.	Rivista di Diritto internazionale
R I T	Revista internacional del trabajo
RIW	Recht der internationalen Wirtschaft
RJ	Repertorio de Jurisprudencia Aranzadi
RTDciv	Revue trimestrielle de droit civil
SAP	Sentencia de Audiencia Provincial
SSAP	Sentencias de Audiencia Provincial
SES	Schip en Schade
STCW Convention	Convention on Standards of Training, Certification and Watchkeeping 197.
STCW-F Convention	International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel, 199.
SOLAS	International Convention for the Safeguarding of Human Life at Sea
STS	Sentencia del Tribunal Supremo
SSTS	Sentencias del Tribunal Supremo
STSJ	Sentencia del Tribunal Superior de Justicia
SSTSJ	Sentencias de Tribunal Superior de Justicia
S. U.	Sezione Unita

TEC	Treaty of the European Communities
TFEU	Treaty of Functioning of the European Union
Tex Int'l L J	Texas International Law Journal
Transp L J	Transportation Law Journal
TranspR	Transportrecht
Trib. Trav.	Tribunal de travail
TRLPEMM	Texto Refundido de la Ley de Puertos del Estado y de la Marina Mercante
Tul Mar L J	Tulane Maritime Law Journal
U Chi L Rev	The University of Chicago Law Review
U Miami L Rev	University of Miami Law Review
UNCLOS	1982 United Nations Convention on the Law of the Sea
UNTS	United Nations Treaty Series
Utrecht L R	Utrecht Law Review
WMU	Journal of Maritime Affairs
Yale L J	Yale Law Journal
YPIL	Yearbook of Private International Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZEuP	Zeitscrift für europäisches Privatrecht
ZfA	Zeitschrift für Arbeitsrecht
ZIAS	Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht
ZZPInt	Zeitschrift für Zivilprozeß international
ZVglRWiss	Zeitschrift für vergleichende Rechtswissenschaft

Contents

Chapter 1
Introduction

Maritime law, including maritime employment, is the testing ground for the globalisation process, which is encouraging the gradual internationalisation of both economies and societies, driven by innovations in technology and communications.[1] This process contrasts with the fact that private international disputes have so far been legally addressed as *rarae aves*, i.e., as exceptions to the domestic situations for which legislative policies are generally conceived. While the latter are characterised by predictable uniformity—although varying to a certain extent in socio-economic terms—the same cannot be said of the former since their contact with different jurisdictions results in different degrees of internationalisation involving different levels of cultural, societal and economic discrepancies.

However, the marginal role played by private international disputes has recently been challenged, with the permeability of borders at the core of the political discussion.[2] The globalisation process involves the opening up of both societies and economies, as well as an inevitable and inexorable blurring of legislative power, which was almost exclusively in the hands of states until recently. It is becoming increasingly difficult for states to control their societies and economies due in part to the relocation of businesses and migratory movements that lead to a loss of power at the point of policy enforcement. This is the undesired result of regulatory competition and stems from initiatives such as those entitling stakeholders to indirectly select the law applicable to the situation in question by taking

[1] See further Basedow (2013), pp. 82–133.

[2] Dealing with the transformation of the concept of state resulting from the increasingly blurred concepts of distance and border, which in turn are the consequence of changes in the concepts of time and space due to innovations in technology; see Hinojosa Martínez (2005), p. 5, and more specifically Michaels (2004), pp. 113–115; de Miguel Asensio (2001), pp. 43–44; Pamboukis (2007), p. 87.

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advantage of market freedoms. In this context, the absence of clear links to any specific jurisdiction gives prominence to private international law as the best set of rules for dealing with private international situations.[3]

Nonetheless, private international rules are not enough to avoid a potential race to the bottom in the sector, and it is therefore necessary to take a step further to reduce globalisation's impact on our open societies, particularly through international cooperation and the development of minimum international standards. Against this background it should be noted that in the field of maritime law, private international situations have long been the rule and not the exception, for which reason maritime law is also an excellent example of how innovations have transformed the way private situations are approached legally.

Maritime employment provides an outstanding example of the new course that has been charted: freedom in ship registration—an area with a strong national component until the twentieth century as a result of the tight control exercised by flag states over their vessels—has turned maritime employment into a truly international activity.[4] Recent developments in technology and communications have enabled operators to choose the law applicable to their businesses through choosing a vessel's flag by registering ships in the country where their interest is based.

Indirect party autonomy allows forum shopping in search of the cheapest law, which is normally the law that reduces both safety on board and labour costs. Healthy competition between legal systems seems unlikely in this context,[5] and the direct result has in fact been that traditional maritime nations have established international and second registries with a view to competing with 'flags of convenience'—meaning countries that open their registries to any ship—to be able to preserve their merchant and fishing fleets in this way. These registries' main feature is that they allow non-residents in the country where the vessel is registered to be recruited as crew members, meaning that their employment contracts are not necessarily subject to the law of the flag. In addition to freedom in ship registration, this further liberalisation process has led to what is known as 'crews of convenience'.

The inevitable consequence of the internationalisation process of the labour market is the relocation of maritime employment, which is currently dependent on a number of factors, given that the law of the flag state can no longer take all workers aboard under its wing, whether protective or otherwise. Crew members can be recruited anywhere outside the flag state, given that open, second and international registries allow the hiring of staff that are not flag state residents. Shipowners make good use of this freedom of recruitment by using manning agencies based in what are now called 'labour-supplying states'. Needless to say, employers are becoming equally international as well, with the added complication that it is becoming increasingly difficult to locate them under the freedoms of establishment and provision of services.

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[3] See Mankowski (1995), pp. 1–2; Muir-Watt (2011).

[4] See Chaumette (2004), pp. 1223–1228.

[5] See Muir-Watt (2005), pp. 615–633. Further, Muir-Watt (2004).

The end result of these factors is deregulation, which also triggers costs, the most striking of which are derived from gaps in maritime safety, leading to substantial losses as a consequence of catastrophic maritime accidents. There are other costs, however, as the internationalisation processes affecting maritime employment also compromises fair competition in the shipping and fishing sectors. The processes leading to internationalisation and their consequences, as well as the reactions of the international community, are discussed in Chap. 2 of this book.

The first reaction takes the issue of flags of convenience as its starting point. There have been numerous attempts to define flags of convenience, but perhaps the most successful characterises them by their total inhibition of the maritime administration in charge of the vessel in question.[6] The flag state's lack of control is clearly indicative of the fact that priority is given to the pursuit of economic objectives over other values such as environmental and worker protection, given their low investment in technical measures and labour standards.

The costs of the accidents that inevitably occur as a result of weaker control measures affect not only flag states but also new players in the international arena in maritime issues, i.e., port states[7]: flags of convenience ignore their responsibilities, which in turn undermines flag state authority and legitimises port state intervention to inspect the conditions of the ships docked at its ports. The situation is roughly the following: environmental protection requires stricter shipbuilding standards,[8] whose implementation should not be avoided by resorting to a flag of convenience. Their enforcement therefore depends on different actors: while there are international agreements on the nature of these standards, whether they are complied with or not falls under the jurisdictions of both the flag state *and* the port state, meaning that port states have become cooperating parties in the control mechanisms, which primarily remain the responsibility of flag states.

Following the trend set in the area of environmental protection issues, the same rationale can be applied to ensuring the protection of workers at sea. At this point,

[6] The difficulties inherent in providing a definition for the concept of flags of convenience are revealed by discussions during the drafting process of Article 5 of the Geneva Convention on the High Seas of 28 April 1958, whose purpose was to establish what is not a flag of convenience, hence the connecting factors that ships must have with the states that grant them nationality. In the end, there was only agreement on one single undetermined factor: the existence of a genuine link between state and ship, which therefore allows states to exercise their jurisdiction over ships. See Meyers (1967), pp. 218–219; Skourtos (1990), pp. 5–11. In addition to the Convention, it is important to mention the report issued in 1970 by the Committee of Inquiry into Shipping, named after its chairman Lord Rochdale, on the following criteria, which may help identify flags of convenience: non-citizens are allowed to own and control vessels, and manpower may be recruited from among non-nationals; access to the registry is easy, and so is transfer from it; taxes on income from shipping are low or non-existent; the country does not have the power to institute national or international regulations over shipowners and does not need the shipping tonnage for its own purposes but is keen to earn the tonnage fees. More recently, see Alderton and Winchester (2002), pp. 35–43.

[7] See Chaumette (2001), pp. 70–83.

[8] See, among many others, Basedow and Wurmnest (2006), pp. 413–434; Basedow and Wurmnest (2008), pp. 278–295; Sobrino Heredia (2005), pp. 1331–1348.

reference must be made to the invaluable work of the two international institutions whose partnership has contributed to laying the foundations of international labour law: the International Maritime Organization (IMO) and the International Labour Organization (ILO). To outline the minimum standards for maritime employment as established by these bodies, the conventions that they have issued that are specifically related to work at sea need to be referred to.

The most important of those conventions are the ILO Maritime Labour Convention 2006 (hereafter MLC, 2006)[9] and the ILO Working in Fishing Convention 2007 (hereafter WFC 2007).[10] As their names indicate, both deal with living and working conditions on board. However, differences in the kind of economic activity and exploitation of the sea's resources carried out by shipping and fishing fleets have an important bearing on the applicable convention.[11] Both seek to institute minimum labour standards, and their compliance needs monitoring not only by the flag state but also by the port state.[12] The 2007 Convention is not as thorough as MLC, 2006, but it also contains provisions on port state control and on the role of labour-supplying countries in establishing and preserving suitable living and working conditions for fishermen.[13]

The background provided by the conventions dealing with international labour law—roughly sketched in the second chapter of this book—is not accepted in all states, nor does it cover all aspects of the employment relationship. It also suffers from serious enforcement problems, making the need to address international jurisdiction and conflict of law issues, the areas to which this book is mainly devoted, even more apparent. The peculiarities of maritime employment have determined the way these issues are approached from a private international law perspective, which is obliged to rely on public international law while tackling situations created and developed at *mare liberum*, namely, in non-sovereignty areas. The 1982 Convention on the Law of the Sea (UNCLOS)[14] was an attempt to reconcile the principle of freedom of the seas with the need for public regulation and private planning involved in every maritime venture by distinguishing among the different maritime areas and submitting whatever happened on the high seas to

[9] Maritime Labor Convention, 23 February 2006, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:91:0::NO:91:P91_INSTRUMENT_ID:312331:NO.

[10] ILO Convention No. 188, 14 June 2007 concerning work in the fishing sector, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312333:NO.

[11] Fish stocks are a limited natural resource, and the planning of their exploitation is the core concept handled by the sector with the participation of the FAO and its Fishing Committee. See Beslier (2010), pp. 47–55.

[12] See Rapport final, Commission paritaire maritime (29e session), Geneva, 22–26 January 2001, JMC/29/2001/14, p. 28. http://www.ilo.org/public/english/dialogue/sector/techmeet/jmc01/jmcfr.pdf. Accessed 2 December 2009.

[13] Port state jurisdiction also plays a key role in the fishing sector with a view to avoiding overexploitation of migratory species. See further Franckx (2010), pp. 57–79; Gautier (2010), pp. 81–96.

[14] UN Convention on the Law of the Sea, concluded at Montego Bay, 10 December 1982, 1833 UNTS 3.

the flag state's jurisdiction. Accordingly, the flag state could also have a say in living and working conditions aboard.

Nevertheless, the fact that flags of convenience neglect their responsibilities and crews of convenience are not subject to the law of the flag erodes the central role that this connecting factor has traditionally played in resolving key private international law issues. This flag state connection has undeniably lost part of its weight where identifying the closest jurisdiction to a seafarer's employment contract is concerned. In fact, the crisis of the flag as the key connecting factor in these matters affects not only individual employment relationships but also their collective dimension, an issue that is dealt with in the last chapter of the book. Aspects such as determining which state is responsible for social security matters affecting seafarers and deciding on current employment contracts in the event of the employer's insolvency are also covered.

The relative loss of the significance of the vessel's flag as the key connecting factor in maritime employment is less clear when issues of international jurisdiction are addressed. This sector of private international law aims to facilitate access to justice, and in so doing it ought to provide seafarers with several heads of jurisdiction so that they can find a close and thus affordable court. This seems particularly complex because of the high degree of internationalisation in maritime employment, where crew members may have been recruited in different countries, usually through manning agencies, while the shipowner's headquarters may be located in a different country and the work itself may well be carried out on board a ship that is sailing or fishing under a third country's flag.

Chapter 3 tackles international jurisdiction issues in maritime employment by focusing on the rules currently in force in the European Economic Area. Hence, Regulation No. 44/2001, of 22 December 2004 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter Brussels I Regulation),[15] and Regulation (EU) No. 1215/2012 (hereafter Brussels I *bis* Regulation),[16] reviewing Brussels I and which is fully applicable from 10 January 2015, are addressed. Together with the 2007 Lugano Convention,[17] they make up what will be referred to here as the Brussels–Lugano system. Based on the principle of worker protection, Section 5 of Chapter II is specifically devoted to individual employment contracts, including maritime employment.

Until the Brussels I *bis* Regulation has been fully applied, the scope of the Brussels I Regulation only included employers domiciled in a member state or those who have a branch, agency or establishment in a member state, and the same goes for the Lugano Convention in force. Where other cases are concerned, the Regulation and the Lugano Convention refer the issue to the respective national law, a reference that is maintained by the Brussels I *bis* Regulation despite covering

[15] OJ No. L 012, 16.1.2001.

[16] OJ No. L 351, 20.12.2012.

[17] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, held at Lugano on 30 October 2007 (OJ No. 147, 10.6.2009).

cases of employers domiciled in third states. However, national law is not systematically addressed in these pages, although some references will be made to it. Space is also devoted to the essential role played by the 1952 and 1999 Conventions on the arrest of ships,[18] both compatible with the Brussels–Lugano system and establishing a *forum arresti*.

Contrary to international jurisdiction matters, conflict of laws focuses on the establishment of a single applicable law to employment relationships during which attention is specifically paid to factors revealing a close connection between employment contract and a given jurisdiction. Choice of law is also allowed in these matters, but a number of correcting factors have been introduced on the basis that workers, as the weaker party to the contract, are entitled to some kind of protection measures.[19] In the absence of choice of law, the preferred connection is the habitual place of work, as laid down by Article 8 of Regulation (EC) No. 593/2008 of the European Parliament and of the European Council of 17 June 2008 on the law applicable to contractual obligations (hereafter Rome I),[20] and in other private international law provisions included in national law systems like those in China,[21] Japan,[22] Panama,[23] Tunisia,[24] Turkey,[25] South Korea[26] and Switzerland.[27] This connecting factor refers to the flag state of the vessel when the work is carried

[18] International Convention relating to the arrest of seagoing ships concluded in Brussels on 10 May 1952, 439 UNTS 193, and International Convention relating to the arrest of seagoing ships concluded in Geneva on 12 March 1999, UN/IMO Doc A/CONF.188/6.

[19] In some countries like Tunisia, Ukraine, China and Panama, a choice of law is not allowed on the ground of worker protection. See Articles 67 of the Tunisian Code on Private international law issued by Law 98-97, 27 November 1998; 52 of the Ukrainian Law of 23 June 2005, No. 2709-IV on Private international law; 43 of the Law of the People's Republic of China on the Application of Law for Foreign-related Civil Relationships of 28 October 2010, and 94 of the Panama Private International Law Code, issued by Law of 8 May 2014 (*Gaceta Oficial Digital* No 27530, 8.5.2014). The approach is different in Switzerland, where choice of law is allowed but is limited to the selection of one of the laws indicated by § 121 *Internationales Privatrechtsgesetz*, 18 December 1987 (AS 1988 1776). The EU and other countries mentioned in the text allow the choice of any law provided that it is more favourable to the worker than the law otherwise applicable, as discussed in Chap. 4.

[20] OJ No. L 177, 4.7.2008.

[21] Article 43 of the Law of the People's Republic of China on the Application of Law for Foreign-related Civil Relationships.

[22] Article 12 of the Japanese Act on the Application of Laws, enacted by law No. 87, 21 June 2006.

[23] Article 94 of the Panamanian Private International Law Code.

[24] Article 67 of the Tunisian Private International Law Code.

[25] Article 27 of the Turkish Act on Private international and procedural law No. 5718, 27 November 2007 (as translated by Wilske S and Esin I).

[26] Article 28 of the South Korean Act on Private International Law adopted in 2001, enacted by law No. 6465, 7 April 2001.

[27] § 121 *Internationales Privatrechtsgesetz*.

out at sea,[28] but, as already pointed out, this premise has been challenged by the existence of flags of convenience.

Chapter 4 examines this connecting factor along with others that have been considered more suitable for overcoming the shortfalls of the law of the flag state in an attempt to find the closest law to the maritime employment relationship. Chapter 4 therefore focuses on the Rome I Regulation and on the different paths it offers, in particular the escape clause. Other approaches that aim to abandon the vessel and, with her, the flag state as the habitual workplace often end up pursuing protectionist measures and do not result in the establishing of a closer law to maritime employment than the one provided by the flag. In line with the traditional unilateralist approach to employment matters,[29] these approaches seek to protect residents living within the court's jurisdiction and hence either ignore the employment relationship's collective dimension or resort to a more easily manipulated connecting factor. The flag, for its part, has the advantage that it allows for equal treatment for all those working on board.[30] It is important to note here that public international law has not rejected the flag as the main connecting factor, as evidenced by MLC, 2006, and WFC 2007. This does not mean that the flag state jurisdiction should not be disregarded in the event of lack of contact with the employment contract, and to this end, private international law has already devised a specific legal mechanism: the escape clause.

Against the background of outsourcing, trade union activity is vital for improving living and working conditions on board, and the International Transport Workers Federation (ITF) plays a crucial role in this area. The last chapter of this book deals with collective labour relations and aspects of private international law concerning issues such as collective bargaining, calls for strike action and their consequences and those of other types of industrial action, and employee participation in the running of companies.

In contrast with the internationalisation of maritime employment, the legal framework of collective bargaining is strictly local, and each state establishes the conditions under which this may be undertaken. The legal reality is thus at odds with the fact that the purpose of any collective agreement is that it is binding on all those working on the same ship, even if their employment contracts are subject to different laws. This divergence triggers two types of problems; the first concerns the collective agreement itself and establishing the law that decides on its very existence, validity and scope of application, while the second affects the application of

[28] Article 52 of the Ukrainian Law on Private International Law specifically mentions the application of the law of the country of the flag's vessel where the employee works by default of choice of law or a law more closely related. However, Article 54 thereof provides for a number of unilateral rules that almost displace Article 52.

[29] With respect to the French market, see Audit (1986), pp. 33–40.

[30] And The application of the law of the flag can respond to protective purposes as well. A good example of this is provided by STSJ Andalucía, 10.12.1993, with comments by Pérez Martín (1996), pp. 386–389, although applying Spanish labour law as *loi de aplication immediate* to the employment relationships between a Spanish shipowner and Moroccan workers providing services on board a Spanish ship in Moroccan waters; contracts had been entered into in Morocco.

the collective agreement, namely, whether or not it actually modifies individual employment relationships, an issue that is governed by the law applicable to the latter, the *lex laboris*. Should the employment contracts aboard be subject to different laws, the collective agreement would have to satisfy each one's test to be applicable to particular employment relationships, and it is from this perspective that the relevance of the collective dimension in determining the law applicable to the employment contract is best appreciated.

Applying the *lex loci actus* is the best option when it comes to deciding on the right to strike and take industrial action, on the ground that these are fundamental rights. When the workers exercising these rights are the crew of a ship docked at a foreign port, the problem is deciding which law that is. Further conflict of law issues emerge with respect to the consequences of collective action, particularly with respect to tort liability arising from it. As a consequence of Court of Justice of the European Union (hereafter CJEU or CJ) case law, this issue has been the subject of legislative intervention, and Article 9 of Regulation (EC) No. 864/2007 of the European Parliament and of the European Council of 11 July 2007 on the law applicable to non-contractual obligations (hereafter Rome II)[31] and the respective case law are analysed in Chap. 5.

The last sections of Chap. 5 discuss the topic of seafarers' rights to information, consultation and participation in company decision-making bodies, an area that has undergone a process of harmonisation, thanks to the European Union. However, seafarers are still excluded from the scope of most directives and regulations in this area for fear of encouraging the flight of merchant and fishing fleets to less demanding flags, although this exclusion is currently under review. In any case, it is still necessary to determine which law governs these rights, firstly to improve living and working conditions in the workplace—a ship in these cases—and secondly to contribute to the smooth running of the shipping or fishing company.

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Chapter 2
The Internationalisation of Maritime Employment: Factors and Remedies

2.1 Introduction

The provision of labour at sea is deemed to be 'special' in most domestic laws due to the specific features of the environment in which it takes place. Working at sea usually involves prolonged absences from one's own home, turning vessels—normally sailing away from sovereign lands and, therefore, jurisdictions—into places for both work and leisure. Against this background, specific working and living conditions are required on board, while many of the requisite training and professional qualifications are not shared with other professions.

The employment relationship is special from the private international law perspective as well because one of its basic assumptions—its provision in an area of sovereignty—usually fails: a vessel may sail through different areas, some subject to one single jurisdiction, some not. This shortcoming has traditionally been overcome by resorting to public international law, which places the responsibility for all matters relating to labour relations at sea in the hands of the flag state. As explained in the following section, this was normally justified on the ground of the close relationship between the vessel and the state whose flag it was flying since the shipowner and crew were usually nationals of and residents in the flag state, which was usually the country where the vessel was built.

However, global socio-economic trends have seriously weakened the links between any one state and the ships flying its flag. In general, international conventions submit all matters related to a ship to the jurisdiction of the flag state, including living and working conditions on board. The latter did not pose problems in a context where crew members were recruited in the flag state, but the current state of affairs makes this assumption debatable, and the third and four sections of this chapter will address the processes leading to the internationalisation of maritime employment. This is mainly caused by the freedom in ship registration granted by some states, with the consequence that neither shipowners nor crew members have to be nationals of the vessel's flag state, nor do they need to be

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domiciled in or operate the ship from there. Such states have been named 'flags of convenience', as the shipowners benefit from low taxes and labour costs as well as a more relaxed approach to technical inspections.

In an attempt to stop the flight of their shipping and fishing fleets to flags of convenience, traditional maritime nations established second and international registries that also grant tax benefits and allow crew members to be hired in countries other than the flag state. The outcome is thus the internationalisation of crews, and a new issue has arisen, that of crews of convenience. The globalisation process has also been driven by the freedoms of establishment and the provision of services, which facilitate new ways of business cooperation and make it difficult to identify the shipowner and employer of a multinational crew.[1] From the private international law perspective, all these factors reveal the minor role nowadays played by the flag state as the key connection in determining the law applicable to an employment relationship in the shipping and fishing industries.[2] Nevertheless, the same factors make it very difficult to determine a closer law to maritime employment than the flag jurisdiction, for which reason its empowerment is sought at international level.

Flags and crews of convenience are manifestations of aggressive international competition, eager to reduce the costs of maritime ventures and able to operate without legal constraints, given the lack of a single state's power to level the playing field. The point is that unfair competition threatens maritime safety in general and worsens the living and working conditions of seafarers and fishermen. The drift towards deregulation as encouraged by flags of convenience has therefore been constrained precisely because of its high costs, such as those arising from maritime accidents. Efforts have meanwhile been made to improve labour standards, an area in which the work of the International Maritime Organization (IMO) and the International Labour Organization (ILO) has been particularly salient, as they have become the forum in which a level playing field in terms of competition is being fought for.

The ILO in particular has produced numerous international conventions that have become the core of international labour law. The last section of this chapter is devoted to these institutions' work, and in particular to an examination of the Maritime Labour Convention 2006 (MLC, 2006) and the Work in Fishing Convention 2007 (WFC 2007). Both are key conventions as they codify the great majority of previous legal instruments in these matters while reinforcing compliance with minimum labour standards, mainly by placing clear-cut responsibilities on flag states and also on port states and labour-supplying countries. It should be noted that their scope of application is not restricted to the ratifying states since ships flying third state flags are also under the obligation to meet the standards established

[1] See Silos et al. (2012), pp. 845–858, including an empirical study on crew members' countries of origin and their salaries, as well as records of working hours.

[2] See this legal evolution in Fitzpatrick and Anderson (2005), pp. 17–35, and with regard to France, Chaumette (2004), pp. 1223–1228.

by the conventions: in other words, the role of port state control is reinforced in both conventions, in particular MLC, 2006, and all ships arriving at the port of a contracting state must comply with the conventions' minimum labour standards, subject to immobilisation.

In fact, the introduction of minimum labour standards has succeeded in levelling the playing field to a certain degree and in stopping the race to the bottom between competing labour laws in terms of worker protection. In this regard, worker protection could now be said to be at a point somewhere between the very high and the very low labour standards found in different countries.[3] For the purposes of this study, the ILO Conventions reveal a change of perspective; international fora no longer seem to require a genuine link between a flag state and a ship flying its flag to ensure that there is a socio-economic link between them to justify the flag state's legal intervention in the vessels' affairs but look for ways to make the flag state fulfil its international obligations effectively. With this goal in mind, essential labour standards are being harmonised, and their implementation is entrusted to the flag state, given that this is now the only state with jurisdiction on board according to public international law. However, in cases where flag states do not fulfil their obligations, port states have to take the lead in ensuring that shipowners comply with minimum standards. Indeed, port state monitoring reveals that there is a crisis in terms of the flag being the factor that shows the closest jurisdiction in labour and employment matters. Nevertheless, both MLC, 2006, and WFC 2007 make it clear that the flag state bears the main international responsibility in these matters, and the ground is prepared for rebuilding the flag jurisdiction as the best law to rule on employment matters.

2.2 The Principle of Freedom of the Seas, a Ship's Nationality and the Law Governing Labour and Employment Matters on Board

The principle of freedom of the seas is more than just a metaphor to describe the fact that the seas are theoretically an open space without a set of established rules, which are now under the umbrella of various international conventions. The earliest attempts to tame the seas include state appropriation of vessels registered in or otherwise connected with their own territory, meaning that a vessel had taken on the state's nationality and the obligation to fly its flag. In fact, the introduction of this international obligation runs parallel to the consolidation of the principle of freedom of the seas and oceans in public international law, as this goes hand in hand with international rules that guarantee free circulation and the maintaining of public order at sea—whether it involves decisions about certain events, such as births, deaths or crimes; regulating matters pertaining to the ship itself; or determining

[3] See DeSombre (2006), pp. 11–54.

behaviour and responsibilities arising from the very fact of being at sea, particularly *vis-à-vis* third parties. The flag state, therefore, has certain rights over 'its' vessels in relation to other states—both on the high seas and in its territorial or inland waters—but it also has certain duties, and it is the combination of these rights and duties that make up the concept of nationality.[4]

According to Article 91(1) of the United Nations Convention on the Law of the Sea (UNCLOS) issued at Montego Bay on 10 December 1982, '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'. Articles 94 and 217 of UNCLOS describe in detail the different duties that fall within the sphere of state control with respect to ships flying its flag. Prior to this Convention, Articles 5 and 16 of the Geneva Convention on the High Seas of 29 April 1958 already conferred jurisdiction over matters on board to the flag state.[5]

The nature of the relationship between a state and a vessel over which it has jurisdiction has been widely discussed since the ship is just a movable asset. The initial approach was that the vessel was subject to national sovereignty because it was part of the territory of the state to which it belonged.[6] This fiction soon became inconsistent in the face of the principle of freedom of the seas, which establishes that it is not necessary to obtain permission to fly over a ship or sail under it, for example, whereas such permission is necessary when dealing with state territory.[7] The subsequent approach to justifying flag jurisdiction mirrored the relationship between a state and its nationals, highlighting the idea that the same bond is applicable to the relationship between a state and a vessel flying its flag. However, citizens and ships have different rights and duties as holders of a nationality, and so this explanation of flag jurisdiction also became useless and further arguments were put forward to support national sovereignty on vessels. The first of these took into account a shipowner's nationality and looked at its correlation with the nationality of the vessel itself. This correlation is rare nowadays, given that the success of open registries specifically relies on the relaxing of the requirement for shipowners to be nationals of the states their vessel are registered with; therefore, state sovereignty over shipowners cannot be extended to their ships.[8] The second argument departed from the English practice of conferring the status of a legal person on a ship.[9]

[4] See Mansell (2009), pp. 15–23; Meyers (1967), pp. 24–30.

[5] 450 UNTS 11.

[6] IJC 7.9.1927, *S.S. Lotus Case*, C.P.J. Sér.A 10 (1927), and Skourtos (1990), pp. 116–123.

[7] Further see Bonassies (1969), pp. 514–515; Dendias (1961), pp. 179–197; Diena (1935), pp. 415–423; Mankowski (1995), pp. 472–474; Núñez-Müller (1994), pp. 82–85; Wolfrum (1990), p. 126.

[8] See Basedow (1990), p. 76, which mentions that the correlation between shipowners and ship nationalities faded after the second half of the twentieth century. Against this correlation, see Wolfrum (1990), p. 126, in the framework of a colloquium in Hamburg in 1989. Mankowski (1995), pp. 475–477; Núñez-Müller (1994), pp. 85–86. On the functions of nationality as a legal link, see Braekhus (1979), pp. 278–279.

[9] See, among others, Howard (1990), pp. 319–329.

However, this treatment was only granted for the purpose of taking legal action against the ship, i.e., placing the vessel in the position of a defendant, or rather deeming it an object that might be subject to attachment, so the fiction was only useful to sustain admiralty jurisdiction *in rem*.

All in all, the conclusion to be drawn is that a ship's nationality is a *sui generis* construction.[10] While the inappropriateness of the term *nationality* to describe the link between flag state and ship has already been remarked on, it is also acknowledged that the term has played the key role of supporting the connection between a ship and a particular state.[11] In any event, this bond between a state and a vessel flying its flag—supported by international conventions as well as international customary law—remains as a counterbalance to the principle of freedom of the seas.[12]

The fact that jurisdiction over a ship is 'allocated' to a specific state justifies the application of the state's own national laws to the vessel, as well as the fact that jurisdiction over matters related to it be granted to the master and officers of the vessel as legitimate representatives of the power on board.[13] Prior to the proliferation of open registries, such power could only be exercised by flag state nationals, which is to say that the captain and the officers had to be holders of the nationality in question.[14] In fact, this rule is only meaningful in the framework of the current structure of international labour markets, whereas in a less globalised world crew members typically shared their vessel's nationality, which in turn was also the shipowner's nationality as a rule. This situation is only currently maintained in closed registries, which still require strong connections between vessel and flag state, sometimes including the requirement for the ship to be built on the flag state's own shores.[15]

[10] See Mankowski (1995), pp. 477–478; Núñez-Müller (1994), pp. 86–87.

[11] 'Allocation' appears to be a better term than 'nationality' to Meyers (1967), p. 1. Further, see Skourtos (1990), pp. 20–23 and 108–137, who pursues the idea that a ship's nationality is equal to a citizen's nationality with a view to building a genuine link between a ship and the flag state; because the two nationalities are radically different, this attempt failed. Kamto (2003), pp. 343–373, considers a ship's nationality to be metaphorical and that the only thing it has in common with a citizen's nationality is that the flag state has exclusive jurisdiction over them both.

[12] Highlighting the role of this principle in the meaning and content of flag jurisdiction, see Bonassies (1969), pp. 515–519; Roucounas (2002), pp. 196–198; Wolfrum (1990), p. 125, who also underlines the *sui generis* nature of the link (p. 126).

[13] See Article 94(2)(b) UNCLOS.

[14] This prerequisite was generally required from the whole crew for military reasons. See Chaumette (2009), pp. 471–472, and Zanobetti Pagnetti (2008), pp. 5–15, with historical and comparative references. Currently the context is quite different, and the fact that crew members may come from many and varied countries adds a highly important risk factor that stems from cultural differences as well as from language misunderstandings. See Couper (1999), pp. 23–26.

[15] On the history and reasons for ship registration, see Ademuni-Odeke (1997), pp. 631–637.

In contrast, a ship without a flag is a pirate ship and is not subject to any law or jurisdiction. By the same token, any vessel can only fly one flag,[16] and the respective state takes responsibility for its actions. Against this background, flag states' interest in knowing which ships are flying their flags—for which registration is generally mandatory—becomes obvious. For similar reasons, flag states also have an interest in specifying seafarers' and fishermen's training and professional qualifications and overseeing crew members' employment contracts. In addition to determining working and living conditions on board a ship, the flag state intervenes very early on in sailors' training activities for military purposes. This practice shows that it is the law of the flag that holds sway on board, including in aspects such as living and working conditions,[17] except for in specific events with implications going beyond the ship itself, occurring in waters subject to the jurisdiction of a coastal state or involving more than one ship.[18]

The fact that a ship is subject to the jurisdiction of the flag state determines not only which law governs on board but also the need to accept international responsibilities regarding the ship, meaning that it has to comply with both international and national laws as passed by the state in question, while the vessel benefits from the state's protection, including on issues such as repatriation of the crew irrespective of their nationality.[19]

The principle of freedom of the seas is not an absolute but a relative principle: states have specific rights and duties in relation to specific areas. According to Article 2 of UNCLOS, coastal state territory includes territorial waters within what is known as the contiguous zone. State sovereignty here is limited, however, since it can only be exercised in accordance with public international law provisions, which impose the right of innocent passage, for example.[20] In this regard, the coastal state is not allowed to use the fact that a ship is sailing through its territorial waters to exercise civil jurisdiction over the people on board and the ship itself by adopting precautionary or arrest measures, 'save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State'.[21]

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[16] It is an international principle that only the state of registry is entitled to discuss the validity of its entries [see *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953)], as acknowledged by Article 6 of the Geneva Convention on the High Seas, 29 April 1958.

[17] Clarifications of this principle can be found in Article 10 of the Geneva Convention on the High Seas: '1. Each 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; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. 2. Each State shall issue to ships to which it has granted the right to fly its flag documents to that effect'. See Drobnig (1990), pp. 40–44; Wolfrum (1990), p. 129.

[18] See Meyers (1967), pp. 77–81.

[19] See Fernández Rozas (1985), pp. 11–21; Meyers (1967), pp. 106–107.

[20] See Wolfrum (1990), pp. 127–128.

[21] See Article 28 UNCLOS.

Public international law allocates other areas beyond the coastline to coastal states: the exclusive economic zone and the continental shelf. In both areas, sovereignty is much more limited than in the territorial sea. Within the exclusive economic zone, jurisdiction is limited to the construction and use of artificial islands and other facilities and structures, marine scientific research, the protection and preservation of the marine environment and other rights and duties provided for in Article 56 of UNCLOS. State sovereignty over the continental shelf is used only for the purposes of exploring and exploiting natural resources in accordance with Article 77 of UNCLOS. Coastal states' jurisdiction specifically covers offshore oil rigs as well as other facilities for the exploiting of mineral resources. The exploiting of fish stocks is more complex due to sustainability issues and is subject to fishing quotas. With regard to the ship's internal affairs, however, the flag jurisdiction is applicable in accordance with Article 94 of UNCLOS.

2.3 The Internationalisation of Maritime Employment: Developments in Ship Registration Systems

2.3.1 The Fight Against the Flight of Shipping and Fishing Fleets to Flags of Convenience

After the decolonisation period and the Second World War,[22] it became clear that the fragile consensus prevailing on the conditions required to fly a state's flag had been breached.[23] The main requirement was that the vessel and owner had the same nationality, which, as previously mentioned, was typically shared with the crew. Nevertheless, this coincidence disappeared with these historical events, as they encouraged the opening of registries in developing countries. These states viewed ship registration as a business opportunity, and this was the beginning of the boom of flags of convenience. The new system provided shipowners not only with fiscal and social advantages but also with further incentives stemming from the lack of control over registered vessels in terms of compliance with technical and labour standards. It is worth noting that flags of convenience may also threaten transparency with regard to ships' operators; indeed, some open registries ensure shipowner anonymity as a further advantage of registering in their countries.[24]

[22] On the origins of flags of convenience, originally called 'of necessity' by shipowners, see Boczek (1962), pp. 1–63; Metaxas (1985), pp. 1–10; Northrup and Rowan (1983), pp. 31–41.

[23] In fact, the 'flag of convenience' concept can be traced back several centuries and is characterised by the mismatch between a shipowner's nationality and that of the ship. See for all Goldie (1963), pp. 224–226.

[24] Mansell (2009), pp. 109–110, refers to these as 'pseudo-national' states because the registry is not located on their territory and its powers have been entrusted to a private entity, including the exercise of its jurisdiction over the vessel, which may be exercised by entities not admitted by the

The heyday of the use of flags of convenience encouraged the flight of merchant and fishing fleets from traditional maritime countries to other more tolerant nations. This had immediate consequences on crews, not just because such countries enjoyed far more flexible social and labour standards but also because jobs were moving there as well. Given the adverse effects of forum shopping on living and working conditions on board, trade unions[25] and major international organisations began to try to pierce the veil and bring the flags of convenience system to an end[26] by demanding a genuine link between a ship's flag and its owner's nationality. This campaign reached a deadlock, however, as public international law allowed every country to determine the conditions required for a ship to acquire the country's nationality. The only way this freedom could be restricted would be through an international convention, and for this reason discussions on the topic shifted to the diplomatic arena.

The 'genuine link' concept was first formulated in Article 5 of the 1958 Geneva Convention of the High Seas. This provision, however, only served to strengthen the flag of convenience system since it implied that nations were free to grant their flags to any vessel willing to register in their territory.[27] Subsequent attempts to identify a genuine link between flag states and vessels have not had significant results,[28] a noteworthy example being the United Nations Convention on Conditions for Registration of Ships adopted on 6 February 1986,[29] which has never in

International Association of Classification Societies. These states do not oppose the establishment of shell companies on their territory and do not demand transparency on ownership and property control over the ship. Further, see Coles (2002) studying the Bahamas, Barbados, Bermuda, Cambodia, the Cayman Islands, Cyprus, Gibraltar, Hong Kong, the Isle of Man, Jamaica, Liberia, Luxemburg, Madeira, Malta, the Marshall Islands, Panama, San Vicente and Grenadine, the United Kingdom and Vanuatu.

[25] For details of trade union campaigns against flags of convenience, see Northrup and Rowan (1983), pp. 43–115; Northrup and Scrase (1996), 369–423.

[26] For more details on the ILO's efforts to reach a consensus over setting up a 'genuine link', see Argiroffo (1974), pp. 437–453.

[27] See further Boczek (1962), pp. 91–292, commenting on International Court of Justice decision, 8.6.1960, *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, whereby states deemed to be flags of convenience acquired their right to be on the Committee. Similarly, Meyers (1967), pp. 198–299; Skourtos (1990), pp. 242–275; Wolfrum (1990), pp. 121–122 and 130–136. For a defence of the classification of flags of convenience by resorting to conflicts of laws, see Goldie (1963), pp. 261–283.

[28] Proof of such difficulties is the bad praxis of trade unions in the ITF as described by Northrup and Rowan (1983), pp. 133–135, consisting of boycotting ships for the only reason that they were sailing under flags of convenience, regardless of the fact that working conditions on board, including salaries, may have been good. In contrast, numerous ships with substandard working conditions on board were not detained just because their flags were not classified as flags of convenience (pp. 133–135). In fact, the international discussion on the identifying of a 'genuine link' underlined the variety of geo-strategic approaches on the part of a number of the states on the flags of convenience list, claiming that others are playing with economic colonialism to stop their development. See Ademuni-Odeke (1988), p. 65 and 125–128.

[29] Available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-7&chapter=12&lang=en.

fact come into effect. This Convention defined the concept of 'genuine link' in terms of two fundamental pillars: the presence of a competent and appropriate national maritime administration with authority to monitor the ship's safety and the implementing of international rules and standards on board, on one hand,[30] and, on the other, the development of economic links with the state, in particular national participation in ownership of the vessel, the composition of crews and management of the companies owning the vessels,[31] as well as ensuring the easy identification of owners and operators of vessels,[32] in order to claim liability if necessary. However, these links were labelled inaccurate, as each state could interpret them differently.[33] In fact, the best way to monitor the veracity of 'genuine links' would have been to introduce a sanctions regime resembling the one posited during the negotiation of the 1958 Convention. At the time, non-recognition of the nationality granted to a vessel was proposed should close links be lacking; as this proposal was ultimately not included in the Convention, each nation is free to grant its flag to a ship under whichever conditions it deems appropriate.[34]

In addition to this, developments in company law have contributed to problems in reaching an agreement on what a genuine link is. Nowadays, freedom of establishment allows dissociation between company and shareholder nationality; accordingly, a shipping or fishing company can be set up in the country where the ship is registered, but not the beneficial ownership. The proliferation of corporate groups further complicates the situation.

Against this background, the problem of how to establish a genuine link between a state and the ships flying its flag is still being discussed in international fora. Particularly salient are the numerous UN General Assembly resolutions inviting IMO and other relevant UN agencies to rethink the issue of how to make flag states take up their responsibility with respect to vessels—including fishing vessels—registered in their territory.[35] In fact, the IMO has consistently explored the role of the 'genuine link' in national practice as well as the consequences that states not meeting their international obligations should bring.[36] In this regard, the focus of

[30] Article 5 of the UN Convention on Conditions for Registration of Ships.

[31] Articles 7 to 9 of the UN Convention on Conditions for Registration of Ships.

[32] Article 6 of the UN Convention on Conditions for Registration of Ships.

[33] See Ademuni-Odeke (1988) with regard to the 1982 Convention (pp. 69–70), also applicable to the 1986 Convention (pp. 112–122), drawing attention to the fact that flag state control does not necessarily involve economic control (p. 72); Chaumette (2001), p. 58; Couper (1999), pp. 155–157; Leanza (1984), p. 34.

[34] See Boczek (1962), pp. 243–286. The sentence left out during the negotiation of the Convention was as follows: 'Nevertheless, for purposes of recognition of the national character of the ship by other states, there must exist a genuine link between the state and the ship'.

[35] See, for example, the UN Resolution approved by the General Assembly on 11 December 2012, Doc. A/RES/67/79.

[36] See Doc. A/61/160, 17.7.2006, Item 67(a), Letter dated 23 June 2006 from the IMO Secretary-General addressed to the UN Secretary-General regarding the Report of the Ad Hoc Consultative Meeting of senior representatives of international organisations on the 'genuine link'. See further Bellayer-Roille (2003), pp. 176–179.

international concern has now shifted from finding a conventional definition of what a genuine link is to ensuring that flag states effectively exercise the jurisdiction conventionally vested upon them over ships flying their flag. This change of approach has been confirmed by international efforts aimed at providing real content to flag state jurisdiction by issuing international conventions complementing UNCLOS and establishing specific obligations to be complied with by flag states. In this regard, the ITF classification of flags of convenience seems to have become obsolete, and hence the organisation has announced changes in its strategy.[37]

Finally, it must be mentioned that the above discussion does not question a ship's flag as the connecting factor when it comes to governing the ship's affairs,[38] as international practice has not provided for alternatives to flag state jurisdiction. Within the framework of EU law, it is worth commenting on the CJEU's decision of 24 November 1992 involving a fishing ship owned by a Danish company with a Danish crew but flying a Panamanian flag that was chosen to circumvent restrictive fishing measures adopted by the then European Community. The Court in Luxembourg claimed that there was no reason to refuse to recognise the nationality of a ship granted by a state in the exercise of powers conferred on it by public international law.[39] This argument is consistent with its ruling on British laws that required any shipowner registering a fishing vessel in the United Kingdom to hold British nationality; although the CJ answers in accordance with the Community prohibition on discrimination on grounds of nationality, it also concedes that 'as Community law stands at present, it is for the Member states to determine, in accordance with the general rules of international law, the conditions which must be fulfilled in order for a vessel to be registered in their registers and granted the right to fly their flag (. . .)'.[40]

2.3.2 *Capitulation: International Registries and Second Registries*

These hurdles to establishing a genuine link between states and ships flying their flag, along with forum shopping in maritime law, have led to many countries opening second registries and international registries as a way to curb the decline of their merchant and fishing fleets in an environment of steady migration towards

[37] 'ITF Softens FOC Stance', *Fairplay Daily News*, 24.7.2007. Statement by McConnell (2009), p. 355.

[38] See Mankowski (1995), pp. 459–528; Mankowski (1989), pp. 487–525.

[39] CJ 24.11.1992, Case C-286/90, *Anklagemyndigheden v. Peter Michael Poulsen, Diva Navigation Corp.*, spec. paras. 12–16, on the interpretation of Article 6(1)(b) of Regulation (CEE) No. 3094/86 of the Council, 7 October of 1986, laying down certain technical measures for the conservation of fish stocks (OJ L 207, 29.7.1987).

[40] CJ 25.7.1991, Case C-221/89, *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and others*, paras. 13–17; 4.10.1991, Case C-246/89, *EU Commission v. the United Kingdom of Great Britain and North Ireland*. See Vialard (1995), pp. 39–50.

flags of convenience.[41] This is the case with Spain, which has a second registry in the Canary Islands;[42] Portugal, which has a registry in Madeira;[43] and Denmark,[44] Luxembourg,[45] Norway and Germany with their respective international registries,[46] an example that has also been followed by France.[47] Even the European Union itself considered the possibility of including a second Community registry—EUROS[48]—but the proposal has not come to fruition.

Registering ships in these entities provides fiscal benefits, as well as social advantages, since the registries enjoy a special status affecting employees' working conditions, differentiating between workers who are resident or domiciled in the country where the register is held and those whose residence or nationality is elsewhere.[49] This distinction opens the door to the possibility of applying different laws to workers aboard, in particular in terms of salaries, to such an extent that crews working on the same vessel may receive different salaries for the same work.[50] This is not new, and the ITF has defined the practice as 'crews of convenience'.[51] Manning agencies, strategically located in countries with low wages, have encouraged the growth in the number of crews of convenience, thus decisively contributing to the internationalisation of maritime employment.

The establishment of these registries and the legal differences between workers aboard that they allow have been constitutionally challenged, although unsuccess-

[41] On this transfer, see, among many others, Metaxas (1985), pp. 1–16 and 52–61.

[42] See Additional Provision No. 15 Law 27/1992, 24.11.1992, of Spain's National Port and Merchant Fleet Authority [BOE No. 283, 25.11.1992), modified by Law 62/1997, 26.12.1997 (BOE No. 312, 30.12.1997), and Law 46/2003, 26.11.2003 (BOE No. 284, 27.11.2003)], and comments by Fotinopoulou Basurko (2008), pp. 58–61. The latest amendment to this law was introduced by Legislative Royal Decree 2/2011, 5 September, sanctioning the Merged Text of the Law of State Ports and the Merchant Fleet, further TRLPEMM (*Texto Refundido de la Ley de Puertos del Estado y de la Marina Mercante*) (BOE No. 253, 20.10.2011). This last amendment changed the number of the last disposition from 15 to 16.

[43] Decree Law No. 96/89, 28.3.1989 establishing the International Maritime Registry of Madeira.

[44] Act on the Danish International Register of Shipping Act, No. 408, 1.7.1988.

[45] Act of 9 November of 1990 to establish a Luxembourg Maritime Register, amended by the Act of 14 April 1992 and the Act of 17 June 1994.

[46] Norwegian *Dansk Internationalt Skibsregister* established by Law No. 408, 1.7.1988; and German *Gesetz zur Einführung eines zusätzlichen Registers für Seeschiffe unter der Bundesflagge im internationalen Verkehr (Internationales Seeschiffahrtsregister –ISR*), 23.3.1989.

[47] See Law No. 2005-412, 3.5.2005, *relative à la création du registre internacional français* (JO No. 103, 4.5.2005), and analysis by Chaumette (2005a), pp. 467–500.

[48] See Proposal for a Council Regulation establishing a Community ship register and providing for the flying of the Community flag by sea-going vessels [COM(89) 266 final].

[49] See German § 21 IV 1 *FlaggRG*, and French Article 12 of the *Loi* No. 2005-412.

[50] Chaumette (2001), p. 57, understands that we are confronting the 'sinking of the law of the flag' in favour of individualism on board.

[51] See Northrup and Rowan (1983), pp. 41–42.

fully. Both the German *Bundesverfassungsgericht*[52] and the French *Conseil Constitutionel*[53] concluded that both international registries were compatible with their respective constitutions. The French Constitutional Court was specifically questioned about the breaching of the 'equal work for equal pay' principle, as emphasised in French law—just as it is in the laws of many other countries setting up second registries—inasmuch as seafarers not domiciled in France may not be covered by the flag state's labour legislation and thus be submitted to working conditions, including wages, that differ from those applicable to seafarers domiciled in France. The Court justified the distinction introduced by the French law establishing an international registry on the ground that a vessel was not part of the territory of the state that lends it nationality. As Recital 33 of the French ruling states, 'qu'il résulte des règles actuelles du droit de la mer qu'un navire battant pavillon français ne peut être regardé comme constituant une portion du territoire français: que, dès lors, les navigants résidant hors de France qui sont employés à bord d'un navire immatriculé au registre international français ne peuvent se prévaloir de toutes les règles liées à l'application territoriale du droit français'.[54] This decision has been understood to weaken the idea of the flag as a crucial factor in determining which law is applicable to individual employment contracts.[55] However, the Court simply emphasises a differential factor affecting workers—the fact that they come from different countries—to justify the exception to the principle of equality at work, at least with regard to salaries. The law that should govern employment matters is a different issue, in which the flag may still play a role, and is determined in any event by Article 8 of Rome I Regulation in the European area of justice.

The German international register was also questioned before to the CJEU, not because of infringing the principle of 'equal work for equal pay' for EU and non-EU workers but because the tax regime and social security benefits available to ships registered there may well be deemed as some kind of state aid.[56] The ruling was in Germany's favour since, according to the Court, the rule granting these benefits is part of Germany's private international law and not an instance of state aid.

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[52] See BVerfG 10.1.1995, *NZV* 1995, p. 272. Previous to this judgement and assessing the constitutionality of the German law, see Kühl (1989), pp. 91–92. The main issue involved freedom of association, which the German Constitutional Court did not consider to be affected by the law, since foreign sailors are allowed to join German trade unions (BVerfG 10.1.1995, NZV 1995, p. 272). That was already the ITF's view in 1961 as explained in Northrup and Rowan (1983), p. 53. See also Basedow (1990), pp. 88–90; Hauschka and Henssler (1988), pp. 597–601; Wimmer (1995), pp. 250–256. However, insisting that this law does not comply with the German Constitution because this freedom of association appears to be formal only and not substantive, see Geffken (1989), pp. 88–91.

[53] See Conseil Constitutionnel, 2005-514 DC, 28.4.2005, *DMF*, 2005, pp. 514–528.

[54] Already concluded by the Permanent Court of International Justice in the Lothus case, 7 September 1927 [1927] P.C.I.J., Ser. A, No. 10.

[55] OJ No. L 18, 21.1.1997. See Chaumette (2006), pp. 276–282, and previous to the establishment of the French international registry, see Drapier (2008), pp. 3–14.

[56] CJ 17.3.1993, Cases C-72/91, C-73/91, *Sloman Neptun Schiffahrts AG*.

Nevertheless, immediately afterwards the EU adopted the 'Community Guidelines on State aid to maritime transport',[57] amended by Commission Communication C (2004) 43,[58] supporting shipping companies' exemption from taxation and social security contributions in order to increase their ability to compete internationally.

These guidelines have achieved a relative degree of success in curbing the flight towards flags of convenience by extending flat rate tonnage taxation systems (tonnage tax) and other tax benefits, such as reduced social security contributions and a reduced income tax rate for EU seafarers employed on board ships registered in a member state. These benefits are not limited to member states' national registries since international, second and open registries can equally enjoy these benefits.[59] It is, however, imperative to prove that there is a link with an EU flag by providing 'details of vessels owned and operated under Community registers, Community nationals employed on ships and in land-based activities and investments in fixed assets',[60] in addition to the prerequisite that companies entitled to this benefit must pay corporate tax in an EU member state. Companies interested in benefitting from this kind of aid have to demonstrate that they comply with international and EU safety standards as well as with rules regulating working conditions on board. The benefits are not confined to shipping companies and may include applications from businesses providing different types of services to shipowners, including crew recruitment and placement services as well as training and management.[61] Despite the fact that seafarers' wages and social protection on board have become more flexible, this helps maintain minimum labour standards and avoids a race to the bottom in this area.

2.4 The Internationalisation of Maritime Employment: Parties to the Maritime Employment Relationship

2.4.1 Introduction

This section deals primarily with the parties to the employment contract but also pays attention to the impact of business cooperation on the employment relationship. As previously noted, the immediate consequence of the internationalisation of

[57] OJ No. C-205, 5.7.1997.

[58] OJ No. C 13, 17.1.2004.

[59] The Annex to this Communication includes the definition of member state registries, not including those in territories in which EU law is not applicable, such as the Kerguelen Islands, the Dutch Antilles, the Isle of Man, Bermuda and the Cayman Islands.

[60] See the Commission's Communication C(2004) 43, p. 6. In some cases, the application of the tonnage tax to fleets consisting of vessels flying non-EU flags is also accepted, on an undertaking from the companies benefitting to increase, or at least maintain, under the flag of a member state, the share of tonnage that they will operate under the flag.

[61] See Communication from the Commission providing guidance on State aid to ship management companies (Text with EEA relevance) 2009/C 132/06 (OJ No. C 132, 11.6.2009).

maritime employment has been the estrangement of the parties to an employment contract from the flag state, as crew members and the shipowner may well come from different countries and their nationalities may not match the vessel's flag. Business cooperation plays a major role in the multinational origins of employers and employees in the shipping and fishing sectors, unfortunately leading to situations where it is sometimes difficult to identify the employers and where they are located.

In addition to the concepts of maritime employee and employer, the section also covers the role of manning agencies in providing seafarer recruitment and placement services to maritime employers. A manning agency may also be part of a corporate group and carry out its management tasks on behalf of other companies in the same group. Indeed, corporate groups are very common in the fishing and shipping sectors, where specific kinds of business cooperation have developed. The point is that the close financial links between companies belonging to the same group often make it unclear who the real employer is. Business cooperation in the shipping and fishing sectors is therefore tackled in this section, as well as legal solutions to the problem of identifying the employer. The first involves piercing the corporate veil, while the second is a more proactive approach as it aims to enhance best management practices by promoting corporate social responsibility.

Besides employment matters, other potential respondents *vis-à-vis* seafarers or fishermen may need to be identified. Significant examples are claims for damage to persons or property arising from collisions between ships or claims arising from damage suffered in ports. In all these cases, it may be necessary to find out who the owner of the other ship is—which is similar to the problems that seafarers may face in identifying their employer, in particular in cases of corporations—or the person among port workers and port authorities who is responsible for the accident.[62] As these claims are not included within the concept of labour and employment relations, the parties to these relationships are not covered in this section.

2.4.2 Maritime Employees

International labour law does not provide for an autonomous definition of 'seafarer', as can be seen from Article 1(2) of Convention No. 145 on Continuity of Employment (Seafarers), 1976: 'persons defined as such by national law or practice or by collective agreement who are normally employed as crew members on board a sea-going ship (. . .)'. MLC, 2006, and WFC 2007 have gone a step further and removed references to national law from their respective definitions of maritime employees. Article II(1)(f) of MLC, 2006, defines seafarers as 'any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies', while Article 1(e) of WFC 2007 identifies fishermen as 'every person employed or engaged in any capacity or carrying out an occupation

[62] See Fitzpatrick and Anderson (2005), p. 171.

on board any fishing vessel, including persons working on board who are paid on the basis of a share of the catch but excluding pilots, naval personnel, other persons in the permanent service of a government, shore-based persons carrying out work aboard a fishing vessel and fisheries observers'.

It should be noted that these definitions do not take into account the kinds of tasks performed on board, and by this means interpretive problems in relation to staff on board performing services other than those related to navigation or fishing, such as waiters, cashiers or scientific personnel, are now solved. All workers on board are currently covered by the provisions of these conventions, and the scope of application of MLC, 2006, is particularly broad since it covers both the transport of goods and passengers.[63] Differences in workers' duties on board are thus irrelevant for the purposes of this book.[64]

Where ships' captains are concerned, the fact that their position is one of command casts doubt on whether or not there is indeed a genuine employment relationship between captain and shipowner.[65] Captains exercise disciplinary power on board while simultaneously performing managerial tasks on behalf of shipowners as well as acting as their sales representatives. They are also legally vested with special powers, some of which are administrative in nature—including nautical management of the vessel as well as maintaining safety measures on board and at sea—while others are civilian—such as occasionally carrying out the functions of a civil registry constituting civil status,[66] which was why only flag state nationals could hold this post.

Nevertheless, the privilege of nationality has to be understood today in the framework of the EU's prohibiting discrimination on grounds of nationality.[67] The CJEU has ruled on this matter, indicating that the prohibition is applicable to both the merchant and fishing sectors.[68] Although both captain and first officer are

[63] On challenges generated by this broad personal scope of application in social security protection matters, see Astegiano (2013), pp. 239–241.

[64] In general, all legal systems have closed the gap between the protection granted to seafarers and other workers performing land-based tasks. See Carbone et al. (2006), pp. 111–119.

[65] See further Egler (2011), pp. 125–131, concluding that captains are also employees. On this employment relationship, see Puttfarken (1997), pp. 224–233, and from a historical viewpoint, Hanses (1983), pp. 140–174, also concluding that captains are employees and discussing the issues arising from their liability as regards events relating to ships. In Italy, see Carbone et al. (2006), pp. 108–111. In Spain, Law 14/2014, of 24 July, on Shipping (*Ley de la Navegación Marítima*) (BOE No. 180, 25.7.2014) makes this point clear by including rules on captains in the chapter devoted to manning (Chapter III, Title III).

[66] See Articles 42, 722 and 729 of the Spanish Civil Code; Article 19 of the Spanish Civil Registry Law; and 178 to 181 of the Law on Shipping. In Germany, the relevant provision is § 45 del *Verordnung zur Ausführung des Personenstandsgesetzes (PersStdGAV)*, 22.11.2008.

[67] Article 18 TFEU.

[68] CJ 4.4.1974, Cade C 167/73, *Commission v. French Republic*; 7.3.1996, Case 334/94, *Commission v. French Republic*. As regards the fishing sector, see CJ 14.12.1989, Case C-3/87, *Agegate Ltd.*

vested with public powers on board,[69] including safety and disciplinary issues and measures in the fight against pollution,[70] these are in fact residual, and it is therefore not possible to justify an exception to the prohibition of discrimination on grounds of nationality, as also applies to some other public sector jobs.[71] In this context, and as long as they do not hold any other position in the shipping company, such as principal partner or owner of the ship on which they also operate as captain,[72] captains and officers have to be considered to be employees because they take orders from the owner and do not bear any business risk. This conclusion can also be drawn from the complete definitions reported in both MLC, 2006,[73] and WFC 2007, where it is clearly indicated that the position held by workers on board is not relevant; what matters is the fact that they are subordinates.

2.4.3 Maritime Employers

2.4.3.1 Definition

The ILO Conventions do not provide a definition of who may be deemed a maritime employer, perhaps because these Conventions are directed not at private actors but at nations. ILO Convention No. 145 commented on above does mention employers,

[69] CJ 1.12.1993, Case 37/93, *Commission v. Belgium*; 2.7.1996, Case 290/94, *Commission v. Greece*.

[70] Additional Disposition 16(6) of the Legislative Royal-Decree 2/2011, 5.9.2011, issuing the TRLPEMM, deals with the manning of ships registered in the second Spanish registry, *Registro Especial de Buques y Empresas Navieras*, located in the Canary Islands. This provision specifies, according to the CJ's doctrine, that captains and officers must be nationals of an EU member state or of a state in the European Economic Area, except in cases where the Maritime Administration establishes that these posts must be held by Spanish citizens because they involve the effective and ordinary exercise of public powers, which do not represent a very small part of their activities. Theoretically, this exception is consistent with the CJ's doctrine; in practice, however, it is an open door to infringement, for example, understanding that the mere legal conferral of public powers and the exercise of police powers on board are enough to make the exception operate. See de Castro Mejuto (2012), pp. 470–474, interpreting Article 212 of the project of law on shipping, now Article 162 of the Law on Shipping.

[71] See CJ 30.9.2003, Case C 405/01, *Colegio de oficiales de la marina mercante española v. State Administration*; Case C 47/02, *Ander, Ras & Snoeck v. Bundesrepublik Deutschland*; 11.9.2008, Case C-447/07, *Commission v. Italy*. See comments by Enrico (2010), pp. 480–482, on the growing lack of significance of the captain's position in the field of national defence in particular and also while taking care of the civil registration of citizens and maintaining discipline on board; Epiney (2004), p. 1073; Morin (1999), pp. 153–161.

[72] See Conclusions of Advocate General Stix-Hackl in Case C 57/02, *Ander and others v. Germany*, para. 19, highlighting the captain's subordination to the shipowner, even when he or she is a stakeholder of the shipping or fishing company at the same time. In the case in question, one of the plaintiffs was both the captain and a stakeholder of the company running the fishing vessels under his authority. The issue was that he did not control the company's activities (para. 27).

[73] In this regard, see Cartner (2014), pp. 47–68.

but only collaterally in Article 3, when it deals with 'contracts or agreements providing for continuous or regular employment with a shipping undertaking or an association of shipowners'. Accordingly, shaping the concept of maritime employer is left to national law—not an easy task, as this is an especially complex definition due to the profound transformations undergone by shipping and fishing companies.[74] Indeed, one of the key issues regarding worker protection is identifying the employer, i.e., the person accountable to national laws in employment matters.[75]

Employers can be defined as the party to a contract who contracts the provision of employment services under certain conditions, either with a for-profit or a non-profit intent. Shipowners fit this definition,[76] which can be completed by reference to the place where the services are provided: a vessel or a fleet—as employees may be attached to more than one ship if the employer owns more than one vessel—operating under the employer's organisation and instructions.

It is therefore important to emphasise that ownership on the one hand and the operating of a ship or fleet on the other are currently seen as separate concepts, and it is the operating of the fleet or vessel that matters when it comes to identifying employers,[77] as acknowledged by MLC, 2006, and WFC 2007. Both conventions take a functional approach when defining the employer, pointing to the identification of the person responsible for the obligations imposed and understanding that the employer is 'the owner of the ship [or fishing vessel] or any other organization or person, such as the manager, agent or bareboat charterer, 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 the duties and responsibilities imposed on shipowners [fishing vessel owners] in accordance with the Convention, regardless of whether any other organization or person fulfils certain of the duties or responsibilities on behalf of the shipowner [fishing vessel owner]'.[78]

These definitions confirm the dissociation between owner and employer, as they specifically refer to different means of operating a ship. To take the most common as an example, leasing a vessel involves the leasers agreeing with the leasees to make a ship available for operating on the latter's behalf and at their own risk. The

[74] See Charbonneau (2009a), p. 129.

[75] See Dimitrova (2010), pp. 10–12, highlighting the role that obtaining funds—via bank credits or by joining capital markets—plays in the process of estrangement between crew members and their employers.

[76] For example, Article 145(1) of the Spanish Law on Shipping furnishes a concept of a shipowner according to which it is whoever, whether he or she is the owner or not, holds possession of a vessel, directly or through their dependents, and dedicates it to sailing on their behalf and under their responsibility. Previous to this Law, see Meléndez Morillo-Velarde (2009), pp. 78–79.

[77] As highlighted by Duque Domínguez (1985), p. 166, a ship operator is in principle the centre of the allocation of the responsibilities stemming from sailing. Also Metaxas (1985), p. 11, who distinguishes between maritime ventures and beneficial ownership. See also Carbone et al. (2006), pp. 95–97. Pulido Begines (2010), pp. 64–69, focuses on the definition of shipping companies and ship exploitation, including in the definition persons operating ships for non-commercial reasons and not only on a profit-making basis.

[78] See Articles II(j) MLC, 2006, and 1(d) WFC 2007.

ship may or may not be equipped and ready for sailing, but the leaser passes nautical, technical and commercial management of the vessel to the leasee. The charterer thereby becomes the sole owner of the shipping or fishing business, is in charge of operational developments and becomes, in turn, an employer.

Under one form, bareboat charter registration, in addition to accepting a ship's nautical and commercial management, the charterer can also choose its nationality via a temporary change of flag. As long as a ship is under contract, it cannot sail under the owner's flag, and this nationality is held in abeyance. The charterer also of course assumes the right to appoint master and crew throughout the contract.[79]

For its part, time charter is a type of contract via which the shipowner gives the charterer the use of a fully equipped freighter for a fixed period of time in exchange for a lease or freight and for commercial purposes. This per-time contract—different from a per-voyage contract—involves the shipowner remaining in control of the vessel's technical and nautical management and brings about a kind of shared control over the captain and crew members: while the shipowner is responsible for nautical matters, the charterer is in charge of the ship's commercial exploitation by, for example, giving indications to the master about ports of destination. The duality would only disappear if the contract included a clause for the transfer of the ship's ownership, as both sides of ship management—nautical and commercial—would have been transferred.

2.4.3.2 Business Cooperation and the Issue of Identifying the Employer

Manning Agencies

Ship management companies provide shipowners with services relating to vessels' technical and commercial management. Manning agencies or seafarers and fishermen recruitment and placement services are types of ship management companies specialising in crew management and thus deal with the selection, recruitment and hiring of crews.[80] The role of manning agents may in fact go beyond these services, and they may continue to manage crews after recruitment, for example, by dealing with visas and journeys, organising crew changeovers, organising and paying salaries and social security contributions, dealing with crew members' complaints and even negotiating working conditions with the ITF. They are so important for both the merchant and fishing sectors that the ILO has targeted the issue and ruled on seafarers' and fishermen's recruitment and placement services, which are now defined as 'any person, company, institution, agency or other organization, in the

[79] On this contract and its history, see Ademuni-Odeke (1997), pp. 649–653. With a view to maintaining the working conditions of the crew, Article 19 of Italian Law No. 234, 14.6.1989 prompts the charterer to comply with collective agreements in force at the time of taking on the ship as a condition to agreeing on the temporary change of flag.

[80] See an example in the case underlying BAG 26.9.1996, *NZA*, 1997, pp. 202–204.

public or private sector, which is engaged in recruiting seafarers [fishers] on behalf of, or placing seafarers [fishers] with, shipowners [fishing vessel owners]'.[81]

Manning agency operations actually involve three types of contract that have to be clearly distinguished from one another, as each is subject to its own law,[82] despite the fact that they are usually intermingled: the first contract is between manning agency and shipowner and deals with placing the order to hire seafarers or fishermen, the second contract is the collocation or placement agreement between worker and manning agency and the third is the employment contract between shipowner and seafarer or fisherman, resulting from the manning agency's role as intermediary. These intertwined relationships make identifying employers cumbersome and also generate conflicts of interest, since the agencies represent both the seafarers or fishermen seeking employment and the employers for whom they recruit and train crews, which includes checking their qualifications. In this regard, both MLC, 2006, and WFC 2007 make it clear that a ship or fishing vessel's operator or owner is ultimately responsible for the employment relationship and therefore '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'.[83]

Due to the technical problems resulting from the type of relationship established between ship management agencies and shipowners, the 1988 Baltic and International Maritime Conference produced and adopted the Shipman Agreement, which outlines the activities of ship management agencies as agents operating on the owner's behalf in the management of a vessel or fleet. Among their tasks is crew management, which in turn includes crew recruitment, training and command. The Shipman Agreement is a policy—available to the contracting parties—whose validity has to pass through the sieve of the relevant national law. It covers all forms of maritime management, including crew, nautical and commercial management. However, since the most common among these was crew management, the BIMCO also drafted a specific *ad hoc* policy: the Crewman Agreement.

The Crewman Agreement was adopted at the 1994 Baltic International Maritime Conference and focuses on crew recruitment and supply, requiring the ship management agency to ensure that seafarers have had a medical check-up, are duly qualified to perform the tasks commissioned to them and keep their professional qualifications up to date throughout their employment contract. There are currently two types of Crewman Agreement, one of which, Crewman B, deserves a specific

[81] Articles II(h) MLC, 2006, and 1(d) WFC 2007. Further, Regulation I(4)(3) MLC, 2006: 'Each Member shall require, in respect of seafarers who work on ships that fly its flag, that shipowners who use seafarer recruitment and placement services that are based in countries or territories in which this Convention does not apply, ensure that those services conform to the requirements set out in the Code'.

[82] See Fitzpatrick and Anderson (2005), pp. 176–177.

[83] Standard A2(1) MLC, 2006; similarly, Article 20 WFC 2007.

mention as it expressly lays down that crew managers act in their own name,[84] which means that they, and not the shipowners, are the actual employers. Crewman A, however, specifies that crew managers act as agents for and on behalf of the owners, as established by the Shipman Agreement.

The use of one of these policies provides valuable information about who the employer is. However, it is not always easy to find out whether the employer is the shipowner or the manning agency on the basis of the contract's terms and conditions. This may lead to conflicts, for example when the contract does not contain information about who the employer is, sometimes because there is confusion as to the role played by agencies with respect to the workers.[85] The agency may sometimes even specify that it is hiring workers on its own behalf,[86] a fairly typical situation for fishing vessels.[87] Furthermore, these agencies have become so important for both the merchant and fishing sectors[88] that countries like the Philippines have decided that Philippine nationals should be recruited exclusively through manning agencies.[89]

For all these reasons, and also because employers may hire crews through a manning agency and then vanish, national courts take them into consideration in their decisions as to who is responsible for an employer's duties, sometimes building a case of joint liability.[90] In Spain, ship management companies are recognised by Article 10(4) of the Spanish General Regulation on business registration and affiliation,[91] although they had been considered illegal for some time.[92] This provision poses a problem of interpretation, as shipping agents and manning

[84] See Crewman-B policy, third clause: 'Subject to the terms and conditions herein provided, during the period of this Agreement the Crew Managers shall be the employers of the Crew and shall carry out the Crew Management Services in respect of the vessel in their own name'. This is the conclusion reached by the Spanish Supreme Court, Employment Division, 27.6.2008, judging an appeal against the Galician High Court of Justice, Employment Division, 10.11.2006.

[85] See further, Chaumette (2005b), pp. 188–189, for whom manning agencies are always intermediaries and never employers.

[86] See Chaumette et al. (2010), p. 354.

[87] See Chaumette et al. (2010), p. 354.

[88] On the economic relevance of manning agencies, see the Commission Communication providing guidance on state aid to ship management companies (OJ Nr. C 132, 11.6.2009, p. 6), whereby state aid—in particular tonnage tax—to shipowners is extended to manning agencies.

[89] See Monzani (2004), p. 673.

[90] This would be the case in Greece according to Makridou (2010), p. 209. And that is also the stance of Uruguayan practice as shown by *Tribunal de Apelaciones* No. 8/99, 5.2.1999.

[91] As amended by Royal Decree 1041/2005, 5.9.2005 (BOE No. 222, 16.9.2005). Article 10 (4) reads as follows: '... are considered employers for the purposes of inclusion in this special scheme shipping agents, manning agencies or such other individuals or legal entities resident in Spain to serve in foreign flag vessels, including Spanish companies participating in fishing joint enterprises created in other countries, all without prejudice to what may result from international conventions or agreements signed by Spain' (my translation). On this provision, see Arrieta Idiakez (2006), pp. 119–165.

[92] See Fotinopoulou Basurko (2005), p. 235.

companies' activity is not in accordance with Article 43 of the Statute of Workers, which states that agency work is held to be illegal unless undertaken by licensed companies and for temporary purposes only, which is not true of manning agencies. In any event, the labour market has changed substantially for seafarers and fishermen as a result of its internationalisation, and the activity of shipping agents and manning agencies has been accepted and qualified as a mandate contract covered by Article 1717(2) of the Spanish Civil Code, which states that by contracting on their behalf, agents are acting on clients' affairs, and therefore the employers are the shipowners.[93] In addition, Article 10(4) stipulates that ship management agencies hiring and paying wages to Spanish seafarers and fishermen serving on foreign vessels are the employers too, for social security purposes. This provision brings together previous Spanish jurisprudence and builds a case for joint liability,[94] with the aim of preventing the kind of fraud that occurs when crews are recruited through a manning agency and once the work has been completed the shipowner simply disappears as a company without fulfilling the terms of the employment contract. By the same token, Article 164(2) of the Spanish Law on Shipping establishes joint liability for contract fulfilment of both shipowners and foreign shipowners' agents recruiting Spanish nationals or residents in Spain to serve on board foreign ships.

The same problems have arisen in the construction sector, leading the EU to considering the possibility of issuing a similar provision whereby the contractors are held liable in the event that the employers-subcontractors fail to fulfil their obligations to posted workers.[95] In view of the impact of manning agencies in the maritime and fishing sectors, the EU should consider promoting the same for such cases.

Corporate Groups and Further Business Cooperation Schemes

Business cooperation among corporate groups may include transferring employees from one company to another or having one company in charge of hiring employees for the other, i.e., acting as a manning agency. From a legal standpoint, there are

[93] See Díaz de la Rosa (2012), pp. 422–441; Górriz López (1998), pp. 425 and 435–451, both following Martínez Girón (1992), pp. 38–39. On the relationship between a shipping company and a ship management company in general, see Díaz de la Rosa (2011), pp. 53–64, underlining the fact that the employment contract binds the shipowner but not the manning agency (pp. 109–110). In Italy, see Monzani (2004), pp. 669–673, who also characterises the bond between shipowner and manning agent as a mandate.

[94] See Arrieta Idiakez (2006), pp. 159–165, and SSTSJ Canarias, Las Palmas, Sala de lo Social, Sección 1, No. 159/2005 & No. 158/2005, 7.3.2005 (JUR 2005\105359), (AS 2005\1016), discussing worker's dismissal.

[95] See Article 12 of the Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') (Text with EEA relevance) (OJ No L 159, 28.5.2014).

two likely scenarios: one in which one company acts as employer whereas the other is actually employing the workers[96] and another where there is a chain of contracts whereby workers are transferred from one company to the other, sometimes retaining a dormant contract with the first employer. A good example of this is a case reported—but not published—in Germany[97] concerning an officer domiciled there who served with Reederei Hamburger ER from 1959 to 1979. The contract was then cancelled by the parties, and the worker was employed by E. E. Shipping Company Ltd., the London branch of the German company, which in turn transferred him to different one-ship-companies based in Liberia, Panama and Cyprus, all of which were controlled by the German company.

In practice, many companies are set up with the sole purpose of restricting their assets to a single ship, the only one they operate. A ship owned by a single-ship company is usually over-mortgaged but is the company's sole asset, which means that creditors are deprived of the possibility of arresting sister ships, for example.[98] In these cases, the main problem is tracing the beneficial owner, who should be ultimately responsible for employment matters.[99] All in all, corporate cooperation dramatically increases the risk of workers' rights being infringed.[100]

Maritime law has developed specific business cooperation schemes, such as liner conferences and liner consortia, where companies are treated on an equal footing. In the case of liner conferences, each company operates individually in the market,[101] whereas liner consortia involve participating companies pooling certain assets, such

[96] See Chaumette (1993), pp. 237–254, on *Cour d'Apppel* Poitiers, 26.2.1992, *Pellae c. Société Française de Transports Pétroliers*. ADMO (1993) 11:252–254, about replacing injured seafarers within the group of companies. In *Cour.Cass. (Ch.soc.)*, 29.4.2003, No. 01-43416, available at http://www.legifrance.com, divers claimed against the parent company that had engaged them to serve abroad from France through two subsidiaries based in Jersey and Switzerland.

[97] See Junker (1992), p. 23.

[98] See Alderton and Winchester (2002), p. 38; Carbone et al. (2006), pp. 97–99; Fitzpatrick and Anderson (2005), p. 171; Puttfarken (1997), p. 223.

[99] The Prestige case is a good example of lack of transparency. The principal was Monach Tanker Corporation; the shipbuilder, Hitachi Shipbuilding and Engineering Co. Ltd. Maizuruy from Japan; the classification society, American Bureau Shipping/ABS; the flag state, first Liberia and later the Bahamas; the shipowner, Monarca Tanker Corporation from 1976 to 1988 and then Mare Shipping, Liberia; the first operator, Maritime Overseas Corporation from 1976 to 1988; the second, Universe Maritime Ltd. from 1980 to 1988; the third, Laurel Sea Transport from 1996 to 2001; the charterer, first Crown Resources A.G. and later ERC Trading; the operator at the time of her sinking, Universe Maritime Ltd; the shipowner, P&I, The London Steamship Mutual Insurance Association Ltd. In general, on problems identifying the ultimate respondent in the maritime transport sector, which are very similar to those in employment matters, see Ndendé (2006a), pp. 195–206.

[100] See Couper (1999), *passim*, studying the case of the *Adriatic Tanker Company* group of companies, based in Greece, which sets out perfectly the significant problems raised by the new financing methods, with over-indebted shipowners who stop paying wages and eventually abandon ships and crews in any port whatsoever (pp. 62–117).

[101] The significance of liner conferences has led the UN Conference on Trade and Development to promote a code of conduct for them, adopted on 17 April 1974, in force from 6 October 1983.

as crew, a central office and the fleet, to achieve a specific aim. Against this background, the question is who is accountable for any environmental damage or infringement of competition law, for example. The best answer comes from studying the type of legal relationship established between the companies: whether they have opted for being independent but operating as a consortium on the basis of specific contracts, in which case general accountability rules are applicable, or have set up a more sustainable scheme and specific answers to the liability issue are therefore to be sought within the scheme.[102] This issue remains unresolved in cases where seafarers are assigned not to a particular vessel or company but to all participant companies in the consortium. Certain legal systems—including Spanish law—may deem this transfer of workers illegal, but the most feasible solution is for all companies involved in the consortium to be held jointly liable *vis-à-vis* crew members.[103]

Business cooperation in the fishing sector has been channelled through joint enterprises and temporary joint ventures aimed at exploiting fish stocks under the responsibility of the respective coastal states. According to Article 9(3) of the Council Regulation (EC) No 3699/93, a joint enterprise is 'any company regulated by private law comprising one or more Community shipowners and one or more partners in a third country, constituted in the framework of formal relations between the Community and the third country, with the aim of fishing for and possibly exploiting fishery resources in the waters under the sovereignty and/or jurisdiction of the third country, with a view to the priority supply of the Community market'.[104] In these cases, transferring crew involves the new company taking on all the first company's rights and obligations. This is a very common pattern in Spain,[105] typically involving Spanish fishermen hired by a Spanish employer to work on a vessel flying the Spanish flag. After the transfer, the employees work for a foreign company on a ship flying a foreign flag, but their former employer remains a stakeholder in the joint enterprise.

Joint enterprises are deemed legal by the European Union,[106] although seagoing vessels in general are excluded from the scope of Directive 2001/23/EC of the

[102] On this solution, see Ndendé (2006b), pp. 263–264.

[103] See further Meléndez Morillo-Velarde (2002), pp. 298–309.

[104] Council Regulation (EC) No. 3699/93 of 21 December 1993 laying down the criteria and arrangements for Community structural assistance in the fishing and aquaculture sector and the processing and marketing of its products (OJ No. L 346, 31.12.1993).

[105] See Spanish Royal Decree No. 798/1995, 19 May, *Por el que se define los criterios y condiciones de las intervenciones con finalidad estructural en el sector de la pesca, de la acuicultura y de la comercialización, la transformación y la promoción de sus productos* (BOE No. 154, 29.6.1995), amended by Royal Decree No. 1549/2009, 9 October, *sobre ordenación del sector pesquero y adaptación al Fondo Europeo de la Pesca* (BOE No. 245, 10.10.2008), amended by Royal Decree No. 1586/2012, 23.11 (BOE No. 283, 24.11.2012).

[106] On joint enterprises in fishing, see Council Regulation (EC) No. 1421/2004, 19.7.2004, amending Council Regulation (EC) No. 2792/1999 of 17 December 1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fishing sector (OJ No. L 260, 6.8.2004), developed in Spain by Royal Decree No. 518/2005, 6.5, amending Royal Decree

Council of 12 March 2001 on the approximation of the laws of member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or part of undertakings or businesses.[107] The same restriction may be adopted by member states on transposing Directive 2002/14/EC of the European Parliament and the Council of 11 March of 2002, which establishes a general framework for informing and consulting employees in the European Community.[108] In its Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on 'Reassessing the regulatory social framework for more and better seafaring jobs in the EU', the Commission fortunately stated the need to re-examine this exclusion.[109]

Along the same lines, an assessment of the functioning of the two Directives jointly with others that also exclude seafarers and fishermen from their scope of application was initiated in 2010. The fundamental goal of the whole revision process is to make working at sea more attractive and appealing to young people by making it clear that working rights are the same as they are on land. The European Commission issued a Proposal for a Directive of the European Parliament and of the Council on seafarers by amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/CE, 2001/23/EC,[110] including both Directives seeking to grant seafarers and fishermen working on ships registered in a member state or flying a member state's flag a degree of protection equivalent to the one provided there.

2.4.3.3 Solutions *Vis-à-Vis* the Lack of Business Transparency

Piercing the Corporate Veil

When the relationship between companies is blurred and doubts are cast on whether they really are different entities, it may be necessary to raise the corporate veil in order to establish their joint liability.[111] The doctrine of piercing the veil operates

No. 3448/2000 on basic rules for structural aid in the fishing sector; Royal Decree No. 1048/2003 on the planning of and structural aid in the fishing sector; and Royal Decree No. 1473/2004 on socio-economic measures for the fishing sector and amendments to Royal Decree No. 3448/2000 (BOE No. 121, 21.5.2005).

[107] OJ No. L 82, 22.3.2001. See Article 1(3).

[108] OJ No. L 80, 23.3.2002. See Article 3(3).

[109] Brussels, 10.10.2007 [COM (2007) 591 final]. The same Communication states that 'it is worth noting considerable number of Member states, including some of the largest shipping countries, have not chosen to exclude seagoing vessels from the scope of national legislation implementing the Directive. It is therefore obvious that this issue requires further attention'. These countries are Austria, the Czech Republic, Denmark, Estonia, Spain, Hungary, Italy, Lithuania, Poland, Portugal, Sweden and the United Kingdom.

[110] Brussels, 18.11.2013 [COM(2013) 798 final].

[111] See Collins (1990), pp. 731–744, focusing on the group's unity with the idea of finding a solution to this problem and, to this end, playing with the trinomial 'ownership, authority and contract'.

on the basis of different legal grounds and by recourse to different laws whose application to the issue depends on the legal relationship involved.[112]

For example, this doctrine is regularly applied in the shipping and fishing sectors in cases involving the arrest of vessels that are deemed by creditors to be the property of their debtors, even if the vessels are assigned to a different company. In such cases, national courts proceed to lift the veil in accordance with the International Convention relating to the Arrest of Sea-Going Ships and using their own law.[113] As is discussed in Chap. 4, seafarers may well have recourse to the Convention to ensure that their claims against shipowners are paid, thus taking advantage of this doctrine. National jurisprudence proceeds by identifying when ships are to be deemed sister vessels on the ground of a number of indicators, including if (1) the vessels belong to the same owner, (2) the companies owning the vessels share assets that are used indiscriminately by both, (3) both are based in the same place, (4) they have a single insurance policy that is valid for all the ships in the fleet, (5) one of the companies is deprived of its decision-making capacity, and, above all, (6) all the companies—which usually operate as single-ship companies—are managed by the same business.[114]

However, there is no doctrinal consensus as to which law should be applicable when it comes to piercing the corporate veil, whether it is the *lex causae* or the *lex fori*.[115] Bearing in mind what is at stake, i.e. identifying the employer in an employment relationship, the *lex laboris* would appear to be the best choice. However, most legal systems—including Spain's—do not set out a clear definition of the procedure for piercing the corporate veil, and this has mainly been developed by the courts. As a result, the *lex fori* seems best placed to pierce corporate law on practical grounds: first, because it is the closest and most familiar to the courts that have to make the decisions and, second, because the other option may involve the application of different laws as is the case where there is a chain of employment contracts with different companies in the same group.[116]

As to when the veil should be lifted, the standard of proof required by national courts varies considerably. For some, the apparent confusion between the two companies to the point where third parties believe them to be a single company is

[112] See Vandekerckhove (2007).

[113] According to Article 3(2) of the 1952 Convention relating to the Arrest of Sea-Going Ships, 'ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons'. This Convention was followed by the 1999 Convention—ratified by Spain—which includes Article 3(2), with a more restricted view than the 1952 version: 'Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose: (a) owner of the ship in respect of which the maritime claim arose; or (b) demise charterer, time charterer or voyage charterer of that ship. This provision does not apply to claims in respect of ownership or possession of a ship'.

[114] See Berlingieri (1998), pp. 318–339; Berlingieri (2009), pp. 818–830; and Rohart (1988), pp. 499–515, both citing numerous national judgments.

[115] See Morgenstern (1987), pp. 91–94.

[116] See Coursier (1993), pp. 25–29; Palao Moreno (2000), p. 80.

enough.[117] For other courts, there is a requirement to establish that there actually is a fiction, i.e., that the company that is the formal owner of a ship is a shell company run by the company that is accountable to creditors. There are examples of this *modus operandi* in the US,[118] France,[119] Italy,[120] and Spain.[121] In other cases, evidence of fraud or abuse of law is required, meaning that proof of intention to defraud creditors must be provided for corporate veil to be lifted, as shown by judicial opinions from the Netherlands,[122] France,[123] Greece,[124] Italy,[125] the US,[126] the UK[127] and Spain.[128]

[117] See *Cour.Cass.* (*Ch.com.*), 12.2.1991. DMF (1991) 43:315–317; DirMar (1992) 94:231–232, with comments by López de Gonzalo (1992), pp. 639–641; *Cour d'Appel* Bordeaux, 13.6.1990. DMF (1991) 43:174–179; DirMar (1992) 94:233–236, upheld by por *Cour.Cass.* (*Ch.com.*), 27.11.1991. DMF (1992) 44:488–492; DirMar (1993) 95:509–511, with comments by Vialard (1991), pp. 179–187.

[118] See case law stemming from the Jones Act and other labour laws by which their scope of application is broadened to cover all situations with minimum contacts with the US despite the ship's flying a foreign flag; minimum contacts are established when activities are controlled by a company located in or operating from the US. See Goldie (1963), pp. 238–254, and District Court of Illinois, 18.4.1984, in the *Amoco Cadiz* case. DirMar (1985) 87:904.

[119] See *Cour d'Appel* Rennes, 21.6.1989. DirMar (1990) 92:780; *Cour d'appel* Rouen (2ª Ch.), 26.1.1995. DMF (1996) 48:49–53; DirMar (1997) 99:1111–1112; *Cour d'appel* Rouen 14.09.2000. DMF (2001) 53:1028–1030, with comments by Marguet (2001), pp. 1030–1032. Turning to a higher standard of proof, see *Cour.Cass.* (*Ch.com.*), 21.1.1997; DMF (1997) 49:612–613, with comments by Vialard (1997), pp. 612–615.

[120] See *Tribunale di* Ravenna, 12.3.1994. DirMar (1994) 96:217–220; *Tribunale di* Livorno, 18.11.1996. DirMar (1998) 100:433–435.

[121] See *Juzgado de Primera Instancia* No. 4 Barakaldo, 27.3.1997.

[122] See Hoge Raad, 4.10.1991. DirMar (1994) 96:561–562; *Arrondissementrechtbank te* Rotterdam, 9.7.1993 DirMar (1994) 96:558–565; DMF (1994) 46:65–72, with comments by Derogée van Roosmalen (1994), pp. 559–560.

[123] See *Cour.Cass.*, 19.3.1996, DMF (1996) 48:503–506; DirMar (1996) 98:803–805, with comments by Vialard (1996), pp. 467–474; *Cour d'appel* d'Aix en Provence (2ª Ch.civ.), 18.12.1984. DMF (1986) 38:44; *Cour d'appel* Douai (2ª *Ch.civ.*), 31.1.1985. DMF (1988) 40:555–558; *Cour d'appel* Rouen (2ª Ch.civ.), 3.11.1998. DMF (1999) 51:123–129. In *Cour.Cass. (Ch.soc.)*, 29.4.2009, Ship *Wedge One*. DMF (2003) 55:960–961, the French Supreme Court had no qualms about deeming the employer to be a Dutch company, piercing the veil of its Cayman-Islands-based subsidiary. The latter was taking on the role of employer with regard to a sailor who was providing his services on a ship that was also registered in the Cayman Islands.

[124] Court of Appeals of Piraeus 213/2007. ADM (2008) 25:477–478.

[125] Tribunale de Bari, 19.7.2002. DirMar (2004) 106:1424.

[126] *Itel Containers International Corp. v. Atlantrafik Export Serv. Ltd.*, [1990] 909 F. 2d. 698-2.

[127] British courts extend registered ownership to the beneficial owner. Thus, the doctrine of piercing the corporate veil is resorted to when the registered company has been established with the sole purpose of avoiding the arrest of the ship. See *The Maritime Trader* [1981] 2 Lloyd's Rep. 153; *Kensington International Limited v. Congo* [2005] EWHC 2684.

[128] SSAP Barcelona, 11.2.2001 and 24.5.2002. DirMar (2004) 106:280 and 106:283. STSJ Andalucía, Sevilla, 16.1.2007, *D. José c. Expoferrer, S.A., José Marti Peix S.A., Pesqueras Marsierra, S.A.* (AS 2007\1376) with a generous approach, according to which groups of companies are equal to joint ownerships as regulated by Article 1(2) of the Workers' Statute. STSJ Comunidad Valenciana, No. 138/2004, 23.1.2004 (AS 2004\1592), applies the doctrine laid down

The matter has also been raised before the CJEU.[129] However, the wording of the questions at stake did not refer to the issue as such, as the case focused on determining which law was applicable to an individual employment contract concluded between a Dutch engineer and a shipowner based in Luxembourg. The contract was expressly subject to Luxembourg law, but the issue in point was whether the applicable law was that of the premises where the employee had to go to get his instructions and to which he returned after each voyage in one of the vessels owned by the shipping company. The establishment in question belonged not to the company but to a different business based in Belgium. Against this background, the CJEU was asked whether the Belgian company might be deemed to own the Luxembourg company for the purposes of designating the law applicable to the employment contract in the absence of choice of law. The plaintiff alleged that he always had to be given his instructions at this establishment, whose director was also the director of the Luxembourg company even though the employer's authority had not been transferred to the other company, for which reason the Court made reference to the issue of lifting the corporate veil.[130] In its judgment, the CJEU emphasised that the seized court must 'take into consideration all the objective factors making it possible to establish that there exists a real situation different from that which appears from the terms of the contract',[131] making specific reference to its *Eurofood IFSC* judgment, according to which the lifting of the corporate veil must proceed when the legal person is a shell company.[132] The CJEU would therefore seem to require a strict standard of proof when it comes to lifting the corporate veil. Nevertheless, this test is still to be developed at EU level, and the issue is presently in the hands of national courts.

by the Spanish Supreme Court as regards piercing the veil for the fishing sector: (1) organization of work managed in a unitary fashion within the group of companies; (2) provision of labour services to several companies in the group, at the same time or consecutively; (3) establishment of shell companies with a view to avoiding labour duties; (4) confusion of manning, confusion of assets, external appearance of business unity and management unity. See other sentences quoted there, in particular STS, Sala de lo Social, 26.2.1998 (RJ 1998\1062). Galicia (Sala de lo Social), 1.7.1999 (RJ 1999/1975). TSJ Galicia, 1.7.1999 (*Santiago B.L. v. Pescanova S.A. y Argenova S.A.*, ship Sarvo. RJ 1975/1999), does not pierce the veil because there is not enough evidence; for example, the only proof that an offer had been made in Spain was a plane ticket. See further Spanish case law on Palao Moreno (2000), *passim*, spec. pp. 66–92.

[129] CJ 15.12.2011, Case C-384/10, *Jan Voogsgeerd v Navimer SA*.

[130] In similar terms, some Spanish and Italian sentences gave due course to the lawsuit against the non-employer parent company that had a base in the forum, applying for joint liability with its subsidiary and formal employer in the employment contract at issue. See Casado Abarquero (2008), pp. 55–56; Palao Moreno (2002), p. 314.

[131] CJ 15.12.2011, Case C-384/10, *Jan Voogsgeerd v Navimer SA*, para. 62.

[132] CJ 2.5.2006, Case C-341/04, *Eurofood IFSC*, para 37.

Corporate Social Responsibility

The cross-border nature of businesses and the strengths and weaknesses stemming from their interaction with a number of regulatory and jurisdictional schemes are the driving force of a voluntary movement—encouraged by various national and international institutions—towards self-regulation, aimed at harmonising labour standards. Beyond hard law standards such as those contained in MLC, 2006, and WFC 2007, this movement promotes the development of soft law, i.e. codes of conduct for best practices in companies, affecting both internal and external matters.[133]

In this respect, it is worth noting the ILO's drafting of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,[134] available to all companies interested in joining the movement. In the same vein, the United Nations has instituted the Global Compact to promote corporate social responsibility.[135] Other non-governmental organisations have been working towards the same objective, including the International Organization for Standardization (ISO), which is developing the new ISO 26000 Standard on corporate social responsibility[136] aided by the United Nations, with which it has signed a Memorandum of Understanding in order to meet, *inter alia*, the ILO standards.[137] All in all, this movement put emphasis on ethics and fair play, which, for example, can be encouraged by banks and other financial institutions by making shipping and fishing businesses eligible for financing, among other reasons, on the grounds of management and treatment of personnel who work on board ships[138] or simply by hiring only companies that show respect for labour standards on board.

The Organization for Economic Cooperation and Development (OECD) laid down the Guidelines for Multinational Enterprises, which addresses both individual and collective labour rights, among other matters.[139] The Guidelines are unusual in that they appear as government recommendations aimed at multinational companies operating in or from their own territory. For this reason, they can be a powerful tool when it comes to interpreting the conduct of companies in a group; that is, the Guidelines should not be used exclusively to assess the activity of a business in the territory of the participating state, but also its mode of operation in foreign countries when operating from a participating state, including through subsidiaries.[140]

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[133] See further Otero García-Castrillón (2008), pp. 329–355.

[134] See http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm.

[135] See http://www.unglobalcompact.org/.

[136] See http://www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=42546 (Accessed October 2013).

[137] Moreau (2009), pp. 93–102, encourages the ILO to undertake an active role in promoting the enforcement and monitoring of corporate social responsibility.

[138] See with this suggestion Mensah (2006), pp. 177–178.

[139] See http://www.oecd.org/department/0,3355,en_2649_34889_1_1_1_1_1,00.html.

[140] On this proposal, see Muchlinski (2001), pp. 23–24.

This opens the door for considering the parent company accountable for its subsidiaries' actions. The *Badger* case, involving the Belgian subsidiary of a US parent company, is a good example of how to achieve the latter's liability for the former's operations by enforcing the principles stated in the OECD Guidelines: the Badger Company, Inc., with headquarters in Cambridge, US, ordered the closure of its subsidiary in Belgium, which had been declared bankrupt and had left wages unpaid, through other subsidiaries also located in Europe. The employees brought a claim against the US parent company, considering it accountable for the wages before the Belgian courts. As a result of public pressure, the Belgian government petitioned the Guidelines Committee on International Investment and Multinational Enterprises for an interpretation of the OECD Guidelines to decide who they were actually aimed at, whether it was only group members in the territory of the participating state or the entire group as a whole, as all the companies were integrated into a single economic unit, regardless of where the company involved had been established.

Had this position been adopted, there would have been grounds for understanding that the parent company was liable for its subsidiary's debts. Thanks to the agreement reached by employees and the parent company, the Committee did not need to give an opinion on the matter in the end, but it did issue a statement that did not preclude this liability, although the emphasis was on the unavoidable analysis of the circumstances involving the case, i.e., there must be proof that the parent company has influenced the subsidiary's decisions on the subject matter.[141] Later on, the Dutch court responsible for the *Batco* case ruled—on the grounds of the principles contained in the OECD Guidelines—on the British American Tobacco Company's liability in its closure of a Dutch subsidiary with the aim of transferring its activity to Belgium, without proper consultations with the relevant government agencies and employees.[142]

All in all, the case law is sparse but promising, firstly, for the purpose of forcing companies to sign a code of conduct—such as the one provided by the ILO or OECD—to respect and apply the code even when they make decisions that may affect other companies they control and, secondly, for the purpose of determining parent company liability for a subsidiary's actions. With this in mind, the OECD has improved mechanisms for interpreting the guidelines by promoting alternative dispute resolution methods, although it highlighted the fact that codes of conduct remain soft law.[143] Further initiatives focused on accountability and transparency, such as the Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.[144] The debate as to whether codes of conduct should be made enforceable thus remains open.

[141] On this case, see Blanpain (1979), pp. 125–146.

[142] See Blanpain (1979), pp. 150–173.

[143] See Ulbrich (2004), pp. 366–384, exploring other ways to make guidelines quasi-binding, such as making their application a condition for obtaining credit and export guarantees.

[144] This Directive has been amended by Directive 2014/95/EU (OJ No. L 330, 15.11.2014).

A growing number of companies, especially multinational corporations, are adopting codes of conduct that often incorporate international standards. For example, problems caused by transnational collective bargaining are now being dealt with via the adopting of a code of conduct that is usually imposed by company managers and sometimes negotiated with trade unions.[145] In such cases, it is interesting to address the question as to whether a code of conduct adopted by a parent company located in a developed country with subsidiaries in emerging countries is binding or not; this would be useful for finding out whether claiming against the parent company for issues related to the management of subsidiary workers on the ground of *culpa in vigilando* would be feasible, i.e., holding the parent company accountable for failing to prevent conducts that might be detrimental to workers' interests or for failing to meet its commitments in terms of monitoring the subsidiary's conduct as established in the respective code of conduct.[146]

Apart from international agreements, this approach to codes of conduct offers a tenuous possibility of improving the working conditions applicable in a given country, even on the high seas. But it also involves major constraints—hence the use of the adjective 'tenuous'—as it depends on the respective court judgment as to the binding character of a code of conduct generally classified as soft law. In reaching such decisions, courts usually take into consideration the detail of the provisions contained in the code of conduct agreed by the company, the degree to which the code has been disseminated and therefore how much knowledge explicit and implicit addressees—such as workers—have about the code and the acceptance of what the code means to and for third parties.[147] However, there is some reluctance towards adopting this approach, as it is likely to lead to conflicts with market freedoms, insofar as it could amount to a situation of abuse of a dominant position or to the imposition of trade barriers.[148]

In any case, the possibility of incorporating codes of conduct into an international contract, in which case their binding character may well increase, is worth exploring. In the cases mentioned previously in which different businesses cooperate, employment relationships are established between seafarers and one of the companies involved, whereas the other companies are not parties to such a relationship. Hence, it is simply not possible to file a contractual claim against any company other than the one involved in the contract, unless piercing the corporate veil is feasible. However, party autonomy may pave the way to a contractual claim if and when the code of conduct adopted by the group of companies is deemed to be

[145] As is the case with the European Social Model. See Ales et al. (2006), pp. 21–27.

[146] In these terms, see Resolution of the *Institut de Droit International*, Lisbon Session 1995, on the obligations of multinational organisations and their member companies, principle 2, available at http://www.idi-iil.org/idiE/resolutionsE/1995_lis_04_en.PDF.

[147] See Kenny (2007), pp. 457–463.

[148] See Otero García-Castrillón (2008), p. 351.

incorporated in the contract at hand and therefore generates obligations that can be subject to legal action by third parties.

For our purposes, it is useful to explore the question of whether a company can force its counterpart to meet specific labour standards. This is usually done by choosing a counterpart from among firms that truly meet these standards[149] or by forcing it to assume the company's own code of conduct. The American company Wal-Mart serves as a good example here due to its involvement in a relevant case brought before the US jurisdiction.

The company had been sued on the ground that some of its suppliers in developing countries did not meet the standards set by its code of conduct, in particular the prohibition of forced labour and payment of minimum wages and overtime. In addition to ensuring that its suppliers enforced its code of conduct, Wal-Mart committed itself to monitoring its suppliers' compliance with its standards. The plaintiffs therefore understood that an implicit contract had been established that was enforceable by third parties. However, the court failed to appreciate that the code of conduct gave rise to any obligations to third parties—workers in this particular case—as it simply set out company policy without providing sufficient detail to be deemed an offer that workers could accept, which would have generated contractual obligations.[150] *Contrario sensu*, these obligations would arise if the company had adopted a code of conduct with an enforcement mechanism that could be invoked by third parties. It would then generate obligations *vis-à-vis* workers, which could be classified as contractual since they stemmed from the contract between the parent company and a supplier or partner, such as a shipping company.[151] At any event and as commented above, this is a promising but still emerging way of making a parent company accountable for its subsidiaries' actions.

2.5 International Labour Law

2.5.1 Introduction

The globalisation process undergone by the merchant and fishing labour markets has led to the common understanding that the only factor that can balance the scales of global competition in its race to the bottom is international cooperation.

[149] This is common practice in the field of public procurement but not in the area of outsourcing. On the boundaries of this strategy, see Otero García-Castrillón (2008), pp. 349–351.

[150] Actually, it was brought before the Los Angeles Superior Court by the International Labour Rights Fund on behalf of workers from China, Bangladesh, Indonesia, Swaziland and Nicaragua on the ground of Wal-Mart's Standards for Suppliers Agreement. See *Doe v. Wal-Mart Stores, Inc*., No. CV 05-7307 GPS (C.D. Cal. 2005), cited by Kenny (2007), *passim*.

[151] See Otero García-Castrillón (2008), p. 354.

However, the unstoppable growth of international trade has not been accompanied by comparable advances in terms of labour rights. In fact, these rights are carefully being excluded from World Trade Organization (WTO) authority, and their defence is being relegated to specific institutions, in particular the ILO, whose activities form the subject matter of the following pages.

It is also important to note that a number of routes have been explored with the aim of making multinational corporations comply with minimum labour standards; for example, the United Nations Conference on Trade and Development (UNCTAD) has suggested introducing a system of generalised tariff preferences for emerging states, granting them export advantages in exchange for participation in and implementation of international conventions, in particular those laying down minimum labour standards. The European Union also plays the role of ambassador for labour rights.[152] Nevertheless, difficulties in monitoring the proper implementation of minimum labour standards cast doubt on the effectiveness of these routes.[153]

The ILO is a privileged forum when it comes to issuing rules on international labour law,[154] and the fact that maritime employment deserves special attention has been clearly stated not only in numerous ILO Conventions on the matter but also in several Recommendations issued in cases where the consensus required for a convention was not achieved.[155] The ILO has a unique structure and includes a participatory mechanism in which each national representation consists of four members, two representing the relevant government and two representing workers and employers from each member state respectively.[156]

A rough outline of the set of rights and obligations established by ILO Conventions with regard to maritime employment is provided in the coming pages; as our concern here is private international law and not international labour law, it is neither necessary nor desirable to go into detail. However, a brief run-through of the latter is essential since these conventions set up minimum standards and as such also need to be taken into account from the private international law standpoint. For example, the ILO's efforts to force flag states to comply with their obligations to

[152] See Council Regulation (EC) No. 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No. 552/97, (EC) No. 1933/2006 and Commission Regulations (EC) No. 1100/2006 and (EC) No. 964/2007 (OJ No. L 211, 6.8.2008).

[153] See for all Birk (2008), pp. 73–82.

[154] See the concept in Valticos (1983), pp. 2–3.

[155] See Article 19(1) of the ILO Constitution. The original text of the ILO Constitution was approved in 1919 and amended in 1922, coming into force on 4 June 1934; it was also amended by the 1945 Instrument of Amendment, which entered into force on 26 September 1946; the 1946 Instrument of Amendment, which entered into force on 20 April 1948; the 1953 Instrument of Amendment, which entered into force on 20 May 1954; the 1962 Instrument of Amendment, entering into force on 22 May 1963; and the 1972 Instrument of Amendment, entering into force on 1 November 1974. Two more Instruments of Amendment were adopted in 1986 and 1997 but have not yet entered into force.

[156] See Article 3(1) of ILO Constitution.

seafarers and fishermen are especially noteworthy as they amount to reinforcing flag state jurisdiction, regardless of the fact that other states may also be monitoring shipowners' compliance with international labour standards.

Within its own set of conventions, which are characterised by a variable number of ratifications, the ILO draws a line highlighting the significance of those containing minimum standards deemed as essential, Convention No. 147 on Minimum Standards for Merchant Shipping (Minimum Standards) being a noteworthy example. In the same vein, it is worth mentioning the Declaration on Fundamental Principles and Rights at Work, adopted by the ILO in its 80th session in Geneva on 18 June 1998,[157] by which the organisation sought to emphasise the core character of the freedom of association and the prohibition of forced and child labour and discrimination at work. All these principles need to be implemented by states regardless of the conventions they have signed.

This dividing line between the types of conventions raises many questions, as it involves advocating—to borrow ILO terminology—core labour standards in a context of growing international trade liberalisation,[158] therefore moving away from a more belligerent stance aimed at effectively establishing a more advanced social framework in which the ILO takes a proactive and vigilant role in the implementation of labour rights.[159]

It is for this reason that MLC, 2006, was so welcome: it aimed to establish universally enforceable obligations, i.e., it is binding on all ships irrespective of the fact that they may be flying the flag of a non-member state—MLC, 2006, not only has to be implemented by vessels from the signatory countries but also covers all ships arriving at their ports, irrespective of their nationality. In fact, one of its main strengths is the increase in the number of officers involved in its proper compliance and, therefore, in the proper implementation of the labour rights it establishes. In our globalised world, enforcing rules on minimum working and living conditions is a complex task, and this has been the main cause for criticism of approaches such as that represented by the 1998 Declaration.

Although MLC, 2006, was the result of a consensus that had long been sought by trade unions, its success has been largely due to maritime employers' contributions. Surprisingly, they were more interested than anyone else in drafting this document, as the Convention was seen as a way of achieving a system of fair competition in the shipping industry, one helping to level the playing field in the international

[157] http://www.oitcinterfor.org/public/spanish/region/ampro/cinterfor/publ/boletin/143/pdf/bol2.pdf.

[158] This shortcoming is equally applicable to commercial treaties between developed and developing nations, where a clear stance with respect to labour rights and their compliance is lacking. See Gallie (2009), pp. 144–198. For a different opinion, see Payoyo (2009), p. 390, based on the clear stand against intermingling national trade policy and compliance with international labour standards taken by the WTO at its Singapore 1996 Session.

[159] See sharp criticism of Alston (2004), pp. 457–521, spec. pp. 481–483; Alston (2006), pp. 1–23, as well as his thoughts on the interpretation and application of the 1998 ILO Declaration in Alston (2005), pp. 467–480.

arena.[160] Thanks to the guarantees it included, this instrument's implementation does not only depend on the number of states ratifying it but also depends on the tonnage they represent. This helps ensure that its application does not have detrimental effects on signatory nations and that its ratification does not actually lead to the very opposite of the outcome that the Convention intended to achieve, i.e., unfair competition from non-signatory states that may be benefitting from the fact that signatory nations have to apply stricter rules than non-signatory nations.

Most ILO Conventions and Recommendations do not apply to either artisanal or industrial fishing vessels, as agreed in a resolution adopted at the International Labour Conference of 10 November 1921.[161] Building on the momentum generated by MLC, 2006, the ILO has drafted WFC 2007, whose scope goes beyond MLC, 2006, as it takes into consideration the deplorable working and living conditions on many fishing vessels,[162] a factor that makes the Convention's implementation absolutely essential. We can only hope that it will come into force at the earliest possible date.

The ILO's intensive work is supported by both international and regional organisations such as the International Maritime Organization and the European Union respectively. In fact, the EU has issued numerous instruments and rules that are relevant to this study, despite the fact that its first steps were somewhat faltering, the result of insufficient legal competences with regard to employment matters, at least in the maritime transport sector[163]; however, there is a common fishing policy.[164] The Union is currently an active member of the ILO and participated in and influenced MLC, 2006, negotiations.[165] In 2009, the EU issued the Third Maritime Safety Package,[166] designed to improve port state control over living and

[160] See Payoyo (2009), pp. 389–399.

[161] See Valticos (1983), pp. 481 and 490–491.

[162] Sometimes those conditions amount to crimes on board. See the report entitled 'Sold to the Sea. Human Trafficking in Thailand's Fishing Industry' produced by the NGO Environmental Justice Foundation. The report begins with the following statement: 'As a result of long hours, low and unpredictable pay, physically demanding work and long periods at sea, the Thai fishing industry is suffering an acute labour shortage, with a shortfall of labour for over 10,000 jobs in 2011. This labour shortage is fuelling human trafficking to supply cheap labour for work on Thai fishing boats'.

[163] See Charbonneau (2009a), pp. 168–183.

[164] See Vignes (2003), pp. 659–672.

[165] See dealing with EU's legislative competencies as regards MLC, 2006; see Abel (2014), pp. 1–12.

[166] The following instruments have been published in OJ No. L 131, 28.5.2009, all of them with EEA relevance: Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port state control; Directive 2009/15/EC of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations; Directive 2009/17/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system; Directive 2009/18/EC of the European Parliament and of the Council of 23 April 2009 establishing the fundamental principles

working conditions on board a ship. Council Decision 2007/431/EC[167] and Council Decision 2010/321/UE,[168] by which the EU authorised and encouraged member states to ratify MLC, 2006, and WFC 2007 respectively, are of particular interest. The EU has also reached an agreement on MLC, 2006, with trade unions and business associations with the aim of harmonising national legislation in accordance with the standards set out there,[169] and a similar agreement has been reached regarding WFC 2007.[170]

In addition to ILO Conventions, it is worth mentioning that international human rights treaties also apply to seafarers and to fishermen and other employees working on board a ship, including on the high seas. To be more precise, this depends on each international treaty's scope of application. In this regard, there is already a clear pronouncement on the scope of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR). In the case of *Bankovic and others v. Belgium and 16 other States*,[171] the European Court of Human Rights (hereafter ECtHR) underlined the territorial nature of jurisdiction according to public international law and emphasised that exterritorial application is also admitted in some cases, as is the case with ships registered under or flying the flag of the state in question.[172] Accordingly, the ECHR is also applicable on board ships sailing under the flag of a state party to the Convention.

Matters are different when it comes to treaties with a restricted scope of application, as exemplified by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the General Assembly in Resolution 45/158 of 18 December of 1990. Article 2 of this Convention specifies that migrant workers are anyone engaged, whether currently

governing the investigation of accidents in the maritime transport sector and amending Council Directive 1999/35/EC and Directive 2002/59/EC of the European Parliament and of the Council; Directive 2009/20/EC of the European Parliament and of the Council of 23 April 2009 on the insurance of shipowners for maritime claims; Directive 2009/21/EC of the European Parliament and of the Council of 23 April 2009 on compliance with flag state requirements; Regulation (EC) No 391/2009 of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations.

[167] OJ No. L 161, 22.6.2007.

[168] Council Decision 2010/321/EU of 7 June 2010 authorising member states to ratify, in the interests of the European Union, the International Labour Organisation's Work in Fishing Convention, 2007 (Convention No 188).

[169] 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/EC (OJ No. L 124, 20.5.2009), both influenced by ILO Convention No. 180, 22.10.1996, concerning Seafarers' Hours of Work and the Manning of Ships. Addressing the contents of this Directive; see Munari and Schiano di Pepe (2012), pp. 50–53.

[170] See European Commission—Press release 'Working conditions in fisheries: key agreement signed by social partners', Brussels, 21 May 2012 (available at http://europa.eu/rapid/press-release_IP-12-493_en.htm. Last access, October 2013).

[171] ECtHR 12.12.2001, Reference No. 52207/99.

[172] ECtHR 12.12.2001, paras. 61, 63, 67.

or in the past, in a remunerated activity in a country of which they are not nationals; *ergo* according to this definition, the Convention would be equally applicable to seafarers or fishermen employed on board a vessel registered in a state of which they are not nationals. However, the Convention does not apply to 'seafarers and workers on an offshore installation who have not been admitted to take up residence and engage in a remunerated activity in the State of employment'.[173] This is a significant exclusion and was adopted in response to pay gaps between countries supplying crew members, given that nowadays workers' country of origin is taken into consideration when wages are paid.[174]

2.5.2 Minimum Labour Standards in the Shipping Industry

2.5.2.1 Introduction

A quick glance at the ILO website reveals that there are over 60 conventions and some 40 recommendations on working conditions in the maritime transport sector. However, these have had different receptions and have had uneven numbers of ratifications, despite the fact that they all enabled an international labour code to be developed; indeed, this code was drafted as a way of avoiding unfair competition stemming from forum shopping. The outcome was MLC, 2006—adopted by the ILO at its 94th Maritime Session—which codifies most ILO Conventions on maritime employment matters and was described as 'a single, 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' and 'designed to secure the widest possible acceptability among governments, shipowners and seafarers committed to the principles of decent work, that it should be readily updateable and that it should lend itself to effective implementation and enforcement'.[175]

MLC, 2006, was included in the 1999 ILO Decent Work Agenda and includes four main objectives: full employment, fundamental principles and rights at work, social protection and social dialogue. The deregulation process now prevailing in the international arena has also taken its toll on the ILO, which ought to measure its objectives in accordance with the general and bitter debate between those in favour of promoting employment creation and those who place the focus on improving social and working conditions, which, in turn, may halt the creation of new jobs.

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[173] See Article 3(f) of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

[174] See Fitzpatrick and Anderson (2005), p. 142.

[175] See MLC, 2006, Preamble. See, on the Convention, Chaumette et al. (2010), pp. 339–349; Marin and Charbonneau (2009), pp. 445–469; McConnell (2009), pp. 349–384; Payoyo (2009), pp. 386–408.

MLC, 2006, was the result of a compromise that acknowledged both goals' relevance, therefore giving fresh impetus to the debate, which now focuses on the true meaning of the term 'decent work', adding a certain flexibility in the application of international labour standards.[176] Paradoxically, the first step taken in this direction was to make the Convention's binding force dependent on ratification by at least 30 ILO members with a total share of not less than 33 % of world gross tonnage of ships.[177] This minimum seeks to ensure that the Convention is complied with, as it imposes obligations that will only be effective when applied by a large number of states. The Convention came into force on 20 August 2013 after being ratified by 30 states representing 60 % of world gross tonnage.[178]

MLC, 2006 contains—amending where appropriate—37 maritime labour conventions,[179] and also includes provisions on welfare and social security protection for seafarers.[180] It comprises three separate but intertwined parts and includes 16 Articles followed by a set of Regulations and a Code, both structured into five Titles dealing with the following issues: minimum requirements for seafarers to work on a ship (Title 1); conditions of employment (Title 2); accommodation, recreational facilities, food and catering (Title 3), and health protection, medical care, welfare and social security protection (Title 4).

Unfortunately, MLC, 2006 does not address workers' collective rights;[181] nevertheless, in accordance with ILO Convention No. 147, ILO Convention No. 87 (1948) on freedom of association and protection of the right to organise and ILO Convention No. 98 (1949) on the right to organise and to bargain collectively are both applicable in this field.[182] Finally, Title 5 deals with compliance with and enforcement of Convention provisions and constituted in itself a highly important breakthrough, for which reason it will be dealt with in a specific section later. Given the significance of this Title, it has been treated as the third pillar of the consolidated Convention.[183] The Code contains two types of rules; Part

[176] See Charbonneau (2009b), pp. 203–206.

[177] See Article VIII MLC, 2006.

[178] Antigua and Barbuda, Argentina, Australia, the Bahamas, Bangladesh, Barbados, Belgium, Belize, Benin, Bosnia–Herzegovina, Bulgaria, Canada, Congo, Cyprus, Croatia, Denmark, the Faroe Islands, Fiji, Finland, France, New Caledonia, Gabon, Germany, Ghana, Greece, Hungary, Iran, Ireland, Italy, Japan, Kenya, Kiribati, Korea, Latvia, Lebanon, Liberia, Lithuania, Luxembourg, Malaysia, Maldives, Malta, the Marshall Islands, Mauritius, Montenegro, Morocco, Nicaragua, Nigeria, Norway, the Netherlands, Palau, Panama, the Philippines, Poland, the UK, Bermuda, Cayman Islands, Gibraltar, the Isle of Man, Russia, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Samoa, Serbia, Seychelles, Singapore, Spain, the Republic of South Africa, Sweden, Switzerland, Togo, Tuvalu, Vietnam. Available at http://www.ilo.org/. Accessed 2 March 2015.

[179] These Conventions are enumerated in Article X MLC, 2006.

[180] See Astegiano (2013), pp. 238–241.

[181] See Dimitrova (2010), p. 88.

[182] Payoyo (2009), p. 405, is of the opinion that this exclusion benefits seafarers insofar as the compliance mechanism laid down in ILO Convention No. 147 is better than the one regulated by MLC, 2006.

[183] See Chaumette et al. (2010), p. 349.

A regulations and standards are mandatory, whereas Part B guidelines are not, although states have agreed to pay them due attention.[184]

The Convention is self-executing, but if states are unable to apply the principles and rights as provided for in Part A they may resort to 'any law, regulation, collective agreement or other implementing measure considered to be substantially equivalent', in accordance with the definition of 'equivalent' as laid down in Article VI(4).[185] By means of this provision, the Convention aims to give material form to the compromise between promoting job creation and improving working conditions at sea: in this way, states are granted flexibility in applying the Convention in accordance with their particular circumstances and degree of development.

Flexibility in applying the Convention is also manifest in the general formulation of numerous provisions of Part A, leaving member states ample room for manoeuvre in its implementation. As stated in the Explanatory Note to the Regulations and Code of MLC, 2006, guidance on implementing the non-mandatory provisions in Part B is provided, but as they are non-binding, states may always resort to other types of measures.[186]

Despite the flexibility that nations have in implementing MLC, 2006, the Convention stands out as an efficient instrument aimed at harmonising legislation. This can be seen right from the start in the definitions in Article II, which includes such terms as 'seafarers', 'seafarers' employment agreement', 'seafarer recruitment and placement service', 'ship' and 'shipowner', continuing with a reference to its broad scope of action, which includes 'all ships, whether publicly or privately owned, ordinarily engaged in commercial activities'.[187]

Unfortunately though, the Convention excludes many categories of ships, such as warships, naval auxiliaries and those sailing exclusively in inland waters or the equivalent, in addition to other categories that are difficult to label. These exclusions will drive states to initiate consultations to clear up their doubts, as the Convention does not give any clues as to the final answer.[188] In order to reduce uncertainty, the ILO has set up a public database and is currently compiling information on complying with MLC, 2006, and national case law interpreting these gaps.[189]

In general terms, the Convention's proper implementation relies on national legislation, from which interpretative divergences will no doubt arise. Furthermore, these are encouraged inasmuch as some standards are of an open texture, and with this wording MLC, 2006, softened some obligations established in previous Conventions with a mandatory nature.[190] The ILO webpage therefore provides guidelines on certain issues and regulatory models with a view to harmonising the

[184] See Article VI(2) MLC, 2006.

[185] On the implementation problems of MLC, 2006, see Charbonneau (2014), pp. 210–227.

[186] See Items 9 and 10 of the Explanatory Note to the Regulations and Code of MLC, 2006.

[187] See Article II(4) of MLC, 2006.

[188] See Dimitrova (2010), pp. 87–88.

[189] See http://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:80001:0::NO.

[190] See Christodoulou-Varotsi (2012), pp. 467–489.

transposing of mandatory and particularly non-mandatory standards in Part B of the MLC, 2006, Code into national law. These guidelines will be referred to in dealing with the Convention's contents. The guidelines in fact form a handbook providing assistance on implementing MLC, 2006, the most general ones being those that make model national provisions available for states,[191] as a kind of model laws.

In addition to the flexible approach that states are granted in implementing the Convention, the Code's specific amendment procedure should also be mentioned. This innovative procedure does not require the formalities usually applied to the amending of international conventions, offering in turn a speedy response to global challenges. It aims to give all stakeholders a voice: governments, workers' representatives and employers.[192] However, as they contain core rights and principles and basic member state obligations, the Articles and the Regulations can only be amended in accordance with the procedure laid down in Article 19 of the ILO Constitution,

2.5.2.2 Maritime Labour Convention, 2006: Contents

Minimum Requirements for Seafarers to Work on Board a Ship

Title 1 deals with the minimum requirements for seafarers to work on a ship. Among these are provisions on the minimum age of seafarers, set at 16 years when MLC, 2006, came into effect,[193] and higher for night work or work likely to jeopardise workers' health or safety.[194] Although this is a separate requirement, it could also be included in the provisions to ensure that all seafarers are medically fit to perform their duties at sea,[195] which must be backed up by an appropriate medical certificate.[196]

Seafarers' training and qualifications also take a prominent place in MLC, 2006,[197] which includes an express reference to member states' obligations in accordance with ILO Convention No. 74 on the Certification of Able Seamen, 1946. To reinforce this Regulation, the European Union issued Directive 2008/106/

[191] ILO Handbook (2012).

[192] See Article XV of MLC, 2006.

[193] See Regulation 1(1) of MLC, 2006.

[194] See Standard A1(1) of MLC, 2006. The ILO had already addressed this topic in Convention No. 58 (Revised) on Minimum Age (Sea) and later in Conventions No. 138, Minimum Age, and No. 180 concerning Seafarers' Hours of Work and the Manning of Ships, 1996.

[195] See Regulation 1(2) of the MLC, 2006.

[196] See Standard A1(2) of the MLC, 2006. In accordance with its significance, the ILO and the International Migration Organization issued Guidelines on the medical examinations of seafarers (2013). Previously, ILO Convention No. 73 concerning Medical Examination (Seafarers), 1946, and prior to that ILO Convention No. 16 concerning Medical Examination of Young Persons (Sea), 1921, and Recommendation No. 153 concerning the Protection of Young Seafarers, 1976.

[197] See Regulation 1(3) of the MLC, 2006.

EC of the European Parliament and of the Council, of November 19, 2008,[198] on the minimum level of training of seafarers (recast), which in turn draws on the IMO Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention).[199]

Seafarers' training is key not only in maritime safety but also for protecting jobs, as expressed in the EU Commission Communication to the Council and the EU Parliament on the training and recruitment of seafarers,[200] where the lack of qualified seafarers is highlighted. This is mainly due to the liberalisation of ship registration and the subsequent hiring of cheap labour in third countries and to sociological factors that are now discouraging young people from starting a career in merchant and fishing fleets. The social isolation resulting from long periods at sea combined with the influence of the current practice of short stays in port, as well as the fact that the multicultural composition of crews may hinder efficient communication on board, are also relevant factors.[201]

The Directive introduces an EU procedure and common criteria for the recognition of certificates issued from third countries, thus ensuring crew qualifications, with the aim of restoring the honourable status it deserves to the maritime profession. Within the EU, Directive 2005/45/EC of the European Parliament and the Council of 7 September 2005 on the mutual recognition of certificates issued by member states to seafarers[202] contributes to the free movement of people and services between member states and therefore increases employment opportunities for seafarers resident in Europe and for manpower available to shipowners operating from member states.

Special consideration is given to conditions for access to employment, i.e. how to manage the recruitment and placement of seafarers,[203] an area for which the

[198] OJ No. L 323, 3.12.2008. Amended by Directive 2012/35/EU of the European Parliament and of the Council of 21 November 2012 (O.J. No. L 343, 14.12.2012).

[199] STCW-Convention of 7 July 1978, 1361 UNTS 2, amended in 1995 and 2010, published by IMO, London, 2011.

[200] Brussels, 6.4.2001 [COM(2001) 188 final]. This Communication begins by highlighting the deficit of qualified seafarers, in particular officers, with figures indicating that their numbers have not increased in recent years. Prior to this, see Commission Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions 'Towards a new maritime strategy', Brussels, 13.3.1996 [COM(1996) 81 final], approved by Council Resolution of 24 March 1997 on a new strategy to increase the competitiveness of Community shipping (OJ Nr. C 109, 8.4.1997, p. 1).

[201] The same concerns were later made explicit in the Green Paper 'Towards a future Maritime Policy for the Union: a European vision for the oceans and seas', Brussels, 7.6.2006 [COM(2006) 275 final], para. 2.5. In a previous report issued in October 2005 entitled Commission Staff Working Paper on measures adopted by the Commission in the field of maritime employment [SEC(2005) 1400/2], the EC Commission had presented several proposals aimed at increasing the number of jobs and improving the quality of employment in the maritime sector. The Green Paper also stressed the significance of qualifications, and the STCW-F Convention—in the fishing sector—was criticised for not receiving sufficient ratifications (para. 2.5).

[202] JO No. L 255, 30.9.2005. This Directive amends Directive 2001/25/EC.

[203] See Regulation 1(4) of MLC, 2006.

corresponding services must be regulated and controlled by the respective states in accordance with Standard A1(4) of MLC, 2006. The fundamental aim of these provisions is to prevent abuses, such as charging seafarers undue fees or blacklisting them if they exercise their rights, in particular by joining a trade union or seeking advice on their working conditions.[204]

On the positive side, seafarer recruitment and placement services have to make sure that seafarers meet the minimum requirements, have the right papers and, in particular, receive a copy of the employment contract and are informed of their rights and duties. A further aim is to prevent seafarers from being abandoned in foreign ports by checking shipowners' financial means and obliging them to take out an insurance policy or an equivalent measure to ensure that seafarers receive compensation in the event of owner default.[205]

Employment Conditions

Title 2 of MLC, 2006, deals with employment conditions and begins with seafarers' employment agreements: 'the terms and conditions for employment of a seafarer shall be set out or referred to in a clear written legally enforceable agreement', entitling seafarers to examine the document and seek advice where necessary. The same Regulation 2(1) lays down that applicable collective bargaining agreements are deemed to be incorporated within seafarers' employment agreements. Section 4 of Standard A2(1) gives a non-exhaustive list of questions to be included in an employment agreement,[206] such as wages or, where applicable, the formula used to calculate them; the conditions for terminating the agreement; and repatriation rights. Indeed, both wages and the right to repatriation merit a specific set of Regulations, namely No. 2(2) and 2(5) respectively, but the Convention neither lays down a minimum wage—mentioned in Guideline B2(2)(3)[207]—nor includes the principle of 'equal work for equal pay'.

The provisions were drafted with the aim of preventing serious abuses such as failure to provide a copy of the contract or simply indicating that the contract is in the hands of the employer, with the result that the—often clearly unfair[208]—contractual terms are interpreted entirely in line with employers' interests. To

[204] Prohibited by ILO Convention No. 9 for Establishing Facilities for Finding Employment for Seamen, 1920, recruitment and placement services were finally admitted by ILO Convention No. 179 and Recommendation No. 186, concerning Recruitment and Placement of Seafarers.

[205] See Standard A1(5)(c) of MLC, 2006.

[206] In accordance with its precedent, ILO Convention No. 22, concerning Seamen's Articles of Agreement, 1926.

[207] On turning social dialogue in wage matters into a key issue, see Chaumette (2007), pp. 135–136. As a matter of fact, an ILO Joint Maritime Commission Subcommittee issued a resolution fixing a minimum monthly basic pay or wage figure for able seafarers in February 2014.

[208] See a list of unfair terms in Couper (1999), pp. 53–57, and another list of general terms in Fitzpatrick and Anderson (2005), pp. 179–184.

these ends, governments,[209] trade unions and shipowners' associations[210] have drawn up standard contract forms.

Regulation 2(5) stipulates that member states are required to demand financial security from their flag vessels to ensure seafarers' repatriation. Despite this provision, MLC, 2006 does not go deeper into the issue of the abandonment of seafarers, as it does not require financial guarantees to cover any expenses that may occur during the period of abandonment, or compensation due to seafarers. For this reason, and given the extent of the problem, the ILO and IMO agreed to continue their negotiations to find a solution, and the outcome was an amendment to MLC, 2006, pursuing the inclusion of the mandatory requirement that all shipowners have financial security, either in the form of an insurance policy or as an instrument included within the social security system, covering not only repatriation but also other costs in addition to unpaid wages.[211] The Special Tripartite Committee has approved the amendment on April 11, 2014, and it is expected it entering into force in 2017.[212]

It must be emphasised that in the event of shipowners not fulfilling their obligation to repatriate seafarers, the flag states will take on the responsibility; should this not be possible, the obligation shifts either to the state from whose territory the seafarers need repatriating or the state of which the seafarers are nationals. Both may be reimbursed by the flag state.[213]

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[209] See POEA Contract on Standard Terms and Conditions governing the employment of Filipino Seafarers on Board Ocean Going Vessels (drafted in 2000 and available at http://www.poea.gov.ph/docs/sec.pdf), UK Maritime and Coastguard Agency Crew Agreement Form ALC/BSF 1(d), UK Maritime and Coastguard Agency Crew Agreement Form ALC (NFD) 1(d) (both drafted in 2004 and available at http://www.dft.gov.uk/mca/).

[210] See ITF Standard Collective Agreement, ITF Uniform TCC CBA 2008–2009, ITF Offshore Standard Agreement, IBF Framework TCC Agreement (available on the ITF webpage).

[211] Proposal for the text of an amendment to the Maritime Labour Convention, 2006 Standard—Provision of financial security in cases of abandonment of seafarers, drafting Article XV to be included within MLC, 2006. Both working documents and the final proposal can be found in Librando (2010), pp. 695–705. See also Fotinopoulou Basurko (2009), pp. 115–153; Nifontov (2014), pp. 117–136. These texts have led to the construction of a database to report all cases of seafarers' abandonment. It can be consulted online at http://www.ilo.org/dyn/seafarers/seafarersbrowse.home?p_lang=es. Previous to the ILO's undertakings, the IMO had issued Guidelines A.930(22), 20.11.2001, on Provision of Financial Security in Cases of Abandonment of Seafarers (A 22/Res.930, 17.12.2001). Seafarer abandonment may be classified as a professional risk, as it is in Spain. In this vein, Carril Vázquez (2009), pp. 217–229, suggests that repatriation and other costs should be included within the coverage provided by the social security system and therefore payable through shipowners' contributions (pp. 224–229).

[212] Amendments to the Code implementing Regulations 2(5) and 4(2) and appendices of the Maritime Labour Convention, 2006 (MLC, 2006), adopted by the Special Tripartite Committee on 11 April 2014. It is remarkable that the UK has already established insurance companies'—in particular, P&Is—obligation of registering the employers they insure, thereby making it feasible for seafarers to easily identify the relevant insurance company. See further Hjalmarsson (2014), pp. 96–97.

[213] See Standard A2(5)(5) of MLC, 2006. All these issues are ruled by Convention No. 166 and Recommendation No. 174, 1987, concerning Repatriation of Seafarers. In Spain, this is addressed

Working hours are dealt with in Regulation 2(3), which seeks to establish a regular standard of working hours for seafarers, as well as maximum working hours and minimum rest hours. Leave entitlement is addressed in Regulation 2(4), and reference is made to Regulation 2(7), which deals with manning levels and aims to ensure that seafarers work on board ships that have sufficient personnel for the vessel's safe, efficient and secure operation.

Manning levels are of course key for the respecting of work and rest periods,[214] and in fact, because of their importance for maritime safety, they are also the subject matter of the International Convention for the Safeguarding of Human Life at Sea, 1960 and 1974,[215] whereas work and rest hours are regulated in the STCW Convention.[216] However, shore leave—i.e., seafarers having the opportunity to take time off when their ship is in port, deemed a welfare matter—is not addressed in these instruments. This is a serious omission if we take into consideration the fact that many states only allow seafarers to enter their territory if they have a visa, in addition to the fact that technology, inspections and other tasks on board limit shore visits to just a few hours, during which seafarers are in fact working.[217]

Regulation 2(6) deals with compensation for seafarers in the event of the ship being lost or wrecked. Finally, Regulation 2(8) is devoted to promoting career and skill development and job opportunities for seafarers.[218]

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in Article 9 of Royal Decree 869/2007, of 2 July, *por el que se regula la concesión de prestaciones asistenciales en atención a las situaciones especiales derivadas del trabajo en la mar para trabajadores y beneficiarios del Régimen Especial de la Seguridad Social de los Trabajadores del Mar y se establecen determinados servicios a los trabajadores del mar* (BOE No. 188, 14.7.2007), where abandonment is classified as a professional risk, measures are undertaken to repatriate and assist specific individuals as well as the state's subrogation on paid expenses (Article 10). Complementing this system, see Order TAS/29/2008, 15 January (BOE No. 17, 19.1.2008. Corrigendum BOE No. 42, 18.2.2008). See Carril Vázquez (2009), pp. 217–229.

[214] See ILO Convention No. 180 concerning Seafarers' Hours of Work and the Manning of Ships and Recommendation No. 18 and Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST)—Annex: European Agreement on the organisation of working time of seafarers (OJ Nr. L 167, 2.7.1999).

[215] Further, SOLAS, Chapter V, Regulation 13.

[216] STCW Convention, Regulation VIII/1 of the Annex of the Convention. The International Safety Management Code providing an international standard for the safe management and operation of ships and pollution prevention adopted by IMO Resolution A.741/18 in 1993, which was incorporated in Chapter IX of SOLAS, also concerns these issues. The human factor is the cause of most maritime accidents, which is why it is necessary to regulate hours of work and rest. Nevertheless, any regulation that does not take into account the specific circumstances in which work is done on board runs the risk of placing all liability on seafarers, in particular when the beneficial shipowner or the ship operator are lacking. For further information on this viewpoint, see Charbonneau (2009b), pp. 211–216.

[217] See Dimitrova (2010), p. 88.

[218] The terms are broad, and obligations are directed at member states. Worth noting here are ILO Convention No. 145 and Recommendation No. 154, 1974, concerning Continuity of Employment

Accommodation, Recreational Facilities, Food and Catering

Title 3 focuses on seafarers' welfare on board ships. It begins with the obligation to ensure that seafarers have decent accommodation and recreational facilities on board,[219] bearing in mind the relevance of these factors for the promotion of seafarers' health and well-being. All ships built after the Convention came into force on August 20, 2013, have to meet the specific technical requirements detailed in Standard A3(1), which are to be specified by member states in laws or regulations; ships built before that date are not required to meet these technical requirements but must comply with the provisions of ILO Conventions No. 92 concerning Accommodation of Crews (1949) and No. 133 (1979), which contains supplementary provisions.

Food and catering are dealt with in Regulation 3(2), which makes specific reference to crew members coming from different cultural and religious backgrounds, highlighting the importance of cooks having the right training and qualifications for the task.[220]

Social Protection and Health Care

Finally—and leaving the provisions on compliance and enforcement of MLC, 2006, for the next section—Title 4 covers healthcare, welfare and social security protection. Regulation 4(1) states the obligation to protect seafarers' health and the need to guarantee prompt access to medical care on board ships and ashore.[221] Health and safety protection measures and accident prevention are also given attention in Regulation 4(3) in order to ensure that seafarers' working environment on board ship promotes occupational safety and health.[222] The process of codification undertaken in MLC, 2006, brought with it the flexibilisation of some obligations, such as that in ILO Convention No 164 concerning the protection of health

(Seafarers), aiming for regular employment and complemented by the ideas of career opportunities and retraining schemes, as mentioned by Recommendation No. 139 concerning Employment of Seafarers (Technical Developments), 1970.

[219] See Regulation 3(1) of MLC, 2006.

[220] See ILO Convention No. 68 concerning Food and Catering (Ships' Crews), 1946. In acknowledgement of the significance of these issues, the ILO issued Guidelines on the training of ships' cooks (MESC/2013/9), available at its website.

[221] See ILO Convention No. 164, concerning Health Protection and Medical Care for Seafarers, 1987.

[222] See ILO Convention No. 134 and Recommendation No. 142, concerning Prevention of Accidents (Seafarers), 1970. MLC, 2006, suggests taking into consideration good practices such as those in the 1996 ILO Document (with several revisions) entitled 'Accident prevention on board ship at sea and in port', without detriment to other international standards established by other international organisations such as IMO (Standard A4.3) being taken into account.

and medical care (seafarers), 1987, and establishing the obligation to provide free medical care, now made flexible by the addition of 'in principle'.[223]

Regulation 4(2) goes beyond the issues of prevention and emergency care and aims to ensure that seafarers are protected from the financial consequences of sickness, injury or death that occurs in connection with their employment by making shipowners have sufficient financial guarantees.[224] Nevertheless, these financial guarantees are in principle not mandatory as a result of the lack of any international agreement on the matter.[225] The gap created by their absence is filled by private insurance, and many policies were signed following the implementation of an ITF standard collective agreement,[226] but they display many enforcement problems. For this reason, the ILO continued working on the issue after the issuance of MLC, 2006, and the first amendment it is to be issued in 2017, i.e., the establishing of a standard making it mandatory for shipowners to agree to sufficient financial guarantees to pay compensation arising out of harm suffered by seafarers as a result of their working activity on board. This amendment joins that concerning Regulation 2(5) dealing with seafarers' repatriation,[227] both hopefully to be put in motion in 2017. In any event, this should not prevent states from providing seafarers with access to social security protection systems.[228]

Finally, and to promote well-being, Regulation 4(4) is concerned with ensuring seafarers' access to shore-based facilities and services to guarantee their health and well-being, indicating the need for states to provide these facilities if they are not already available.

[223] See Carril Vázquez (2014), pp. 248–261.

[224] See ILO Convention No. 55 concerning Shipowners' Liability (Sick and Injured Seamen), 1936.

[225] See IMO Resolution A931(22), 29.11.2001.

[226] Worthy of note are Articles 23 and 25 of the International Bargaining Forum (IBF), 13.11.2003. Further, see Fotinopoulou Basurko (2012), pp. 33–53.

[227] Amendments to the Code implementing Regulations 2(5) and 4(2) and appendices of the Maritime Labour Convention, 2006 (MLC, 2006), adopted by the Special Tripartite Committee on 11 April 2014, where the relevant regulation is 4(2).

[228] See Regulation 4(5) of the MLC, 2006, and ILO (2012). Previously, see ILO Convention No. 70 concerning social security (seafarers), 1946; ILO Convention No. 71 concerning Seafarers' Pensions, 1946, ultimately not codified by MLC, 2006; ILO Recommendation No. 75, concerning Seafarers' Social Security (Agreements), 1946; ILO Convention No. 165 concerning Social Security (Seafarers), 1987, incorporating ILO Convention No. 102, concerning Social Security (Minimum Standards), 1952 into this sector.

2.5.3 Labour Standards in the Fishing Sector

2.5.3.1 Introduction

Most ILO Conventions do not cover the fishing sector.[229] This does not mean that the ILO has not dealt with them but rather that its activity in this area has been much more limited. The first relevant text is Recommendation No. 7, 1920, which set a limit on working hours in the fishing industry, and some conventions concerning the shipping industry extended their scope of application to the fishing industry, specifically ILO Convention No. 55 concerning Shipowners' Liability in cases of illness or injury to seafarers and ILO Convention No. 56 concerning Sickness Insurance for Seamen, both issued in 1936, as well as ILO Conventions No. 70 concerning Social Security and No. 71 concerning Seafarers' Pensions issued in 1946.

More specifically, ILO Convention No. 112, 1959, set out the minimum age for employment on board fishing vessels. In the same year, ILO Convention No. 113 imposed the requirement for a medical certificate to work on board fishing vessels, and ILO Convention No. 114, which was heavily influenced by the ILO 1926 Convention concerning seafarers, dealt with fishermen's articles of agreement. ILO Recommendation No. 126, 1966, covered fishermen's vocational training in the same year that ILO Convention No. 125 dealt with the qualifications required to perform the duties of master, second officer and mechanic on fishing vessels. This ILO Convention is similar to the IMO Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel (STCW-F Convention).[230] However, the latter is more detailed and includes mandatory provisions on safety training for all fishermen. The issue of accommodation was tackled in ILO Convention No. 126 of 1966, also heavily influenced by ILO Convention No. 92 concerning Accommodation of Crews in the shipping industry.

Worthy of mention in the European Union are Council Directives 92/29/EEC of 31 March 1992 on minimum safety and health requirements for improved medical treatment on board vessels,[231] 93/103/EC of 23 November 1993 concerning minimum safety and health requirements for work on board fishing vessels[232] and

[229] See Valticos (2003), pp. 616–617. Addressing general problems in achieving decent working conditions on board fishing vessels, see Proutière-Maulion and Chaumette (2000), pp. 297–320.

[230] This Convention entered into force on 29 September 2012, after the required 15 ratifications were reached on 29 September 2011, with ratification by the Republic of Palau. Spain had already ratified it.

[231] OJ No. L 113, 30.4.1992.

[232] Thirteenth individual Directive in accordance with Article 16 (1) of Directive 89/391/EEC E (OJ No. L 307, 13.12.1993), the latter having been amended by Regulation (EC) No. 1882/2003 of the European Parliament and of the Council of 29 September 2003 (O.J. No. L 284, 31.12.2003); by Directive 2007/30/EC of the European Parliament and of the Council of 20 June 2007 (O.J. No. L 165, 27.6.2007); and by Regulation (EC) No. 1137/2008 of the European Parliament and of the Council of 22 October 2008 (O.J. L 311, 21.11.2008).

Directive 2003/88/EC of the European Parliament and the Council of 4 November 2003 concerning certain aspects of the organisation of working hours.[233] However, fishing vessels working offshore are excluded from the provisions dealing with daily rest, breaks, weekly rest, maximum weekly working time and the length of night work periods.[234] In 2013, the Commission formulated a Proposal for a decision to sign the STCW-F Convention,[235] thereby filling the gaps mentioned above.

2.5.3.2 C188 ILO Convention on Work in Fishing, 2007

The positive mood of consensus stemming from MLC, 2006, led the ILO to negotiate Convention No. 188 concerning Work in Fishing within the ILO programme devoted to promoting decent work.[236] As the Preamble states, 'the objective of this Convention is to ensure that fishers have decent conditions of work on board fishing vessels with regard to minimum requirements for work on board; conditions of service; accommodation and food; occupational safety and health protection; medical care and social security'. WFC 2007 does not have the same structure as MLC, 2006, and takes the form of a regular convention.[237] However, in addition to revising previous ILO Conventions, the document addresses relevant issues that had so far been either insufficiently dealt with or totally ignored by the ILO, such as shore leave, repatriation of fishermen and inspections on board.

Although structured like a regular Convention, WFC 2007 was strongly influenced by MLC, 2006, including flexibility in the application of its provisions, i.e., it depends on member states' individual circumstances.[238] The Convention contains the following parts: Definitions and Scope (I); General Principles (II); Minimum Requirements for Work on Board Fishing Vessels (III); Conditions of Service (IV); Accommodation and Food (V); Medical Care, Health Protection and Social Security (VI); Compliance and Enforcement (VII); Amendment Issues (VIII); and Final Provisions (IX), closing with several annexes covering detailed provisions on certain issues connected with Part A of the Code contained in MLC, 2006, for example, terms to be included within fishermen's employment agreements or building fishing vessels to ensure decent accommodation for fishermen. WFC 2007 provisions broadly reflect those of the compulsory part of MLC, 2006, and seek to establish exactly the same international minimum standards in the

[233] OJ No. L 299, 18.11.2003.

[234] See Article 21 of Directive 2003/88/EC.

[235] Proposal of Council Directive authorising member states to sign and/or ratify, in the interest of the European Union, the International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel, 1995, of the International Maritime Organisation (Text with EEA relevance) (COM/2013/595 final).

[236] On the origin of this Convention, see Chaumette et al. (2010), pp. 349–359.

[237] See Marin and Charbonneau (2007a), pp. 115–116.

[238] See Article 4 of MLC, 2006.

fishing sector. Recommendation No. 199 concerning Work in Fishing was issued in parallel with WFC 2007.

2.5.4 Compliance and Enforcement of International Labour Law

2.5.4.1 Flag State Liability

International Grounds for Flag State Liability

As can be seen from the preceding section, numerous international instruments and core conventions cover essential issues of life and work on board vessels, as well as other matters concerning safety on board. Regardless of the numerous ratifications of the conventions and the extent to which they have been implemented, it is important to highlight the fact that they all rest on the same principle embodied in Articles 91 and 94 of UNCLOS: living and working conditions on board ships are allocated to the jurisdiction of the flag state. Nevertheless, as already mentioned, this allocation system does not always run smoothly, given that many flag states do not fulfil their duties to ensure compliance with labour standards. Such negligence is not just a matter of lack of political will or policies designed to attract funding but is sometimes due to a lack of the financial resources and trained staff needed for states to supervise their own merchant and fishing fleets.[239]

Flag states' lack of control over compliance with technical standards often jeopardises maritime safety. This triggered a backlash, which also affected working and living conditions on board[240]: shipping casualties and environmental damage

[239] As reported by the International Commission for Shipping in 2001 in a study entitled 'Ships, Slaves and Competition', paras. 2.24–2.26: 'There were constant demands for nations registering ships to be held more accountable in performing of their responsibilities. A major concern was the inability of a significant number of registers to provide adequate legal and administrative infrastructures to meet their obligations in international law, particularly the United Nations Convention on the Law of the Sea 1982. A growing number of port and coastal States and other interest groups are seeking measures to oblige the 'rogue flag states' to accept and implement relevant legislation and administrative controls over the quality of shipping. A general consensus is that there are sufficient regulations to do the job, the problem is their lack of implementation. Major reasons stated for failure to implement the necessary measures were the lack of competent personnel and financial resources, and a lack of political will in many cases. There was a widespread view throughout the Commission's inquiries that the IMO's work on flag state implementation has been largely ineffective. Concerns were also expressed concerning the validity of the Convention on Standards of Training, Certification and Watchkeeping 1978 and Revision 1998 (STCW) White List, as well as the effectiveness of the International Safety Management Code (ISM)'. This report is available at http://www.itfglobal.org/seafarers/icons-site/images/ICONS-fullreport.pdf.

[240] See 1983 statistics in Metaxas (1985), pp. 72–105. For subsequent updates, see Alderton and Winchester (2002), pp. 35–43.

led to a number of instruments being introduced that seek to improve safety standards in the design, construction, equipping and manning of vessels (CDEM standards).[241] In the same vein, improving labour standards on board is essential to prevent accidents at sea. This led the ILO to draft the international conventions mentioned above with the aim of fixing minimum labour standards, the most significant and representative of which are MLC, 2006, and WFC 2007. However, these measures are not enough to guarantee compliance. In accordance with international law, in particular with Article 94 of UNCLOS, the flag state is responsible for ensuring that ships flying its flag comply with international standards on maritime safety and marine environment protection. An essential part of their obligation is to ensure that all vessels flying their flag are regularly examined by a qualified inspector to ensure these standards are met.[242]

Implementation: Certificates Issued by the Flag State and Inspections

To confirm that the flag state indeed ensures that ships comply with international maritime security standards, they are required to carry a certificate issued by the state, which other states have a duty to accept without further investigation. These certificates provide shipowners with the guarantee that they are not risking being detained by other states for further inspection. This system also involves certain risks, however, in that in principle other states have to accept the certificates even if the flag state lacks an infrastructure capable of carrying out the inspections required for the certificates to be issued or monitoring whether inspections carried out by private companies on the flag state's behalf are performed adequately,[243] for which reason the certificates' very usefulness is being challenged.[244]

In fact, the certification system works because of the threat that ships seen as a real danger to shipping may be detained by another state. If a ship is detained, the owner incurs significant losses as the vessel cannot meet its commitments, and so shipowners have a natural interest in avoiding such delays. The blue certificates issued by the International Transport Workers' Federation (ITF) and given to shipowners after the concluding of collective agreements for their ships or fleet operate on the same basis, guaranteeing that the vessel in question complies with international labour standards; ITF unions around the world thus refrain from

[241] See König (2002), pp. 1–14.

[242] See Basedow and Wurmnest (2006).

[243] There are no international regulations indicating what kind of checks a flag state may undertake before registering a ship. The IMO is aware of this loophole and has issued guidelines for governments to ensure the adequacy of the transfer of class-related matters between recognised organisations (MSC/MEPC 2005, 5/Circ.2) and for the transfer of ships between states (MSC/Circ.1140, MECP/Circ.424). All in all, these are voluntary procedures that are badly in need of international regulation. For a proposal on this point, see Mansell (2009), p. 32.

[244] See Mansell (2009), pp. 3–4.

boycotting and taking other industrial actions against these ships at their ports of arrival.[245]

In this sense, the MLC, 2006, compliance and enforcement mechanism relies on flag states issuing new certificates. As laid down in Regulation 5(1)(1)(2), 'Each Member shall establish an effective system for the inspection and certification of maritime labour conditions'. This results in the issuing of a *maritime labour certificate*, complemented by a *declaration of maritime labour compliance*, both constituting '*prima facie* evidence that the ship has been duly inspected by the Member whose flag it flies and that the requirements of this Convention relating to working and living conditions of the seafarers have been met to the extent so certified'.[246] The ILO is aware that the success of MLC, 2006, rests on the uniform and harmonised implementation of flag state responsibilities, for which it prepared the *Guidelines for flag state inspections under the Maritime Labour Convention*, 2006.[247]

Annexes to MLC, 2006, contain examples of both the maritime labour certificate and the declaration of maritime labour compliance, aiming thus to ensure uniformity in the list of items that have to be subject to flag state control and recognition of these documents by other states. Regulation 5(1)(3), complemented by Standard A5(1)(3), deals with both documents at some length, specifying that they are only mandatory for vessels with a gross tonnage of 500 tonnes or more, engaged in international voyages or flying the flag of a member state and operating from a port, or between ports, in another country; beyond these cases, compliance with MLC, 2006, standards is dependent on the will of the shipowner, who may at any point submit the ship to inspection and apply the corresponding standards.

Maritime labour certificates guarantee that the working and living conditions on board are in accordance with the requirements laid down by national legislation or with other provisions and measures for the implementation of MLC, 2006. The declaration of maritime labour compliance, in turn, specifies the national provisions in force for the implementing of MLC, 2006, and describes the measures adopted by shipowners to ensure compliance with these provisions on board ships. They are valid for a maximum period of 5 years, during which the vessel should have undergone at least one intermediate inspection. The Convention also provides for the possibility of issuing an *interim* maritime labour certificate with a 6-month validity from the date of issue, which will be at the time of delivery for new vessels, when there is a flag change for old vessels, or when shipowners accept responsibility for operating a ship that is new to them.

[245] See Smith (2004), pp. 265–276. Implementation of MLC, 2006, may change ITF *modus operandi* and, in particular, the effectiveness of blue certificates. On warnings of a potential weakening in trade union action, see Charbonneau (2009b), pp. 168–172.

[246] See Regulation 5(1)(1)(4) of MLC, 2006.

[247] Available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_101788.pdf.

MLC, 2006, requires member states to create a body of inspectors responsible for checking that ships flying their flag do indeed provide decent working and living conditions on board, as laid down by the Convention.[248] Inspections can be carried out *ex officio* and also when a well-founded complaint has been lodged. To this end, Regulation 5(1)(5) and Standard A5(1)(5) set out an on-board complaint procedure expressly warning against the victimising of seafarers for filing complaints.

When a complaint is lodged, the inspection mechanism is activated but legal proceedings are not, meaning that the Convention does not deal with international jurisdiction issues. Title 5(4) of MLC, 2006, warns that 'the provisions of this Title shall be implemented bearing in mind that seafarers and shipowners, like all other persons, are equal before the law and are entitled to the equal protection of the law and shall not be subject to discrimination in their access to courts, tribunals or other dispute resolution mechanisms. *The provisions of this Title do not determine legal jurisdiction or a legal venue*'.[249]

The WFC 2007 compliance and enforcement system is not as sophisticated as that of MLC, 2006. Article 40 merely states that 'each Member shall effectively exercise its jurisdiction and control over vessels that fly its flag by establishing a system for ensuring compliance with the requirements of this Convention including, as appropriate, inspections, reporting, monitoring, complaints procedures, appropriate penalties and corrective measures, in accordance with national laws or regulations'. It follows from this and the subsequent provisions that fishing vessels should also be examined by inspectors and should carry a certificate confirming that they have passed the inspection.

In fact, WFC 2007 does echo the obligation to provide inspectors in charge of monitoring compliance with the Convention's provisions on board fishing vessels,[250] also insisting that, should there be complaints or evidence of the ship not meeting minimum standards, flag state inspectors must carry out investigations and take appropriate measures to rectify any shortcomings found where necessary.[251] Despite being less thorough than MLC, 2006, there are obvious parallels between the two Conventions, so that it is to be hoped that when WFC 2007 comes into force, good use will be made of the steps already taken to implement MLC, 2006, and the same body of inspectors involved in applying the latter will be put in charge of implementing the former.

[248] See Regulation 5(1)(4) and Standard A5(1)(4) of the MLC, 2006.

[249] My emphasis.

[250] See Article 42 of WFC 2007.

[251] See Article 43 of WFC 2007.

2.5.4.2 Port State Responsibilities

Origins and Articulation

Unfortunately, not all flag states fulfil their duties on compliance and enforcement of international labour standards. In this context, international labour law turned to coastal and port states to further monitor compliance with international standards.[252] This major step forward is contained in ILO Convention No. 147 concerning Minimum Standards on Merchant Ships, 1976. Article 4 of this Convention stipulates that any member state 'in whose port a ship calls in the normal course of its business or for operational reasons receives a complaint or obtains evidence that the ship does not conform to the standards of this Convention, after it has come into force, it may prepare a report addressed to the government of the country in which the ship is registered, with a copy to the Director-General of the International Labour Office, and may take measures necessary to rectify any conditions on board which are clearly hazardous to safety or health'. This ILO Convention has undoubtedly contributed to the development of port state control, but actual intervention is mainly dependent on a complaint being lodged. MLC, 2006, aims to improve control in this area.[253]

Following the ground broken by ILO Convention No. 147 and the sinking of the *Amoco Cadiz* on 16 March 1978, a Memorandum of Understanding (MOU) was signed in Paris on 22 January 1982,[254] with the aim of coordinating international maritime inspections carried out by port and coastal states. The Memorandum seeks to harmonise inspection practices and stipulates that at least 25 % of the ships that enter any port must be subject to inspection. Moreover, inspections cannot be discriminatory, which means that the MOU targets both vessels flying the flag of states that are party to international conventions—which are monitored by each inspection—and ships flying the flags of non-member states.[255]

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[252] See Leanza (1999), pp. 130–140; Tassel (1999), pp. 237–255; Oya Özçayir (2001), *passim*; Wolfrum (1990), pp. 139–141.

[253] Common law countries approach this issue differently, since they assume jurisdiction over foreign ships, only restricted by comity. See Symeonides (2006), pp. 491–519. On the other hand, French tradition denies jurisdiction over internal ship matters. On the grounds for this jurisdiction, see Celle (2007), pp. 712–749.

[254] The Paris MOU entered into force on 1 July 1982. It has served as a model for other MOUs such as the 1992 Viña del Mar MOU, coordinating Latin American countries and the Barbados MOU, 1996, operating in the Caribbean region. The Tokyo MOU was introduced in Asia in 1993, and on July 1997 the Malta MOU came into force for operations in the Mediterranean Sea. The Indian Ocean MOU dates from 7 June 1998 and the Black Sea MOU from 7 April 2000, and the latest of these initiatives is the June 2004 Persian Gulf MOU. An African MOU involving 16 States from West and Central Africa was concluded in 1999. On related implementation issues, see, among others, Zinsou (2009), pp. 353–377.

[255] The Paris MOU is also open to signatures from non-European states and was signed by Canada in 1994. Part of its success is due to its incorporation within the EEA by Council Directive 95/21/EC, 19.6.1995 (OJ No. L 157, 7.7.1995).

Much of this MOU's success is due to EU involvement, whose purpose is to strike a balance for the benefit of all the stakeholders: '... living and working conditions should rest primarily with the flag state; (...) however, there is a serious failure on the part of an increasing number of flag states to implement and enforce international standards; (...) henceforth the monitoring of compliance with the international standards for safety, pollution prevention and shipboard living and working conditions has also to be ensured by the port State'.[256]

These administrative cooperation agreements have helped speed up the ratification of international instruments relating to maritime safety and environmental protection. In the context of these inspections, coastal and port states may monitor working and living conditions on board, but only when and if a complaint has been lodged. With the ratification of the STCW Convention, port state control was extended to cover crew training and qualifications. Other international instruments aimed to broaden the range of issues covered by port state inspections to include working and living conditions on board, one example being 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.[257]

Port State Control in MLC, 2006, and WFC 2007

MLC, 2006, also deals with the question of the port states' responsibilities—which are crucial to international cooperation as their intervention is essential in ensuring the implementation and enforcement of international labour standards on foreign ships.[258] Given its key role, the ILO issued a set of Guidelines for port state control officers carrying out inspections under the Maritime Labour Convention 2006.[259] Following EU adherence to the goals of MLC, 2006, Directive 2009/16/EC of the

[256] See Council Directive 95/21/EC of 19 June 1995 concerning the enforcement of international standards for ship safety, pollution prevention and shipboard living and working conditions (port state control) in respect of shipping using Community ports and sailing in the waters under the jurisdiction of member states (OJ No. L 157, 7.7.1995. Corrigendum in OJ No. L 291, 14.11.1996, OJ No. L 133, 7.5.1998, OJ No. L 184, 27.6.1998, OJ No. L 331, 23.12.1999). See also Noussia (2009), pp. 644–669.

[257] OJ No. L 14, 20.1.2000. Due consideration must be given to Council Directive 94/57/EC of 22 November 1994 on common rules and standards for ship inspection and survey organisation and for the relevant activities of maritime administrations (OJ No. L 319, 12.12.1994) and to Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods (OJ No. L 247, 5.10.1993).

[258] See Regulation 5(2) of MLC 2006 and Christodoulou-Varotsi (2003), pp. 251–285.

[259] Available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_101787.pdf. Highlighting the importance of these inspectors' competencies for the system's success, see Piniella et al. (2013), pp. 59–84.

European Parliament and of the Council of 23 April 2009 on port state control was also issued.[260]

Ships arriving at port must therefore meet the working and living conditions required by MLC, 2006, regardless of the fact that they may be flying a non-member state's flag. Should they be flying a member state flag, port state inspectors' duties would be limited to checking that the ship was carrying the appropriate maritime labour certificate and declaration of maritime labour compliance.[261]

However, there must be a full inspection if there are irregularities in the documents or clear grounds for believing that working and living conditions on board do not conform to the MLC, 2006, requirements; if there is reason to believe that the flag has been changed to avoid these requirements; or if a complaint has been filed.[262] Nonetheless, as with complaints lodged before the flag state jurisdiction, filing these complaints does not mean that the state in question has international grounds for jurisdiction to prescribe, as the Convention does not deal with these issues.[263] In all these cases, port state control operations may end up with a ship being detained[264] should the conditions on board represent a clear threat to seafarers' safety, health or security, or when the failure to comply with Convention requirements represents a serious or repeated breach, including of seafarers' rights.[265]

Article 43 of WFC 2007 establishes port state control over fishing vessels as well. Specifically, this provision requires port states to investigate working and living conditions on board fishing vessels if there is a complaint or evidence that the vessel does not meet the minimum requirements set out in the Convention and report any such cases to the flag state immediately. Measures will be introduced to rectify shortcomings affecting health and safety on board when necessary. This provision also stipulates that complaints may be filed by all stakeholders, with particular reference to fishermen and their associations and unions. When carrying

[260] This Directive was amended by Directive 2013/38/EU of the European Parliament and of the Council, 12.8.2013 (OJ No. L 218, 14.8.2013). Transposition in Spain was carried out by Royal Decree 1737/2010, 23.12.2010, approving the Regulation on foreign ships' inspections in Spanish ports (BOE Nr. 317, 30.12.2010), which granted the authority to carry out inspections to the General Directorate of the Maritime Merchant. This body relies in turn on the Spanish *Capitanías Marítimas*.

[261] See the subsection 'Implementation: Certificates Issued by the Flag State and Inspections' under Sect. 2.5.4.1.

[262] See Regulation A5(2)(1)(1) of the MLC, 2006. On the procedure following a complaint in France, see Marin and Charbonneau (2007b), pp. 173–208, who criticise problems in gaining access to justice due to the fact that the Convention does not provide for international jurisdiction, which they held to be developed on the basis of ECHR (pp. 199–205). Likewise, Charbonneau (2010), pp. 273–275; Ntovas (2014), pp. 151–180 and 179–180.

[263] See the subsection 'Implementation: Certificates Issued by the Flag State and Inspections' under Sect. 2.5.4.1.

[264] See Standard A5(2)(1)(7) of MLC, 2006.

[265] See Standard A5(2)(1)(6) of MLC, 2006.

out inspections, port states cannot distinguish between vessels flying Convention member states' flags and other vessels.[266]

Developments in port state control measures have had a positive impact on improving the condition of ships registered under flags of convenience. On the negative side, it has been observed that ships that cannot meet international standards have moved to what might be called 'emerging' flags of convenience as a way to avoid ports where inspections are carried out regularly.[267]

Obligations Related to Seafarers' Welfare

Finally, since this section deals with states' port management responsibilities, it is important to recall that port states are also subject to other obligations, in particular providing shelter for seafarers so that they can enjoy recreational facilities when in port. Unfortunately, port security controls and docking tolls have increasingly led ship operators to reduce time in port, which has negative effects on seafarers' health and safety.

Following the tragic events of 11 September 2001, port security was reinforced by requiring seafarers to carry a new identity card and to undertake new security measures in accordance with the International Ship and Port Facility Security Code (ISPS Code).[268] In this context, ILO Convention No. 185 concerning Seafarers' Identity Documents (Revised), 2003, aimed to strike a balance between the new security requirements and respect for human rights rules, refugee rights and international humanitarian law, which includes seafarers' welfare.[269]

It should be pointed out that in the event of an international journey for reasons of transit, transfer or repatriation, no visa is required, nor is one needed for temporary shore leave, although the immigration authorities must be informed before a ship arrives at port.[270] These are the terms of the Spanish Immigration Regulation in force, although it is less generous over port access, which is only

[266] See Article 44 of WFC 2007.

[267] See Alderton and Winchester (2002), p. 39.

[268] Complemented within the EU by Regulation (EC) No 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security (Text with EEA relevance) (OJ No. L 129, 29.4.2004). On problems arising out of these measures for seafarers' well-being, see Christodoulou-Varotsi (2007), pp. 141–156. On its implementation in Spain, see Article 7(2)(e) of the Royal Decree No. 557/2011, 20.4.2011, *por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009*, and comments by Fotinopoulou Basurko (2007), pp. 157–171.

[269] See Doumbia-Henry (2003), pp. 129–148.

[270] See Article 6 of ILO Convention No. 185 concerning Seafarers' Identity Documents (Revised), 2003.

granted if seafarers hold a uniform visa or a visa with limited territorial validity that may be requested at external borders.[271]

2.5.4.3 Responsibilities of Labour-Supplying States

The use of seafarer recruitment and placement services is currently a common practice among shipowners, and MLC, 2006, also contains provisions relating to this. The provisions have been introduced not only because of the high financial impact of using these services regularly but also because serious abuses have been detected, among which are (1) charging seafarers and fishermen illegal fees for finding them jobs, (2) cutting their salaries with the excuse that there have been further administrative and social security costs associated with their contracts, (3) forcing seafarers to sign two contracts, (4) sending them to non-existent jobs or promising false working conditions, (5) abandoning them, and (6) prohibiting them from joining trade unions under the threat of dismissal and inclusion on a 'black list', which would effectively exclude them from the labour market.[272] One way to avoid and detect such abuses is state certification of agencies or even limiting permits to operate with seafarers and fishermen exclusively to state agencies in the country.

With the aim of putting an end to these abuses, MLC, 2006, makes labour-supplying states accountable for recruitment and placement services operating there. In particular, these countries must implement provisions 'regarding the recruitment and placement of seafarers as well as the social security protection of seafarers that are its nationals or are resident or are otherwise domiciled in its territory, to the extent that such responsibility is provided for in this Convention', without jeopardising the principle of flag state responsibility for the working and living conditions of seafarers on ships that fly their flag.[273] Labour-supplying countries must also set up a system of inspection and monitoring as well as legal proceedings for cases where a breach of licensing and other operational requirements has been committed, as set out by the Convention.[274]

Likewise, WFC 2007 requires member states to include agencies they manage within public recruitment and placement services and to subject private agencies to a licensing procedure. In this regard, ILO Convention No. 181 on Private Employment Agencies, 1997, remains the main instrument regarding agencies, as WFC 2007 refers to it.[275] The Convention expressly orders member states to prohibit

[271] See Articles 1(3) and 31(2) of Royal Decree 557/2011 respectively. In fact, the Convention does not ban visa requirements, but member states that are unable to meet the requirements it provides for may issue essentially equivalent measures. With these terms, the Convention adopts a flexible approach in its implementation, which is also to be found later on in MLC, 2006. Note that a Recommendation concerning Decent Working Conditions was also adopted in parallel with ILO Convention No. 185.

[272] See Dimitrova (2010), pp. 12–14.

[273] See Regulation 5(3)(1) of MLC, 2006.

[274] See Standard A5(3) of MLC, 2006.

[275] See Article 22(4) of WFC 2007.

unfair practices such as blacklisting fishermen or charging them for employment-related services. In any event, it holds the fishing vessel's owner responsible *vis-à-vis* fishermen should a manning agency fail to meet its obligations.

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Chapter 3
International Jurisdiction Over Individual Employment Contracts

3.1 Jurisdictional Regimes

The allocation of international jurisdiction over individual employment contracts proceeds in accordance with the rules laid down by the existing instrument of reference for this purpose within the European Area of Justice. Until January 10, 2015, that was Regulation (EC) No. 44/2001, of 22 December 2000 on international jurisdiction, recognition and enforcement of judgments in civil and commercial matters,[1] also known as the Brussels I Regulation, that follows the course charted by a prior document, the 1968 Brussels Convention. The Regulation has already been reviewed, and Regulation (EU) No. 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), also known as the Brussels I *bis* Regulation, is applicable to all lawsuits brought before member states' courts from 10 January 2015.[2] Neither the said Convention nor the Brussels I or Brussels I *bis* Regulations formulate specific rules on maritime employment, but as they deal with civil and commercial matters, including employment contract matters, we must turn to them as a primary source of international jurisdiction rules for the issues in question here. It is therefore important to recall that both Brussels I and Brussels I *bis* Regulations are binding on all member states, including Denmark, thanks to an international agreement concluded with the European Community in 2005.[3]

[1] OJ No. L 12, 16.1.2001.

[2] See Articles 66 and 81 of the Brussels I *bis* Regulation.

[3] Council Decision 2006/325/EC, of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ No. 120, 5.5.2006). Denmark sent a letter notifying the Commission of its decision to implement the contents of Regulation (EU) No. 1215/2012 (OJ No. L 79, 21.3.2013) on 20 December 2012. The latter Regulation has already been amended as regards the rules to be applied with respect to the Unified

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Nevertheless, the fact that these instruments do not have universal scope of application means that other instruments may equally come into play to establish a member state's international jurisdiction, in particular the 1988 and 2007 Lugano Conventions[4]: in parallel with the Brussels Convention and the Brussels I and Brussels I *bis* Regulations, the Lugano Conventions share the aim of binding non-EU members that are members of the European Economic Area (hereafter EEA). The interrelationship between these instruments, whose provisions have fairly similar aims, allows us to speak of a 'Brussels–Lugano system'. Accordingly, and although the CJEU only provides binding guidance on the Brussels Convention and the Brussels I and I *bis* Regulations, its case law is also taken into consideration when it comes to applying the Lugano Conventions. As a matter of fact, Protocol No. 2 to the 2007 Lugano Convention already pays due regard to the connection between these legal instruments, and EU members may ask the CJEU questions on the interpretation of this Convention as well.[5]

This study basically focuses on Section 5, Chapter II, of the Brussels I and Brussels I *bis* Regulations and the 2007 Lugano Convention, which are almost identical. The latter replaced the 1988 Lugano Convention and is to be applied to all claims arising after it comes into force,[6] while the Brussels Convention was replaced by the Brussels I Regulation, which has been in turn replaced by the Brussels I *bis* Regulation in 2015. As to jurisdiction issues the latter has completely overcome Brussels I Regulation, but this book keeps referring to it to the extent that, on the one hand, the ongoing discussion still is based upon its provisions and, on the other hand, the Lugano Convention in force is parallel to it. Nevertheless and for reasons of simplicity, constant reference to the Brussels I Regulation and the Lugano Convention is avoided in the discussion, although there are variations in the numbering of provisions otherwise similar when not identical in the Brussels I bis Regulation. As the following discussion is applicable to the Lugano Convention references will be made to the European Economic Area instead to the European Area of Justice. In addition to this, it must be noted that both the 1968 Brussels and the 1988 Lugano Conventions are still effective in some territories, as specified below.

The fact that some member states have established open and second registries overseas raises the question of exactly where the Brussels I *bis* Regulation is

Patent Court and the Benelux Court of Justice by Regulation (EU) No. 542/2014 of the European Parliament and of the Council of 15 May 2014 (OJ No. L 163, 29.5.2014), whose implementation has also been agreed on between Denmark and the EU (OJ No. L 240, 13.8.2014).

[4] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, held at Lugano on 30 October 2007 (OJ No. 147, 10.6.2009).

[5] See in particular Article 2 of Protocol No. 2 to the 2007 Lugano Convention on the uniform interpretation of the Convention and on the Standing Committee, pursuant to which non-EU members may provide written allegations in CJEU proceedings dealing with prejudicial questions posed by EU members.

[6] See Articles 63 and 69(2) of the 2007 Lugano Convention. This Convention entered into force for the EU, Denmark and Norway on 1 January 2010; for Switzerland on 1 January 2011; and for Iceland on 1 May 2011.

enforceable, i.e. which courts are to be deemed part of the European Area of Justice, despite their remoteness from European shores. Article 355 of the TFEU, in accordance with Article 68(1) of the Brussels I *bis* Regulation, provides an answer to this question. Accordingly, EU Treaties—and thus the Brussels I and I *bis* Regulations[7]—apply to Guadeloupe, French Guyana, Martinique, Réunion, Saint Barthélemy, Saint Martin, the Azores, Madeira and the Canary Islands, i.e., territories where an open or second registry has been set up. Other territories are, however, excluded from the application of EU Treaties and hence from the territorial scope of the Brussels I *bis* Regulation.

Nevertheless, some of these territories are bound by the 1968 Brussels Convention and the 1988 Lugano Convention by virtue of specific statements on the part of member states that have special relationships with them.[8] This applies to French overseas territories, including French Polynesia, the French Southern and Antarctic Territories, Wallis and Futuna, New Caledonia and the local authorities of St. Pierre and Miquelon and Mayotte. In 1994, the UK stated that the Brussels and Rome Conventions applied to Gibraltar,[9] but there is no such statement with regard to British overseas territories, i.e., Anguilla, the Cayman Islands, South Georgia and the South Sandwich Islands, Montserrat, the Pitcairn Islands, Saint Helena and Dependencies, the British Antarctic Territory, the British Indian Ocean Territory, Turks and Caicos, the British Virgin Islands and Bermuda. Both Conventions apply in Aruba and the Dutch Antilles—Bonaire, Curacao, Saba, St. Eustatius and St. Maarten, as well as in Danish-ruled Greenland and the Faroe Islands.

As to their scope of application, neither the Brussels I *bis* Regulation nor the Lugano Convention aims to provide a fixed set of rules on international jurisdiction for all international cases, but only those in which the defendant is domiciled in a member state; otherwise, the system refers international jurisdiction issues to the relevant national law. Hence, the Brussels–Lugano system is not rigid when it comes to defendants domiciled in third states, allowing member states to maintain exorbitant heads of jurisdiction, for example. Simultaneously, and given the variety of labour markets within the EEA, submission to national law allows member states to tailor international jurisdiction rules to their own peculiarities by reference to their national legislation. This happens in Spain, in which employment and labour matters are dealt with in Article 25 of the Spanish Judiciary Act, the *Ley Orgánica del Poder Judicial* (hereafter LOPJ). The fishing sector is particularly important in Spain as it employs a large number of workers, and the provision mentioned above lays down special heads of jurisdiction in matters of seafarers' employment contracts, giving consideration to the fact that access to justice is even more difficult for

[7] Article 68(1) of the Brussels I *bis* Regulation is identical to that in the Brussels I Regulation.

[8] See Beraudo (2001), p. 1034; Droz and Gaudemet-Tallon (2001), pp. 612–615; Plender and Wilderspin (2009), pp. 30–31, paras. 1-078–1-079.

[9] See Plender and Wilderspin (2009), p. 30, para. 1-07.

them as a result of the internationalisation of maritime employment, as discussed in Chap. 2.[10] In this regard, following an analysis of Section 5, Chapter II, of the Brussels and Lugano system, we will turn to Article 25 of LOPJ, with a view to comparing it with these instruments.

The allocation of jurisdiction by reference to national law has expired for some criteria of international jurisdiction, in particular the special forum on individual employment contracts, with Brussels I *bis* Regulation becoming fully applicable. As said above, this Regulation revises the Brussels I Regulation and has replaced it from 10 January 2015. Article 6(1) of Regulation No. 1215/2012—corresponding to Article 4(1) of the Brussels I Regulation—indeed specifies that the international jurisdiction of each member state is to be determined by the state's own law if the defendant is not domiciled in a member state, subject to Article 21(2). In this regard, Recital 14 of the Brussels I *bis* Regulation clearly states: 'to ensure the protection of (. . .) employees (. . .) certain rules of jurisdiction in this Regulation should apply regardless of the defendant's domicile'. Accordingly, from 10 January 2015 an employee may also sue an employer who is not domiciled in a member state pursuant to the *forum laboris*.

Nevertheless, it is important to note that the Brussels I *bis* Regulation recasts the Brussels I Regulation on several issues but does not modify most provisions relating to individual employment contracts. Apart from the significant modification concerning the scope of application of the *forum laboris*, and further clarifications with a view to enhancing worker protection, the content of Section 5, Chapter II, remains almost identical to the Brussels I Regulation. The following commentary is mainly grounded on the Brussels I Regulation, but the link between EU instruments makes this commentary transferable to the Regulation applicable from 2015 onwards and to Articles 20 to 23 replacing Articles 19 to 21 of the Brussels I Regulation.

It must be highlighted that more heads of jurisdiction are available for seafarers than those provided for in Section 5, Chapter II, to the extent that submission to the relevant national legislation if the defendant is domiciled in a third state remains in the Brussels I *bis* Regulation. In the following pages, Spanish legislation and Article 25(1) of the LOPJ will be compared with the criteria laid down in Section 5, with a view to establishing whether it makes sense to resort to national legislation.

Finally, it must be recalled that the strict parallelism between the 2007 Lugano Convention and the Brussels I Regulation concludes in 2015, unless the former is revised to keep pace with the Brussels I *bis* Regulation.

In addition, all instruments comprised in the Brussels–Lugano system are compatible with other conventions concerning private matters, whose application they do not affect. In maritime employment, neither Maritime Labour Convention, 2006

[10] See Sects. 2.3 and 2.4. See Siehr (1983), pp. 309–310, highlighting the many hurdles seafarers may encounter in bringing lawsuits before flag state courts.

(MLC, 2006), nor ILO Convention No. 188 concerning Work in Fishing (WFC, 2007), deals with private international law issues.[11] However, both the 1952 Brussels and the 1999 Geneva Conventions relating to the Arrest of Ships[12] include rules on international jurisdiction, which will be analysed later on, since they are also applicable to maritime employment.

3.2 International Jurisdiction Over Individual Employment Contracts in the Brussels–Lugano System: Section 5, Chapter II

3.2.1 Rationale and Structure

3.2.1.1 Rationale

Section 5, Chapter II, of the Brussels and the Lugano system entitled 'Jurisdiction over individual contracts of employment' makes up a single unit within these instruments in that only rules provided there can allocate international jurisdiction to a member state court with a view to deciding on a dispute arising from an employment contract. In this regard, the Section is in line with those devoted specifically to matters relating to insurance and consumer contracts, all of which stem from the contractual asymmetry attributable to these contracts and focus on protecting the weaker party, in this case the employee.

Section 5 first emerged with the Brussels I Regulation, being absent from both the 1968 Brussels and the 1988 Lugano Conventions. In fact, it was the CJEU that highlighted and shaped the peculiarities of employment contracts with regard to jurisdictional matters, when interpreting Article 5(1) of the 1968 Brussels Convention on 'matters relating to a contract'. This provision allocates these matters to the courts of the place of performance of the obligation in question—just as Article 7(1)(a) of the Brussels I *bis* Regulation does—so that the contract at issue may be litigated before as many jurisdictions as obligations arising from it are disputable. In other words, there is no *forum contractus* with a view to putting both parties to a contract on the same footing, and thus not favouring the party of the characteristic performance, for example by allocating jurisdiction to the courts of the country where that performance is carried out. This viewpoint cannot be supported when it comes to employment contracts, as the employee needs to be protected against forum shopping on the part of the employer. This was argued by the CJEU in

[11] See Sects. 2.5.2 and 2.5.3.

[12] International Convention relating to the arrest of seagoing ships concluded in Brussels on 10 May 1952, 439 UNTS 193 and International Convention relating to the arrest of seagoing ships concluded in Geneva on 12 March 1999, UN/IMO Doc A/CONF.188/6.

several judgments,[13] through which it set up a special head of jurisdiction for employment contracts, submitting all issues arising from them to the state where the employment services are habitually provided, i.e., where an employee carries out the characteristic performance in the contract.

3.2.1.2 Internal Structure

Section 5 picks up CJEU doctrine on employment contract matters, enhancing it in the sense that it aims to protect the weaker party, the employee, through means other than the establishing of a special head of jurisdiction. The means are not new but formed part of the protection granted by the 1968 Brussels and 1988 Lugano Conventions to consumers and insurance policyholders, insured people and beneficiaries. Employee protection in international jurisdiction matters is manifested in three aspects.

First, Section 5—as well as Sections 3 and 4, Chapter II—extends the territorial scope of application of the Brussels–Lugano system to include claims against defendants domiciled in third states, provided that they have a branch in a member state. Hence, the fact that an employer has a branch in a member state means that she is in fact domiciled in a member state for the purposes of Section 5; in other words, she can be sued in that state for all claims arising out of the operations of the branch.

Second, a line is drawn between cases where employees are the plaintiffs and those where they are the defendants. In the first of these instances, the employee-plaintiffs may choose from within a range of heads of jurisdiction to facilitate their access to justice. In the second case, the employee-defendants are protected by the fact that their employers are only allowed to sue them in the courts of the employees' domicile. This difference in judicial treatment is backed up by the fact that employees are the plaintiffs in roughly 90 % of all labour disputes.

Third, party autonomy is not excluded as a head of jurisdiction. However, its application is restricted to cases in which the employee's will to submit a claim to a specific court can be assumed to be on an equal footing with the employer's or to cases in which the choice of court agreement provides the employee with courts other than those already established in Section 5.

Nevertheless, it is important to note that while the Brussels I Regulation and the Lugano Convention do protect workers, they do not make use of the fourth pillar of protection, which exists for insured people, holders or beneficiaries of insurance policies and consumers and which manifests itself when a foreign decision is only recognised after having been checked the jurisdiction of the court of origin. The reason for these checks is the need to ensure that the weaker parties to insurance or consumer contracts do not have to appear before the court where the proceedings have been initiated simply to enter a plea that the seized court is not vested with

[13] Specifically, CJ 26.5.1982, Case 133/81, *Ivenel*. On the legal development of this provision, see for all de Sousa Gonçalves (2005) pp. 35–49.

international jurisdiction. In the event that the seized court does not declare *ex officio* its lack of international jurisdiction in a given case, there will be a second check at the time of *exequatur*, i.e., a foreign judgment going against the parties will not be recognised on the ground that the court of origin lacked jurisdiction.

The second check does not help workers, however, as it is designed to assist the defendant; because employees are mainly plaintiffs in employment claims, they are more interested in their judgment being recognised and enforced than in being protected in the rare cases in which they are the defendants.[14] Nevertheless, it must be acknowledged that since employees are deemed the weaker party to the contract, the absence of the latter control entails depriving them of an important guarantee that may protect them from submitting to a choice of court that does not favour their interests, for example.[15] Accordingly, the Brussels I *bis* Regulation has reviewed this issue, and a check on the jurisdiction of the court of origin can also be requested by any interested party in the enforcement of a judgment on employment contract matters from 2015 onwards.[16] Furthermore, the fact that the new Regulation has eliminated the *exequatur* and referred the examination of the grounds for non-recognition of a foreign judgment to the enforcement proceeding makes it easier for employees to have their decisions enforced.

3.2.1.3 External Structure: Relationship with Other Forums Not Provided for in Section 5

The drafting of a specific Section on individual employment contracts seeks to strengthen the weaker party's position in the employment relationship through the mechanisms mentioned above. Along the same lines, resorting to heads of jurisdiction other than those provided for by Section 5 is not allowed, which is also a means of achieving the goal of protecting workers. In short, an employer may only bring a claim against an employee before the courts of the latter's domicile and, where appropriate, counterclaim.

The thoroughness of Section 5 also has unintended consequences, one of which is highly relevant; an employee cannot institute proceedings against several co-defendants, as provided for by Article 6(1) of the Brussels I Regulation and the Lugano Convention. More specifically, the CJEU does not allow this on the ground that the provision is not included in Section 5 of the said instruments.[17] This

[14] As highlighted by the proposal. See COM(1999) 348 final, para. 25.

[15] See Lajolo di Cossano (2002), pp. 923–924; Müller (2004), pp. 49–51.

[16] See Article 45(1)(e)(i) Brussels I *bis* Regulation.

[17] CJ 22.5.2008, Case C 462/06, *GlaxoSmithKline, Laboratoires GlaxoSmithKline v. Jean-Pierre Rouard*, para. 18, and comments by Arenas García (2008), pp. 226–229; Fotinopoulou Basurko (2008a, b), pp. 1–16; Franzina (2008), pp. 1093–1100. In this case, Mr. Rouard was hired in 1977 by Laboratoires Beecham Sévigné, located in France, and was posted to several African states. In 1984, with a new employment contract with the company Beecham Research UK, a company in the group located in the UK, he was sent to Morocco. His new contract was based on the terms of

limitation is particularly salient if we take into consideration the many instances in which there are several employers or, as often happens in the shipping and fishing sectors, when employment services are provided to a group of companies and seafarers who wish to sue both the company that first hired them and the company or companies to whom they have provided services.[18] In fact, the Piraeus Court of Appeals addressed a similar case to the one in which the CJEU delivered a negative judgment; a seafarer sued his employer, a shipping company and the shipping agent, who were both jointly and severally liable under Greek law.[19] Article 6 (1) was thus applied with a view to avoiding irreconcilable judgments.

In view of the gap in Section 5 stemming from the absence of due consideration to the possibility of claiming against several employers, the revision of Article 18 (1) of the Brussels I Regulation by Brussels I *bis* Regulation is very welcomed. Article 20(1) thereof now contains a specific reference to Article 8(1), which replaces Article 6(1) of the Brussels I Regulation, and reads as follows: 'In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 6, point 5 of Article 7 and, *in the case of proceedings brought against an employer, point 1 of Article 8*'.[20] Therefore, referral to the *forum connexitatis* allows the employee to sue co-defendants in the employer's domicile.

As mentioned, it should be noted that the 2007 Lugano Convention has not yet been revised, and the wording of Article 18(1) therefore remains the same, meaning that employees cannot bring a lawsuit against several defendants until this instrument is revised.

The final wording of Article 20(1) Brussels I *bis* Regulation enhances the Commission Proposal for a revised Brussels I Regulation,[21] in the sense that the proposal included a reference to the provision allowing several defendants to be brought before the same court, but regardless of the role played by the employee in

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the previous one, and the new employer was required to maintain the contractual benefits already acquired by Mr. Rouard during the time he worked for Laboratoires Beecham Sévigné, in terms of seniority and entitlements to certain compensation if he was made redundant, for example. He was in fact dismissed in 2001 and brought a case to court against both companies in France in 2002, specifically against Laboratoires GlaxoSmithKline, successor of Laboratoires Beecham Sévigné located in France, and against GlaxoSmithKline, successor of Beecham Research UK based in the UK. Previous to this sentence and pointing out the completeness of Section 5, see Junker (2005a), pp. 307–308; Winterling (2006), p. 24. On the opposite viewpoint and with a broad interpretation of this Section, see Geimer and Schütze (2010), pp. 367 and 370.

[18] Given that this would be the typical case, Migliorini (2010), pp. 88–105, spec. pp. 97–105, suggests a different approach, i.e., by taking a broad interpretation of who the employer is, including both groups of companies and networks of companies.

[19] See the Piraeus Court of Appeals No. 237/2007, *ENautD Law Review*, 2007.19, cited by Makridou (2010) p. 209.

[20] My emphasis.

[21] See Article 18(1) of the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), Brussels, 14.12.2010 [COM(2010) 748/2 final].

those proceedings, i.e., that of plaintiff or defendant. Accordingly, the employer would have been provided with a head of jurisdiction other than that of the employee's domicile, therefore undermining worker protection. In fact, this is why the CJEU decided not to allow employees to resort to different heads of jurisdiction from the ones laid down in Section 5, with a view to maintaining a protective shield for employees and preventing employers from suing their employees in places other than those where they are domiciled. Some governments suggested that Article 6(1) of the Brussels I Regulation should be read as being available only to employees suing several co-defendants. However, the CJEU did not find any reason in favour of this teleological reduction that 'would go beyond the balance of interests which the Community legislature has established in the law as it currently stands' and be contrary to the principle of legal certainty.[22]

Article 18(1) of the Brussels I Regulation and the Lugano Convention does contain a reference to Article 5(5), as Article 20(1) of the Brussels I *bis* Regulation does to Article 7(5). Hence, an employee may claim before the courts in the place where the employer has a branch, agency or establishment, but not vice-versa, as by definition an employee lacks an establishment and therefore this head of jurisdiction is not available for the employer.[23]

The same provisions pay due regard to Articles 4 and 6 respectively, allowing plaintiffs to make good use of forums furnished by national law when the defendant is domiciled in a third state. For these cases, there is no distinction as to the position in which workers may find themselves in the proceeding.

3.2.2 Scope of Application

3.2.2.1 Material Scope: Issues Included Within Section 5

Section 5 is devoted to individual employment contracts. What is actually held to be an individual employment contract is a question that must be answered from a European standpoint, i.e. it is regarded as an autonomous concept, for whose development attention must be paid to CJEU case law in relation to Article 5 (1) of the Brussels Convention and also to EU primary law, in particular to Article 45 of the TFEU.[24]

[22] See CJ 22.5.2008, paras. 25–34, cited above in para. 32. For a critique, see Franzina (2008), pp. 1098–1099. Mankowski (2008), pp. 104–120, is of the opinion that the terms of Article 6 (1) ensure the avoidance of procedural abuses.

[23] See Geimer and Schütze (2010), p. 356; Kropholler and von Hein (2011), p. 344.

[24] See Casado Abarquero (2008), pp. 51–76; Egler (2011), pp. 121–124; Franzen (2011), pp. 178–179, paras. 5–8; Geimer and Schütze (2010), p. 354; Kaye (1993), pp. 222–223; Johner (1995), pp. 72–75; Kropholler and von Hein (2011), pp. 342–343; Magnus (2011), p. 565, paras. 35–37; Mankowski (2011a), pp. 418–420; Martiny (2015), paras. 18–19; Merrett (2011), pp. 58–62, paras. 3.29–3.34; Oetker (2009), para. 8; Spickhoff (2011), para. 8.

There is certainly no precise definition of the concept, among other reasons, because this would limit the operability of Section 5 to some extent, in the light of the legal diversity in this field. Some general features can be defined, however, that may help to identify the kind of relationships that fall into the broad concept 'employment contract'. Of particular interest here is the CJEU *Shenavai v Kreischer* judgment, according to which the concept is characterised by the fact that it involves the provision of services in exchange for remuneration, creating 'a lasting bond which brings the worker to some extent within the organisational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements'.[25]

There are two instances in the shipping and fishing sectors where there is some doubt as to whether these features really apply. The first one concerns the bond between captain and shipowner, and the conclusion is that they are linked by an employment contract as well, as already mentioned.[26] The second case is that of share fishermen: pursuant to CJEU case law,[27] the fact that the fishermen are paid in kind does not change their status as employees. The problems arising when identifying the employer have already been referred to,[28] and it is important to recall here that the employer is the stakeholder to whom performance is due and not the stakeholder for whom services are actually performed.[29]

Although restricted to contractual claims, the phrase 'matters relating to individual contracts of employment' deserves a broad rather than a narrow interpretation.[30] Although not as exhaustive as it might be, Section 5 covers all claims concerning the formation and conclusion of employment contracts—including non-existence or invalidity—as well as discussions on the provision of services, including contract duration and hours of work and rest, wages and supplements, including bonuses and allowances—resulting from transfers, for example, and other expenses— dismissal and compensation or settlements arising from them.

Pension fund payments agreed by the employer are to be deemed contractual claims as they are due as a consequence of the work done and regardless of whether they are paid by a third party acting as an insurer.[31] For example, Article 41, *in fine* of the Spanish Constitution opens the door to benefits other than those included

[25] CJ 15.1.1987, Case 266/85, Rec. p. 239, para. 16. See, among others, Bosse (2007), pp. 60–66; Mosconi (2003), pp. 11–13; Pacic (2007), pp. 84–94; Trenner (2001), pp. 59–90, with special attention paid to the notion of 'worker'; Virgós Soriano and Garcimartín Alférez (2007), pp. 177–178.

[26] See Sect. 2.4.2.

[27] See CJ 14.12.1989, Case C-3/87, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd.*

[28] See Sect. 2.4.3.2.

[29] See Mankowski (2011a), p. 420.

[30] See Mankowski (2011a), p. 422.

[31] See Mankowski (2011a), p. 423; Winterling (2006), p. 18. The same may be said of other benefits to which employers contractually commit themselves, as highlighted by Hoppe (1999), p. 51; Iriarte Ángel (2001), p. 107.

within the Spanish social security scheme, such as those arising out of commercial contracts entered into with a bank or a voluntary mutual provident society. Accordingly, they fit within the material scope of this Section.[32] The complementary nature of these benefits to the public social security system was also acknowledged by the EU according to Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community,[33] with a view to ensuring pension rights already due in the framework of private schemes in other member states where the employer had been posted.

It is worth noting that the obligation to repatriate sailors is also deemed to be contractual. Furthermore, in the event of a ship and crew being abandoned, shipowners may incur expenses other than those related to repatriation,[34] the amount of which depends on the duration of the abandonment, given that maintaining decent living conditions on board ship—including both accommodation and food—results in expenses for which the shipowner is mainly responsible, as established by MLC, 2006.[35] It is still to be determined whether these claims are contractual or not. However, and taking into account the fact that the employer has a contractual obligation to provide accommodation and food on board as well as repatriation in specific cases and circumstances, these claims are regarded as contractual claims on the ground that they arise from the failure to fulfil these duties.

Collective interests are not covered by Section 5,[36] and international jurisdiction rules on these matters are to be determined beyond its scope. Accordingly, labour relations, i.e. all claims involving parties that are entitled to collective bargaining, such as employer and employee representatives, business associations and trade unions, are excluded from this Section. By the same token, disputes arising out of employees' information, consultation and negotiation rights, including the protection of staff representatives against dismissal,[37] are also excluded from Section 5.[38]

[32] On this issue, see Fotinopoulou Basurko (2008a, b), pp. 149–151. This contract was established in the Spanish Law 8/1987, 8.6.1987, and Royal Decree 1307/1988, 30.9, both recast by Royal Decree-Legislative 1/2002, 29.11, codifying the Law concerning pension plans and funds.

[33] OJ No. L 209, 25.7.1998. This Directive is now complemented by Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights Text with EEA relevance (OJ No. L 128, 30.4.2014).

[34] This seems to be characterisation of French labour law whose Article L 1231(5)—of the *Code du travail*—lays down this employer's obligation. French courts have liberally interpreted this provision as discussed by Moreau (2013), p. 409.

[35] See Sect. 2.5.2.2. Maritime Labour Convention, 23 February 2006, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:91:0::NO:91:P91_INSTRUMENT_ID:312331:NO.

[36] See CJ 1.10.2002, Case C-167/00, *Verein für Konsumenteninformation v Karl Heinz Henkel*, although regarding consumer matters. See Sect. 5.3.

[37] The CJEU failed to recognise this issue of the case underlying its judgment 15.3.2011, Case C 29/10, *Heiko Koelzsch v Großherzogtum Luxemburg*. See Basedow (2013), pp. 401–402.

[38] See Sect. 5.5.

However, individual claims arising from collective agreements applicable to individual contracts of employment,[39] including those claims related to safety at work involving individual employees and their employers, are not excluded from the scope of Section 5.[40]

3.2.2.2 Excluded Issues

Non-contractual Obligations

The title of Section 5 points to the distinction drawn here between claims arising from individual employment contracts and those that may be characterised as non-contractual and for which other heads of jurisdiction are to be sought beyond this Section. In the context of the Brussels–Lugano system, the distinction between the two matters is imposed by the dialogue that is set up between paragraphs 1 and 2 of Article 7 Brussels I *bis* Regulation.[41]

Nevertheless, it has also been pointed out that the distinction between contract and tort claims does not seem appropriate when it comes to Section 5.[42] The German version of the Brussels I *bis* Regulation would support this interpretation while noting its application in individual employment contracts and labour relations: 'wenn ein Vertrag oder Ansprüche aus einem Vertrag den Gegenstand des Verfahrens bilden. . .', broader than the Spanish version, 'en materia de contratos individuales de trabajo. . .', and the English version, 'in matters relating to individual contracts of employment . . .'.

The background to Section 5 does not support though such an interpretation, arising as it does from Article 5(1) of the Brussels Convention dealing with matters related to contract, as interpreted by the CJEU. Meanwhile, the Court has remained faithful to this distinction, which neither the wording of Section 5's title nor its provisions aim to override.[43] It must also be pointed out that where both contractual and non-contractual matters were to be included in Section 5, employers could only

[39] See Laborde (1999), pp. 160–161; Johner (1995), pp. 77–80; Krebbert (2000), pp. 514–515; Kropholler and von Hein (2011), p. 342; Mankowski (2011a, b), pp. 93–96; Müller (2004), p. 54; Salvadori (1993), p. 60; Trenner (2001), pp. 92–93; Winterling (2006), pp. 12–16.

[40] See Däubler (2003), p. 1299; Johner (1995), p. 80; Junker (1998), pp. 179–202, p. 182; Mankowski (2011a), p. 425.

[41] See in particular CJ 27.9.1988, Case 189/87, *Kalfelis*.

[42] See Hess et al. (2011), p. 152, para. 356. Makridou (2010), pp. 201–203, held this position when non-contractual matters arise directly from the contract, such as accidents suffered by the employee, also on the basis of Greek case law. This is also the position in Spain [see Gabaldón García (2002), pp. 118–121] and the UK [Merrett (2011), pp. 102–104, paras. 4.48–4.49].

[43] See Behr (2004), p. 29; Bosse (2007), pp. 74–75; Geimer and Schütze (2010), p. 353; Junker (2007), p. 50; Mankowski (2011a), p. 417; Junker (1998), pp. 299–319, p. 303; Trenner (2001), p. 53. Schlosser (2009), pp. 95–96, only points out the preference to be given to contractual over non-contractual characterisation.

sue in tort in the employees' domicile, which is not justified in view of the underlying interests in these claims.[44]

In addition, should employees have an accident in the course of their work, most jurisdictions currently hold employers' non-contractual liability to be a strict one, and it is dealt with by social security schemes[45] so that claims relating to accidents that occur in the framework of an employment contract usually fall outside Section 5.

Nevertheless, there is still room for claims subject to the general rules on non-contractual liability, in particular when brought against the supervisor. These cases are common at sea, when the captain or the master carry out risky manoeuvres with potentially negative consequences for seafarers' and fishermen's health. In these cases, the employer is usually held jointly liable with the person who made the decision. This is also the case should employees cause harm to third parties in the performance of their duties: the employer is then liable for the employees' actions. Against this background, it has been proposed that this should be considered a contractual claim.[46] The interfaces are evident, but this does not prevent the characterisation issue arising, i.e., although this is an employment matter, accidents at work do not fall into the category of 'individual contracts of employment'.

Accidents in the workplace or *in itinere* as a result of breach of the duty of care on the part of employers or due to other causes attributable to them are thus deemed non-contractual matters; the same holds for accidents caused by a co-worker or a third party. In all these cases, in addition to the choice of court, the defendant's domicile or branch, Article 7(2) of the Brussels I *bis* Regulation, lays down a special head of jurisdiction. Pursuant to this, both the court where the adverse event occurred and that where the harm became evident have jurisdiction, as interpreted by the CJEU.[47]

Non-contractual matters, including crimes, are generally regarded as internal ship matters and are thus allocated to the jurisdiction of the state whose flag the vessel is flying.[48] The flourishing of flags of convenience may call this allocation into question, but international jurisdiction rules lack the flexibility to take other factors into account when an accident actually happens on the high seas. Furthermore, in *DFDS Torline v Sjöfolk*, the CJEU supported flag state jurisdiction.[49]

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[44] *Swithenbank Foods Ltd v Bowers and others* [2002] All ER (D) 530 (Jul). See Kropholler and von Hein (2011), p. 343; Hoppe (1999), pp. 62–66; Müller (2004), p. 48.

[45] See on this development Jambu-Merlin (1983), pp. 245–253.

[46] See Pacic (2007), pp. 95–98.

[47] CJ 30.11.1976, Case 21/76, *Mines de Potasse d'Alsacia v Bier*; 5.2.2004, Case C 18/02, *DFDS Torline*.

[48] The issue was discussed in Spain after Law 1/2014 (BOE No. 63, 14.3.2014) severely restricted the universal jurisdiction on specific crimes until then granted to Spanish courts. Accordingly, some courts understood that they cannot prosecute drug crimes committed on board ships flying a flag other than the Spanish one. The Supreme Court in a judgment of 24 July 2014 highlighted that the prosecution of drug crimes even when occurring beyond Spanish territory is possible on the ground of international treaties signed by Spain.

[49] CJ 5.2.2004, Case C-18/02, *DFDS Torline v. Sjöfolk*.

We will come back to this case later, as it deals with international jurisdiction in an industrial action case in which a shipowner was threatened with a boycott.[50] The issue at stake was the interpretation of Article 5(3) of the Brussels I Regulation; the Court stated that 'in the course of that assessment by the national court, the flag state, that is the state in which the ship is registered, must be regarded as only one factor, among others, assisting in the identification of the place where the harmful event took place. The nationality of the ship can play a decisive role only if the national court reaches the conclusion that the damage arose on board the Tor Caledonia. In that case the flag state must necessarily be regarded as the place where the harmful event caused damage'.[51] Accordingly, if the harmful event or damage arising out of it occurs on board the ship, the jurisdiction of the flag state comes into play, but if the seafarer suffers an accident while working in port, the place to be taken into consideration is the country where the port is located.[52]

Social Security Matters

Social security and insolvency issues are among the questions that are excluded from the scope of the Brussels–Lugano system. Social security is a key area in employment matters and as such must be addressed here, in particular in its relationship with private international law and its governing instruments within the European Union, such as Regulation (EEC) No. 1408/71 of 14 June 1971.[53]

In accordance with the Jenard Report to the Brussels Convention,[54] the concept of 'social security' is to be filled by reference to the latter Regulation as complemented by ILO Convention No. 102, of 28 June 1952, concerning Social Security (Minimum Standards). Both this and the Regulation that replaced it from 2009 onwards, Regulation (EC) No. 883/2004 of the European Parliament and the Council of 29 April 2004,[55] list the matters included in their scope: medical treatment; sick leave; maternity/paternity leave; invalidity; old-age pensions;

[50] See Sect. 5.4.2.1.

[51] CJ 5.2.2004, Case C-18/02, *Torline*, para. 44. Further on this case, see Basedow (2010), pp. 131–132. Nevertheless, see *Saldanha v Fulton Navigation Inc* [2011] EWHC 1118 (Admlty) applying British law on the ground that the accident occurred in British territorial waters.

[52] See *Cour d'Appel* d'Aix-en-Provence, 9.12.2008, ship *M/V Ani*, with comments by Chaumette (2009a), pp. 391–400, where a Croatian sailor employed by a Croatian company to work on a Croatian ship was injured while taking goods on board.

[53] OJ No. L 149, 5.6.1971.

[54] See Jenard Report (1979). In doctrine referring to Regulation No. 1408/71, see Hoppe (1999), p. 51; Müller (2004), p. 36; Winterling (2006), p. 17.

[55] OJ No. L 314, 7.6.2004. Regulation No. 883/2004 has been amended by Regulation (EC) No 988/2009 (OJ No. L 284, 30.10.2009); Regulation (EU) No 1244/2010 (OJ No. L 338, 22.12.2010); Regulation (EU) No. 465/2012 (OJ No. L 149 8.6.2012); and Regulation (EU) No 1224/2012 (OJ No. L 349, 19.12.2012). Regulation No. 1408/71 has not been completely replaced, given that it is still applied to nationals of third states that are not included within Regulation No. 883/2004 due exclusively to nationality issues.

insurance against illness and accidents at work and the corresponding benefits for heirs, including family support; and unemployment benefit. The Regulation's main aim is to coordinate different social security systems, and so the list cannot be understood to be a complete catalogue; rather, two parameters must be taken into account in filling up the concept of 'social security': the involvement of public management and, in particular, employers' obligation to pay into the respective social security scheme.[56] The protection granted by this Regulation comprises both EU nationals and non-nationals, but legally residing in an EU country.[57]

It is important to emphasise that the exclusion of these matters from the scope of the Brussels and Lugano system refers to litigation faced by those in charge of managing the social security system brought by those entitled to social security benefits, including the refund of incorrectly paid claims.[58] For these cases, legal systems provide a *forum legis* as stated by the Jenard Report,[59] i.e., jurisdiction is allocated to the legal system responsible for these matters, an issue that will be discussed later on.[60] This is the case in Spain pursuant to Article 25(3) LOPJ, whereby Spanish courts are allocated jurisdiction to deal with social security matters handled by Spanish entities or entities with a domicile, branch, delegation or any other kind of representation in Spain.

In contrast, the right of return granted to social security entities, by means of which they can get worker's payments back from the third parties responsible for an event that gives rise to a worker's entitlement to benefits, does fall within the material scope of the Brussels–Lugano system.[61] In its *Steenbergen v Baten* judgment, the CJEU stated that those responsible for administering the social security system may subrogate themselves in the place of the recipients of benefits. However, they cannot make use of special heads of jurisdiction, as the latter's purpose is to remedy contractual asymmetries that are not present when social security entities or insurance companies claim in the employee's place, for example. Section 5 cannot therefore be invoked in these cases, which is why other provisions of the Brussels and Lugano system such as Article 5(1) or (3) Brussels I Regulation and Lugano Convention, 7(1) or (3) of the Brussels I *bis* Regulation, dealing with non-contractual matters comes to the fore.[62]

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[56] See Casado Abarquero (2008), pp. 85–89.

[57] Regulation (EU) No. 1231/2010 of the European Parliament and of the Council of 24 November 210 extending Regulation (EC) No. 883/20004 and Regulation (EC) No. 987/2009 to nationals of third countries who are not legally covered by these Regulations solely on the ground of their nationality (OJ No. L 344, 29.12.2010).

[58] See Evrigenis and Kerameus Report (1986), para. 36, and CJ 14.11.2002, Case C 271/00, *Gemeente Steenbergen v Luc Baten*.

[59] See Jenard Report (1979) p. 12. Explaining the grounds for this *forum legis*, see Jambu-Merlin (1983), pp. 267–270.

[60] See Sect. 4.2.3.4.

[61] See Evrigenis and Kerameus Report (1986) para. 37.

[62] CJ 14.11.2002, Case C-271/100, *Gemeente Steenbergen v. Luc Baten* with comments by Álvarez González (2004). See also Däubler (2003), p. 1299, allowing procedural succession.

Employer Insolvency

Employer insolvency has serious implications for individual employment relationships, whether it leads to the termination of the contract or to the readjustment of working conditions, or simply to unpaid wage claims. Even more serious risks may arise when the affected workers are seafarers, such as being abandoned with the ship at any port in the world.[63] The procedural treatment of employer insolvency departs from Regulation (EC) No. 1346/2000, 29 May 2000, on insolvency proceedings (hereafter EIR) as Article 1(2)(b) of the Brussels–Lugano system excludes bankruptcy matters from its scope of application. However, this Regulation only applies if the centre of the debtor's main interests is located in a member state; otherwise, it is necessary to turn to national law for regulation.

EIR—as well as most member state insolvency legislation—adopted a cross-border insolvency model based on mitigated universalism[64]: only one main insolvency proceeding with universal effects over the debtor's estate can be opened in the debtor's centre of main interests. Nevertheless, secondary insolvency proceedings with territorial effects are also allowed in states where the debtor has an establishment, thus restricting the scope of the main insolvency proceeding insofar as secondary proceedings comprise the debtor's assets located in the state where they are opened. Accordingly, several insolvency proceedings may be started over the same debtor, although with different scopes. Creditors can lodge claims in them, and so employees can resort to both main and secondary insolvency proceedings for payment. However, when it comes to deciding on the fate of current contracts to which the debtor is a party, attention should be paid to whether the employee reports to the establishment that has provided the head of jurisdiction for the starting of a secondary insolvency proceeding.[65] Otherwise, the fate of current employment contracts will be decided by the insolvency office holder appointed to deal with the main insolvency proceeding.

International jurisdiction problems arise where the effects of insolvency proceedings on current employment contracts are concerned, but not with regard to unpaid wage claims. In such cases, the employees are creditors and as such have to lodge their claims with the insolvency court, which will rank them among the creditors in accordance with the relevant insolvency law. The same law may vest insolvency office holders with specific powers to deal with current employment contracts—to terminate them, for example. The issue here concerns individual employment contracts, although in the framework of an insolvency proceeding. Against this background, insolvency courts in its condition of the *forum concursus* may therefore have a role to play in these cases. Although EIR does not explicitly

[63] See Couper (1999) for a thorough study of the collapse of the Adriatic Tanker group.

[64] This model has also been adopted by the UNCITRAL Model Law on cross-border insolvency, as recommended by the General Assembly of the United Nations Organization in Resolution 52/158, 15.12.1997.

[65] In general, see Espiniella Menéndez (2011), pp. 125–127.

acknowledge the principle of *vis attractiva concursus*, i.e. that some actions dealing with insolvency-related matters have to be brought before the insolvency courts, the CJEU has made it clear that they do.[66] Nevertheless, the *vis attractiva* principle is restricted to claims deriving directly from and closely related to the insolvency proceedings.[67] Pursuant to the Proposal amending Regulation No. 1346/2000 presented by the European Commission on 12 December 2012,[68] the forthcoming revised EIR will include a specific head of jurisdiction confirming that the above-mentioned claims have to be brought before the insolvency courts.[69]

Claims arising from the insolvency office holder's powers to terminate the employment relationship or modify the working conditions would seem to fit neatly into the aforementioned definition, i.e. claims deriving directly from and closely related to the insolvency proceedings. However, employment matters are so closely intertwined with public and collective interests that it seems advisable to submit the question of the effects of insolvency proceedings on current employment contracts to the heads of international jurisdiction laid down in Section 5. In other words, the grounds of the *vis attractiva concursus* principle—the effectiveness and efficiency of the insolvency proceedings—would not justify the *forum concursus* deciding the fate of workers who actually discharge their duties to their employer in countries other than the one where the main insolvency proceedings are started.[70]

This issue is highly debatable, however, given that it concerns the insolvency representative's powers, which stem from the insolvency proceeding and are closely related to it. The Proposal amending Regulation No. 1346/2000 contains a new provision that may help to solve the dilemma; found in the chapter on conflict of laws, it refers to cases in which the insolvency law in a member state that is dealing with the effects of insolvency on employment contracts stipulates that the latter can only be terminated or modified with the approval of the court that opens the insolvency proceedings, but where no insolvency proceedings have actually been opened in the state. The provision indicates that the court that opens the insolvency proceedings is competent to approve the termination or modification of the contracts in these cases;[71] thus, an adaptation problem is solved. *Contrario sensu*, it could be concluded that, with the exception of this case, it should be the jurisdiction of the country where employees are habitually working that decides on any disputes arising from the modification or termination of the contracts, as these issues may also involve the intervention of government agencies.

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[66] This issue was settled by CJ 12.2.2009, Case C 339/07, *Christopher Seagon v. Deko Marty Belgium NV*.

[67] In detail, see Carballo Piñeiro (2011), pp. 360–379.

[68] COM(2012) 744 final.

[69] See Article 3a of the Proposal. In fact, the ranking of claims is one of these issues, for which reason employees will have to present their wage claims and any other claims to the insolvency courts.

[70] See Espiniella Menéndez (2011), pp. 133–135.

[71] See Article 10a of the Proposal.

3.2.2.3 Personal and Territorial Scope of Application

Section 5, Chapter II, of the Brussels–Lugano system applies as long as the defendant is domiciled in a member state when the lawsuit is filed. It is important to note that the concept of domicile is broadened in the framework of this Section. In accordance with Article 20(2) of the Brussels I *bis* Regulation, 'where an employee enters into an individual employment contract with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member states, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member state'. This provision is in line with its counterparts on insurance and consumer matters respectively, and this interpretation increases the number of cases falling within these Sections.

The justification for extending the personal scope of these instruments lies in the protection of the weaker party, backed up by the concept of foreseeability on the part of defendants, in this case employers: having set up a branch, agency or other establishment in a member state, it is only reasonable to assume that they may be sued for their acts and omissions there. Article 20(2) clarifies the issue thus: resorting to the heads of jurisdiction provided by the Brussels–Lugano system is *only* permitted in claims *arising from* the operations of the branch in question,[72] justifying the inclusion of claims against employers domiciled in third countries in this Section on the ground of their strong links with the European Economic Area. It should be noted that this condition seems to be met by all claims involving employees working for the establishment in question, even if they have been posted abroad.[73] In short, if the employer domiciled in a third state has a branch, agency or establishment in a member state when the claim is lodged, the jurisdiction will be determined in accordance with the Section 5 rules discussed.

A key element in the extending of the personal scope of Section 5 is the meaning of the concepts 'branch', 'agency' and 'establishment'. Article 7(5) of the Brussels I *bis* Regulation, already contains a similar concept to that mentioned in Article 20 (2) that has been interpreted by the CJEU, and so a uniform interpretation of both provisions seems appropriate.[74] The Court of Justice stated that 'the concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a

[72] See Esplugues Mota and Palao Moreno (2012), p. 396; Mankowski (2011a), p. 433, followed by Bosse (2007), pp. 84–85.

[73] See Mankowski (2011a), p. 433.

[74] As the German *Bundesarbeitsgericht* seems to understand it in its judgment of 13.11.2007—9 AZR 134/07, denying that a base of a U.S. flight company located at the Frankfurt a.M. airport may be deemed a branch, agency or establishment since this office only dealt with the internal organisation of employees by providing them with the respective technical assistance. See for a critique Kropholler and von Hein (2011), p. 345, which understands the concept to be the same. See also Däubler (2003), p. 1298; Geimer and Schütze (2010), p. 353; Mosconi (2003), pp. 16–17; Junker (1998), p. 305, n. 34; and, in particular, Schlosser (2009), p. 96.

management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension'.[75]

Other voices suggest a different characterisation though,[76] and their proposal is supported in both the procedural peculiarities of the employment relationship and the undeniable fact that this is all about litigation arising from the internal dimension of the branch, agency or establishment, and not from its external dimension, as is the case in Article 7(5). Nevertheless, the stability expected from this concept points to the need for preserving the analogy with the concept established in Article 7(5), and thus for granting both provisions the same interpretation, in particular because the definition of what is to be understood by an establishment is intended to provide legal certainty, and the fact that an employee is integrated within the employer's organisation, hidden to third parties, does not provide such certainty.[77]

The CJEU acknowledged this uniform interpretation in its *Mahamdia v Algeria* judgment, making express reference to its case law on Article 5(5) of the Brussels I Regulation and the concept in question.[78] More specifically, it should be highlighted that this definition of establishment includes maritime employment manning agencies acting on behalf of the employer in hiring crew.[79] As will be discussed later,[80] with this rule seafarers gain access to justice where they have been recruited by an establishment belonging to the foreign shipowner, understanding that manning agencies acting on the shipowner's behalf in the framework of a lasting relationship match the aforementioned definition.

After Brussels I *bis* Regulation's application, the domicile of employers in their position as defendants is irrelevant when it comes to applying the special forum on employment contract matters as laid down in Article 21(2). More specifically, the courts in a member state have jurisdiction when a seaman's habitual workplace is in this member state, or if establishing a habitual workplace in a member state or any

[75] CJ 22.11.1978, Case 33/78, *Somafer SA c. Saar-Ferngas AG*.

[76] See Johner (1995), pp. 95–97; Mankowski (2011a), p. 433, followed by Egler (2011), pp. 139–140; Müller (2004), p. 59.

[77] Müller (2004), pp. 57–58, points to the system of Section 5 to sustain the identity of this concept with the one contained in Article 5(5) of the Brussels I Regulation.

[78] CJ 19.7.2012, Case C-154/11, *Ahmed Mahamdia v Democratic and Popular Algerian Republic*, para 48, which in turn borrows the definition from CJ 18.3.1981, Case C-139/80, *Blanckaert & Willems*, para 11. The main issue in this case was whether an embassy was deemed to be an establishment as indicated in Article 18(2) of Brussels I Regulation; before going into this question, which it answered in the affirmative, the CJEU rejected Algeria's plea of immunity from jurisdiction. See Guzmán Zapater (2013), pp. 1–15; Martiny (2013), pp. 536–545.

[79] Other jurisdictions such as Uruguay have arrived at a similar interpretation. See *Tribunal de Apelaciones* No. 516/2010, 8.12.2010, *Daniel Silupi Juarez v Propietarios y Armadores de buque de Pesca Paradanta Primero (Flag of Falkland) and other* and Aguirre Ramírez and Fresnedo de Aguirre (2002), pp. 179, 184–186.

[80] See Sects. 3.2.3.4 and 3.2.3.5.

other state is impossible, the courts in the member state where the business which engaged the worker is situated, even if the shipowner is domiciled in a third state.

Section 5 may also be applied when there is a choice of court agreement. Article 21 of the Brussels I Regulation and the Lugano Convention leaves room for party autonomy in these matters, but only to place the worker in a better position to litigate. Therefore, if the specified conditions are met, the designated court will assume jurisdiction in accordance with this provision, even if the defendant is not domiciled in the European Economic Area. As Article 21 relies on Article 23 of the same instruments, if its provisions are to be applied there has to be confirmation that at least one of the parties to the employment contract is domiciled in a member state. After Brussels I *bis* Regulation's application, the distinction between cases where at least one party is domiciled in a member state and cases where neither is but a member state court has been designated by the agreement between the parties has disappeared, and the only applicable requirements are those laid down by Article 25—the former Article 23 Regulation Brussels I, but current of Lugano Convention—regardless of where parties to the agreement are domiciled.

3.2.3 The Employee as Plaintiff

3.2.3.1 Introductory Notes to Article 21 of the Brussels I *bis* Regulation

Article 21 of the Brussels I *bis* Regulation, establishes the availability of two heads of jurisdiction for seafarers and fishermen, mirroring the existing dichotomy between Articles 4 and 7 of the Brussels I *bis* Regulation, i.e., employees can choose between the courts of the defendant's domicile or the courts appointed by a special head of jurisdiction. With respect to the first court, it must be borne in mind that employers are deemed to be domiciled in a member state if they have a branch, agency or establishment in a member state, even though they are domiciled in a third state.[81] The second court, the special head of jurisdiction contained in the provision, is based on the proximity principle and allocates claims to the courts where the characteristic performance of the employment contract is to be—or has been—carried out. Should identifying the location prove impossible, the second half of Article 21(1)(b) of the Brussels I *bis* Regulation comes into operation, and the issue is allocated to the courts in the place where the business which engaged the employee is situated. This provision thus lays down two criteria, one subordinate to the other, and the courts where the business which engaged the employee is located only come into play when there is no habitual place of work.

To interpret Article 21(1)(b), it is necessary to highlight the interrelation between EU legal instruments, i.e., not only between the 1968 Brussels Convention and the Brussels I and Brussels I *bis* Regulations—to which the Lugano

[81] See Sect. 3.2.2.3.

Conventions need to be added—but also between these and the 1980 Rome Convention and the Rome I Regulation concerning the law applicable to contractual obligations.[82] The CJEU reaffirmed this relationship in its *Koelzsch v Luxembourg* judgment when interpreting Article 6 of the Rome Convention, which deals precisely with the law governing employment contract matters.[83]

All these instruments contain a number of common concepts, and the CJEU encourages a uniform interpretation to enhance interpretative consistency and, of course, consistency between *forum* and *ius*.[84] This is even more relevant where employment matters are concerned, as the origin of the special head of jurisdiction mentioned above lies in a Court of Justice interpretation of Article 5(1) of the Brussels Convention, which took Article 6 of the Rome Convention as a key aid to its construction.[85] This is why both the special head of jurisdiction and the conflict rule share connecting factors, i.e., the *locus laboris* and the place of the business which engaged the employee, the uniform interpretation of which must be conducive to the coordination between *forum* and *ius* in these matters,[86] thus avoiding the costs of ascertaining the foreign law.

Nevertheless, there are limitations to the uniform interpretation sought by the CJEU, as so far only small steps have been taken towards establishing consistency between *forum* and *ius*: the conflict rule laid down in Article 6 of the Rome Convention and Article 8 of the Rome I Regulation submits employment contracts to the law chosen by the parties in the first instance, thus moving away from consistency as a main objective from the very beginning.[87]

Furthermore, it is vital not to lose sight of the fact that the concepts in question are to be interpreted within the framework of the objectives pursued by the respective private international law sector into which they are incorporated.[88] In other words, worker protection measures apply differently in international jurisdiction—where the main goal is access to justice, i.e., different heads of jurisdictions must be made available to the employee-plaintiff—whereas when it comes to

[82] Regulation (EC) No. 593/2008 of the European Parliament and of the European Council of 17 June 2008 on the law applicable to contractual obligations (OJ No. L 177, 4.7.2008).

[83] See CJ 15.3.2011, Case C 29/10, *Heiko Koelzsch v. Großherzogtum Luxemburg*. The Conclusions to this case drafted by General Advocate V Trstenjak are of particular interest in outlining the links between these instruments; in particular, see paras. 47–83.

[84] As otherwise highlighted by Recitals 19 of the Brussels I Regulation, 7 Rome I Regulation and 7 Rome II Regulation. On this link, see Parisot (2012), pp. 597–645. More generally, see Crawford and Carruthers (2013), pp. 1–29.

[85] See CJ 26.2.1982, Case 133/81, *Ivenel v Schwab*, paras. 13 and 14.

[86] See Resolution of the *Institut de droit internacional* of 3 August 1971 during the Zagreb Session on 'Les conflits de lois en matière de droit du travail'.

[87] See a criticism of the CJEU for not making these issues sufficiently clear in its judgment 15.3.2011, Case C 29/10, *Koelzsch*, in Zanobetti (2011), pp. 355–357. In general, highlighting the many difficulties of a common interpretation in both the field of international jurisdiction and the field of conflict of laws, see Haftel (2013), pp. 768–770.

[88] See in relation to consumer contracts, Leible (2006), pp. 365–371.

conflict of laws, the main aim is to identify the closest law to the employment relationship. With the latter goal in mind, the conflict rule in question provides an escape clause that does not work when it comes to determining the competent court, which it cannot do.[89] However, as employees may bring their claims before various courts, it may well be said that the closest connection is achieved by this means.[90]

3.2.3.2 The Defendant's Domicile

The courts of the defendant's domicile have jurisdiction in employment contracts, as provided for in Article 21(1)(a) of the Brussels I *bis* Regulation. This provision is in line with Article 4 thereof, in that it only determines which courts have international jurisdiction but not which one has venue; this issue depends on national law.

This head of jurisdiction is particularly useful when the habitual place of work is outside the European Economic Area,[91] allowing employees to claim their rights in the courts of the member state where the employer is domiciled. Once more it should be remembered that the Brussels–Lugano system establishes the fiction that an employer that is domiciled in a third state but has an establishment in a member state is domiciled in the EEA for the purposes of Section 5. Against this background, the provision in question here is the one that is applicable to gaining access to justice.

The Brussels–Lugano system deals with the concept of domicile, distinguishing between employer-natural person and employer-legal person. In the first, the system does not provide an interpretation but submits the issue to the law of the state where the person in question is presumed to be domiciled,[92] whereas in the case of the legal person it introduces an autonomous rule that stipulates that the domicile is either in the place where the person has a registered office, central administration or principle place of business.[93]

This last provision may be utilised to offset the 'flag of convenience' factor, in that it enables the employer's domicile to be determined, not the place where the business has its statutory seat—which is usually the country in which the employer

[89] See reasons in Mankowski (2005b), pp. 868–870. In relation to employment matters, see Carrillo Pozo (2011), pp. 1027–1029.

[90] See Junker (2005c), pp. 725–726.

[91] See Esplugues Mota and Palao Moreno (2012), p. 398. There is no question about the non-Community nature of this relationship as stated in CJ 13.7.2000, Case C 412/98, *Group Josi Re-Insurance Company SA v. Universal General Insurance Company*, and 1.3.2005, Case C 281/02, *Andrew Owusu v. N. B. Jackson and others*.

[92] See Article 59(1) of the Brussels I Regulation and the Lugano Convention, 62(1) of the Brussels I *bis* Regulation.

[93] See Article 60 of the Brussels I Regulation and the Lugano Convention, 63 of the Brussels I *bis* Regulation.

has chosen to register the ship or fleet—but the place where the head office or main place of business is situated,[94] the latter being understood as the place where all finance-related activities—including commercial, industrial and professional activities—take place. As these activities may be manifold and divided among several countries, the fact that it must be the *principal* place of business serves to identify which one is the legal person's centre of activity. The concept of central administration, on its part, refers to the place where the company designs its operational strategy, formulates objectives, monitors operations and centralises funding and balance sheets, etc., meaning the place from which the entrepreneur manages and administers the business.

3.2.3.3 Special Jurisdictional Rule in Employment Contract Matters: The Habitual Place of Work

Introduction and General Features

As mentioned previously, the historical background to Article 21(1)(b)(i) of the Brussels I *bis* Regulation is to be found in Article 5(1) of the Brussels Convention, which in turn stems from the need to give due consideration to the objectives underlying the establishing of all special jurisdiction rules in particular matters. They seek to ensure a close link between the courts and any claims they are allocated, in that the state jurisdiction to which these rules refer will normally be the same as the place where most sources of evidence are to be found; it is therefore about vesting jurisdiction upon the court that is closest to the facts.

More specifically, for reasons of legal certainty and worker protection, the CJEU gave an autonomous interpretation of Article 5(1) regarding individual employment contracts that diverged from the official interpretation used for all other contractual matters. A key difference was that as a result of this interpretation, the Court of Justice constituted a real *forum contractus* insofar as this head of jurisdiction submits all disputes arising from employment contracts or relationships to the jurisdiction of a single state, regardless of the obligation in question and the place where it is discharged. Actually, the *forum* in question points to the place where the characteristic performance has to be carried out: it seems logical for the employer to be sued in the place where the employee has performed or is expected to perform tasks that the employer has specified and managed; accordingly, the employer cannot argue that these courts are not foreseeable.[95]

[94] See on this point Egler (2011), p. 135. In general, Virgós Soriano and Garcimartín Alférez (2007), p. 127.

[95] On the procedural and substantive grounds of Article 5(1) of the Brussels Convention, now 7 (1) of the Brussels I *bis* Regulation, see CJ 19.2.2002, Case C-256/00, *Besix v WAGAB and Plafog*, paras. 30–31; 6.10.1976, Case 12/76, *Tessili v Dunlop*, para. 13; 15.1.1987, Case 266/85, *Shenavai v Kreischer*, pp. 239–257, para. 18; 29.6.1984, Case C-288/92, *Custom Made Commercial v Stawa*, paras. 12–21. Also, see Jenard Report (1979), p. 22; Droz (1976), p. 123; Geimer and

One of the main strengths of this head of jurisdiction, in addition to its predictability, is that it is manipulation resistant and that it generally corresponds to somewhere that is accessible for workers, meaning that they should therefore have access to affordable justice. This accounts for the success and lack of controversy surrounding this international jurisdiction rule, a forum already known in member states before its adoption by the Brussels–Lugano system.[96]

Article 5(1) of the Brussels Convention's transformation into Section 5, Chapter II, of the Brussels I Regulation involved a qualitative change in the area of worker protection.[97] The special forum developed by CJEU case law, later introduced as a positive rule by the 1988 Lugano Convention and eventually laid down in Article 19(2)(a) of the Brussels I Regulation and the 2007 Lugano Convention, 21(1)(b)(i) of the Brussels I *bis* Regulation, remained, but the transformation brought further clarifications with it.

In the context of Article 5(1) of the Brussels Convention, and now 7(1) of the Brussels I *bis* Regulation, covenants as to where contractual obligations have to be carried out are permitted without restriction to determine international jurisdiction, i.e., to indicate the place where the obligation in question was, or is to be, performed, and thus the relevant jurisdiction. The establishment of a specific Section concerned with employment contract matters involves disregarding such covenants when it comes to determining international jurisdiction.[98] This has to be welcomed in view of the uncertainty that these *pacta* provoke: the parties actually agree on the place of performance of an obligation, but they are usually unaware of the fact that they are also agreeing on a head of jurisdiction, and are hence referring matters to the court of the place agreed on in the covenant. So, the fact that the place where the work has to be carried out—such as the name of a ship—is expressly indicated in the contract is an important clue for determining exactly where employees habitually carry out their work, but it is not conclusive evidence and can only be used as a starting point to determine exactly where the place is.[99] In fact, the place is where the employee follows the employer's instructions and in

Schütze (2010), p. 361; Gothot and Holleaux (1986), pp. 46–47; Lüderitz (1981), p. 238; Trenner (2001), pp. 98–101; Virgós Soriano and Garcimartín Alférez (1998), pp. 86–87.

[96] As proved by Article 16(2) of the Preliminary Project of the Convention of 1964 prior to the 1968 Brussels Convention, which laid down a special head of jurisdiction on employment matters submitting them, in addition to the defendant's domicile, to the courts of the place where the employer is located or in which the activity is or will be carried out. On the other hand, party autonomy was not allowed, which led to this rule being excluded from the Brussels Convention. The said Project is available in RDIPP (1965), p. 790, and Jenard Report (1979), p. 24. With the same basis, see Junker (1998), p. 309.

[97] Strongly criticised for being unnecessary, as explained by Behr (2004). In favour of the change that entails limiting this head to the employee, see Winterling (2006), pp. 54–56.

[98] See Behr (2004), p. 21; Kropholler and von Hein (2011), p. 348; Mankowski (2011a), p. 415; Winterling (2006), pp. 28–30. Pointing out its inapplication in relation to the Brussels Convention, see Trenner (2001), pp. 55–57.

[99] See *Corte di Cassazione*, 13.12.2007, No. 26089 and Mankowski (2011a), p. 439.

which work is performed on a regular basis, as suggested by the adverb that qualifies the connection, i.e., the work is *habitually* carried out in a given place.

Two factors need to be examined to apply this forum: firstly, the type of activity in which the worker is engaged and, secondly, the place where the activity is usually carried out. In other words, attention has to be paid to the type of worker involved and the kind of obligations they are supposed to discharge for the employer, with a view to determining where the duties are effectively performed, i.e., where 'the employee *actually* performs the work covered by the contract with his employer'.[100] In practice, some kind of differentiation may be necessary with respect to the activities performed by the employee since the place in question 'is the place where, or from which, taking account of all the circumstances of the case, he in fact performs the *essential part* of his duties *vis-à-vis* his employer'.[101]

As regards distinguishing between essential and non-essential parts of an employee's tasks, a proposal has been made based on characterising individual employment contracts as contracts establishing 'a lasting bond which brings the worker to some extent within the organisational framework of the employer's business'.[102] The definition of the 'organizational framework of the employer's business' points to some kind of operational activity that includes the utilisation of an organisational unit with material, non-material and human resources, which is at the service of the employer's economic activity. Workers' integration into this organisational framework means that they are subject to the employer's authority and will consequently undertake assignments in accordance with the requirements they are given in order to fulfil their role in the specific economic activity. Under such circumstances, the habitual place of work is the place where the organisational unit a worker forms part of is located.[103] As a matter of fact, this rule applies in simpler cases,[104] but application becomes more complicated in intricate cases in which employees carry out their work in different countries or in non-sovereignty areas, for example.[105]

Another proposal has been made that elaborates upon the latter for such cases, so that emphasis is placed not upon the organisational framework of the employer's business but upon the labour market in which a worker is actually integrated.[106] Nevertheless, the task of determining the boundaries of a specific labour market is

[100] CJ 13.7.1993, Case C-125/92, *Mulox Ibc Ltd v Hendrick Geels*, para. 20; 9.1.1997, Case C 383/95, *Rutten*, para. 15*;* and 28.9.1999, Case C-440/97*, GIE Groupe Concorde v. Master of the Vessel Suhadiwarno Panjan,* para. 14.

[101] CJ 27.2.2002, Case C 37/00, *Herbert Weber contra Universal Ogden Services Ltd*, para. 58. My emphasis**.**

[102] CJ 13.7.1993, Case C-125/92, *Mulox Ibc Ltd v Hendrick Geels*.

[103] See, in general, Hoppe (1999), pp. 150–159.

[104] See Junker (2005c), p. 734.

[105] See Mankowski (1999), p. 332.

[106] See Mankowski (1999), pp. 336–338.

another issue that internationalisation has made even more complicated,[107] for which reason the establishment of the habitual place of work in complicated cases usually relies on the assessment of the circumstances at hand.

When it comes to actually determining which courts have jurisdiction according to this forum, the issue that inevitably arises is whether there is a role for worker protection. As previously said, worker protection is guaranteed by the fact that employees can choose to sue in different heads of jurisdiction, a choice that is forbidden to employers. However, while consumers and the weaker parties to insurance contracts can sue the other party in their domicile or habitual residence,[108] employees do not enjoy this benefit. Instead, employees are granted access to the courts of the place where they are supposed to carry out, or have carried out, their tasks. The reasons for this have already been explained and point to the foreseeability of this forum for both employers and employees. While in most cases this place will designate the country where the worker's habitual residence is, the CJEU also remarks 'that is the place where it is least expensive for the employee to commence, or defend himself against, court proceedings'.[109]

Beyond this assertion, this head of jurisdiction is basically an expression of both the principles of procedural proximity and of foreseeability. Nevertheless, worker protection may explain the priority given to the habitual place of work over the place where the business which engaged the employee is situated pursuant to CJEU case law,[110] for which reason the former is being liberally interpreted.

Determining a Habitual Workplace for Maritime Employment Relationships: The Role of Public International Law

Work at sea has the peculiarity of being carried out on a ship, a movable asset that sails through different territories, including areas not subject to territorial sovereignty. This feature has already been discussed in the second Chapter of the study,[111] but it is useful to come back to it here to highlight the role of public international law. The concept of 'habitual place of work' refers to the territory of a state, which certainly does not exist when the work is performed on a floating

[107] See Junker (2005c), p. 735.

[108] Article 115(2) of the Swiss Private International law Act does grant this benefit to employees who may claim against the employer before the courts of their domicile or habitual residence.

[109] CJ 13.7.1993, Case C-125/92, *Mulox*, para. 19; 27.2.2002, Case C 37/00, *Weber*, para. 40. As stated in *Mulox*, para. 18, 'in *Ivenel* and *Six Constructions*, the Court took the view that, in interpreting that provision of the Convention, account must be taken of the concern to afford proper protection to the party to the contract who is the weaker from the social point of view, in this case the employee'.

[110] CJ 15.3.2011, Case C 29/10, *Koelzsch*, para. 42.

[111] See Sects. 2.2 and 2.3.

structure, whether movable or not;[112] therefore, private international law has to make use of public international law when it comes to applying the rule in question to maritime employment.

The interrelationship between public and private international laws is not unknown in EU legislation, even though there is no specific rule connecting the two areas of law. For our purposes, it is worth mentioning the provision proposed during the drafting of the Rome II Regulation on the law applicable to non-contractual obligations, which reads as follows: 'a ship on the high seas which is registered in the State or bears *lettres de mer* or a comparable document issued by it or on its behalf, or which, not being registered or bearing *lettres de mer* or a comparable document, is owned by a national of the State' shall be treated as being the territory of a State.[113] This provision was abandoned, apparently because it was moving into the field of public law;[114] however, it is still useful to illustrate that public international law has to play a role in this field as well.

The CJEU *Weber v Ogden* judgment is an outstanding example of the interrelationship between public and private international laws in these matters,[115] as it actually dealt with a maritime employment case: the plaintiff, a cook with German nationality whose habitual residence was also in Germany, sued his employer, a Scottish company, for unfair dismissal. His lawsuit was brought in the Netherlands based on the fact that he had performed a significant portion of his tasks on different platforms and vessels adjacent to the country's continental shelf. In reaching its judgment, the CJEU relied on international treaties regulating the use of the sea, in particular on the Convention on the Continental Shelf, approved in Geneva on 29 April 1958 and signed by the Netherlands. The CJEU did not take UNCLOS into account because the Netherlands had not yet ratified it when the employment contract in question began.

In its argumentation to establish whether the activity carried out on a state's continental shelf means that the habitual place of work is that state, the Court emphasised that both Conventions attribute 'over the continental shelf sovereign rights for the purposes of exploring it and exploiting its natural resources' to the coastal state,[116] hence assimilating this maritime area to a state territory at least for the purposes of the exploitation of these resources.[117] Meanwhile, other uses,

[112] See Chaumette (2007b), pp. 99–110; Chaumette (2007c), pp. 579–587. See an opinion on this matter concerning applicable law by Lagarde (2005), p. 531.

[113] Article 18(b) of the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations [COM (2003) 427 final].

[114] On legislative works, see Dickinson (2008), pp. 279–281, paras. 3.302–3.305.

[115] CJ 27.2.2002, Case C 37/00, *Herbert Weber* v *Universal Ogden Services Ltd.*

[116] See CJ 27.2.2002, Case C 37/00, *Weber*, para. 32. Discussing public international law application and its scope, see also paras. 33–36. On the applicability of these treaties to every state, see Mankowski (2003), pp. 21–22, and on its influence when it comes to determining the law applicable to maritime employment, see pp. 26–27.

[117] This case law is to be found in the CJ 17.1.2012, Case C-347/10, *A Salemink v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, whose para. 35 indicates: 'Since a

such as the simple passage of ships, do not lead to the conclusion that the area qualifies as a place of work [in addition to the fact that it would not qualify as habitual, as required by Article 21(1)(b)(i) of the Brussels I *bis* Regulation].

In short, applying public international law to the case at hand is crucial for establishing the habitual place of work with a view to designating which state is vested with international jurisdiction in the matter. The cook had also worked on a ship that was flying the Danish flag, but the fact that he provided most of his services on platforms on the Dutch continental shelf and vessels flying the Dutch flag tipped the balance in favour of the Netherlands as the country where the habitual work of place was situated. Against this background, allocating different sovereign rights to coastal states according to the maritime area also has an impact on establishing the country where the habitual performance of labour services is carried out. Nevertheless, the usual public international rule deciding on this issue is the one submitting the ship's internal matters to the jurisdiction of the flag state to the extent that the controversial cases concern vessels with contacts with different jurisdictions or the high seas.[118] In fact, the truly controversial cases are those such as the one underlying *Weber v Ogden*, where workers carry out their tasks on two or more vessels that fly different flags or combine their work on board with land-based activities or work on another kind of structure.

Vessels on the high seas sail or fish in waters that are not subject to state sovereignty or move through waters that are subject to different sovereignties. Against this background, there is extensive literature that points to the idea that under such circumstances, the workplace depends on a vessel's flag, so the vessel's internal matters are conventionally subject to the sovereignty of the flag state[119]: in principle, states cannot impose their jurisdiction at *mare liberum*, but this is only true up to a point, since rules to orientate behaviour are needed everywhere, even on the high seas. Hence, Article 94 of UNCLOS submits whatever happens on board ships to the flag jurisdiction. Accordingly, employment matters on board would primarily

Member State has sovereignty over the continental shelf adjacent to it — albeit functional and limited sovereignty (see, to that effect, Case C-111/05 *Aktiebolaget NN* [2007] ECR I-2697, paragraph 59) — work carried out on fixed or floating installations positioned on the continental shelf, in the context of the prospecting and/or exploitation of natural resources, is to be regarded as work carried out in the territory of that State for the purposes of applying EU law (see, to that effect, Case C-37/00 *Weber* [2002] ECR I-2013, paragraph 36, and Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraph 117)'. In similar terms, see *Addison and other v Denholm Ship Management* [1997] ICR 770.

[118] See in this sense Bosse (2007), pp. 186–187; Egler (2011), pp. 149, 152–170; Trenner (2001), p. 103; Mankowski (2005a), pp. 58–61, pp. 59–60; Winterling (2006), p. 58. In jurisprudence, see BAG, 24.9.2009—8 AZR 306/08 (First instance: LAG Mecklenburg-Vorpommern, 18. 3. 2008 1 Sa 57/07).

[119] See Bosse (2007), pp. 187–188; Egler (2011), pp. 203–204; Junker (2005a, b, c), pp. 730–731; Geimer and Schütze (2010), p. 363; Kropholler and von Hein (2011), pp. 353–354; Mankowski (1995); Mankowski (1989), pp. 487–525; Mankowski (2005a), pp. 59–60; Zanobetti (2011), p. 352.

be regulated by the law of the flag state, as otherwise confirmed by MLC, 2006, and WFC, 2007, both of which vest obligations in these matters upon the flag state.

This is emphasised by the reasoning followed by the CJEU in *Weber v Ogden*, where it was acknowledged that coastal states hold certain sovereign rights over specific maritime areas as defined by public international rules, i.e., the CJEU borrowed concepts and rights from public international law to resolve a private international law case. Within this framework, public international law also explains why coastal state jurisdiction does not cover employment claims arising from work on board ships passing through the sea area adjacent to it, these cases being subject to the jurisdiction of the flag state.[120] By this means, variation and discrepancies in jurisdiction and applicable law depending on the sea where the ship operates are avoided.

The Difficult Cases: Flags of Convenience and Mobile Workers

The allocation of jurisdiction to the flag state is, nevertheless, challenged when the flag is merely one of convenience, i.e., when there are no genuine links between the vessel and the country whose flag is flying. For this kind of case, as well as for those where there is more than one workplace, usually because workers discharge their duties to the shipowner on more than one vessel or provide both land-based and aboard services, Article 21(1)(b)(ii) of the Brussels I *bis* Regulation seems to provide an alternative: the courts where the business which engaged the seafarer is situated.[121] In both cases, the reading of Article 21(1)(b) leads to the conclusion that if it is not possible to identify where employees habitually perform their duties to employers—either because there is no genuine link between the work performed at sea and a given territory or because there is more than one workplace—the alternative provided there comes into operation, and the jurisdiction of the state in which the seafarer or fisherman was engaged therefore takes on the responsibility for providing justice services.

However, CJEU case law does not support this reading of Article 21(1)(b) of the Brussels I *bis* Regulation. The Court of Justice states that worker protection entails the closest jurisdiction to the employment relationship deciding on the case, and this is none other than that of the *locus laboris*. On the basis of this idea, the CJEU draws the conclusion that all employees have a habitual place of work, even if they provide services in different states. In fact, CJEU case law rests on the assumption that worker protection informs the priority given to the habitual place of work while relegating the place where the business which engaged the employee is situated to a

[120] See this approach in Advocate General F. G. Jacobs' Conclusions on Case C-37/00, presented on 18.10.2001, paras. 29 and 30, where Articles 5.1 and 6.1 of the Convention on the High Seas are cited. Para. 48 discusses whether the law of the flag can be taken into account when work has been carried out on board a ship flying it.

[121] See Kropholler and von Hein (2011), p. 354.

secondary role, on the ground that it lacks sufficient contacts with the employment relationship and can be easily manipulated by employers.[122]

As mentioned above, the CJEU has ruled on several cases dealing with work simultaneously performed in different countries, either by interpreting the habitual place of work as a head of jurisdiction, as in *Mulox v Geels* and *Rutten v Cross Medical*,[123] or making use of the conflict rule laid down in Article 6 of the Rome Convention, which also submits employment contract matters to the law of the habitual workplace, in *Koelzsch v Luxembourg* and *Voogsgeerd v Navimer*.[124] Prior to these judgments, the Giuliano-Lagarde Report stated that 'if the employee does not habitually work in one and the same country the employment contract is governed by the law of the country in which the place of business through which he was engaged is situated', with particular reference to work carried out on oil-rig platforms on the high seas.[125]

The Court of Justice holds a different view though, based on the worker protection principle, which identifies the closest courts to employment matters where international jurisdiction issues are concerned and the closest applicable law when it comes to conflict of law issues.[126] To this end, the concept of 'habitual workplace' is granted a liberal interpretation on the ground of the principle of proximity and predictability, according to which, in the case of mobile workers, this place is the *principal* place of work.

More specifically, this place is defined by *Mulox v Geels* as 'the place where or from which the employee principally discharges his obligations towards his employer'[127] and by *Rütten v Cross Medical* as 'the place where the employee has established the effective centre of his working activities'.[128] *Koelzsch v Luxembourg* and *Voogsgeerd v Navimer* also refer to the relevant place of work, expounding on the numerous factors that the seized court must take into consideration to arrive at a conclusion as to where that place is.[129] This is a crucial

[122] On the risks stemming from this subsidiary head of jurisdiction and in favour of the CJ's restrictive interpretation, see Lajolo di Cossano (2002), pp. 914–925.

[123] CJ 13.7.1993, Case C-125/92, *Mulox*; 9.1.1997, Case C 383/95, *Rutten*.

[124] CJ 15.3.2011, Case C 29/10, *Koelzsch*, para. 49. Although deciding on conflict of law issues, both judgments, *Koelzsch v Luxembourg* and *Voogsgeerd v Navimer*, concern international jurisdiction as a result of the *forum-ius* connection set up in these matters. See, for all, Lüttringhaus and Schmidt-Westphal (2012), p. 141. In contrast, LAG Köln 14.01.2010—7 Sa 834/09 applies Article 19(2)(b) of the Brussels I Regulation in a case involving a lorry driver.

[125] See Giuliano-Lagarde Report (1980), p. 24.

[126] As Johner (1995), p. 87, recalls, this broad interpretation aims to protect workers and ensure proximity between the court with jurisdiction and the subject matter of the proceedings.

[127] CJ 13.7.1993, Case C-125/92, *Mulox*, paras. 24, also 18–20.

[128] CJ 9.1.1997, Case C 383/95, *Rutten*, para. 23, with comments by Zabalo Escudero (1997), pp. 283–286.

[129] CJ 15.3.2011, Case C 29/10, *Koelzsch*, para 49, and 15.12.2011, Case C-384/10, *Voogsgeerd*, para. 38.

clarification, given that the regular basis on which work must be provided in one and the same country is lacking in the case of mobile workers;[130] *ergo*, there is no key link to a given country so other factors must be borne in mind when establishing in which country employees habitually perform their duties, even should part of their job involve travelling from country to country. While providing guidance on the location of the principal workplace, the CJEU interpretation aims to prevent situations where multiple courts have jurisdiction in these matters, to preclude the risk of irreconcilable decisions.[131]

The same *leitmotif* accounts for the new wording of Article 8 of the Rome I Regulation, which refers to the place *from which* employees provide their services, with a view to covering cases similar to those decided in *Mulox v Geels* and *Rütten v Cross Medical*, and also to provide a solution to work carried out in non-sovereign areas, targeting airline workers in particular.[132] In this case, identifying a base of operations from which they carry out their work would seem easy; hence, Article 8 aimed to enshrine what is referred to as the 'base rule'.[133]

In spite of this, the wording of Article 8 does not seem suitable for seafarers, first, due to the difficulty of identifying their base of operations[134] and, second, because of the flag jurisdiction's traditional role in these matters.[135] Not surprisingly, the fact that the workplace here is mobile but the worker is not has been highlighted.[136] As a matter of fact, there is just one case in which courts[137] and

[130] Junker (2005a, b, c), pp. 734–735, recalls that habitually means 'according to habit', and so is an absolute term, either something is habitual or it is not.

[131] This idea has been advocated in the case of a worker whose work time was mainly spent on the Dutch continental shelf but who also spent some time on the British continental shelf, meaning that there would have been a change of habitual workplace, giving rise to two possible heads of jurisdiction. See Hoge Raad, 31.5.2002, with comments by Boer (2002) and Mankowski (2005a), p. 60.

[132] In short, all workers must have a habitual workplace, which is not in accordance with the structure of this head of jurisdiction. Pointing out this paradox, see Junker (1998), pp. 193–195, and pointing out the need for a change, Beraudo (2001), p. 1058.

[133] In the words of Mankowski (2009a), p. 177. Lagarde (1989), p. 91, had already talked about the base test.

[134] In this sense, see Maestre Casas (2012), p. 333; Zanobetti (2011), p. 350.

[135] The Giuliano-Lagarde Report (1980), p. 24, says that it did not seek a special rule for crew members' work on board a ship, clearly distinguishing this case from another dealing with workers on offshore facilities and air workers, thus not automatically applying the alternative foreseen for cases in which a habitual place of work is not identified.

[136] See Behr (2009), pp. 90–95.

[137] This doctrine was applied in *Diggins v Condor* [2010] EWCA Civ 1133: Condor Marine Crewing Services Limited is a company based in and operating from Guernsey. The company hired Mr. Diggins as first officer aboard a ship sailing between the Channel Islands and Portsmouth through a subsidiary. The ship was registered in the Bahamas. On his 2-week shifts, Mr. Diggins lived and worked on board, embarking and disembarking in Portsmouth, as he lived in Lowestoft, UK. This decision had to rule on the validity of his dismissal, for which it first had to rule on the international jurisdiction of the English courts. The same goes for BAG, 27.1.2011—2 AZR 646/09 (First court: LAG Düsseldorf, 28. 5. 2009—13 Sa 1492/08) NZA (2011) 28:1309–1312,

literature[138] have identified a base of operations, i.e., workers employed on board ferries that always sail on the same route between countries and that embark and disembark at the same port, where they also provide services. Setting aside this case, the base test is of little help in maritime employment affairs, and resorting to public international law with a view to identifying the habitual place of work is clearly preferable.

Notwithstanding this, the CJEU in its judgment *Voogsgeerd v Navimer* includes seafarers among the workers for whom identifying the place from which employees mainly discharge their obligations to employers is possible: '(. . .) in the light of the nature of work in the maritime sector, such as that at issue in the main proceedings, the court seized must take account of all the factors which characterise the activity of the employee (. . .)'.[139]

Surprisingly and even though the worker is a seafarer, any reference to public international law is excluded from the CJUE's motivation, in particular considering a ship to be a workplace. After reading the decision, what particularly stands out is the lack of a single reference to the flag of the ships on which Mr. Voogsgeerd provided his services.[140] This absence seems to be motivated by the proliferation of flags of convenience—now increased by second and international registries—and the consequent loss of links with the country in which the ship is registered, undermining the identifying of the *forum/lex laboris* with the flag state. However, this is mere speculation since the CJEU did not make specific mention of flags of convenience to justify its judgment. In this sense, *Voogsgeerd v Navimer* represents a radical departure from traditional discussion in this field, as it may lead the seized court to find *in casu* the seafarer's base of operations. The CJEU breaks away from the traditional discussion on these issues—of which it could not of course be

with an analysis of all employment circumstances, including environment, as German was the language used for communication and organisational issues, namely, from where the sacked seafarer received instructions and boarded the ship. Likewise, LAG Mecklenburg-Vorpommern, 18.03.2008—1 Sa 38/07.

[138] See Fotinopoulou Basurko (2013), p. 298; Garber (2012), pp. 232–233.

[139] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, para. 38. In favour of the application of the base rule to sea workers, see Merrett (2011), paras. 4.68–4.72, pp. 112–115. Also in Corte di Cassazione, S.U., No. 19595, 17.7.2008, with positive comments by Carbone (2009), pp. 81–89, and critical ones by Zanobetti Pagnetti (2008), p. 151, note 109. Cour.Cass. (Ch.soc.), 31.3.2009, Ship Ontario, revises a decision accepting French international jurisdiction to decide on the merits of a case concerning a Filipino seafarer on the ground that the ship was flying a Luxembourg flag and owned by a Luxembourg company and spent 5 months a year at a French port. As Chaumette (2009b), pp. 543–548, explains in this case, the appropriate head of jurisdiction would have been the one provided by Article 7(1) of the 1952 Convention on the Arrest of Ships, the adoption of which had already been requested by the seafarer and granted to him. In favour of the Cour de Cassation position, see Proutière-Maulion (2009), pp. 836–843, which understands that its interpretation leads to the closest link.

[140] Chaumette (2012), pp. 227–233, talks of transparent flags.

ignorant—taking into consideration the precedent of *Weber v Ogden* and the pre-legislative activities of EU instruments in which an *ad hoc* solution for obligations contracted at sea had been sought.[141]

Other factors could also have influenced the *Voogsgeerd v Navimer* decision, in particular the evolution of company law and new recruitment methods. It is increasingly common for shipping agents and manning companies to act on behalf of shipowners when it comes to hiring seafarers or fishermen. As already discussed, in both the shipping and fishing sectors these companies are responsible not only for recruiting staff but often also for remunerating and giving instructions to seafarers as to where they have to go to carry out their work, as well as for managing transfers to and from the place of embarkation. It could also apply to a group of companies with one subsidiary acting as the shipowner and employer for tax and labour purposes and other as the one actually employing the worker. This seems to be the case of Naviglobe, a Belgian company acting in Antwerp on behalf of Navimer, a Luxembourg-based business that owned the vessels on which Mr. Voogsgeerd worked.

This case is therefore an excellent example of the impact of modern company law on the relocation of maritime employment: although starting out on the journey towards a genuine link between the flag and the state of the shipowners' nationality has been advocated, the route is lined with obstacles resulting from the proliferation of one-ship companies and international business cooperation. The point to be made now is that the flag of convenience issue seems to be out of discussion nowadays, given that it is only one more factor leading to the internationalisation of the employment relationship.[142] The case underlying the CJEU judgment also exemplifies that the problem to be tackled nowadays is groups of companies actually acting as employers, but not legally. Some jurisdictions have already tackled this issue by establishing joint liability of shipowners and manning agencies,[143] and the same has been suggested at EU level with the aim of developing an autonomous concept of the employer.[144] Indeed, those proposals would help worker protection much more than the approach undertaken in *Voogsgeerd v Navimer*.

In contrast, the factual approach to the habitual place of work endorsed by *Voogsgeerd v Navimer* involves transferring a significant amount of power to shipowners, as it enables them to choose indirectly which courts are deemed to be seized, either by hiring their manpower through agencies operating from the country of their choice or by selecting the base port.[145] The *Voogsgeerd v Navimer*

[141] See Sect. 3.2.3.3. Determining a habitual workplace for maritime employment relationships: the role of public international law.

[142] See Sects. 2.3 and 2.4.

[143] Such as happens in Spain and Greece. See Sect. 2.4.3.2.

[144] See Devers (2012), pp. 140–145.

[145] Knöfel (2014), pp. 130–136, p. 132, celebrates the CJ judgment, but he cannot avoid detailing the many facts that a judge ought to take into account while determining a seafarer's habitual place of work, such as sea routes and the respective waters on which the ship sails. In my opinion, this assessment increases legal uncertainty dramatically and thus worsens seafarers' position.

judgment rules that the seized court must 'first establish whether the employee, in the performance of his contract, habitually carries out his work in any one country, which is that in which or from which, in the light of all the aspects characterising that activity, the employee performs the main part of his duties to his employer'.[146] The Court of Justice seems to point to Antwerp in this case, as Mr. Voogsgeerd had to go there to receive instructions as to where to perform his duties and report back there afterwards. The main problem with this interpretation is that it places manning agencies at the centre of the maritime employment relationship when the employer is a different subject and instructions are complied with outside the territory from which the agencies operate. The same applies when this place is meant to be the vessel's base port,[147] as this is decided by the shipowner.

Accordingly, the scope of the CJEU's judgment in *Voogsgeerd v Navimer* has to be restricted to those cases in which a seafarer is a truly mobile worker. Otherwise, the factual approach encouraged by the CJEU is likely to seriously affect predictability with respect to which courts can be seized,[148] and it is not in accordance with the fact that the place where services are habitually provided is indeed a ship. In cases where employees work on board a single ship, the vessel should be presumed to be the workplace at issue, and resort to public international law is necessary to establish which country has jurisdiction to take on matters concerning the ship.

Should tasks not be performed in one and the same country pursuant to public international law, the place from which services are habitually provided is to be identified. To this end, a number of factors is mentioned in *Voogsgeerd v Navimer*—'. . .determine in which State the place is situated from which the employee carries out his transport tasks, receives instructions concerning his tasks and organises his work, and the place where his work tools are to be found'[149]—which basically referred to the test establishing the habitual workplace already addressed and that requires first, identifying employees' main tasks and, second, the place where they are performed.[150]

The judgment deals with Article 6 of the Rome Convention, and the doubt arises as to whether there is still room for the escape clause included in it as well as in Article 8 Rome I. In its judgment *Schlecker v Boedecker*,[151] the CJEU addresses the role of the escape clause in this provision, highlighting that factors other than the ones concerning the worker's provision of services have to be taken into account while assessing whether there is a closer law than the law of the habitual workplace,

[146] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, para. 41.

[147] Pointing to this extreme globalisation to criticise CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, see Maestre Casas (2012), pp. 332–334, and Lavelle (2014), pp. 192–193.

[148] Expressing this opinion, see Esplugues Mota and Palao Moreno (2012), p. 404; Carballo Piñeiro (2012), pp. 242–245. On the other hand, insisting on the principle of *favor laboratoris* informing this doctrine, see Grass (2011), pp. 849–852.

[149] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, para. 38.

[150] CJ 13.7.1993, Case C-125/92, *Mulox*, para. 20; 9.1.1997, Case C 383/95, *Rutten*, para. 15; and 28.9.1999, Case C-440/97, *Groupe Concorde*, para. 14.

[151] CJ 12.9.2013, Case C-64/12, *Schlecker v Boedecker*.

such as the place where employees are paid wages and other working conditions are fixed, where they pay income tax, are affiliated to social security schemes and are covered by pension, sickness insurance and disability schemes.[152] Hence and from an international jurisdiction viewpoint, these factors should not be taken into account either to determine the place from which services are provided.

One relevant factor in determining the principal workplace could be the employer's domicile, registered place of business or head office. But the dynamics of the heads of international jurisdiction provided for under Section 5 has shown that excessive weight should not be given to this link because of the mere fact that the employer's domicile is already a head of jurisdiction. Although there will be certain cases in which both point to the same courts, general and special heads of jurisdiction are meant to be alternative choices. The place where the employer has a branch, agency or establishment should not be taken into account either since this would pave the way for a different head of jurisdiction. This is particularly salient in maritime employment matters, as it could be argued that the position of a shipping agent or a manning company acting on behalf of a shipowner in recruiting seafarers to work on board a vessel is comparable to that of a shipowner's establishment for international jurisdiction purposes.[153]

The place of employees' domicile or habitual residence might help establish the country from which employees perform their duties.[154] Nevertheless, in contrast to insurance and consumer matters, EU legislation and related instruments avoid allocating jurisdiction to the courts of the place where a worker's private life is based in favour of an approach that takes the employee's professional life as a reference point, in particular because it is easy to change the place of habitual residence but not the place where duties to an employer are discharged. Undue weight must not be given to this factor when it comes to indicating the habitual workplace, although a coincidence between the two places seems to be quite common.

All in all, the seized court must basically identify the country where the main part of seafarers' tasks is performed, setting aside the aforementioned factors as they are not directly connected to the provision of services. The point to be made now is that public international law cannot be disregarded either while establishing the principal workplace to the extent that the essential part of seafarers' tasks may be provided in an area subject to public international rules. Against this background, *Weber v Ogden* provides an example of a mobile worker as the plaintiff worked on board ships flying different flags and also on maritime platforms, the key difference from *Voogsgeerd v Navimer* being the fact that the latter did take into account public international law while examining where the worker had carried out

[152] CJ 12.9.2013, Case C-64/12, *Schlecker*, para. 41. See Sect. 4.3.3.3.

[153] See Sect. 3.2.3.5. Fotinopoulou Basurko (2012), pp. 750–751, seems to restrict this operation to cases in which the piercing of the corporate veil succeeded, which, in my opinion, is too restrictive.

[154] This is the rule in German and French regulations. For a critique, see Chaumette (1995), pp. 997–1005.

the essential or relevant part of his activities.[155] The Court of Justice's silence on this matter is not acceptable inasmuch as public international law is also involved in worker protection, not to mention the regulating of areas in which most seafarers and fishermen actually work.

Successive Provision of Services in Different Countries

Cases in which workers successively fulfil their obligations towards their employer in different countries are somewhat different. In *Weber v Ogden*, the CJEU expressly addressed this situation, submitting the case to the courts of 'in principle, the place where he [the employee] spends most of his working time engaged on his employer's business'.[156] This statement led to a discussion on the meaning of 'most of his working time', and it was proposed that this ought to amount to at least 60 % of activity.[157] The debate was abandoned in the end, however, as the *Weber v Ogden* judgment reduced the significance of the time factor.[158]

Instead, *Weber v Ogden* addressed the issue of workers being temporarily posted to a different state and how this should be approached when it came to establishing the habitual place of work.[159] The matter was settled by taking the parties' intentions at the time of the posting into account, i.e., whether or not they intend to carry on working in the country of origin after the period spent working abroad. Recital 36 of the Rome I Regulation confirmed this case law and provided a number of guidelines along these lines, which are also applicable when employees are assigned to a subsidiary of the group or company other than their employer's, thus sorting out the problems stemming from the *Pugliese v Finmeccanica* doctrine.[160]

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[155] Similarly, see *Wilson v Maynard Shipbuilding Consultants AB* [1978] 2 All E.R. 78.

[156] CJ 27.2.2002, Case C 37/00, *Weber*, para. 50. Para. 52 points out that the logic behind this temporal principle, 'which is based on the relative duration of periods of time spent working in the various Contracting States in question, is that all of an employee's term of employment must be taken into account in establishing the place where he carries out the most significant part of his work and where, in such a case, his contractual relationship with his employer is centred'.

[157] See Mankowski (1999), p. 336.

[158] See Junker (2005c), p. 735; Palao Moreno (2002), pp. 867–868; Trenner (2001), pp. 57–59; Zabalo Escudero (2003), pp. 230–236.

[159] CJ 27.2.2002, Case C 37/00, *Weber*, para. 54: 'For example, weight will be given to the most recent period of work where the employee, after having worked for a certain time in one place, then takes up his work activities on a permanent basis in a different place, since the clear intention of the parties is for the latter place to become a new habitual place of work within the meaning of Article 5(1) of the Brussels Convention'. See Däubler (2003), pp. 1299–1300; Junker (1998), pp. 310–313; Mankowski (2003), pp. 23–25; Merrett (2011), paras. 4.76–4.4.80, pp. 117–118; Thüsing (2003), p. 1310; Trenner (2001), pp. 57–59, p. 105.

[160] CJ 10.4.2003, Case C-437/00, *Giulia Pugliese v Finmeccanica SpA, Betriebsteil Alenia Aerospazio*, para. 23, interpreting Article 5(1) of the Brussels Convention in such a way that the first employer may be sued if work is performed in the frame of a second employment contract 'only when, at the time of the conclusion of the second employment contract, the first employer itself has an interest in the employee's performance of the service for the second employer in a place decided on by the latter'. See, on the issues raised by this decision, Kropholler and von Hein

The same conclusion is to be drawn from the wording of Article 21(1)(b)(i) of the Brussels I *bis* Regulation, according to which attention needs to be paid to the courts of the last place of work if the employees have been permanently transferred to a ship flying a different flag, regardless of the time elapsing between the transfer and the arising of the dispute.[161]

3.2.3.4 Special Jurisdictional Rule in Employment Contract Matters: The Place Where the Business Which Engaged the Employee Is or Was Situated

The logic behind Article 21(1)(b) of the Brussels I *bis* Regulation indicates that paragraph (ii) should only be turned to when identifying a habitual workplace in one and the same country is not feasible,[162] such as in cases in which the vessel changes flag regularly and the employment relationship in question lacks sufficient contacts with a base.[163] Then, and only then, can seafarers make use of the courts of the place where the business which engaged them is situated. To this end, it does not really matter whether the habitual place of work is located in a third state: what counts here is that there is actually a habitual place of work, meaning that the prerequisite for resorting to Article 21(1)(b)(ii) is not met.[164] In other words, even if seafarers or fishermen habitually carry out their tasks on board vessels flying the flag of a third state, they are not allowed to resort to the provision with a view to allocating jurisdiction to a member state, for example.[165]

Despite the subordinate role granted to this head of jurisdiction, there have been suggestions that it should be brought to the forefront when a ship sails or fishes in

(2011), pp. 351–353; Müller (2004), pp. 74–77; Mankowski (2009a), pp. 190–193; Palao Moreno (2003), pp. 907–913. In contrast, Geimer and Schütze (2010), pp. 362–363, propose the retaining of this doctrine. Aiming to combine the two approaches in the sense that a posting should only be treated as temporary when the first employer's interest mentioned by *Pugliese* does not exist, see Bosse (2007), pp. 235–236. This doctrine may contain certain weaknesses however, for example the impossibility of applying Article 6(1) of the Brussels I Regulation, as it is excluded from employment contract matters, as suggested by Franzina (2008), p. 1099.

[161] See Beraudo (2001), p. 1058; Mankowski (2003), pp. 23–24; Marchal Escalona (2004b). Zabalo Escudero (2003), p. 234, had already pointed out that resorting to the subsidiary connection means restricting the functionality of the *forum loci laboris*.

[162] See Giuliano-Lagarde Report (1980), p. 24; CJ 27.2.2002, Case C 37/00, *Weber*, paras. 55 and 57; Esplugues Mota and Palao Moreno (2012), p. 402; Junker (1998), p. 729. Müller (2004), pp. 78–79, implying that there is no habitual place of work when it is performed at sea, for which this is the only head of jurisdiction.

[163] See Garber (2012), pp. 234–235; Grušic (2013), pp. 173–192.

[164] See CJ 15.2.1989, Case C-32/88, *Six Constructions v Humbert*.

[165] See Bosse (2007), p. 255; Däubler (2003), p. 1300; Geimer and Schütze (2010), p. 365; Kropholler and von Hein (2011), p. 356; Mankowski (2011a), p. 447. From a different viewpoint, see Mankowski (2008), p. 119. The subsidiary nature of this head of jurisdiction in relation to the habitual workplace was already present in the Brussels Convention. See Trenner (2001), pp. 47–48, advocating a different solution (pp. 158–159), and Winterling (2006), p. 116.

non-sovereignty areas,[166] thus establishing a more appropriate forum than the flag jurisdiction, given the emergence of the flag of convenience issue. In spite of such stances, CJEU case law actively seeks to turn the forum of the country where the business engaging the employee is situated into a residual one via a liberal interpretation of the terms of Article 21(1)(b)(i). As seen above, the CJEU prioritises the location of a habitual place of work even where mobile workers are concerned, by taking into account all circumstances surrounding the work they carry out with a view to identifying the place from which the majority of their tasks for the employer are undertaken or in which the essential part of their obligations is fulfilled. This interpretation is also supported by the hint in Article 21(1)(b)(i) in the sense that weight should be given to the last place of work where appropriate.

In particular, *Voogsgeerd v Navimer* stressed the fact that resorting to the courts of the engaging business is truly subsidiary in maritime employment matters.[167] In this sense, the special rule's development is certainly striking up to a point,[168] although there have been many warnings about its effects. As pointed out above, the provision resorts to a weak linking factor, as the business which engaged the employee may have very little connection with the maritime employment relationship and in fact the relationship can be easily manipulated by the employer.[169]

Considerable controversy surrounds the interpretation of the phrase 'business which engaged the employee', precisely because of the ease with which the relationship can be manipulated.[170] Some authors suggest that the provision should be read literally for the sake of legal certainty,[171] i.e., jurisdiction should be allocated to the courts where the establishment that engaged the employee is located, thus rejecting the integration of the employee within the business structure as a factor in interpreting the phrase.

Others, meanwhile, highlight the idea that counting the mere conclusion of the employment contract as a linking factor to a jurisdiction opens the door to forum shopping; this concept should therefore be consolidated by resorting to the business in which the employee is effectively integrated within the employer's organisation.[172] This approach is supported by the principles that should inform the

[166] In this sense, see Trenner (2001), pp. 177–178. Although indirectly addressing this case and only when the vessel does not have a close link with the base port, see Grušic (2012), p. 115.

[167] CJ 15.12.2011, Case C-384/10, *Jan Voogsgeerd v Navimer SA*, para. 62, referring to *Eurofood*.

[168] For a critique, in particular due to predictability problems, see Esplugues Mota and Palao Moreno (2012), pp. 406–407. In the opinion of de Sousa Gonçalves (2005), pp. 48–49, this is the closest link after the habitual workplace.

[169] See Bosse (2007), p. 188; Lavelle (2014), p. 195; Merrett (2011), paras. 4.82, pp. 119–120. While addressing conflict of law issues, this problem is also highlighted because of the growing importance of manning agencies.

[170] With the example of manning agencies, see Mankowski (2003), p. 27.

[171] Such as Däubler (2003), p. 1300; Kropholler and von Hein (2011), pp. 357–358.

[172] See Mankowski (2011a), pp. 448–449, followed by Geimer and Schütze (2010), p. 365; Marchal Escalona (2004b; Müller (2004), pp. 80–81; Virgós Soriano and Garcimartín Alférez (2007), p. 179.

determination of international jurisdiction, proximity and foreseeability, which are both to be found in the country where the establishment actually employing the worker is located.[173] In similar terms, another proposal suggests taking the place that checks that workers carry out their tasks into account, the place where wages are paid and the place where workers receive instructions and guidelines—in short, the place where staff management takes place.[174] Yet another proposal goes back to the pre-contract phase in order to trace the business in question.[175]

The issue seems to have been settled for good by *Voogsgeerd v Navimer*, in which the Court of Justice concluded that effective occupation in an establishment is a factor to be taken into account to establish where the work is provided on a regular basis, and this factor cannot be used to determine the business to which Article 21(1)(b)(ii) refers. On the contrary, legal certainty requires foreseeability in identifying the business, and this is only achieved by actually resorting to the place in which the employment contract was concluded.

For the purposes of identifying this place, 'the referring court should take into consideration not those matters relating to the performance of the work but only those relating to the procedure for concluding the contract, such as the place of business which published the recruitment notice and that which carried out the recruitment interview, and it must endeavour to determine the real location of that place of business'.[176] Hence, the Court moves away from a purely formal interpretation since what is important is not where the contract was signed but where the worker was recruited. However, there will be a habitual place of work if it is possible to locate the establishment in which the employee is actually doing the work, being paid and receiving instructions concerning the tasks to be carried out.

There is also debate around the concept of 'business' as employed in Article 21(1)(b)(ii). Some support the consistency of meaning between this concept and that of 'branch', 'agency' or 'other establishment' as mentioned in Article 7(5) of the Brussels I *bis* Regulation, for reasons of legal certainty.[177] Others, however, prefer a broader interpretation of 'business'.[178] *Voogsgeerd v Navimer* did not directly address this issue but at the same time furnished no argument for treating both provisions as containing different concepts of 'establishment'.

In any event, *Voogsgeerd v Navimer* is significant because it stresses that establishments acting on behalf of the employer are also included in Article 21(1)(b)(ii): subsidiaries, branches and offices of a company other than the employer-

[173] In this sense, see Zanobetti (2011), p. 350.

[174] See Oetker (2009), para. 34.

[175] See Garcimartín Alférez (2008), p. 76; Bosse (2007), pp. 257–261; Johner (1995), pp. 97–98; Trenner (2001), pp. 171; Winterling (2006), pp. 118–119, invoking the difference with Article 6 of the Rome Convention insofar as this lack of links can be corrected by turning to the escape clause.

[176] See *Voogsgeerd v Navimer*, para. 50.

[177] See Schlosser (2009) p. 96; Trenner (2001) pp. 160–168; Winterling (2006) pp. 111–112.

[178] Blefgen (2005) pp. 61–64, inasmuch as there is no need of the external appearance required in Article 5(5) of the Brussels I Regulation; Esplugues Mota and Palao Moreno (2012) p. 406; Merrett (2011) para. 4.85, pp. 121–122.

company may be the business which engaged the employee, provided that they are stable establishments.[179] This judgment noted that, in principle, the business has to be part of the employer's structure.[180] This is not mandatory, however: 'It is only if one of the two companies acted for the other that the place of business of the first could be regarded as belonging to the second, for the purposes of applying the linking factor in Article 6(2)(b) of the Rome Convention'.[181] In short, a manning agency acting on behalf of the shipowner may also be the business in question for the purposes of applying Article 21(1)(b)(ii) and also when it comes to applying Article 7(5) of the Brussels I *bis* Regulation, as discussed below. Finally, in *Voogsgeerd v Navimer* the CJEU also addressed the situation in which the engaging business is a shell company; then once the veil has been lifted, the engaging business becomes the real employer.[182]

The use of the past tense in the terms of this head of jurisdiction indicates that no matter whether the business has disappeared when the claim is filed, the employee's claim is to be lodged where the engaging business was situated and also when deciding which court has venue within a country. Only when the business moves within the same territory does the new location have to be considered.[183]

3.2.3.5 The Forum of a Branch, Agency or Other Establishment

Article 20(1) of the Brussels I *bis* Regulation, refers to Article 7(5), which implies that workers may also bring their claims before the courts of the place where the employer has a branch, agency or establishment, provided that such a claim arises from its operation. The country where the employer's branch is located is vested with jurisdiction on the ground that while the employer must be accountable for activities organised from the branch in question, consideration is given to the principle of protection of legitimate expectations of all those who approach the employer through the said establishment.[184] For this reason, obligations entered into by the branch need not necessarily be carried out in the state where the branch

[179] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, paras. 54 and 55.

[180] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, para. 57. Critique, Maestre Casas (2012), p. 338.

[181] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, para. 64. In this sense, see Fernández Rozas and Sánchez Lorenzo (2013), p. 585; Martiny (2015), para. 70. Contra, Grušic (2012), p. 113, with a restrictive interpretation.

[182] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, para. 40, and comments by Grušic (2013), pp. 173–192. See Sect. 4.3.3.2.

[183] See Beraudo (2001), p. 1058; Bosse (2007), pp. 262–265; Kropholler and von Hein (2011), p. 357; Mankowski (2011a), p. 449. Däubler (2003), p. 1300; Trenner (2001), pp. 173–175 (although only when it is transferred to another state); Winterling (2006), pp. 119–120.

[184] See, among many others, Virgós Soriano and Garcimartín Alférez (2007), p. 136.

is situated to be considered as arising out of its operation and thus falling within this forum's scope.[185]

This head of jurisdiction is only available to employees, but not to employers as by definition employees cannot have a branch.[186] As mentioned above, Article 21(2) establishes the fiction that having a branch, agency or establishment in a member state amounts to being domiciled in the state, even if the employer is actually domiciled in a third country. As a result, Article 21(1)(a) of the Brussels I *bis* Regulation also applies when the employer does have a branch in the European Economic Area but not a domicile.[187] However, if the employer is domiciled in a member state, Article 7(5) offers workers another head of jurisdiction as long as their claim arises from the corresponding branch, agency or establishment's activity. Likewise, if an employer domiciled in a third state has establishments in different member states, workers can choose where to sue, depending on the place with which their claim is associated.[188]

The meaning of 'branch, agency or other establishment' in relation to employment contract matters has already been discussed.[189] Closely intertwined with this discussion is the issue of the inappropriateness of this head of jurisdiction with respect to employment contract matters, as highlighted by some authors: it is most likely that the branch, agency or establishment is the same as the business which engaged the employee, and therefore the reference of Article 20(1) to Article 7 (5) paves the way to an alternative route that, in principle, is not offered by Article 21(1)(b) of the Brussels I *bis* Regulation. As a result, employees can sue in the courts of the country where they habitually carry out their tasks but may only resort to the courts where the engaging business is situated when the habitual workplace is not in one and the same country; however, employees may recover this option by invoking Article 7(5). Since this somehow breaks with the internal logic of Section 5, the latter head of jurisdiction has been labelled inconvenient.[190]

Nevertheless, noteworthy is that the business which engaged the employee may be located in a different country from the one where the branch, agency or establishment mentioned in Article 7(5) is. The point is that employment claims falling within the scope of the latter forum must arise from the business operations, i.e., not limited to the employment contracts entered into there, but include other workers who have a close relationship with the establishment, perhaps because wages are paid there or because their tasks are supervised from there.[191] As a matter of fact, there would

[185] CJ 6.4.1995, Case C-439/93, *Lloyd's Register of Shipping v. Societé Campenon Bernard*, para. 16.

[186] See Bosse (2007), p. 267; Geimer and Schütze (2010), p. 356; Kropholler and von Hein (2011), p. 344; Mankowski (2011a), p. 435; Winterling (2006), pp. 25–27.

[187] Therefore, it is also held that the rule only works in these cases. See Müller (2004), p. 55.

[188] See Bosse (2007), pp. 79–80; Esplugues Mota and Palao Moreno (2012), pp. 397–398; Mankowski (2011a), p. 435.

[189] See Sect. 3.2.2.3.

[190] See further Egler (2011), p. 140, following Mankowski (2011a), p. 435.

[191] Also for this clarification, see Mankowski (2011a), p. 435.

seem to be a greater likelihood of overlap between the forums of the branch and the habitual place of work than between the heads of jurisdiction mentioned above.

When it comes to maritime employment, manning agencies deserve special consideration. In fact, manning agencies acting on behalf of the shipowner should be deemed to be its establishment. In a context of extreme offshoring models,[192] such an interpretation is required to open a forum in the country in which workers are recruited, given that shipowners may be domiciled in one country and their ships may be flying a second nation's flag, while crew members are supplied by yet another country. In these situations, owners are outsourcing a service that they themselves or a branch of their company would otherwise perform.[193] For this purpose, it is irrelevant whether the agency has been set up as a different company to that operating the ship because the relevant fact here is that it is acting on behalf of the employer. Hence, although the ship is deemed to be the habitual place of work, seafarers should be allowed to claim against their employer in the place where the latter acts through another company, as pointed out in *Voogsgeerd v Navimer*.[194] Nevertheless, a certain degree of permanence is required, including cases of agents regularly travelling to a given country and working from other companies' offices but not cases in which a captain or master recruits seafarers and fishermen directly in port due to immediate service needs.[195]

The meaning of the concept 'litigation arising from the operations of the shipowner's establishment' such as a manning agency is more controversial, particularly when such operations are restricted to the recruiting and placement of seafarers wherever they have to do their job. It is clear that this head of jurisdiction attracts all claims related to individual employment contracts when manning agencies are responsible not only for recruitment activities but also for all the vicissitudes of the contract, such as checking seafarers and fishermen's professional qualifications, providing instructions and tickets for the journey to the ship and back, paying salaries and contributions to social security systems, and even managing complaints or negotiating collective agreements.

Manning agency activity is sometimes limited to staff recruitment and the subsequent management of seafarers' transfer operations to a ship where they finally sign their employment contracts, in which case extending this forum would not seem to be as justifiable as it is in the previous case. However, the inherent contractual asymmetry between the parties to the contract must be borne in mind for a broad interpretation to be supported, which would also allow claims to be lodged against the employer in the place where the seafarer or fisherman was recruited. Reasons of effective judicial protection from the court support the idea of

[192] The *pro laboratore* principle must be mentioned at this point, such it was argued by the Uruguayan *Suprema Corte de Justicia judgment*, 29.7.1994. Vol 112 (1995) LJU Case 1284, *Roberto Bordon v Universal Shipping Agency Ltda. & other*, while seeking to establish Uruguayan jurisdiction over a case involving a Uruguayan seaman, a Greek company and a Chipriot vessel.

[193] See in general Mankowski (2012), pp. 223–227.

[194] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, para. 57.

[195] See Sect. 4.3.3.2.

resorting to this forum in these cases as well, given that access to another jurisdiction may be *de facto* impossible for seafarers and fishermen as plaintiffs.

3.2.3.6 Party Autonomy

Prorogation of Jurisdiction

In contractual matters, the choice of forum seems appropriate for establishing the closest competent court. However, the approach to party autonomy as the basis for establishing international jurisdiction is influenced by worker protection, to prevent employers from taking advantage of their superior position *vis-à-vis* the weaker party to the contract, in this case workers. Article 23 of the Brussels I *bis* Regulation therefore limits the role of party autonomy to cases in which the choice of court agreement is concluded after the dispute has arisen or if it grants workers a head of jurisdiction other than those provided for in Section 5.[196]

Where the first situation is concerned, the specification that the agreement must have been entered into after a dispute arises refers to the time when extra-jurisdictional disputes emerge, i.e., the point when a disagreement leading to a court case actually happens.[197] The second kind of agreement specifically mentioned seeks to favour workers by providing them with an additional forum to the ones laid down in Section 5. For this reason, prorogation of jurisdiction as indicated by Article 23 can only be applied to allocate jurisdiction to the corresponding courts and not to derogate jurisdiction. In other words, employees cannot resort to choice of court agreements with a view to challenging the jurisdiction of the courts where an employer has brought a claim against them in accordance with Article 22 of the Brussels I *bis* Regulation, i.e. the courts of the worker's domicile.[198]

Article 23 is a special rule in relation to Article 25 of the Brussels I *bis* Regulation. The latter provision applies to forum selection clauses on employment contract matters with regard to the formal requirements provided, which are to be complied with by workers and employers in shaping an agreement conferring jurisdiction.[199] If these agreements do not fall within the categories of either of the two cases laid down in Article 23, they are not binding on the parties, in

[196] However, criticising this interpretation on the ground that it may deprive workers of protection, see Bosse (2007), pp. 286–288; and, in general, suggesting prohibiting party autonomy in this context, Johner (1995), pp. 150–151.

[197] In this sense, see the Jenard Report (1979), p. 33. Contra, Bosse (2007), pp. 288–289.

[198] In these terms, CJ 19.7.2012, Case C-154/11, *Ahmed Mahamdia v République algérienne dé mocratique et populaire*, para. 62. See Guzmán Zapater (2013), pp. 15–19; Knöfel (2006), p. 277; Mankowski (2011a), pp. 458–460; Winterling (2006), p. 131.

[199] See the general analysis by Casado Abarquero (2008), pp. 148–171.

particular on the worker,[200] not even when they bestow international jurisdiction on the courts of a third state.[201]

In principle, the Brussels–Lugano system provides for prorogation of jurisdiction exclusively to courts located in the European Economic Area, either when one party is domiciled in a member state or neither of them is; in both cases, the restrictions on the binding effect of choice of court agreements as imposed by Article 23 apply. The opposite route, i.e. when the agreement vests jurisdiction upon the courts of a third state, is not taken into consideration, and so nothing is said regarding restrictions on party autonomy. Nevertheless, there would be no point to the restrictions imposed by Article 23 only affecting the former but not the latter, as this would create an ideal way not only to circumvent the worker protection measures provided by these instruments but also to avoid EU substantive law in this area. Hence, Article 23 is always applicable and not only in the cases expressly provided for in Article 25.

Restrictions to party autonomy as laid down in Article 23 affect collective agreements too, as they may contain clauses bestowing jurisdiction on the courts of a state, which could presumably be applicable to individual employment matters as well. Article 23 may therefore render such choice of court agreements ineffective.[202] Article 25 is also applicable to the choice of court clauses established in collective agreements, for which it must meet the formal requirements laid down by this provision where appropriate. In these cases, choice of court agreements are not negotiated individually and their formal validity is preserved as the interested parties would have agreed on the relevant collective agreement.[203]

Neither Article 23 of the Brussels I *bis* Regulation, nor Articles 15 and 19—dealing with prorogation of jurisdiction in insurance and consumer matters respectively—address cases of workers' implied submission to the courts where employers have lodged their claims. Nevertheless, it is commonly accepted that Article 26 of these legal instruments is also applicable in employment contract matters.[204] Some argue that it should not be applied in these matters for the sake of the completeness of Section 5, which makes no reference to this provision.[205] However, the similarities between cases of implied submission and agreements entered into after disputes arise, to which Article 23 does refer, support the idea of

[200] See Article 23(5) of the Brussels I Regulation and the Lugano Convention; 25(4) of the Brussels I *bis* Regulation.

[201] CJ 19.7.2012, Case C-154/11, *Ahmed Mahamdia v République algérienne démocratique et populaire*, para. 66. See Däubler (2003), p. 1301; Esplugues Mota and Palao Moreno (2012), p. 411; Knöfel (2006), p. 277; Mankowski (2011a), p. 421; Mosconi (2003), pp. 24–26; Müller (2004), pp. 91–93; Trenner (2001), p. 186. Advocating the absolute prohibition of submission to third states, see Bosse (2007), pp. 292–295.

[202] See Kropholler and von Hein (2011), p. 342; Mankowski (2009b), pp. 588–589.

[203] See Winterling (2006), pp. 137–152, including a discussion on which agreement ought to be applied in case more than one collective agreement is internationally applicable.

[204] See Däubler (2003), p. 1301; Geimer and Schütze (2010), p. 353; Mankowski (2011a), pp. 417–418.

[205] See Esplugues Mota and Palao Moreno (2012), pp. 410–411.

making an exception, meaning that Article 26 of the Brussels I *bis* Regulation, is also applicable here. The CJEU has come to this conclusion as well, making it clear that defendants' implied submission to the courts where lawsuits have been brought against them is only expressly excluded in cases of exclusive jurisdiction as laid down by Article 24 of the Brussels I *bis* Regulation.[206]

The Brussels I *bis* Regulation introduces new provisions on the prorogation of jurisdiction with respect to the Brussels I Regulation and the Lugano Convention. The first amendment aims to solve the issue of the law applicable to the substantive validity of the choice of court agreement, to be decided by the law of the member state to which the agreement allocates jurisdiction in accordance with Article 25(1). This means that in addition to assessing whether this agreement benefits the worker in line with what is now established in Article 23 of Brussels I *bis* Regulation,[207] the seized court has to rule on the material validity of the agreement according to the law of the member state designated as competent by the agreement, as well as on the formal validity in accordance with the provisions laid down in the same Article 25.

The second innovation is that worker protection is broadened. Article 26(2) of Brussels I *bis* Regulation lays down that courts whose jurisdiction defendants have tacitly accepted are obliged to warn them of the consequences of participating in the proceedings without challenging its jurisdiction. These courts have to inform the defendant 'of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance'.

The provision does not indicate the appropriate stage in the proceedings to furnish the defendant with this information, so it depends on the relevant national procedural law. It could be argued that notification of the lawsuit is the appropriate time,[208] i.e., when individuals are informed of the claim brought against them, they should be informed of their right to contest the court's jurisdiction and the consequences of not doing so.

Submission to Arbitration

It is common knowledge that the Brussels–Lugano system does not include arbitration matters. However, it seems appropriate to make a reference, albeit brief, to the submission of employment disputes to arbitration in this section. At this point, the 1958 New York Convention on Recognition and Enforcement of Arbitral

[206] See this line of reasoning with regard to insurance contracts in CJ 20.5.2010, Case C 111/09, *Česká podnikatelská pojišťovna as, Vienna Insurance Group v. Michal Bilas*.

[207] To which Article 25(4) of the Brussels I *bis* Regulation refers and corresponds with Article 21 of the Brussels I Regulation.

[208] Marchal Escalona (2013), pp. 147–159, points out to the first hearing before a court.

Awards comes to the fore. According to US case law, this Convention also applies to maritime employment disputes and serves to circumvent state jurisdiction.[209]

The situation is slightly different on this side of the Atlantic, where in countries that accept the derivation of the employment contract claim to arbitration,[210] worker protection is still guaranteed by Article 23 of the Brussels I *bis* Regulation, which is also applicable to restrict the prorogation effect of arbitration clauses to the cases accepted by this provision and therefore to cases in which the arbitration clause has been entered into after the dispute arose,[211] or the worker can benefit from it.[212]

3.2.3.7 Counterclaims

It is generally believed that workers can lodge counterclaims against their employer when the latter is the plaintiff.[213] However, the comprehensiveness of Section 5 in fact implies the reverse: its Article 20(1) contains no references to Article 8(3) of the Brussels I *bis* Regulation, which deals with counterclaims as a head of international jurisdiction, nor does Article 21, devoted to the heads of jurisdiction before which workers may bring their claims, a specific provision on counterclaims. Nevertheless, the rationale behind counterclaiming—on the grounds of procedural economy and the need to avoid contradictory decisions—has to prevail over this rather formalistic interpretation. Furthermore, the wording of Article 22(2) of the Brussels I *bis* Regulation—dealing with employers' counterclaims—can be interpreted in such a way that it also refers to cases in which the counterclaiming party is the worker.

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[209] *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 1991 AMC 1697 (1991), and *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 1972 AMC 1407 (1972), are both decisions opening the door to arbitration in maritime law and also in employment matters, despite the exception provided by 9 U.S.C. § 1. Later on, *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 265 (1949), paved the way for limiting arbitration in cases involving the Jones Act. See Davies (2003), pp. 367–387; Hernández Gutiérrez (2009), pp. 1–18; Maruka (2008), pp. 229–259; Nickson (2006), pp. 103–144; Sechelsky (2003), pp. 203–242; Wales (2011), pp. 1215–1240. More recently, see *Balen v Holland America Line Inc.* 583 F 3d 647 (2009); 2009 AMC 2561 (9th Cir).

[210] In Italy, it is not held to be an arbitration matter. See di Marco (2002), pp. 1453–1455. But it is in Spain; see Marchal Escalona (2004a) and comparative analysis therein undertaken.

[211] In this regard and although it is a US-American case, it is worth mentioning *Harrington v Atlantic Sounding Co.*, 602 F ed 113 (2010), dealing with an arbitration clause signed between the shipowner and the seafarer after the accident at sea occurred. The New-York-based federal court concluded the agreement to be valid on the ground that it was not unconscionable and, therefore, was enforceable.

[212] See *Cour.Cass. (Ch.soc.)*, 28.6.2005, Ship *Nan Shan*, with comments by Chaumette (2006) citing more sentences on these matters (note 5): an employment contract between a French captain and a company domiciled in Guernsey where the yacht was also registered; the French Supreme Court declared the arbitration clause unenforceable for workers, although not invalid, since they may be able to invoke it in their favour.

[213] See Bosse (2007), pp. 283–284; Lavelle (2014), p. 195.

Having accepted that employees can counterclaim, consideration should be given to choice of forum agreements, as they prevail over counterclaims if both have the same subject matter, i.e., a counterclaim will not be accepted should there already be a court with exclusive jurisdiction on the same matter. Nevertheless, the wording of Article 23 of the Brussels I *bis* Regulation states that the preference of a choice of forum clause over a counterclaim only prevails when the agreement was entered into after the dispute arose or invoked by the worker.[214] In other words, an employer may not successfully invoke the choice of court agreement against an employee's counterclaim.

3.2.4 Seafarers as Defendants: Which Courts Can They Be Sued In?

Although the *forum laboris* is an objective connecting factor, it is not open to employers, who may only claim against workers in the courts of the workers' domicile. It has been pointed out that worker protection could be enhanced if the head of jurisdiction had opted for the courts of the worker's habitual residence, i.e. this connecting factor should in principle submit disputes to one and the same country, whereas there may always be more than one domicile for the same person and it is impossible to oblige the plaintiff to choose the closest one to the worker.[215]

In any event, leaving the decision about where to be sued in the hands of workers has been criticised, as they choose their domicile, whereas the employer is deprived of the jurisdiction of the state where the habitual place of work is situated, even though this head of jurisdiction may be close to both parties to the employment contract and, in principle, be deemed neutral. The main source of criticism focuses on the fact that it is easy for workers to change their domicile, thus forcing employers to follow them to a state that is not where the work was actually carried out—and which is probably not where workers lived before moving; the coincidence between *forum* and *ius,* as allegedly pursued in employment contract matters, is therefore rendered simply impossible.[216]

Both these objections can be refuted, however[217]: the second can easily be challenged in the light of the obvious differences between the concepts of international jurisdiction and conflict of laws, which make it difficult to preserve the parallelism between *forum* and *ius*, whereas the first may well be questioned in the sense that making a plaintiff-employer sue an employee at the latter's domicile seeks a kind of protection that is achieved anyway when employees have to change their domicile to another state for reasons of work, for example. In addition, it must be noted that although the habitual place of work is in principle a reliable criterion,

[214] See Bosse (2007), pp. 295–296.

[215] See Bosse (2007), pp. 268–269.

[216] See this criticism in Junker (1998), pp. 316–317; Junker (2005a, b), p. 202.

[217] In similar terms, see Bosse (2007), pp. 270–272.

this is not the case with the place where the engaging business is situated; worker protection is thus better served by ensuring that employers cannot bring their claims before the *forum laboris*.

Employers may also counterclaim against employees, provided that the claim arises from the employment contract discussed in the proceeding in question.[218] This is because all the restrictions to counterclaiming laid down in Article 8(3) of the Brussels I *bis* Regulation are applicable here, with aim of preventing this *forum connexitatis* becoming exorbitant. Particularly salient among these limitations is the requirement that the counterclaim must arise from the same facts on which the main proceedings are based—in this case, from the same employment contract.[219]

3.2.5 Venue

Some of the heads of international jurisdiction laid down by the Brussels–Lugano system also have local jurisdiction. Although this does not apply to the defendant's domicile, it is the case with the heads of jurisdiction provided for in Article 21(1)(b) of the Brussels I *bis* Regulation.

If work is carried out on board a ship, some method of identifying a court with venue in flag state territory is required. As vessels always operate from a port, this seems to indicate that the port is the closest link, and so employment contract matters are to be discussed in the courts of the respective port, provided that this is located in the flag state territory. Even if the base port is not situated within the flag state territory, a port needs to be identified for venue to be granted to the courts in the flag state.[220]

In cases where seafarers or fishermen are mobile workers, the factors mentioned in *Voogsgeerd v Navimer* to establish the place where the worker's duties towards the shipowner are to be discharged point to a place that is subject to state sovereignty, for which reason these problems do not arise, and the venue should be easy to establish. However, there will be cases of mobile workers whose international jurisdiction head will be determined in accordance with public international rules, for which reason again a port in the country at hand has to be identified for venue purposes.

Further problems do not arise when jurisdiction is allocated to the country where the business that employed the workers is located.

[218] See Geimer and Schütze (2010), p. 367.

[219] See Bosse (2007), p. 280.

[220] See Mankowski (2011a), p. 442. Also, Geimer and Schütze (2010), p. 363; Kropholler and von Hein (2011), p. 355. Bosse (2007), pp. 191–193, points to the defendant's domicile provided that it coincides with the flag state, pursuing a parallelism between these heads of jurisdiction and those of consumer matters.

3.3 Further Heads of Jurisdiction Laid Down by National Legislation: Special Reference to Article 25 of the Spanish Judiciary Act

The Brussels I Regulation was applicable and the Lugano Convention applies when the defendant is domiciled or has a branch, agency or other establishment in a member state or whenever there is an agreement to submit disputes to a court of a member state in the terms already analysed. When none of these conditions are met, Article 4 comes into play, and the international jurisdiction issue is submitted to national legislation. With the Brussels I *bis* Regulation's application, there will still be room for this reference to national legislation, as Article 6(1) only makes the special court on employment contract matters always applicable, i.e., regardless of the country in which the employer is domiciled. Accordingly, in addition to the heads of jurisdiction provided for in Section 5, Chapter II, of the Brussels I *bis* Regulation, any court other than those in the Section and laid down by the relevant national legislation will be of use if the employer is domiciled in a third state.

Article 25 of the Spanish Judiciary Act—*Ley Orgánica del Poder Judicial* or LOPJ—is currently applicable in Spain, and it would be useful to look briefly at this provision at this point. First, the fact that Spain has a coastline that stretches for many miles means that many maritime employment disputes are regularly lodged there, and second, these cases have shaped the interpretation given to some heads of jurisdiction provided in Article 25 while also resulting in at least one special forum being established. In this vein, Article 25(1) of LOPJ, as interpreted by Spanish courts, provided an account of the heads of jurisdiction to which seafarers can resort to assert their rights. In view of the scope of application of Brussels I *bis* Regulation, these two legal instruments need to be compared for a conclusion to be reached about whether there is still room for national legislation in these matters. With regard to Spain, the conclusion is positive.

Article 25(1) of LOPJ is expressed in much broader terms than Section 5. In fact, Article 25(1) describes a number of cases in which jurisdiction in employment contract matters is assumed by Spanish courts: (1) when services are rendered in Spain, or (2) the contract has been entered into in Spain; (3) when the defendant is domiciled in Spain, or (4) it has an agency, branch, local office or any other representation in Spain; (5) when both the employee and the employer hold Spanish nationality regardless of the place of work or conclusion of the contract; and (6) in addition to these, if the contract was preceded by an offer received in Spain by a Spanish seafarer or fisherman.

The provision is the result of previous Spanish case law that has finally been codified in its wording[221] and furnishes seafarers with six alternative heads of jurisdiction to bring their claims before Spanish courts. Furthermore, some of

[221] See Iriarte Ángel (2001), pp. 64–87, on connections employed by Spanish courts to assume jurisdiction before the issuance of the Judiciary Act.

them are particularly appropriate for cases in which Spanish seafarers have been engaged for work on board ships that were flying foreign flags, in particular those that are based on the contract being entered into in Spain, the presence of some kind of employer's representation in Spain and that which specifically refers to seafarers.

All these heads of jurisdiction are formulated as alternatives; thus, the lack of reference to any express or implicit choice of Spanish courts as the most suitable courts to deal with these matters is mitigated.[222] However, the fact that there are several alternatives raises the problem that not only workers but also employers/plaintiffs can choose their court. Against this background, this choice needs to be limited for reasons of worker protection, and it therefore ought to be prohibited in cases where the employer intends to sue the worker in a court other than the latter's domicile.

Likewise, reasons of legal consistency recommend interpreting the heads of jurisdiction laid down by Article 25 of LOPJ, where appropriate, in line with those set out in Section 5 of the Brussels and Lugano system. The first head of jurisdiction cited there is a good example and refers to the workplace, although there is no requirement that this be in the country where work is habitually carried out. It is clear that the fact that some tasks are carried out in Spain is not a sufficient linking factor to allocate jurisdiction to Spanish courts, especially because this would not be consistent with the jurisdictional head provided for workers who are temporarily posted to Spain.[223] Nevertheless, some Spanish judicial opinions have interpreted it in a broad sense,[224] which ultimately benefits workers, for example, when a worker's only contact with the Spanish legal system is providing services on land while the ship is in a Spanish port for a brief period. The weakness of the link between these cases and Spain would advocate rejecting this broad interpretation.[225]

The difference between the Brussels–Lugano system and the Spanish legislation mentioned above would vanish once the Brussels I *bis* Regulation becomes fully applicable, as there should only be room for the application of the special head of jurisdiction contained there, i.e., the court of the habitual workplace as laid down by Article 21(1)(b)(i) will displace this item in Article 25(1) of LOPJ. As this is a matter of interpretation, there is, however, room for the latter's application.

Having concluded an individual employment contract in Spain is also a sufficient reason to bestow jurisdiction on Spanish courts.[226] This head of jurisdiction

[222] See Serrano García (2011), pp. 84–85. In these terms, STS, *Sala de lo Social*, 14.7.1988, and STSJ Canary Islands (Santa Cruz de Tenerife), 3.6.1999, rejecting submission to Moroccan courts in a dispute concerning Spanish sailors working on a Moroccan flag vessel; it applied the head of jurisdiction based on the Moroccan employer's representation in Spain, although the contract was entered into in Morocco as well.

[223] See Article 16 of the Law Ley 44/1999, 29.11.1999, concerning the posting of workers in the framework of a transnational provision of services.

[224] SSTSJ Canary Islands, Las Palmas, *Sala de lo Social*, Nr. 120/1998, 17.2.1998; Basque Country, *Sala de lo Social*, No. 1718/2004, 14.9.2004, without taking into consideration the Brussels Convention applicable in this case.

[225] See Casado Abarquero (2008), p. 190, highlighting this head of jurisdiction's probable exorbitant nature when faced with the exequatur of the corresponding decision in the destination state.

[226] SSTS, *Sala de lo Social*, 20.6.1968; 18.7.1983; 24.11.1984.

presents problems of interpretation where distance contracts are concerned. These may be solved by relying on Article 1262(2) of the Spanish Civil Code, according to which the offer has to have been issued in Spain for the contract to be understood as having been entered into in Spain. In this regard, this forum in some way overlaps with the provisions of the last paragraph of Article 25(1) of LOPJ—the contract was preceded by an offer received in Spain by a Spanish seafarer or fisherman—which aims to put an end to the practice of recruiting seafarers in Spain and then sending them to serve on a ship flying the flag of a foreign country; once on board, the employee finally signs the contract with the captain, who is acting on behalf of the shipowner. In these cases, the mediation of shipping agents or recruitment and placement services based in Spain is absolutely critical, as a Spanish Supreme Court decision on 2 May 1984 acknowledged.[227] The Supreme Court held the agency's operations to be a sufficiently solid linking factor with the Spanish territory, and the recruitment offer therefore served to provide grounds for the Spanish Courts' international jurisdiction.

When this head of jurisdiction is applied, it is particularly necessary to bear in mind the fact that it only refers to Spanish seafarers if an offer has been received in Spain. The meaning of this final requirement is a matter of interpretation and is comprehensively addressed by both doctrine and practice by being understood to include any preparatory act aimed at recruiting seafarers in Spain.[228] Nevertheless, some Spanish courts are more demanding and require a real offer to have actually been issued, i.e., a proposal that includes all the fundamental components of a contract, such that the worker's simple acceptance would be enough for the contract to be concluded.[229] The fact that it only refers to Spaniards has not been challenged, but it is clear that the prohibition of discrimination on grounds of nationality prescribed by EU law has a say on this matter.

In the previous head of jurisdiction, manning agencies played the role of mere intermediaries, and they were not involved in concluding employment contracts or any type of follow-up activities. As seen above, manning agencies frequently do not restrict their services to the recruitment and placement of workers but exceed that role by checking seafarers' qualifications for the job, signing the contract on behalf of the shipowner and making payments to workers and social security institutions. In these cases, Article 25(1) of LOPJ allocates jurisdiction to Spanish courts if shipowners have a Spanish agency, branch, local office or any other representation in Spain.

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[227] Likewise, STS, *Sala de lo Social*, 14.4.1987; 9.2.1987. This sentence was preceded by others in lower courts supporting the opposite doctrine, i.e., that Spain did not have jurisdiction. See Iriarte Ángel (2001), pp. 82–87.

[228] See STSJ Galicia, 26.6.1991, and Iriarte Ángel (2001), pp. 90–91.

[229] See SSTSJ Galicia (*Sala de lo Social*), 16.2.1994, where it was the workers who contacted the company; Galicia (*Sala de lo Social*), 21.6.1996; Galicia (*Sala de lo Social*), 1.7.1999; Galicia (*Sala de lo Social*), Nr. 134/2010, 15.1.2010. In STS, *Sala de lo Social*, 25.10.1989, the worker was asked to take a flight and was informed about the employment contract, although this was not signed in Spain.

Article 25(1) of LOPJ is not applicable if shipowners are domiciled in another member state or a third state—this provision also includes the defendant's domicile being in Spain as a head of jurisdiction, but this possibility is not examined here, given that the Brussels–Lugano system applies in such cases— since Article 20 (2) of the Brussels I *bis* Regulation, considers shipowners to be domiciled in a member state if they have a branch, agency or establishment from whose operation the claim in question arises. This fiction therefore devours most of the cases where the aforementioned item of Article 25(1) of LOPJ might be applicable, but there is still room for its application as the two instruments do not necessarily have to deal with the same concepts. In this vein, the concept of branch, agency or establishment as understood within the Brussels–Lugano system, for example, requires a permanency that is not sought in the presence of a branch of the defendant's business or indeed any other representation in Spain for jurisdiction to be granted to Spanish courts.[230]

Spanish courts also assume international jurisdiction when both parties are Spanish nationals. The explanation for this rule can be found in the will to establish a *forum legis*, taking into account Article 1(4) of the Spanish Workers' Statute, which also covers cases in which all contracts related to the employment relationship point to Spain, except for undertaking work abroad. Nevertheless, this provision has to be read in the light of the *Boukhalfa v Germany* judgment, whereby the CJEU stated that discriminating on grounds of nationality is also prohibited in these cases, leaving no room for applying Article 1(4) or for the corresponding rule in Article 25(1) of LOPJ.[231]

This provision leaves no room for choice of forum, however. Still, the provision's comprehensive scope is formulated to cover virtually all cases, except those where a Spanish seafarer moves to another country to seek employment, is then recruited and enters into a contract in a foreign country and therefore has to provide services on board a foreign vessel for an employer with no links to Spain. In other cases, there would always be a sufficient link with Spain in the light of Article 25(1) of LOPJ. For identical reasons that point to the comprehensiveness of this law, it is to be understood that the list of heads of jurisdiction is exhaustive and cannot therefore be interpreted as leaving room for choice of forum.[232]

Setting aside prorogation of jurisdiction, Article 25 of LOPJ is broader than Section 5, in particular because it bestows jurisdiction on Spanish courts should the contract have been concluded in Spain or preceded by an offer received in Spain by a Spanish seafarer or fisherman. The closest forum to these heads of jurisdiction is the one that refers to the courts where the business which engaged the seafarer is located, but it is applicable only when the habitual workplace is not in one and same country. All in all, the Brussels I *bis* Regulation does not fully displace the

[230] STSJ Canarias, 18.10.1994 (RA 1994, 3952).

[231] See Casado Abarquero (2008), pp. 199–200; Fernández Rozas and Sánchez Lorenzo (2013), pp. 583, 585–586.

[232] As pointed out by Iriarte Ángel (2001), pp. 91–93.

application of Article 25(1) of LOPJ when the defendant is domiciled in a third state, as the latter furnishes further heads of jurisdiction. This is very convenient given Spain's experience as a labour-supplying country and consequent concern about protecting national seafarers abroad, for which reason due consideration has been given to the significance of manning agencies and shipping agents in general in the shipping and fishing industries.

3.4 Conventions on the Arrest of Ships

3.4.1 Scope of Application

The International Convention on the Arrest of Seagoing Ships, signed in Brussels on 10 May 1952, is of particular significance when it comes to protecting creditors. Indeed, emphasising its relevance is unnecessary in view of its main objective, namely, to implement an injunction consisting in the arrest of a ship as security for a maritime claim. The Convention was updated in 1999,[233] with the aim of broadening the concept of 'maritime claims' that could justify the arrest of a ship. The claims that are of interest for our purposes and may bring about the arrest of a ship will be briefly addressed in the following section.

For the time being, it is worth noting that the Convention is the product of a compromise between two legal cultures[234]: one allowing ships to be detained on the ground of any claim whatsoever and another only permitting detention on the basis of specific claims, which is what this Convention did by establishing the concept of 'maritime claims', namely, claims stemming from the use or operation of the ship. This system enabled a compromise to be reached between the competing interests of shipowners and creditors, providing both parties with legal certainty. While benefitting shipowners and legal transactions because of the limits it sets on the circumstances in which the arrest of a ship is allowed, thus avoiding unnecessary damage to business expectations, the limiting of claims that may lead to a vessel's immobilisation also benefits creditors, as it enhances their chances of recovery.

Both the 1952 and the 1999 Conventions apply irrespective of the flag of vessels subject to this provisional measure, i.e., their provisions are also applicable to ships flying the flag of non-contracting states. Article 8 of the 1952 Convention

[233] On the preparations for this convention, see Berlingieri (2011), pp. 1140–1144. It is reported there that the terms of the 1999 Convention have been internally adopted by China, Bolivia, Colombia, Ecuador, Peru and Venezuela. Some of their provisions, in particular those regarding maritime claims, have also been adopted by India, the Russian Federation and the States of the Economic and Monetary Community of Central Africa (Cameroon, Chad, the Central African Republic, Congo, Gabon and Equatorial Guinea). For a comparison between the 1952 and 1999 Conventions, see Berlingeri (2012), pp. 367–396.

[234] See Álvarez Rubio (2000), pp. 91–92; on the preparatory works for the 1952 Convention, see Mora Capitán (2000), pp. 1–49.

distinguishes between flags insofar as only ships flying the flag of a contracting state can benefit from the limitation of maritime creditors who are allowed to trigger an arrest. On the contrary, 'a ship flying the flag of a non-Contracting State may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in Article 1 or of any other claim for which the law of the Contracting State permits arrest',[235] which means that vessels can be detained on the ground of claims other than those listed in the 1952 Convention.[236] It should be noted that the ship's flag has to be established at the time when the arrest takes place.[237]

This dichotomy is not found in the 1999 Convention, where Article 8(1) specifically states that 'this Convention shall apply to any ship within the jurisdiction of any State Party, whether or not that ship is flying the flag of a State Party'. The 1999 Convention has been signed by 15 states,[238] of which Spain is one,[239] coming into force in Spain on 14 September 2011 with a reservation under Article 10(1)(b) that provided for the right not to apply it to ships that were not flying the flag of a state party. This reservation amounts to a significant undermining of the Convention's scope because one of its effects is that activating the reservation clause is likely to cause significant harm to creditors domiciled in Spain or whose head offices are there who intend to apply for the arrest of a ship that is not flying the flag of a contracting state. They can certainly resort to the Spanish Civil Procedure Act, but this law is more restrictive than the 1999 Convention, in relation to the *prima facie* justification of a claim triggering the arrest of a ship, for example, and also *vis-à-vis* the allocating of jurisdiction to Spain with the aim of giving further consideration to

[235] See Article 8(2) of the 1952 Convention.

[236] Above and beyond these cases, and to avoid influencing internal affairs, Article 8(4) of the Convention indicates that it is not applicable when the ship's flag, the *forum arresti* and the domicile or place of business of the arrestor all belong to or fall within the boundaries of the same state; *ergo*, it would be an internal matter. See Álvarez Rubio (2000), pp. 97–100.

[237] Regarding the 1952 Convention see Mora Capitán (2000), p. 70.

[238] Albania, Algeria, Benin, Bulgaria, Congo, Denmark, Ecuador, Estonia, Finland, Latvia, Liberia, Norway, Pakistan, Spain and the Syrian Arab Republic.

[239] BOE No. 104, 2.5.2011. Corrigendum BOE No. 160, 6.7.2011. Nevertheless, provisions implementing the Convention in Spain—currently incorporated into the 26th Final Disposition of the Spanish Civil Procedure Act—did not enter into force until 28 March 2012, the date on which the termination of the 1952 Convention became effective. It had been in force in Spain since 27 February 1956, and Spain withdrew from it on 28 March 2012 due to the ratification of the 1999 Convention. See BOE No. 242, 7.10.2011. Hence, there has been a time lapse in which both international conventions were in force in Spain, although one of them, the 1999 Convention, was not accompanied by the corresponding national provisions implementing it. According to Article 30(2) of the Vienna Convention on the Law of Treaties of 23 May 1969, the latter Convention ought to prevail. Nevertheless, in addition to the problem that there were no internal provisions for implementing the Convention, it is important to note Spain's reservation whereby ships flying non-contracting parties' flags may be excluded from this Convention, whereas the scope of the 1952 Convention included them. At that time, some situations were not covered by the 1999 Convention but were actually covered by the 1952 Convention while both were in force, so there seems to have been a case of the two Conventions being applied concurrently.

the merits of the case, as the 1999 Convention sets up a *forum arresti*. Fortunately, this reservation was rendered worthless by Royal Decree No. 12/2011,[240] a piece of legislation aimed at amending the Spanish Civil Procedure Act by including in it the 26th Final Disposition, which reads as follows: 'the provisions of the Geneva International Convention on the Arrest of Ships of 12 March 1999 and this provision shall *also* apply to vessels flying the flag of a State not party to the Convention'.[241] This change must be welcomed,[242] and in the light of the shortcomings mentioned above it would be advisable for Spain to resort to Article 22 of the Vienna Convention on the Law of Treaties of 23 May 1969, to proceed with the official withdrawal of the reservation.

The 1999 Convention did not introduce further changes to the provisions dealing with the arrest of other vessels belonging to the debtor, a prospect that is currently very unlikely due to the proliferation of one-ship companies. It is therefore up to the *lex fori* to decide how to tackle this problem, by piercing the corporate veil, for example.[243] In this regard, it is important to recall that Article 3(2) of the 1952 Convention states that 'ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons', including joint ownership. In the light of these problems, it would have been interesting if the equivalent provision in the 1999 Convention had expanded its scope to cover cases in which the person held responsible were the owner of the companies to which the ship belonged, thus getting to grips with the trend of establishing single-ship companies.[244]

The 1999 Convention introduced a severe limitation on the adopting of the provisional measure with respect to the 1952 Convention, by virtue of which a vessel will only be arrested when the debtor is the vessel's owner or bareboat charterer at the time when the maritime claim arises and the arrest of the ship is effected. Expressed in these terms, Article 3 of the 1999 Convention represents a

[240] Royal Decree-law 12/2011, 26.8.2011, amending the Spanish Civil Procedure Act, with a view to applying the International Convention concerning the Arrest of Ships and regulating the competence of the Spanish Regions in matters of public water policy (BOE No. 208, 30.8.2011). This piece of legislation derogates Law 2/1967, 8.4.1967, on the arrest of ships, which implemented the 1952 Convention in Spain; Spain withdrew due to the entering into force of the 1999 Convention (see the Derogatory Disposition thereof). It is worth noting that these provisions only become applicable once Royal Decree-Law of 28 March 2012 entered into force, the day on which Spain officially withdrew from the 1952 Convention.

[241] My emphasis and translation. Article 473(2) of the Spanish Law on Shipping contains a similar provision to the one established in the 1952 Convention so that ships flying a non-contracting flag may be arrested on the ground of either a maritime line or any claims whatsoever.

[242] Editorial JIML (2011) p. 247, informed of this change of opinion. Highlighting advantages for ships flying the flag of non-contracting parties to the 1952 Convention, see Antapassis (2010), pp. 58–60.

[243] Discussed in the first section of this study. See on this gap Martínez Gutiérrez (2011), p. 208; Mora Capitán (2000), pp. 291–320.

[244] The UK delegation and others in fact tried to address this issue while proposing to arrest a ship for claims in respect of ships under common control but separate ownership, also known as associated ship arrest. Obviously, this proposal did not succeed. See Shaw (2001).

significant restriction compared to the 1952 Convention, as the latter allows a ship to be detained regardless of the debtor's identity and relationship with the ship when the arrest takes place. The restriction is clear in the light of Article 3(3) of the 1999 Convention, which allows the arrest of a ship that is not owned by the person liable for the claim 'only if, under the law of the State where the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship'.

This restriction involves certain disadvantages with respect to the 1952 Convention, as the immobilisation of a ship functions as a coercive measure aimed at ensuring that the debtor pays up with a view to continuing to trade. This system is underpinned by the insurance requirement for all operations, even when the debtor is not the current owner or ship-operator, since it is the insurance company that provides the security that enables the vessel to move. In the rare instances in which an underwriter is not involved, it is the parties—whether they are the debtors or not—that provide the corresponding security, thus acquiring standing in the provisional proceedings and being allowed to apply for the arrest to be dismissed, even by arguing that the alleged claim is non-existent.[245] The 1999 Convention, however, takes a conservative approach towards precautionary measures, aiming exclusively to secure the enforcement of judgments. A ship will therefore only be arrested if its judicial or forced sale is enforceable.[246] For our purposes, it is important to highlight the fact that there is a significant exception to this, which is when creditors applying for a ship's arrest hold a maritime lien, as is the case of claims pertaining to the manning of the ship.

Both article 57 of the 1968 Brussels Convention and its equivalent in the 1988 Lugano Convention dealt with international conventions in particular matters, including the 1952 Convention. According to those provisions, the latter's international jurisdiction rules prevail over the former's, which otherwise apply to issues outside the scope of the 1952 Convention, such as provisions on *lis pendens* and related cases.[247] The relationship with the Brussels I *bis* Regulation, where Article 71(1) states that it 'shall not affect any conventions *to which the Member states are parties* and which in relation to particular matters, govern jurisdiction',[248] is less clear when it comes to the 1999 Convention.

In this vein, it is important to recall here that Opinion No 1/03[249] issued by the CJEU grants exclusive legislative competence to the European Union in matters covered by this Regulation. This allocation places us in a complex situation if we

[245] Justifying this joinder, see Mora Capitán (2000), pp. 348–353.

[246] See Arroyo (2010), p. 372; Mora Capitán (2007), pp. 97–99. Stressing the issue of damages to suppliers, see Cigolini (2011), pp. 1215–1219. However, in support of the new approach, see Martínez Gutiérrez (2011), pp. 201–202, 210–211; Siccardi (2011), pp. 1153–1168.

[247] CJ 6.12.1994, Case C 406/92, *The owners of the cargo lately laden on board the ship Tatry v. the owners of the ship Maciej Rataj*.

[248] My emphasis.

[249] CJ Opinion No. 1/03 of 7 February 2006.

bear in mind that the 1999 Convention lays down international jurisdiction rules along with uniform substantive rules. The latter are not included within the scope of the Brussels I *bis* Regulation, meaning that member states still hold exclusive competence for the ratification of the Convention as regards these rules. Otherwise, and according to the CJEU opinion mentioned above, the European Union holds exclusive legislative competence as regards jurisdiction and recognition and enforcement rules in these matters. Hence, we are confronted with a complex dilemma that can only be resolved if the EU as a whole and individual member states ratify the Convention. However, this option still leaves room for uncertainty as it could create obstacles leading to a paralysis in the approval of conventions that might be of interest for some countries and not for others.[250] In the meantime, Spain's ratification of the 1999 Convention was effective from 7 June 2002, i.e., prior to CJEU Opinion No. 1/03, of 7 February 2006, but subsequent to the Regulation's entry into force.

Finally, other maritime law conventions can interfere with the application of the 1952 and 1999 Conventions by virtue of their complementarity, particularly those establishing limitations on ship operator liability. The Brussels Conventions for the unification of certain rules concerning the limiting of the liability of seagoing vessel owners of 24 August 1924[251] and 10 October 1957,[252] and the London Convention of 19 November 1976 on the limitation of liability for maritime claims[253] are all of interest for our purposes. They contain rules—Articles 8(II), 5 and 13 respectively—that describe in detail their relationship with the arrest of ships directed against owners who can limit their liability through setting up a fund; once this fund is set up, the arrest will be lifted immediately, provided that the maritime claim can be asserted against it.

3.4.2 Maritime Claims and Sums due to Seafarers

Both the 1952 and the 1999 Conventions are uniform law, and for this reason they usually override private international law rules. Nonetheless, these rules cannot be absolutely disregarded as none of the conventions are comprehensive, for example, in the procedural rules of the provisional measure they provided for. Consequently, and also as a result of the well-known *lex fori regit processum* rule, the national law of the court responsible for making the arrest has to be resorted to, to complement their provisions. The same can be argued for claims that justify the arrest of a ship: the convention provision sets out an exhaustive list of potential maritime claims,

[250] At any rate, applicability will rely on CJ 4.5.2010, Case C-533/08, *TNT Express Nederland*, as suggested by Tuo (2011), pp. 1220–1232.

[251] 120 LNTS 123.

[252] 1412 UNTS 73. This has been amended by Protocol 21 December 1979 (1412 UNTS 73).

[253] 1456 UNTS 221. This has been amended by Protocol of 2 May 1996 (35 ILM 1430).

but the mere existence and validity of the claim or right depends on the law applicable to the legal relationship in question, hence on the relevant conflict rule. In our case, this might well be the rule in Article 8 of the Rome I Regulation, which may help decide whether there is in fact an employment contract and therefore wages and other sums are due to seafarers, as requested by the Convention.

It is worth highlighting the fact that the two Conventions only require a maritime claim to be invoked and *fumus boni iuris,* i.e. the claim must appear to be due, to apply for the provisional measure.[254] As paragraph 2 of the 26th Final Disposition of the Spanish Civil Procedure Act indicates, the mere allegation of a maritime claim and its cause or origin is enough for the arrest of a vessel to be ordered. It should also be noted that no documentary evidence is needed.[255] The list of maritime claims includes a number of cases concerning employment contracts and relationships, which differ between the two conventions, as discussed below.

The 1952 Convention deems claims originating in loss of life or personal injury caused by a ship or arising from the operating of a ship to be maritime claims,[256] whereas the 1999 Convention recasts this maritime claim to adjust its phrasing to the 6 May 1993 version of the International Convention on Maritime Liens and Mortgages.[257] In these cases, the vessel does not necessarily have to be the direct cause of the accident: the personal injury may be caused by an act of fault.[258]

Article 1(m) of the 1952 Convention, which classified masters', officers' and crews' wages as maritime claims, is worthy of mention.[259] The 1999 Convention completed this text by adding new causes for claims: 'wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf'.[260] The UNCTAD and IMO Secretariats Note highlighted the fact that this wording shed light on three fundamental issues related to the 1952 Convention: first, it made it clear that ships could be arrested for sums other than wages; second, replacing the term 'crew' by the term 'other members of the ship' facilitated the inclusion of many workers over and above seafarers and fishermen in this category; and third, the question raised in the 1952 Convention framework as to whether the term 'wages' also included social security contributions and repatriation costs now had an affirmative answer.[261]

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[254] See Article 3 of 1952 and 1999 Conventions.

[255] For an account of jurisprudence in the 1952 Convention in other states, see Mora Capitán (2000), pp. 152–163.

[256] See article 1(b) of the 1952 Convention.

[257] Spain is also a party to the 1993 Convention; see BOE No. 99, 23.4.2004. Germany signed the Convention on 11.7.1994 but has not yet ratified it.

[258] See Mora Capitán (2000), pp. 178–179.

[259] Article 1(n) of the 1952 Convention also makes reference to 'master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner', which are not dealt with in this study because they only have a collateral bearing on maritime employment.

[260] See Article 1(o) of the 1999 Convention.

[261] Doc. TD/B/CN.4/GE.2/2, p. 9, note 15. Likewise on praxis, see Mora Capitán (2000), pp. 200–201.

This precision in the wording of Article 1(o) of the 1999 Convention is of great importance in the light of the growing number of truly problem cases, i.e., those that go beyond litigation stemming from non-payment of wages and other emoluments. These are situations in which owners abandon both ship and crew in foreign ports,[262] circumstances that have already been brought before the ECtHR: the mainly Ghanaian crew of a ship flying the Honduras flag, owned by a company registered in Belize and chartered by a Cypriot shipowner raised a lawsuit against Bulgaria on the basis of several different incidents after their ship was arrested at a Bulgarian port.[263] In order to claim their wages,[264] the crew assigned their claims to a Bulgarian trade union, but the Bulgarian courts refused to decide on the merits for lack of international jurisdiction.[265]

There are numerous examples of such cases, including one concerning a Turkish vessel, the Obo Basak, which was abandoned in Dunkirk for 9 months during which the crew was neither paid nor repatriated.[266] Although the Obo Basak had been arrested at the port of arrival, the French court in charge decided to refer the crew to the Turkish courts to claim their wages.[267] This doctrine was finally revised by the French *Cour de Cassation,* which ascertained that the 1952 Convention also allocates jurisdiction to the state in which the ship is detained with a view to deciding on the merits, in particular concerning wages and other sums due to the

[262] The ILO proposes to revise the civil liability of shipowners and, in particular, to require them to ensure the repatriation and other costs in the event of insolvency, to avoid the crew's abandonment. Nevertheless, the 2006 Convention does not consider this issue compulsory, nor does Directive 2009/20/EC on the insurance of shipowners for maritime claims.

[263] The lawsuit was not admitted by the ECtHR. See details and references to the ongoing preparatory works on these matters within IMO-ILO, Chaumette (2008), pp. 883–891.

[264] Sometimes it is a third party that pays off the outstanding wages. In these cases, it is not clear whether payers can be subrogated in the maritime lien. The Hong Kong courts denied this in *Centel Shipping Co Ltd v The Owners and/or Demise Charterers of the Ship or Vessel 'King Coal'* [2012] *HKCFI* 2103. The seized court did not apply the 1952 Convention, and the plaintiff mentioned a case, *The Eschersheim* [1976] 2 *Lloyd's Rep* p. 6, highlighting that the 1952 Convention focuses on the nature of the claim but not on the person who should bring it before a court.

[265] In addition to focusing on the issue of the abandonment of ships, the case also raises questions on the standing of unions to litigate for these claims. It must be borne in mind that the first amendment to MLC, 2006, namely Standard A2(5)(2), aims at establishing financial guarantees for cases of abandonment. Pursuant to Section 8 of the Standard, 'Assistance provided by the financial security system shall be granted promptly upon request made by the seafarer or the seafarer's nominated representative (. . .)', cutting short situations such as the one described in the text.

[266] See the facts of the case in Lefrançois (2009), pp. 25–34; Kahveci (2006), pp. 281–322. On the situation in Spain, see Baz (2009), pp. 63–68, and Arrachedi (2009), pp. 69–79.

[267] *Cour d'Appel* Douai (1ª Ch.), 1.12.1997, ship *Obo Basak*, with comments by Chaumette (1998), and *Cour d'Appel* Rennes (2ª Ch.), 8.7.1998 and 21.10.1998, ship *Oscar Jupiter*, with comments by Chaumette (1999).

crew.[268] The wording of Article 1(o) of the 1999 Convention aims to avoid these uncertainties in its application.

Article 1(o) of the 1999 Convention deems wage claims originating 'in respect of their employment on the ship' to be maritime claims. This provision's phrasing casts doubt on whether crew members can claim for the arrest of ships other than those that they are or were working on. National legislation may resolve these uncertainties; Spain passed a Law on Shipping dealing with this issue in 2014.[269] The law does not refer to the 1999 Convention, but it does refer to the 1993 Geneva Convention on Maritime Liens and Mortgages, which contains a provision with similar terms to those of Article 1(o) of the 1999 Convention. Along these lines, the Spanish law contains a provision that complements the wording of Article 4(1)(a) of the 1993 Convention, the one provision that is identical to Article 1(o) of the 1999 Convention.

According to the Spanish provision, if the ship on which the maritime lien relating to wages and other sums due to the master and other crew members arising from an employment contract originated cannot be identified because the claim was generated on several ships operated by the same company or group of companies, the privilege will be extended to them all. In fact, the power to demand the arrest of ships other than the one on which wages were generated would lapse, either along with the wage claim or because a year elapsed during which enforcement proceedings for the judicial sale of any of the vessels on board from which the lien originated had not been opened and no ships had been arrested, as set out in Article 123(2) of the Spanish law—which follows Article 9 of the 1993 Convention.[270] For our purposes, the logic behind Article 123 of the Spanish Law on Shipping ought to be extended to the 1999 Convention, thus allowing for its application in all those cases in which it is possible to identify more than one vessel as being responsible for the payment of wages, regardless of whether the ships are being operated by the same company or by a group of companies.[271]

According to the 1999 Convention, maritime claims now include not only environmental damage but also 'costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and

[268] *Cour.Cass. (Ch.civ.)*, 18.7.2000, Ship *Obo Basak*. Later on, *Cour d'Appel* Aix-en-Provence (18ª Ch.), 13.4.2004, ship *Wedge One*, with comments by Chaumette (2004); *Cour d'Appel* Rennes (5 Ch.), 30.11.2004, ship *Zamoura of Zermatt*, with comments by Chaumette (2005); *Cour.Cass. (Ch.com.)*, 7.12.2004, ship *Jerba*, with comments by Remery (2005). Previously, Rezenthel (1998), pp. 658–671.

[269] Law 14/2014, of 24 July, on Shipping (*Ley de la Navegación Marítima*) (BOE No. 180, 25.7.2014).

[270] The 1-year period starts on the day of the termination of the employment contract, as indicated by Article 123(3) of the Spanish Law on Shipping. Article 122(1) expressly refers the issue of maritime liens to the 1993 Convention.

[271] See in this regard Alonso Ledesma (2012), pp. 300–303.

maintenance of its crew'.[272] It is clear that the crew is not the creditor here, but it is also worth noting that the system provides support for different repatriation and payment mechanisms arranged through other international instruments.

Finally, it is important to note that all these claims enjoy preferential status according to both the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, signed in Brussels on 10 April 1926,[273] and the 1993 Convention. The latter is also consistent with the innovations introduced by the 1999 Convention in respect of maritime claims. The privileges granted by the Convention include the right to have claims take priority over other mortgages and the right of prosecution, irrespective of change of ship ownership or other changes.[274] This is of great importance—for example, should a ship be abandoned—because this lien guarantees seafarers that they will be repatriated as soon as possible and that they will be paid as soon as the vessel is sold to pay the shipowner's debts, for instance. Nevertheless, there is still a significant risk that this will not happen.[275]

3.4.3 Requirements for Adopting the Provisional Measure

Articles 1 and 2 of the 1952 and the 1999 Conventions respectively stipulate that the decision to arrest a ship has to be taken by a court, therefore ensuring that no other authorities are involved in adopting this provisional measure. To this end and as a provisional measure, the court will check that the specific requirements necessary for detaining the ship are met, in particular *fumus boni iuris* and *periculum in mora*.

The first of these was referred to above, insofar as Article 3(1) of the 1952 and 1999 Conventions states that the very allegation of a maritime claim—but no other kind of claim, as stated in Article 2(2) of the Convention—is sufficient for these purposes, even when documentary evidence is absent, which is reinforced in paragraph 2 of the 26th Final Disposition of the Spanish Civil Procedure Act. Nevertheless, the fact that the arrest of a ship depends on the existence of a lien or a personal action against the shipowner or bareboat charterer will lead the court to explore the *fumus boni iuris* in depth.[276]

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[272] Article 1(e) of the 1999 Convention.

[273] From which Spain withdrew in 2004 (BOE No. 242, 7.10.2004). The withdrawal took effect on 27 May 2005.

[274] See, in particular, Articles 5 and 8 of the 1993 Convention.

[275] On risks arising from the praxis, see Chaumette (2009c), pp. 13–23, 20–21. On the basis of the 18th Additional Disposition of the Spanish Law 48/2003, of 26 November, concerning the Economic Regimen and the Provision of Services in Ports of General Interest, once the ship has been declared administratively abandoned, it becomes state property, and accordingly the Spanish authorities acquire the right to sell it. See González Joyanes (2009), pp. 202–215.

[276] See Alcántara González (2013).

Where the second requirement is concerned, there is no need in principle for an assessment of the *periculum in mora* because this is thought to be inherent in the internationalisation of maritime and fishing activities.[277] This does not rule out the possibility of the question of whether there is a risk of the judgment not coming to fruition being addressed at some point in the proceedings, as other maritime claim guarantees may have been indicated that would make arresting the vessel unnecessary.

In addition to these requirements, the court may also require the person or persons applying for the provisional measure to provide a security to compensate the defendant for damage should adopting the measure prove unjustified. The literature on the 1952 Convention discussed whether this was a mandatory requirement or simply a condition for arresting the ship, and the 1999 Convention seemed to prefer the latter characterisation by leaving the issue to judicial discretion, naturally taking into account the circumstances of the case.[278] This has implications for the length of time during which security should be provided, as it could be after the provisional measure were adopted. The 1999 Convention's ultimate failure to clarify the issue means that it is referred to each national jurisdiction, in line with the predominant interpretation of the 1952 Convention.[279]

The Spanish legal system's approach to the issue was to make it mandatory to provide security, according to both Law 2/1967 implementing the 1952 Convention and the second paragraph of the 26th Final Disposition of the Spanish Civil Procedure Act implementing the 1999 Convention. This is regrettable, at least where crews are concerned, because many problems arise from the practice due to crew members being unable to provide security because of the difficult situation they are in when the arrest of the vessel is requested. Nevertheless, Spanish courts are inflexible over this requirement, not only with regard to the legal provision mentioned above but also concerning the proportionality required between the security and the foreseeable damage arising from the ship's detention, in general to avoid unjustified harm to defendants.[280]

There is no doubt that instrumentality is a prerequisite of this provisional measure, i.e. its adoption and maintenance depend on the pendency of the main proceedings, whether or not this is open at the time of the application and actual arrest of the ship. The issue of the relationship between the head of jurisdiction carrying out the arrest of the vessel and the one hearing on the merits is addressed in the following section. It should be emphasised here that these are intertwined and

[277] On the objective nature of this requirement, see Mora Capitán (2000), pp. 207–213.

[278] See Article 6 of the 1999 Convention. See, regarding the 1952 Convention on this issue, Mora Capitán (2000), pp. 218–219.

[279] Critical of this aspect of the 1999 Convention, see Mora Capitán (2000), pp. 229–231, who points out that the discretion granted may be employed as a tool to protect nationals.

[280] See AAP Barcelona, 19.7.1993, ship *Bora Cillioglu* under a Turkish flag; the crew claimed their wages [*Tribunal* (A.1419) 1993, pp. 273–274, cited by Mora Capitán (2000), pp. 220–223]. Article 472(2) of the Spanish Law on Shipping deals with this issue and establishes that the security must be at least 15 % of the amount of the maritime lien, which is still a large sum for seafarers.

that the request to adopt the provisional measure is generally prior to the opening of a proceeding on the merits, which may begin either in the same jurisdiction or in a different one depending on where the plaintiff brings the claim according to the respective international jurisdictional rules. In this context and for cases in which a proceeding on the merits has not yet been opened, Article 7(3) of the 1999 Convention states that the court that detained the ship, or in which security has been provided to obtain the vessel's release, 'may, and upon request shall, order a period of time within which the claimant shall bring proceedings before a competent Court or arbitral tribunal'. A similar provision is laid down in Article 7(3) of the 1952 Convention.

While the above provision seems to grant discretional power to the courts that decide on the arrest of the ship as to whether or not they need to set a time limit for bringing a proceeding on the merits, Article 7(3) must be interpreted as mandatory for reasons of legal certainty. The length of this time period is a different issue, which has been resolved in different ways according to interpretations of the 1952 Convention,[281] either by submitting the issue to the application of the *lex fori*[282] or by leaving its determination to judicial discretion. The latter solution seems to prevail, bearing in mind that when the arrest is adopted it is not known which jurisdiction will be chosen to decide on the merits and the court cannot therefore resort to one law or another, including the legal deadline established by its own procedural law.

In fact, should a proceeding upon the merits not begin within the fixed time period, the arrested ship is released or the security provided is cancelled, as long as this is requested *ex parte*.[283] If proceedings were duly instituted in a state or arbitral court with jurisdiction on the merits, 'any final decision resulting there from shall be recognized and given effect with respect to the arrested ship or to the security provided in order to obtain its release, on condition that: (a) the defendant has been given reasonable notice of such proceedings and a reasonable opportunity to present the case for the defence; and (b) such recognition is not against public policy (*ordre public*)'.[284] This is intended to facilitate recognition of the final decision in order to prevent further harm to the defendant. As it results from Article 7(6) of the 1999 Convention, the provisions contained there do not prevent other effects assigned to a foreign judgment or arbitral award under the *lex fori* of the country where the provisional measure was effected from being recognised as well.

[281] See Mora Capitán (2000), pp. 238–246, pointing out that the time period must begin at the point when the measure entered into force (pp. 246–247).

[282] This now applies to Spain. Article 479 of the Law on Shipping specifically addresses this issue and asks the seized court to set a time limit of no less than 30 days and no more than 90 days.

[283] Article 7(4) of the 1952 and 1999 Conventions.

[284] Article 7(5) of the 1999 Convention.

3.4.4 Forum Arresti *and International Jurisdiction to Decide upon the Merits*

In accordance with the definition in Article 1(2) of the 1999 Convention, international jurisdiction to arrest a ship depends on the courts of the place where the arrest is effected, i.e., where it is to immobilise or detain the departure of a ship. It therefore consists in a *forum arresti* and can, furthermore, vest jurisdiction to adjudicate on these courts. Article 7(1) of the 1999 Convention states, 'the Courts of the State in which an arrest has been effected or security provided to obtain the release of the ship shall have jurisdiction to determine the case upon its merits, unless the parties validly agree or have validly agreed to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration'.[285]

This provision would bestow jurisdiction to decide on the merits of the case on the courts of the place where the ship was effectively immobilised.[286] In spite of the fact that the random nature of this head of jurisdiction may certainly cast doubts on its constitutionality,[287] a provision of this kind may furnish a basis for resolving certain complex situations, such as those caused by the arrest of a ship that is not followed by the repatriation of the crew and in which seafarers claim their wages and other sums. For them, the port state jurisdiction may be the only viable one.

In addition to this provisional measure, the protection granted to holders of maritime claims by the Conventions in question may cover the ability to select the appropriate courts to decide on the merits of the case and thus the applicable law. This benefit is limited though, in the sense that Article 7(3) of the 1999 Convention states that when the competent court for the adoption of the provisional measure 'does not have jurisdiction to determine the case upon the merits' or has declined jurisdiction under national law in favour of another court that has accepted it, the court may *ex officio* or at the request of one of the parties set down a deadline for instituting proceedings on the merits before the corresponding courts, either judicial or arbitral.

This is the case when, for example, the jurisdiction in which the ship has been arrested decides not to assume jurisdiction on the merits but to refer the case to

[285] The Netherlands Maritime and Transport Law Association suggested including a similar rule in the Brussels I Regulation. See Report on the Application of the Regulation Brussels I in Member States, p. 136.

[286] Or, otherwise, the procedure to lift the arrest upon the debtor's delivery of a security should have been open. In this regard, it has been discussed whether the provision of a security before the detention of the ship (which therefore leads to the ship's non-detention) also serves to establish international jurisdiction or if this is exclusively established by effective immobilisation. Logic supports the first interpretation in the context of the 1952 [see on this debate Mora Capitán (2000) pp. 385–387] but not in the framework of the 1999 Convention [see Dimundo (2011), pp. 1175–1178].

[287] Difficulties in synthesising this complex international reality are pushing for the adoption of the use of flexible heads of jurisdiction, as is the case with this provision, similar in its terms to Article 15 of the Regulation. With English influence, its regulation is necessary when it is intended to apply in systems that give priority to legal certainty. See Caro Gándara (1995), pp. 55–80.

another court, in what is a clear reference to the *forum non conveniens* doctrine,[288] and it is equally the case when there is a choice of forum agreement or an arbitral clause. It should be recalled that, at least from the European Economic Area's point of view, jurisdiction to decide on employment maritime claims would not be altered by the choice of forum clause or by submission to arbitration, taking into consideration the restrictions applicable under Article 23 of the Brussels I *bis* Regulation. In addition, the wording of Article 7(1) makes it clear that there is no choice between jurisdictions, i.e., the maritime claim holder must sue where 'an arrest has been effected or security provided to obtain the release of the ship'.[289]

The situation is different in the 1952 Convention, where Article 7 sets out a number of cases in which the court of the ship's arrest indeed also assumes jurisdiction over the merits of the case. Outside these cases, the issue is subject to 'internal law', a reference that raised the question of whether this should be exclusively understood in terms of domestic law or should also take into account certain international conventions to which the contracting state concerned is a party, such as the Brussels and Lugano Conventions.[290]

In Spain's case, the former option prevailed and Spanish courts therefore relied on the Spanish Judiciary Act to determine whether they had jurisdiction on the merits on the basis that the ship was actually detained or security to release the ship was provided in Spain. In general, this seems to be the prevailing interpretation following the negotiating processes of the 1952 Convention and the 1968 Brussels Convention, which were aimed at preserving the *forum arresti* as foreseen in some member states' domestic legislation.[291] For our purposes, it is important to highlight the fact that Article 7(1)(c) of the 1952 Convention vests jurisdiction upon the merits in relation to claims concerning the voyage of the ship during which the arrest was made. Crew members may consequently make use of this provision to institute proceedings on the matter in the corresponding port jurisdiction.[292]

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[288] Article 7(2) of the 1999 Convention.

[289] Article 7(1) of the 1999 Convention. See Dimundo (2011), pp. 1178–1179.

[290] See Álvarez Rubio (2000), pp. 116–121; Hartley (1995), pp. 31–33. As is the case of the International Convention for the Unification of Certain Rules relating to civil jurisdiction in matters of collision, Brussels, 10.5.1952.

[291] See Mora Capitán (2000), pp. 92–93. In France, see *Conseil des Prud'Hommes* Cannes, 13.5.2004, Ship *Wedge One*, with comments by Chaumette (2004); *Cour d'Appel* Rennes, 3.10.2006, No. 05/04144, Ship *Zamoura of Zermatt*, with comments by Chaumette (2007a) pp. 129–135, where the *lex fori* is applied in the absence of proof of foreign law, the English law being applicable as a result of both party autonomy and the ship's flag. Previously, Cour.Cass. (Ch.civ.), 18.7.2000, ship *Obo Basak*, with comments by Tassel (2000).

[292] Against, *Cour d'Appel* Rennes (2ª Ch.), 8.7.1998 and 21.10.1998, ship *Oscar Jupiter*, with comments by Chaumette (1999). This jurisprudence was finally revised in France*: Cour.Cass. (Ch. civ.)*, 18.7.2000, ship *Obo Basak*; *Cour.Cass.* (*Ch.com.*), 7.12.2004, ship *Jerba*, with comments by Remery (2005). On its evolution, see Chaumette (2009d) pp. 180–183. The practice is, however, reluctant as shown by the Italian courts, which grant the measure but do not assume jurisdiction upon the merits: *Corte di Cassazione, S.U.* No. 10322, 24.10.1990, *Pacific International Lines (Private) Ltd. C. Billyardo L. Camalig ed altri*: the crew of the 'Kota Kay' under the Singapore flag

However, only wages and sums related to the voyage in question are covered, which may clearly be insufficient.

It should be mentioned here that the port state's international jurisdiction as a consequence of the *forum arresti* may lead to parallel litigation, but not within the EEA.[293] The Brussels–Lugano system contains *lis pendens* rules to deal with proceedings that involve the same cause of action and the same parties but are initiated in different member states, and these are compatible with both Conventions on ship arrest due to a compatibility clause established in the system.[294] Until the Brussels I *bis* Regulation, parallel litigation in a member state and a third state was always governed by national law, but now the Regulation's provisions replace national rules in this regard.

There is though one important exception, i.e., when proceedings are begun in a member state pursuant to Sections 3, 4 and 5, Chapter II, of the Brussels I *bis* Regulation.[295] The fact that these Sections deal with weak parties to a contract and their provisions seek to empower such parties-advocates not imposing compulsory rules on member state jurisdictions that lead to the stay of a proceeding brought before them and prioritise a foreign proceeding that may have been started in a third state for opportunistic reasons, such as to prevent workers from having access to a close forum.

3.5 Epilogue

The internationalisation of maritime employment may hamper seafarer's access to justice, an issue that can be partially solved by providing them with several alternative heads of jurisdiction. To this end, Section 5, Chapter II, of the Brussels–Lugano system establishes four different forums:

(1) courts in the country where the employer is domiciled, which can be that of the statutory seat, central administration or principal place of business when the employer is a legal person;

(2) courts where the employer has a business whose operations trigger litigation, such as employment claims arising from operations undertaken by shipping agents and manning agencies on behalf of shipowners;

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claimed against the owner, Pacific International Lines, the difference between what they were actually paid and what they should have received according to the transnational collective agreement; *Corte di Cassazione, S.U.* No. 5848, 25.5.1993, *Equinox Shipping Co. Ltd c. Ryszard Lyko ed altri*, where the arrest was effected on the 'Al Taif', flying the Maltese flag and crewed by Polish, Egyptian and Sudanese nationals with a view to ensuring their wages, ultimately being abandoned by the shipowner; *Tribunale di Venezia*, 25.8.2001, *El Sayed Aly Alla ed altri v. Sayed Nasr Navigation Lines*, in which the only issue was whether to arrest the ship 'Kawkab', flying the Egyptian flag and manned by Egyptians. It was answered in the affirmative, but the Italian courts were not granted jurisdiction to decide on the merits.

[293] See an example of the significance of this procedural strategy in achieving success in Maseda Rodríguez (2007), pp. 525–571.

[294] See Article 71 of the Brussels and Lugano system.

[295] See Article 33 of the Brussels I *bis* Regulation.

(3) courts where the habitual place of work is located, which means the flag state of the ship where captain and crew provide their services, except for cases in which seafarers are working on more than one vessel or undertake land-based activities as well in as much as the courts in the country from which services are provided are vested with jurisdiction pursuant to this forum; for cases in which a habitual workplace cannot be identified, the courts of the country in which the business which engaged the seafarer is located,

and (4) courts appointed by a forum selection clause or implied choice of forum in cases in which it can be ascertained that the seafarer voluntarily agrees to this.

The 1952 and 1999 Conventions on the arrest of ships establish an additional head of jurisdiction, the *forum arresti*. This is particularly relevant when it comes to protecting seafarer's rights, but still of limited operability specifically because of the security to be provided by creditors for this provisional measure to be adopted, which is sometimes unattainable for seafarers. Furthermore, although the 1999 Convention clearly established the *forum arresti*, the 1952 Convention made it dependent on the *lex fori* and, in particular, on the way the courts arresting a ship understand the provision that establishes that they can decide on the merits of claims arising during the voyage of the arrested ship, including wages and other sums due to seafarers.

A wide range of heads of jurisdiction is therefore available to seafarers, and in practice this should be more than enough for identifying one that is close to their case. The jurisdictional criterion of the branch is of particular significance as it is capable of granting due relevance to modern recruitment methods, *ergo* resorting to shipping agents and manning agencies strategically located in labour-supplying countries.

The relevance of this business strategy is reflected in the practice of traditional maritime countries such as Spain and Greece, where courts have developed a rule of joint liability of shipowners and manning agencies to deal with situations in which owners simply vanish once they have made their profits and seafarers have no choice but to approach the manning agency that hired them. In these cases, the courts of the defendant's domicile—now the manning agency—come into play, and seafarers can try to bring the shipowner before these courts as well, at least when the latter lives in a third state, since this *forum connexitatis* was not allowed in the Brussels I Regulation,[296] a situation that has changed with the application of Brussels I *bis* Regulation. Now, resorting to this forum is possible when a co-defendant is domiciled in a member state. Otherwise, national legislation will come to the fore, given that Article 20(1) refers to Article 8(1) of the said Regulation and the latter clearly states that it is only applicable to defendants domiciled in member states; accordingly, Article 6(1) of the Brussels I *bis* Regulation comes into play, and the *forum connexitatis* must be sought in national rules.

In cases where there is no joint liability between manning agencies and shipowners, it is still possible to take into account the fact that the former act on behalf of the latter, in particular when manning agencies do not just recruit and place seafarers but also guarantee their professional qualifications and manage their payroll and social security issues and their complaints. In these cases, a shipping agent or a manning agency should be deemed a shipowner's business for the purpose of

[296] See Sects. 3.2.2.3 and 3.2.3.5.

establishing jurisdiction in the country where it operates. *Voogsgeerd v Navimer* supports this interpretation, although does not directly tackle the forum of a branch. In general, CJEU case law provides arguments for interpreting Section 5 in the light of the principle of worker protection while respecting foreseeability of the courts where employers may be sued; shipowners cannot argue that they are caught unaware by a claim in a country in which they operate through an intermediary.[297]

Nevertheless, the difficulty of arguing that the courts of the place where manning agencies are located have jurisdiction over shipowners when the former simply recruit seafarers and do not provide other services needs to be acknowledged. Spanish practice reveals the need for such an interpretation as it has led to the development of a specific forum according to which Spanish courts have jurisdiction over employment matters when the offer of employment was received in Spain, which was finally laid down in Article 25 of LOPJ. This forum's advantages basically lie in the attention paid to the weaker party to a contract in the framework of a globalised sector. In particular, it benefits seafarers with a habitual residence in a member state as it opens a close jurisdiction for them. A similar outcome can be achieved by understanding that the forum of a branch includes cases in which a manning agency makes a seafarer an offer on behalf of a shipowner. If a manning agency is to be considered the shipowner's business for all claims arising from its operations, this interpretation advocates the application of this forum on the ground that the agency recruited seafarers who were resident in the state where it operated.

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[297] The English case *Hasan v Shell International Shipping Services (Pte) Ltd and Others* [2014] UK EAT/0242/13/SM is one of the many examples showing the significance of this forum for seafarers: Mr. Hasan, a British national domiciled in the UK, was employed as a second officer by a Singapore-flagged vessel owned by a Singapore-based company, Shell International Shipping Services (Pte) Ltd., the legal employer of the former. However, he received his instructions from a company registered in the Isle of Man, Shell Ship Management Ltd. Shell International also had a manning agreement with an English-registered company. Mr. Hasan claimed against all three on the grounds of unfair dismissal, discrimination and breach of contract. However, the UK court dismissed the case on the ground that it lacked jurisdiction as the case was related to service on board a non-UK-flagged vessel in international waters.

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Chapter 4
The Law Applicable to Individual Employment Contracts

4.1 Sources of Law

Establishing the law applicable to individual employment contracts, including contracts involving seafarers, fishermen and other employees working on board ships, nowadays relies mainly on Regulation No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on Law Applicable to Contractual Obligations,[1] i.e., what is known as the Rome I Regulation. This instrument of EU secondary legislation is the result of a process through which the European Union assumes legislative competence, establishing an area of justice under Article 65 TCE introduced by the Treaty of Amsterdam, now Article 81 TFEU as amended by the Treaty of Lisbon. The outcome of the transfer of legislative competence was the transformation of the 1980 Rome Convention on the Law Applicable to Contractual Obligations into the Rome I Regulation.

Against this background, it is important to emphasise the deep relationship between those two instruments, despite marked differences in their legal bases; not only is the latter based upon the former, but both are also intended to be applied simultaneously. Article 24 of the Rome I Regulation clearly states that it replaces the Rome Convention, but only where contracts that have come into force as from 17 December 2009 are concerned, including those that were concluded that very same day.[2] Meanwhile, contracts entered into before that date remain subject to the conflict rules laid down in the Rome Convention, which is therefore still applicable to claims arising from such contracts, in spite of the fact that they were brought to

[1] OJ No. L 177, 4.7.2008.

[2] Previous to the corrigendum of Article 28 of the Rome I Regulation (OJ No. L 309, 24.11.2009), the topic addressed above was much discussed, given that its initial wording referred to 'after' instead of 'as from'. After the corrigendum, the EU adopted the German stance on the matter. See in this regard BAG 29.10.1992, with comments by Mankowski (1994), pp. 89–92.

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court after 17 December 2009.[3] Furthermore, the genetic dependence of the two legal sources is relevant for interpretation purposes, also because of their links with the Brussels–Lugano system.[4]

The main issue that needs to be addressed with regard to the law applicable to individual employment contracts is the role of provisions such as that in Spain's Additional Disposition 16(7) of Consolidated Text of the Law on State Ports and the Merchant Navy, according to which: 'The working conditions and social security benefits for non-Spanish nationals employed on board ships registered in the Special Register shall be governed by the legislation to which the parties to the contract freely submit, provided that it respects the rules issued by the International Labour Organization or, failing express submission, by the provisions of Spanish labour and social security regulations, all without prejudice to the application of any Community legislation and international agreements signed by Spain'.[5] This provision appears in the legal text that establishes a Special Register of Ships and Shipping Companies in the Canary Islands, which was referred to previously during the discussion of the role of second, international and open registries in maritime employment.[6]

The Spanish provision is far from being an isolated case, as there are a number of comparative law examples[7] that submit working and living conditions on board ships registered in the respective special register to the law chosen by the parties to the employment contract or to the law of the habitual residence of the seafarers or fishermen.[8] In fact, this type of rule underlies the CJEU *Sloman Neptun Schiffahrts*

[3] The Rome Convention entered into force in 1991 and started to apply in Spain from l September 1993, so national rules were applicable before that date, in particular Articles 10(6) of the Civil Code and 1(4) of the Statute of Workers. So, on deciding the case according to the Spanish legislation pursuant to Article 1(4) ET, see STS, *Sala de lo Social*, 7.11.1989, although the lack of proof of Panamanian law is also mentioned.

[4] See Sect. 3.2.3.1.

[5] My translation.

[6] See Sect. 2.3.2.

[7] This applies, for example, to Article 3 of Italian Law No. 30, 27.2.1998, which is drafted in very similar terms to the Spanish regulation: '1. Le condizioni economiche, normative, previdenziali ed assicurative dei marittimi italiani o comunitari imbarcati sulle navi iscritte nel Registro internazionale sono disciplinate dalla legge regolatrice del contratto di arruolamento e dai contratti collettivi dei singoli Stati membri. 2. Il rapporto di lavoro del personale non comunitario non residente nell'Unione europea, imbarcato a bordo di navi iscritte nel Registro internazionale, è regolamentato dalla legge scelta dalle parti e comunque nel rispetto delle convenzioni OIL in materia di lavoro marittimo. 3. Le organizzazioni sindacali sottoscrittrici di contratti collettivi di cui al comma 1 stabiliscono le condizioni economiche, salariali ed assicurative minime che devono comunque essere osservate per tutti i lavoratori non comunitari impegnati a bordo delle navi iscritte nel Registro internazionale, nel rispetto dei limiti internazionalmente stability'.

[8] Currently, the Italian rule cited in the previous footnote is complemented by a collective agreement concluded between representatives of the most prominent employers' organisations on one side and the ITF and other associated trade unions on the other, according to which a clause is laid down submitting all vicissitudes of the contract to the law of the seafarer's habitual residence. See comments on the matter by Zanobetti Pagnetti (2008), pp. 194–200.

AG judgment that elucidates the complaint filed by German trade unions against the hiring of non-EU workers,[9] especially Filipinos, to work on ships registered in the German international register and to whom different working and living conditions from those applicable to German seafarers were applicable, in particular receiving lower wages than the Germans. The CJEU did not tackle the question of whether national legislation that enabled some workers to enjoy different working conditions from others were compatible with Community law, but it did rule on whether this differential treatment constituted a kind of state aid.

Furthermore, the CJEU did not have the power to decide on these provisions' relationship with the Rome Convention on the law applicable to contractual obligations because at that time it had not been conferred with powers of interpretation with respect to the Convention. The answer that the Court did not furnish directly was, however, supplied by the universal scope of the conflict rules in both the Rome Convention and the Rome I Regulation[10]: that the national provisions under discussion could only be understood in relation to the rules of the latter international instruments, i.e., those that ultimately decide on the law applicable to seafarers' employment relationships, even when they were not habitually resident in an EU member state.[11] Accordingly, these provisions operate as mere clarifications, addressed to shipowners, of the consequences of the conflict rule laid down by the Rome I Regulation.[12]

[9] CJ 17.3.1993, Case C-72/91 and C-73/91, *Sloman Neptun Schiffahrts AG*.

[10] Article 2 Rome Convention/Rome I Regulation.

[11] In fact, in CJ 17.3.1993, Case C-72/91 and C-73/91, *Sloman Neptun Schiffahrts AGK*, the German government claims before the CJ that § 21.IV, 1 *Flaggenrechtsverordnung* only aims to clarify the fact that German shipowners may hire non-Community workers according to a legislation other than German legislation, pursuant to Article 6 of the Rome Convention, with a view to avoiding the flight to other flags. In this regard, the judgment issued by the BGA, 24.8.1989, made this point clear. Agreeing on these arguments, see Advocate General Mr. Darmon's Opinion on the *Sloman Neptun Schiffahrts AGK* case, paras. 74–75 and 81, presented on 17 March 1992. On the doctrine, see Basedow (1990), p. 82; von Hoffmann (1996), p. 1644, para. 56, pp. 1646–1648, paras. 60–61; Junker (2005), p. 721, for whom this rule opens the door to the immediate application of the escape clause contained in Article 6 of the Rome Convention; Kühl (1989), pp. 92–95; Thorn (2012), p. 2653, para. 12. Regarding this issue in Italy, see Zanobetti Pagnetti (2008), pp. 200–216.

[12] According to the final amendment of § 21.IV Flaggenrechtsverordnung: 'Arbeitsverhältnisse von Besatzungsmitgliedern eines im Internationalen Seeschiffahrtsregister eingetragenen Kauffahrteischiffes, die im Inland keinen Wohnsitz oder ständigen Aufenthalt haben, unterliegen bei der Anwendung des Artikels 8 der Verordnung (EG) No. 593/2008 des Europäischen Parlaments und des Rates vom 17. Juni 2008 über das auf vertragliche Schuldverhältnisse anzuwendende Recht (Rom I) vorbehaltlich anderer Rechtsvorschriften der Europäischen Gemeinschaft nicht schon auf Grund der Tatsache, daß das Schiff die Bundesflagge führt, dem deutschen Recht. Werden für die in Satz 1 genannten Arbeitsverhältnisse von ausländischen Gewerkschaften Tarifverträge abgeschlossen, so haben diese nur dann die im Tarifvertragsgesetz genannten Wirkungen, wenn für sie die Anwendung des im Geltungsbereich des Grundgesetzes geltenden Tarifrechts sowie die Zuständigkeit der deutschen Gerichte vereinbart worden ist. Nach Inkrafttreten dieses Absatzes abgeschlossene Tarifverträge beziehen sich auf die in Satz

With regard to EU law provisions that can take precedence over the Rome I Regulation,[13] it is worth mentioning Article 3 of Regulation 3577/92 of 7 December 1992[14] regulating maritime cabotage between member states. This rule specifies that generally 'all matters relating to manning' are the flag state's responsibility except for small ships and island cabotage, in which case responsibility is submitted to the host state. The scope of the text quoted was in principle only proposed to cover certain aspects of public law that fall within the employment relationship sphere; the legislative outcome, however, is a provision that is expressed in sufficiently broad terms such as to also embrace aspects of private law that can be extended to the regulation of individual employment contracts, including the relevant collective agreements, in accordance with the submission to the corresponding legal system contained there.[15] The shadow of flags of convenience and fears of a potential flight to states with lower labour costs and the corresponding loss of jobs in host states all support an interpretation of this provision that is consistent with what has been posited here, i.e., one encompassing private matters. This interpretation is not without opposition, however, as is emphasised by a different interpretation based on the more restrictive English version that refuses to accept this provision as a conflict rule.[16]

As a matter of fact, subsequent Commission initiatives seem to confirm that this provision does not interfere with private international law instruments. While in the field of regular passenger and ferry services the great majority of the activity is in the hands of ships both flying EU flags and manned by employees recruited from member states, a trend for hiring non-EU seafarers was detected, triggering Commission intervention with the aim of halting it by amending the Regulation on maritime cabotage and proposing a Council Directive on manning conditions for regular passenger and ferry services operating between member states.[17] Although this measure was never approved, it sheds some light on the matter, as the starting point was the different laws that might be applied on board in accordance with the then in force Rome Convention, with a view to subjecting non-EU nationals to living and working conditions similar to those applied to EU seafarers. No further steps were taken, but the proposal contributed to clarifying the fact that the only relevant provisions regarding the law applicable to employment contracts are those in the Rome I Regulation or the Rome Convention, where it is still in force.

1 genannten Arbeitsverhältnisse im Zweifel nur, wenn sie dies ausdrücklich vorsehen. Die Vorschriften des deutschen Sozialversicherungsrechts bleiben unberührt'.

[13] Article 23 of the Rome I Regulation.

[14] Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within member states (maritime cabotage) (OJ No. L 364, 12.12.1992).

[15] On these alternatives, see Basedow (1994), p. 90. See Fotinopoulou Basurko (2006), pp. 467–478, on this Directive and Directive 96/71/EC.

[16] See Mankowski (1995), p. 458.

[17] Brussels, 3.6.1998 [COM(1998) 251 final].

4.2 Scope of Application of Article 8 of the Rome I Regulation

4.2.1 Territorial Scope of Application

The Rome I Regulation contains a special conflict rule on individual employment contracts, as its predecessor, the Rome Convention, did, specifically Article 8, which corresponds to Article 6 of the Rome Convention. As indicated above, this provision was designed to be universally applicable. Hence, as long as the seized court is bound by the 1980 Convention or the Rome I Regulation, it applies the conflict rule dealing with individual employment contracts included there, even if the claim in question is submitted to a non-EU legal system pursuant to this conflict rule. Identifying the jurisdictions that are bound by these legal instruments is a separate issue that deserves a brief mention here.

When the United Kingdom and the Republic of Ireland exercised their right to opt in, the Rome I Regulation came into force in twenty-six—now twenty-seven, thanks to Croatia—EU member states. The exception is Denmark, which does not participate in any of the acts based on the area of freedom, security and justice. Had Denmark wished to join the Rome I Regulation, it would have had to conclude an international agreement with the European Union for the instrument to be applicable there. However, this did not happen, and as a result the Rome Convention is still applicable in Denmark. Indeed, Article 1(4) of the Rome I Regulation contains a reminder that member states are to be understood as all those to whom the Regulation applies. In contrast, the term member state in Article 3(4) of the Rome I Regulation denotes all member states, including Denmark, and therefore its stipulations on choice of law and EU mandatory rules also refer to this country.

Article 24(1) of the Rome I Regulation contains a significant specification: 'This Regulation shall replace the Rome Convention in the Member states, except as regards the territories of the Member states which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty', now Article 355 of the TFEU. As already indicated when dealing with these matters with regard to the Brussels I and Brussels I *bis* Regulations, the Treaties apply to Guadeloupe, French Guiana, Martinique, Reunion, Saint Barthélemy, Saint Martin, the Azores, Madeira and the Canary Islands, where member states have established a second or open registry. On the other hand, other overseas territories are left out of the territorial scope of the Rome I Regulation and, more generally, of EU legislation, as are those of the United Kingdom since the Regulation only applies to Britain, Northern Ireland and Gibraltar.[18] The Rome Convention does apply to the Isle of Man[19] but not to the Channel Islands,

[18] See *Rome I – should the UK opt in? Consultation response*, available at http://www.justice.gov.uk/consultations/docs/rome-i-consultation-govt-response.pdf. Accessed 19 November 2011.

[19] See Asín Cabrera (1997), pp. 341–345.

territories in Cyprus, Anguilla, Bermuda, the Virgin Islands, the Cayman Islands, the Turks and Caicos Islands and the Maldives. The Rome Convention is in force in French overseas territories[20] such as the Kerguelen Islands, Saint-Pierre and Miquelon, Saint Barthélemy, French Polynesia and the Wallis and Futuna Islands; in Antilles and Aruba, which are under Dutch rule; and in the Danish-ruled[21] territories of Greenland and the Faroe Islands.[22]

4.2.2 Material Scope of Application: Issues Included in Article 8

Like Article 6 of the Rome Convention, the wording of Article 8 of the Rome I Regulation does not contain a proper definition of what is to be understood by individual employment contracts, a definition that cannot even be inferred from its preamble. However, the terminology employed in the new provision includes certain changes with respect to Article 6 of the Rome Convention, seeking a coincidence with the content of Section 5, Chapter II, of the Brussels and Lugano system.[23] The EU aims to bring about a convergence between EU instruments and the concepts and definitions they include, with a view to establishing a relationship between *forum* and *ius*, at least in some cases.[24]

Within this framework, what is understood by the term 'individual employment contract' is to be construed independently,[25] and for this reason reference is made here to the considerations already discussed while dealing with this concept in the framework of international jurisdiction.[26] It is worth remembering here that in general terms an employment contract implies the provision of services in exchange for remuneration, which brings the worker within the organisational framework of the business of the employer. As already said, there are no particular problems of characterisation as regards seafarers once uncertainties concerning captains and share fishermen have been resolved.[27]

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[20] See Fotinopoulou Basurko (2008), pp. 103–108.

[21] See list in Annex II TFEU by reference of Article 355(2) TFEU.

[22] According to Article 27 of the Rome Convention – in force until its amendment by the Treaty of 18 May 1992 on the accession of Spain and Portugal to the EU – Denmark extended its application to the Faroe Islands and the U.K. to Gibraltar.

[23] See Wurmnest (2009), pp. 481–499. In detail, see Hoppe (1999), pp. 101–142, with particular emphasis on the concepts of individual employment contract and employee.

[24] On the coincidence between *forum* and *ius* in employment matters, see Moura Ramos (1991), pp. 165–194.

[25] See, among others, Franzen (2011), pp. 178–179, para. 5; Mankowski (1997), pp. 466–469. Some voices suggest a characterisation *ex lege causae* [see Collins et al. (2006), pp. 1663–1665; Morse (1992), p. 13; Plender and Wilderspin (2009), pp. 304–309, paras. 11-010 a 11-024], or a double characterisation, *ex lege fori* and *ex lege causae*. See Birk (2006), p. 21.

[26] See Sect. 3.2.2.1.

[27] See Sect. 2.4.2.

Article 8 of the Rome I Regulation therefore decides on the law governing individual employment contracts, while Article 12 deals with the issues that are subject to its material scope of application. It is important to bear in mind that collective agreements are also part of the law designated by this conflict rule, although disputes between those with the bargaining power to conclude them are not submitted to this legal system.[28] Collective labour relations are excluded from the scope of application of Article 8 and from Article 6 of the Rome Convention, a question that will be addressed in the last chapter of this book.

Likewise, it should be noted that the law designated in accordance with Article 8 decides on the existence and material validity of employment contracts, as confirmed by Article 10 of the Rome I Regulation, and also covers the consequences of nullity, such as compensation or the obligation to pay wages for the time worked.[29] Nevertheless, the scope of the *lex laboris* does not include the capacity of the parties to contract or the formal validity of the contract. For both issues, the Rome I Regulation lays down specific conflict rules that will be discussed below.

More specifically, according to Article 12 of Rome I the issues that are subject to the *lex laboris* are the following: the subject matter of the contract, contract types, the contents—i.e., the services and tasks that must be performed as part of the employment relationship—the payment of wages—including payment arrangements such as crew profit sharing,[30] and overtime and holidays—workers' duties of loyalty, contract duration, the number hours of work and rest, holidays, contract modification, temporary worker placement, termination of the contract—including the grounds for dismissal—and the interpretation of the contract.

The consequences of ownership transfer of shipping or fishing companies for employment contracts are also subject to the law applicable to the contract regardless of whether there is a change of employer or habitual workplace, the result being that the contract is subject to a new *lex laboris*. In these cases, the effects of business relocation on current employment contracts depend on the *lex laboris* applicable before the move, to oblige the new employer to take on the workers of the transferred business, for example.[31]

The law applicable to individual employment contracts particularly covers employers' obligations towards employees, including the duty of care—whose contents and boundaries may depend on laws other than the *lex laboris*[32]—payment of wages, holidays, equal treatment, training, repatriation and so forth. However, the payment of social security is excluded from the scope of this law, as discussed later in a separate section. It is argued that the obligation to pay for sick leave is also excluded from the *lex laboris* due to its close relationship with the concept of social

[28] In this regard, see the Explanatory Report accompanying the Rome Convention drafted by Giuliano and Lagarde (1992) while commenting on Article 6, para. 2.

[29] See Article 12(1)(e) of the Rome I Regulation.

[30] Among others, see Deinert (2013), p. 297.

[31] Among others, see Deinert (2013), pp. 338–339.

[32] Such as the law of the country in which performance takes place. See Hoppe (1999), p. 223.

security.[33] However, the position advocating its contractual nature is certainly more consistent, inasmuch as this obligation is the result of failure to comply with the main labour obligation. In any event, it is deemed an overriding mandatory rule, given that its ultimate goal is to ensure that the most basic needs are covered during periods of incapacity.[34]

In general, the *lex laboris* decides on the performance of obligations, i.e., whether the parties have fulfilled their obligations, whether there has been noncompliance or compliance has been poor, and to the extent to which the worker is responsible for the defective performance.[35] In this regard, it should be noted that Article 18(1) of the Rome I Regulation states that legal presumptions and rules of burden of proof are also subject to the *lex contractus*. This law also decides on prescription in cases of wage or dismissal claims.[36]

Potential limitations of liability for breach of contract by workers, usually linked to compulsory insurance, must also be sought in the law applicable to the employment contract. On the other hand, third party liability is reserved to tort law and is therefore left out of employment contract matters, except in the event that the employee is entitled to hide behind the employer, as this matter is subject to the *lex laboris*. The procedures for dismissal, deadlines and the consequences are also subject to this law, as are collective redundancies, in principle. It must be pointed out, however, that these cases are subject to overriding mandatory rules because of their impact on the economy, as illustrated by both the intervention of public authorities and the regulation of collective bargaining in this framework.[37]

There are more doubts surrounding health and hygiene issues,[38] which as part of public law are referred to the state where the business performing the service is located. In maritime law, this is the state whose flag the ship is flying, irrespective of the law governing the employment contract. Similarly, if the work is done in port, due regard should be given to what the port state law provides for. This leads us on to the manner of performance, which must comply with the law of the place where the work is carried out. Typical examples are public holidays, longer working hours than those established by the *lex laboris* and the respective risk prevention measures. In fact, given that employment contracts are long-term relationships, many more laws may potentially be taken into consideration,[39] including those regarding

[33] See Hoppe (1999), p. 223; Müller (2004), p. 249, on the basis of CJ 3.6.1992, Case C-45/90, *Vittorio Paletta v Brennet AG*; 2.5.1996, Case 206/94, *Brennet AG v Vittorio Paletta*, on the application of EU law on coordination of social security systems.

[34] See Deinert (2013), pp. 299–301.

[35] See Müller (2004), p. 249, suggesting a secondary connection on non-contractual matters to avoid the non-match of the two laws.

[36] See Article 12(1)(d) of the Rome I Regulation.

[37] As stated by Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of member states relating to collective redundancies (O.J. No. L 225, 12.8.1998).

[38] See Kaye (1993), pp. 227–228.

[39] See examples cited, as well as comments by Thüsing (2003a), p. 1309. Further, also Junker (1992), pp. 294–300.

payment arrangements. In any event, applying the law of the place where the work is carried out is not mandatory, as is illustrated by Article 12(2) of the Rome I Regulation; this only requires the relevant law to be taken into consideration, meaning that there is no impediment to these matters being decided in accordance with the most favourable law for the worker.[40]

4.2.3 Material Scope of Application: Issues Excluded From Article 8

4.2.3.1 The Law Applicable to the Capacity to Contract, Minimum Age and Professional Training

Without prejudice to Article 13 of the Rome I Regulation, the legal capacity of natural persons is excluded from its scope and also from the Rome Convention. Both international instruments exclusively comprise cases in which the parties to a contract enter into the contract in the same country and one party is unaware of the other's incapacity to contract, in which case the law of the country in which the agreement was reached applies. In other cases, it is necessary to turn to national law for the relevant conflict rule, such as Article 9(1) of the Spanish Civil Code or § 7 of the Introductory Act to the German Civil Code, which lays down the application of workers' national law to decide on their capacity to contract.[41] However, some other systems, such as the British, choose to submit this issue to the *lex substantiae actus*, in this case the *lex laboris*. National conflict rules also determine who can supplement workers' limited capacity, i.e., who can or should act as their representative—decided in Spain, for example, by Article 10(10) of the Civil Code—which does not prevent public order from intervening when there is a breach of constitutional principles by the applicable law.

The application of national law to the capacity to enter into an employment contract cannot escape the mandatory rules of the *lex contractus* or the *lex fori*, particularly when they establish the conditions for access to the labour market.[42] Of utmost importance here is the legal provision establishing the minimum working age. This cannot be ignored if a worker's national law stipulates a lower minimum age, as these rules aim to protect children as well as workers' health.[43] A case in point is Spanish law, which allows foreigners to engage in professional activities in

[40] See Magnus (2011), pp. 616–617, para. 213.

[41] Since it concerns workers' legal capacity, as indicated by Ubertazzi (2006), pp. 208–217.

[42] See Gardeñes Santiago (2008), pp. 419–420; Ubertazzi (2006), pp. 208–217. Article 1 of the Resolution of the Institut de droit internacional, 3.8.1971, during the Zagreb session on 'Conflicts of Laws in the Field of Labour Law' seems to acknowledge this distinction by establishing a law applicable to the capacity to contract and another on the ability to act thus.

[43] In doctrine see, among others, Gamillscheg (1983), p. 324.

Spain when they are over the age of sixteen, regardless of what their respective national legislation says.[44]

In a similar vein, attention should be paid to several international provisions that reinforce the statement that this is an overriding mandatory rule, as established by ILO Convention No. 138, of 26 June 1973 on the minimum age for admission to employment,[45] requiring all contracting states to specify the minimum age for admission to work 'within its territory and on means of transport registered in its territory'.[46] ILO Convention No. 147 of 1976 on minimum standards for the merchant fleet also takes the minimum age into account, through a 1996 Protocol,[47] while MLC, 2006, contains provisions on this matter as well, fixing the minimum age at 16.[48] ILO Convention No. 112 of 1959 on Minimum Age (Fishermen) stands out among the very few conventions dealing with work in the fishing sector; however, this will be replaced by Article 9 of the WFC, 2007[49]—when it enters into force—which sets the minimum age at sixteen with some exceptions for 15-year-olds, provided they are not legally obliged to be in full-time education in their countries of origin and have received professional training.

As discussed above, the employee's age is a matter of capacity to contract and as such is excluded from the Rome I Regulation. The rules on the minimum working age may be opposed not in accordance with this Regulation but by resorting to the respective national law provisions. However, Article 13 of the Rome I Regulation now offers a feasible solution that has the virtue of avoiding the public policy exception. This provision is based on the exception of national interest as developed by French courts in the *Lizardi* case and seeks to ensure that contracts between parties in the same country follow the rules of the market in question, including capacity issues.[50] The broad terms in which Article 13 is written no longer point to the place where the contract is concluded but rather point to the country where the parties to the contract are located. This is true of both the English and Spanish versions, 'en los contratos celebrados entre personas que se encuentren en un mismo país', and also of the German version, which reads as follows: 'bei einem zwischen Personen, die sich in demselben Staat befinden, geschlossenen Vertrag'.

[44] See Article 36(1) of the Spanish Organic Law 4/2000, of 11 January, on rights and freedoms of foreigners in Spain and their social integration.

[45] Ratified by Spain on 13.4.1977 (BOE No. 109, 8.5.1978) and Germany on 8.4.1976.

[46] See Article 2 thereof. Previous to the Convention cited in the text, see ILO Convention No. 7, of 1920, ratified by Spain on 24.4.1924 (*Gaceta*, 13.5.1924) and later amended by the 1936 ILO Convention No. 58, ratified by Spain on 8.4.1971 (BOE No. 120, 19.5.1972).

[47] This Convention was ratified by Spain on 10.3.1978 (BOE No. 15, 18.1.1982) and Germany on 15.7.1980. However, it is not yet in force in either country.

[48] See Rule 1(1) of Maritime Labour Convention, 23 February 2006, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:91:0::NO:91:P91_INSTRUMENT_ID:312331:NO.

[49] ILO Convention No. 188, 14 June 2007 concerning work in the fishing sector, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312333:NO.

[50] For a thorough treatment, see Ubertazzi (2006), pp. 45–92.

This wording allows us to understand that this country is the place where the work is habitually carried out, i.e., the *locus laboris*,[51] thus avoiding differences between nationals and foreigners for reasons of legal certainty.

Although this is not an issue of capacity to contract, workers' professional qualifications are linked to the issue of the minimum working age and have become an additional key component to gaining access to the labour market. Moreover, seafarers' and fishermen's professional qualifications are essential to maritime safety, in addition to being regarded as a way of keeping jobs in the traditional maritime nations. In this regard, it has already been reported that the European Union is active in the struggle to preserve maritime-related employment by focusing on the importance of seafarers' training both for safety at sea and the fight against pollution and also for access to skilled jobs.[52] In this framework, the law governing the professional qualifications seafarers need to have access to work and then keep their jobs will also be the law of *locus laboris*. In this matter, Article 13 of the Rome I Regulation is of little or no use, but these qualifications' links with maritime safety and the fight against pollution enable us to classify them as *lois de police* and thus to activate Article 9 of the Rome I Regulation. This is of course without prejudice to the law governing the employment contract being applicable when it coincides with *locus laboris*.

It is of particular importance these days to highlight the fact that work permits are not a question of the capacity to contract but merely an administrative requirement.[53] Article 36(5) of Spanish immigration law, for example, clearly indicates that lack of authorisation to reside and work in Spain—without prejudice to the employer's respective responsibilities, including where the social security system is concerned—does not invalidate the employment contract where foreign workers' rights are concerned, nor does it preclude them from obtaining the benefits deriving from cases enshrined in international conventions for the protection of workers or other benefits they may be entitled to, provided that these are compatible with their situation. As a matter of fact, work permits are not normally required in the merchant and fishing sectors, in an effort to facilitate the recruitment of crews in third countries and with the subsequent savings in terms of labour and social security costs to shipowners. For example, to enable foreigners to work aboard ships flying the Spanish flag, Spanish legislation simply requires an employment contract or a document of renewal of enrolment; *ergo*, foreign seafarers are exempt from the work permit requirement, and, furthermore, their recruitment is not dependent on the internal situation of the labour market.[54]

[51] See this proposal in Deinert (2013), pp. 85–86.

[52] See Sect. 2.5.2.2.

[53] As discussed by Gamillscheg (1983), p. 325.

[54] Article 64(5) of the Royal Decree 557/2011, of 20 April, approving the Regulation on Organic Law 4/2000, on rights and freedoms of foreigners in Spain and their social integration, after its amendment by Organic Law 2/2009, reads as follows: 'Igualmente, se autorizará a trabajar sin atender a la situación nacional de empleo a los nacionales de Estados con los que se hayan suscrito convenios internacionales a tal efecto, así como a los nacionales de Estados no pertenecientes a la

4.2.3.2 The Law Applicable to the Formal Validity of Contracts

The law applicable to the formal requirements of contracts is decided by the Rome I Regulation, which lays down a specific conflict rule governed by the *favor validitatis* principle, with the aim of avoiding cases of nullity of contracts on the grounds of formal invalidity. The idea is embodied in a result-oriented conflict rule that is structured around alternative connecting factors. Hence, a contract's formal validity has to be tested in accordance with the *lex loci celebrationis*, or pursuant to the law applicable to the contract's material validity or the law of the habitual residence of either party if they are in different countries when the contract is concluded.[55]

Employment contracts are also subject to this array of connecting factors. Unlike consumer contracts and those dealing with real estate or the use of property,[56] the formal requirements of employment contracts do not have a tailor-made conflict rule that refers them primarily to one single law. The Giuliano-Lagarde Report justified this treatment on the ground that merely submitting the form of the contract to *lex laboris* would originate excessive legal uncertainty to the extent that courts may resort to the exception clause in determining the law applicable.[57] Furthermore, the application of the general conflict rule and all its connecting factors is in line with the freedom of form that governs this particular type of contract,[58] namely, a contract's form does not affect its validity, thereby benefitting workers insofar as their access to the labour market is not hampered, nor is the existence of an employment relationship questioned for this simple reason.[59]

Nevertheless, the employment relationship goes well beyond the concluding of the contract, encompassing other acts such as notice of dismissal or provision of written information about working conditions, in such a way that freedom of form is no longer beneficial for the weaker party but rather the reverse. It makes no sense to maintain the principle of *favor validitatis* and the ability to validate such actions in accordance with various laws. This kind of criticism had already been voiced in relation to Article 9 of the Rome Convention,[60] but the drafters of the Rome I

Unión Europea ni al Espacio Económico Europeo enrolados en buques españoles en virtud de acuerdos internacionales de pesca marítima. En este caso, se concederá validez de autorización para trabajar al duplicado de la notificación de embarque o renovación del contrato de tripulantes extranjeros en buques españoles'. Although mention is made of the fishing sector exclusively, it seems that in practice it also covers the merchant shipping sector. See Fotinopoulou Basurko (2005), pp. 228–232. Accepting that this provision is in accordance with immigration laws, see STS 29.5.2003.

[55] See Article 11 of the Rome I Regulation.

[56] See Article 11, paragraphs 4 and 5 respectively.

[57] See Giuliano-Lagarde Report (1980), p. 28.

[58] For example, Article 8 of the Spanish Statute of Workers lays down that the contract may be written or verbal. When the written form is required [see Article 8(2)], non-compliance never invalidates the contract.

[59] See Fotinopoulou Basurko (2008), pp. 159–164; Gardeñes Santiago (2008), pp. 420–421.

[60] See Gamillscheg (1983), pp. 324–325; Krebbert (2000), p. 530.

Regulation did not take the opportunity to address this issue at the time. Article 11 applies to the entire life of the employment relationship, with the aggravating circumstance that this provision has increased the number of laws in accordance with which the formal requirements of the act have to be compared: in addition to the law governing the contract and the *lex loci actus*, it is now possible to apply the law of the country in which the person performing the act in question is habitually resident at the time of its completion.

This problem was not unknown to the Rome Convention drafters, and the Giuliano-Lagarde Report suggested applying Article 7 of the Convention on overriding mandatory rules, in such a way that should the form of the act in question entail mandatory nature, the relevant law is applied in accordance with the provision.[61] Nevertheless, this proposal has been criticised[62] on the ground that it leads to the application of a given law, usually the *lex fori* or the *lex laboris*, avoiding any assessment of which law is the most appropriate to govern these matters. In this regard, it has also been proposed that the issue be resolved through the mechanism of characterisation, i.e., dealt with as a matter of substantive validity or evidence and thus subject to the *lex contractus* pursuant to Article 18 of the Rome I Regulation.[63] Another solution takes the principle of worker protection—underpinning Article 8 of the Rome I Regulation—as a benchmark to project it on Article 11 when applied to an employment relationship; in short, the most favourable solution for workers, either because it is the least or the most demanding in matters of contract form, should be chosen from among the connecting factors provided for.[64]

In the maritime and fishing sectors, however, it seems that precedence should be given to the solution envisaged in the Giuliano-Lagarde Report, which refers not only to overriding mandatory rules laid down in the *lex fori* but also to the *lex contractus*. One way or the other, consideration must be given to international minimum standards that require seafarers' employment contracts to be written down and a copy to be given to workers.[65] The policy underlying these provisions is concerned with the principle of worker protection as it aims to avoid forced work, expressly forbidden by the 1998 ILO Declaration;[66] it is also concerned with

[61] Giuliano-Lagarde Report (1980), comments to Article 9 of the Rome Convention, para. 4. Note that Article 2 of the Resolution of the Institut de droit international, 3.8.1971, during the Zagreb session on 'Conflicts of Laws in the Field of Labour Law', also referred to an array of laws but recalled that 'Nevertheless, any provision imposing special formal requirements must be observed in so far as they are in force in the country in which the work is to be performed'.

[62] As was the proposal of Gardeñes Santiago (2008), pp. 421–422, suggesting the possibility of setting employment contracts aside from Article 11(3) of the Rome I Regulation or otherwise seeking an alternative that is more respectful to the legislative objectives involved, such as the *lex contractus* or the law of the habitual workplace if the former does not match the latter.

[63] See Krebbert (2000), p. 530, citing French decisions seeking to apply formal requirements laid down by French law.

[64] See Magnus (2011), pp. 608–609, paras. 182–183.

[65] See Rule 2(1) MLC, 2006, and Articles 18–20 WFC, 2007.

[66] See Charbonneau (2014), p. 218.

maritime safety[67] and is therefore linked to seafarers' professional qualifications, which in turn bestows the status of overriding mandatory provisions on these requirements.

4.2.3.3 Non-contractual Obligations: Accidents at Work

The behaviour of one party to a contract may involve a breach of contractual obligations but can also constitute an unlawful event that results in non-contractual obligations. Safety in the workplace and accident prevention regulations have forced many jurisdictions to reflect on the characterisation of damage claims resulting from accidents brought by employees against their employers, and which are clearly framed within the contractual relationship. In fact, certain legal systems—including the English system—allow claimants to opt for the kind of liability that they wish to invoke against their employers based on either contract law or tort law.[68]

The well-known case of *Lauritzen v Larsen*[69] in the US entailed the court ruling on an accident that happened in Cuba to a Danish seafarer who had signed his contract in New York to work on board a Danish ship. The decision was finally made in accordance with the flag law, which was deemed to be the law governing the employment relationship; consequently, the *lex loci laboris* was applied, throwing into relief the many doubts that had been raised on the way accidents at work deserved to be characterised and which law ought therefore to be applied in such cases depending on whether they were characterised as non-contractual or contractual matters.[70] Identical doubts also emerged in EU private international law; an initial answer characterising damage claims arising from occupational accidents as contractual matters found its basis in the Rome Convention's silence on the issue.[71] A different answer would now be required in the light of the Rome I Regulation and its relationship to the Regulation (EC) No. 864/2007 of the European Parliament and of the European Council of 11 July 2007 on law applicable to non-contractual obligations (Rome II),[72] as these two legal instruments are complementary and their scopes of application thus have to be clearly separated.

The controversy surrounding this matter continues today, but problems of characterisation and adaptation between rules governing contractual and

[67] See Zanobetti Pagnetti (2008), pp. 129–131.

[68] See Merrett (2011), pp. 188–190, para. 6.31–6.34. However, see *Brodin v A/R Seljan and Another* [1973] S.L.T. 198, avoiding the application of Norwegian law as the law of the employment contract and applying English law as the *lex loci delicti commissi*. In this direction and regarding the Swiss legal system, see Johner (1995), pp. 133–134.

[69] *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953).

[70] See Jambu-Merlin (1983), pp. 255–262.

[71] See Morse (1992), p. 20.

[72] OJ No. L 199 of 31.7.2007.

non-contractual relationships may be avoided by invoking Article 4(3) of the Rome II Regulation. This provision allows decisions to be made on non-contractual obligations in accordance with the law governing 'a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question'.[73] As a matter of fact, the same provision facilitates the overlap between the law applicable to damage claims and that governing social security issues. Articulated as an escape clause, this secondary connection mechanism pushes both the *lex loci damni* and the law of the parties' common habitual residence into the background since both may be the product of mere chance. This is particularly true when it comes to accidents at sea, to the point that it has been claimed that the escape clause enshrined in Article 4(3) *in fine* is much more than just an exception concerning maritime activity.[74] Accordingly, it must be operative in cases where the accident involves another worker as well, provided that both are subject to the same *lex laboris*.[75]

The consequences of applying Article 4(3) of the Rome II Regulation remain uncertain, however, when it comes to setting aside the law chosen by the parties to the employment contract on the ground that the law applicable to the contract in the absence of choice of law favours the worker. The European Commission was perfectly aware of this issue when it presented the proposal for the Rome II Regulation[76] but consciously chose not to include an express provision in this regard on the understanding that workers are entitled to such protection and the law governing the pre-existing relationship is consequently the one governing the contract in the absence of choice of law where appropriate. Therefore, although Article 4(3) does not contain any reference to the protection of the weaker party, fairness and reasons of consistency support such an interpretation.[77] Now the question remains as how to come to the conclusion that such a law is more favourable to the worker than the one chosen in a case dealing with non-contractual liability.[78] Beyond cases in which both types of liability are in question, the first response is to apply the law agreed on by the parties unless it can be proved that the law chosen is less protective than the default law governing the contract.

[73] See Junker (2010), para. 167. This approach is also to be found in *Cour d'Appel* Rouen, 5.12.1991, ship *Diamond*, with comments by Chaumette (1992), where the law governing the contract was applied to decide on damages arising out of a maritime accident, and in the absence of proof of the foreign law, plaintiffs were requested to provide it. The *Cour d'appel* Rouen finally issued a judgment on 3 March 1994, with comments by Chaumette (1994), according to Greek law as a result of an implied choice of law: Panamanian flag, Greek seafarer and Greek shipowner.

[74] This Proposal was suggested by GEDIP (2008), the topic having been introduced there by Profs. Basedow and Siehr. See further Basedow (2010), p. 120.

[75] See Junker (2010), para. 168.

[76] COM(2003) 427 final, p. 14.

[77] See Okoli and Arishe (2012), pp. 539–541.

[78] With some doubts, see Merrett (2011), para. 6.90, pp. 219–220.

When a social security scheme is established by a legal system, employer liability becomes strict liability, i.e. non-dependant on negligence or intentional misconduct and therefore greatly limiting it. The intrinsic correlation between social security systems and employers' disclaimers therefore suggests that the latter should be subject to the law applicable to the former. This is the aim of Article 85 (2) of Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems,[79] which states that 'if a person receives benefits under the legislation of one Member state in respect of an injury resulting from events occurring in another Member state, the provisions of the said legislation which determine the cases in which the civil liability of employers or of their employees is to be excluded shall apply with regard to the said person or to the competent institution'. Apart from these expressly regulated cases, others are covered by the Rome II Regulation, which determines the law governing the treatment of disclaimers. As they are intrinsically connected with social protection, they should be deemed to be overriding mandatory rules, operating only if the worker is really protected against contingencies that occur after the event causing the damage.[80]

When a third party is involved in the employment relationship there will not be such a close connection with the *lex contractus*, and other connecting factors of Article 4 of the Rome II Regulation take precedence in deciding on the law applicable to non-contractual obligations. When liability is attributed to third parties, the *lex loci delicti commissi* comes to the fore, together with the law of the flag. However, in addition to cases where the law of the flag cannot operate in its condition of law of the country in which the damage occurs, such as in cases where ships flying different flags collide,[81] the law of the flag may also be relegated, as priority is given to other interests that can be channelled via the escape clause.[82] Cases involving more than one vessel are generally the most difficult, and it would be desirable for a specific conflict rule on maritime liability to be issued, as was suggested in the European Group for Private International Law report.[83] This idea is reinforced by the role played by uniform law in this area,[84] which would justify referral to the *lex fori*.[85]

[79] OJ No. L 314, 7.6.2004. Amended by Regulation (EC) No. 988/2009 (OJ No. L 284, 30.10.2009) and Regulations (EU) No. 1231/2010 (O.J. No. L 344, 29.12.2010), No. 465/2012 (O.J. No. L 149, 8.6.2012). Regulation (EC) No. 987/2009 of the European Parliament and of the Council of 16 September 2009 (O.J. No. L 284, 30.10.2009) contains its rules of application. Text with relevance for the EEA and Switzerland.

[80] See Deinert (2013), pp. 332–334.

[81] See George (2007), pp. 137–172.

[82] See Manchuk (2007), pp. 221–248.

[83] See GEDIP (2001).

[84] See Guadagna (2006), pp. 668–698. On the autonomous interpretation of uniform law by national courts, see Basedow (2000), pp. 777–798.

[85] See Basedow (2010), pp. 135–137.

4.2.3.4 Social Security Matters

The law applicable to social security matters is relevant to this study because all matters relating to accidents at work and occupational diseases tend to be channelled through this specific law.[86] However, this matter is not included in the Rome I or Rome II Regulations since it cannot be characterised as contractual or non-contractual.[87] As this is about a system for social protection provision and the law applicable is therefore generally decided according to the principle of territoriality with concessions to posted workers, the *lex loci laboris* is usually applied from a conflict of laws perspective.[88]

In a mobile society, this approach can easily lead to injustices stemming from the fact that workers could come under more than one social security system, which is the reason for establishing the principle that they can only be subject to one such system to avoid potential duplication derived from participating in different social security schemes. Workers can of course be employed in different countries and by different employers, and so the choice of applicable law is also governed by the principle of protecting migrants, that is, the relevant system must take into account time worked and the contributions generated abroad to calculate the benefits due. This requires interstate coordination, which in turn has resulted in the conclusion of numerous bilateral and multilateral agreements in this field.

The European Union has issued regulations to coordinate national social security schemes in accordance with the principle of territoriality. The key instrument here is Regulation (EC) No. 883/2004 of the European Parliament and the Council of 29 April 2004 on the coordination of social security systems, where the issue of the system that actually provides guidelines for affiliation to a social security scheme is addressed in Article 11 *et seq*. Article 11(4) states that 'for purposes of this title, an activity as an employed or self employed person normally pursued on board a vessel at sea flying the flag of a Member state shall be deemed to be an activity pursued in the said Member state'.[89]

The Regulation is based on the principle that only the law of a member state, in this case the law of the flag state, should be applied. In this respect, it fails to matter

[86] Undermining the significance of conflicts of laws in these matters, see Gaudemet-Tallon (1986), pp. 2–9.

[87] See Sect. 3.2.2.2. On this debate in Spain, see Fotinopoulou Basurko (2008), pp. 147–151, who departs from its characterisation as a matter of public law to have it excluded from the Rome Convention. In contrast, including it in the Rome Convention, see Carril Vázquez (1999), pp. 221–224.

[88] See García Rodríguez (1991), pp. 60–69 and 149–152; Joussen (2003), p. 21.

[89] In judgment 24.2.2014, the Spanish Supreme Court addressed the issue of whether an accident suffered by a Spanish fisherman working on board a Spanish-flagged ship operated by a Spanish shipowner qualified as an accident *in itinere* since the fall that caused his death while he was trying to board his ship in Dingle (Ireland) happened during his own free time. The death occurred in Irish waters, and the Spanish court applied Spanish law to conclude that it was indeed an accident *in itinere*.

whether the vessel essentially operates in the territorial waters of third states, as the CJEU points out in *M. J. Bakker and Minister van Financiën*,[90] where the underlying discussion was about the contributions made to the Dutch social security system by a worker residing in Spain who provided services for a Netherlands-based company on board dredgers sailing under the Dutch flag and operating in the territorial waters of China and the United Arab Emirates. In this context, the Court stated that 'neither respect for the sovereignty of the coastal State nor the United Nations Convention on the Law of the Sea requires that a worker in Mr Bakker's situation be deprived of the benefit of the social insurance provided for, in accordance with Regulation No 1408/71, by the Member state whose flag the vessel flies, when that vessel is located in the territorial waters of a State other than that Member state'.[91]

The provision also indicates that people who are pursuing activities in a member state, whether as employees or as self-employed persons, are subject to the state's law.[92] This section of Article 11 makes it clear which the relevant state is for these purposes, in cases where the employee works in one country but is resident in another, a particularly significant issue where seafarers are concerned. In the *Salemink* judgment, the CJEU gave an affirmative answer to the question of whether a gas extraction platform situated on the Dutch continental shelf is comparable to member state territory for the purposes of Article 13(2)(a) of Regulation No. 1408/71,[93] on the basis of which Regulation No. 883/2004 is constructed. In this case, the employee was resident in Spain and had consequently been excluded from the statutory social security scheme in the Netherlands. The CJEU indicated that a member state cannot impose a further obligation—in this case, that of residing in the country—for a person to be entitled to the benefits of the social security scheme there when the activity is pursued either as an employed or a self-employed worker in the country. This would fly on the face of the provision in question, as it asserts that these workers should be included in the social security scheme of the state where they work even when they are resident in other states.[94] However, there are three exceptions to this rule.

The first exception is specified in Article 11(4) of Regulation No. 883/2004 to the effect that 'a person employed on board a vessel flying the flag of a Member state and remunerated for such activity by an undertaking or a person whose registered office or place of business is another Member state shall be subject to the legislation of the latter Member state if he resides in that State. The undertaking or person paying the remuneration shall be considered as the employer for purposes

[90] CJ 7.6.2012, Case C-106/11, *M. J. Bakker v Minister van Financiën*, with comments by Avegno (2013), pp. 814–818.

[91] CJ 7.6.2012, Case C-106/11, *M. J. Bakker v Minister van Financiën*, para. 29. See also para. 28.

[92] Article 11(3)(a) of the Regulation No. 883/2004.

[93] CJ 17.1.2012, Case C-347/10, *A. Salemink v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, paras. 32–35, and comments by Rodríguez Magdaleno (2012), pp. 1–5.

[94] CJ 17.1.2012, Case C-347/10, *A. Salemink*, para. 40–44.

of the said legislation'. Thus, the fact that employers and seafarers or fishermen have a common habitual country of residence qualifies the application of this country's law. Certain practices exist that should be mentioned here, such as those followed by the Dutch National Institute of Social Security: Title II of Regulation No. 1408/71, now No. 883/2004, is understood to apply to seafarers who hold nationality in an EU member state or the European Economic Area and are resident in one of these states but employed on board ships that do not fly a member state flag, by the mere fact that the employer is established in the Netherlands.[95]

The second exception affects temporarily posted workers. The principle of a single applicable legislation is put into effect for them by resorting to the law of the state of origin,[96] according to which seafarers or fishermen who are temporarily posted on board vessels flying flags that they do not usually fly remain subject to the legislation of the state of origin, which may well be their country of habitual residence if the employer's residence is also there.

The third is not really an exception, in that it addresses the case of mobile workers.[97] For these cases, where services are provided on board more than one ship or on land as well as on ships or other maritime platforms, the state of seafarers' habitual residence is preferred, provided that a substantial part of their activity is undertaken in this state. Otherwise, priority is given to the member state where the registered office or place of business of the business or employer is located.[98] Nevertheless, the rule again prioritises the state of habitual residence in cases involving several employers with registered offices or places of business in different member states.

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[95] See this mention in CJ 7.6.2012, Case C-106/11, *M. J. Bakker*, para. 15.

[96] Article 12 of Regulation No. 883/2004.

[97] Article 13 of the Regulation No. 883/2004.

[98] A request for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands) was lodged on 15 May 2013, Case C-266/13, *L. Kik v Staatssecretaris van Financiën*, on whether Regulation 1408/71 applies to the following case: '(a) a worker residing in the Netherlands who (b) is a national of the Netherlands, (c) in any event, was previously compulsorily insured in the Netherlands, (d) is employed as a seafarer by an employer established in Switzerland, (e) carries out his work on board a pipelayer which flies the Panamanian flag, and (f) carries out those activities first outside the territory of the Union (approximately 3 weeks above the continental shelf of the United States and approximately 2 weeks in international waters) and then above the continental shelf of the Netherlands (periods of one month and approximately one week) and of the United Kingdom (a period of slightly more than one week), while (g) the income earned thereby is subject to income tax levied by the Netherlands'. The Opinion of the Advocate General Mr. P Cruz-Villalón presented on 16 October 2014 is a positive one and classifies this worker as a mobile one as finally asserted by the CJEU in its judgment of 19 March 2015 submitting this issue to 'the legislation of the State in which his employer is established. However, in circumstances such as those of the main proceedings, if, pursuant to Regulation No 1408/71, that legislation entails him being insured under a voluntary insurance scheme or not being insured under any social security scheme, that national will be subject to the legislation of his Member State of residence' (para. 64).

The network of international conventions on social security is certainly intricate, in particular when agreements are concluded between member states, since Regulation No. 883/2004 does not preclude the application of previous agreements that may be more favourable, and allows new ones to be concluded under certain conditions.[99] For example, Spain has entered into numerous agreements with third states that follow *grosso modo* the guidelines laid down in Regulation No. 883/2004,[100] outlined in Article 17 of ILO Convention No. 165 on seafarers' social security, in particular the principle according to which seafarers can only be subject to one social security scheme, be it that of the flag state or their habitual residence. This Convention was terminated by Spain due to its revision by MLC, 2006.[101] WFC, 2007, also follows in the footsteps of MLC, 2006, with regard to fishing vessels.[102]

In any event, both MLC, 2006, and WFC, 2007, are in line with ILO Convention No. 165 and are based on several factors, including differences in social security systems, the need for coordination among those systems and the idea that each system must determine who is entitled to receive coverage. In this regard, they primarily place obligations to provide social protection on flag states but also contain a clear mandate to the member state of seafarers or fishermen's habitual residence to include them in its social security system, aiming for equivalent protection to that granted to every other employee resident in its territory.[103] In short, regardless of the flag flown by the ship on which seafarers serve, the law of habitual residence takes a prominent role in social security matters as it affects the one country that remains truly stable throughout seafarers' or fishermen's working lives. There must therefore be coordination between flag states and states of habitual residence to offer seafarers and fishermen protection that is not less favourable than that enjoyed by land-based workers.[104]

Spanish legislation is already pursuing this approach with a view to protecting workers living in its territory. In general, and on condition that they both reside and provide services in Spain, Article 7 of the Spanish General Social Security Act covers seafarers and fishermen, for whom a special system has been developed.[105]

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[99] Article 8 of the Regulation No. 883/2004.

[100] For an analysis of these conventions' provisions, see García Rodríguez (1991), pp. 265–277. On the relationship between social security matters and private international law, see Lugato (1994).

[101] See Rule 4(5) MLC, 2006.

[102] See Article 34 WFC, 2007.

[103] This is a point at which the flexibility of application with which both Conventions were conceived ought to play a role in allowing contracting states to make progress on social protection for seafarers who are habitually resident on their territory. Along the same lines, see ILO (2012), pp. 36–39.

[104] This may give rise to many implementation issues. See Charbonneau (2014), pp. 224–225.

[105] As established in Decree No. 1867/1970, 9.7 approving the General Regulation of Law 116/1969, 30.12 regulating the special social security scheme for seafarers, and No. 2864/1974, 30.8 approving the Consolidated Text of Laws 116/1969, 30.12 and 24/1972, 21.6 regulating the special social security scheme for seafarers.

The vessel is considered a workplace, and the activity provided on board a ship registered in a Spanish registry is therefore regarded in the same way as that conducted on Spanish soil.[106] This means that all workers on board, regardless of their nationality,[107] have to pay contributions to the Spanish social security system, although there are certain exceptions, as seen above.

The other side of the coin is that Article 125(2) of the General Social Security Act specifies that seafarers or fishermen will be included within the system under certain circumstances if the company they are employed by transfers them to a different country, as long as a special agreement with the social security administration is in place. Hence, workers posted to foreign-flagged vessels by Spanish companies continue to be part of the Spanish social security system, according to the Order of 27 January 1982.[108] If the company is foreign, this scheme no longer applies, and workers can opt for private insurance or sign a special agreement with the social security administration.[109] However, neither of these procedures is fully satisfactory since the benefits and compensations they provide are never as favourable as those provided by the Spanish social security system. In the light of MLC, 2006, Spain should move forward and increase social protection for seafarers and fishermen resident there, given its expected accession to WFC, 2007.[110]

Given that the law of the flag operates as the first connecting factor, flags of convenience are also an important matter and need to be approached within the broader issue of how to protect state nationals abroad; for these purposes, Law No 40/2006 of 14 December on the Statute of Spanish citizens abroad is applicable.[111] Article 18 requires the state to safeguard the social protection of Spanish nationals who move abroad for professional reasons, and the first measure to be taken in the struggle against social protection that is unfavourable to Spanish workers abroad is the signing of international social security agreements.

The second measure was introduced by Spanish labour courts by interpreting the concept of 'employer' to include consignees, manning agencies and joint fishing undertakings,[112] thus making them jointly and severally liable with foreign

[106] See Article 1(5), *in fine* of the Spanish Statute of Workers, indicating that in maritime activity the ship is deemed to be the workplace and located at the province in which is situated its base port.

[107] Along the same lines, see STSJ Galicia No. 343/2003, 3.3.2003, concerning a Senegalese citizen.

[108] BOE No. 40, 16.2.1982. This Order deals with the special nature of affiliation to the Spanish social security scheme for seafarers working for Spanish companies and posted abroad.

[109] This formula was developed by Order TAS/2865/2003, of 13 October, regulating special agreements in the social security scheme.

[110] On Spanish legislation's adaptation to MLC, 2006, see Carril Vázquez (2014), pp. 260–261.

[111] BOE No. 299, 15.12.2006. See Spanish case law applying a foreign law in cases involving foreign employers: SSTSJ Galicia (*Sala de lo Social*), 13.11.1998; Canarias, 17.2.1998; Madrid, 17.2.1998; Navarra, 25.3.1998; País Vasco, 28.4.1998; SSTS 17.12.2012; 18.12.2012; 21.1.2013; 31.1.2013; 19.2.2013. On this issue, see further Fotinopoulou Basurko (2013), pp. 1–13.

[112] SSTS, *Sala de lo Social*, 8.10.1973; 11.12.1974; 28.4.1975; 9.2.1987; 15.3.1984. A different opinion is represented, however, by SSTS 19.2.1990, which dealt with the claim of a Spanish

shipowners for the payment of damages in the event of accidents at work and for widow's and orphan's pensions, in line with the Spanish social security system.

This jurisprudence is currently endorsed by Article 10(3) of the Royal Decree 84/1996 of 26 January on general regulations on business registration and worker affiliation in the Spanish social security system. The law lays down that for the purposes of the special scheme for seafarers, the employers category includes shipowners, operators or owners of fishing vessels or maritime facilities, the consignees of vessels, manning agencies or other natural or legal persons resident in Spain that hire and remunerate Spanish residents to provide services on board foreign flag vessels, including Spanish companies participating in joint fishing ventures incorporated in other countries. More specifically, the Law on Shipping establishes that agents or representatives of foreign shipowners that engage Spanish nationals or residents in Spain must take out an insurance policy whereby seafarers can receive similar compensation to that granted by the Spanish social security scheme in case of death, accident or repatriation; should no policy be taken out, the employment contract will not obtain a visa;[113] all without prejudice to international conventions or agreements signed by Spain.

In fact, Spain has several agreements in this area, and some of the earliest submit these matters to the law of the flag, which is not always favourable to workers.[114] Accordingly, modern social security conventions also take into account Spanish companies participating in foreign undertakings as employers.[115]

Finally, it is interesting to note that there are specific regulations for the rights of return of social security institutions responsible for providing benefits against a third party that is liable to provide compensation for injuries to employees in the European Area of Justice. Articles 93 of Regulation No. 1408/71 and 85 of Regulation No. 883/2004 lay down the recognition of legal subrogation and the right of return when events requiring the intervention of a social security body occur in another member state. It is expected that these rights will also be specified in the

national who entered into a contract in Bilbao and suffered an accident on board a ship flying the Liberian flag; 15.1.2001 on contributions to the Spanish social security scheme by Spaniards working on board a ship flying the British flag and refusing to accept the consignee in the Basque Country – who was paying their remuneration – as an employer. On these case law, see Carril Vázquez (1999), pp. 220–221; Iriarte Ángel (1993), pp. 169–171.

[113] See Article 164(2) of the Law 14/2014, of 24 July, on Shipping (*Ley de la Navegación Marítima*) (BOE No. 180, 25.7.2014).

[114] Pursuant to CJ 15.1.2012, Case C-55/00, *Elide Gottardo v Instituto Nazionale della Previdenza Sociale*, 'when a Member State concludes a bilateral international convention on social security with a non-member country which provides for account to be taken of periods of insurance completed in that non-member country for acquisition of entitlement to old-age benefits, the fundamental principle of equal treatment requires that that Member State grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so' (para. 34).

[115] On these conventions, see Arrieta Idiakez (2006), p. 156, note 84; Carril Vázquez (1999), pp. 228–231, who cites the Conventions between Spain and Argentina and Spain and Chile as examples of conventions where Spanish fishermen working for joint enterprises are specifically included in the Spanish social security scheme.

respective national laws where applicable, i.e., to cases not involving other member states.

Article 19 of the Rome II Regulation deals with the law applicable to such rights in these instances, therefore making it possible for the issue to be submitted to the same law that governs the employment relationship by invoking Article 4(3). However, the public nature of the social security system advocates a characterisation in accordance with this, and thus the rules containing those rights should be treated as overriding mandatory rules of Article 16 of the Rome II Regulation.[116] At any rate, any ensuing litigation against a third party that was the cause of damage is subject to the relevant conflict rules.

4.2.3.5 Employer Insolvency

Employer insolvency inevitably has a profound impact on employment contracts, and this can be even greater when employees are seafarers on board ships whose debts the shipowner cannot pay.

In the European Area of Justice, the law governing the effects of insolvency proceedings on current contracts is determined according to Regulation (EC) No. 1346/2000 of 29 May on insolvency proceedings[117] or, where this is not applicable, in accordance with the respective national law. The European Insolvency Regulation (hereafter EIR) is only applicable when the centre of a debtor's main interests is located in a member state, except for Denmark, which is not a party to the Regulation. When this centre is in a third country, national law prevails, in Spain's case, Law 22/2003 of 9 July on bankruptcy,[118] in Germany's case, *Insolvenzordnung*,[119] which otherwise seems to copy the cross-border insolvency model adopted by the European Union as, in general, national cross-border insolvency rules are fundamentally similar to those laid down by EIR.[120] Furthermore, the territorial scope of EIR, which came into force in March 2002, requires further clarifications, in particular where its conflict rules are concerned: in addition to always requiring the centre of a debtor's main interests to be in a member state, the conflict rules provided for only apply when the law of a member state is referred to; *ergo*, when the law of a third state is applicable the seized court sets the Regulation aside and resorts to national conflict rules to determine the applicable law.

The opening of an insolvency proceeding does not interfere in principle with specific contractual arrangements, in particular the concluding, performance and termination of contracts, which remain subject to the *lex contractus* determined in

[116] See Deinert (2013), p. 334.

[117] OJ No. L 160, 30.6.2000.

[118] BOE No. 164, 10.7.2003.

[119] *Insolvenzordnung* of 5 October 1994 (BGBl. I S. 2866), as amended by the Law of 31 August 2013 (BGBl. I S. 3533).

[120] See Sect. 3.2.2.2. Employer insolvency.

accordance with either the Rome I Regulation or the Rome Convention. Nevertheless, the objectives of the insolvency proceeding may have certain legal consequences for the contractual relationship—thus, altering its normal course—as a result of the need to reorganise the debtor's estate, with a view to either liquidating or restructuring it. Accordingly, Article 4(2)(e) of EIR submits this matter to *lex fori concursus*, as most legal systems do, i.e., Article 200 of the Spanish *Ley Concursal* or § 335 of the German *Insolvenzordnung*.

However, legal instruments dealing with cross-border insolvency provide for two exceptions to the application of the *lex fori concursus* to the effects of insolvency proceedings on current contracts, specifically for contracts dealing with real estate and employment. These exceptions are laid down in Articles 8 and 10 of EIR, in Articles 206 and 207 of the Spanish *Ley Concursal* and §§ 336 and 337 of the German *Insolvenzordung*. The rules are the consequence of the many interests involved in these matters, which has resulted in a wide array of mandatory rules in both sectors. For this reason, the European Union and member states submit the impact of insolvency proceedings on such contracts exclusively to the law of the place where the property is located or the law governing the employment contract. The law applicable to insolvency proceedings is thus set aside, with the aim of avoiding conflicts between the mandatory rules laid down by these laws, whose basic purpose is to protect tenants and workers.[121]

Article 10 of Regulation 1346/2000, together with its national counterparts such as Article 207 of the Spanish *Ley Concursal* or § 337 of the German *Insolvenzordnung*, sets out the exclusive application of *lex laboris* to employment contracts and relationships. The underlying principle is worker protection, and employees are at least afforded the protection guaranteed by the law applicable to the contract in the event of their employer's insolvency. The *lex laboris* insolvency rules therefore determine the contract's fate, covering aspects such as its continuing validity, modification or termination as a result of the opening of insolvency proceedings, for example via a collective redundancy plan, and under which specific conditions, procedures and deadlines, as well as the rights and obligations arising from the new situation such as the right of workers to terminate their contracts where appropriate.[122]

In accordance with these provisions, the insolvency practitioner must apply the *lex laboris* insolvency rules to deal with employment contracts that are subject to the law of a state other than the one where insolvency proceedings were opened. The implementing of this law by a foreign insolvency practitioner may lead to problems of adaptation that the insolvency judge must try to resolve.[123] Such

[121] Virgós and Schmit Report (1995), para. 118.

[122] Virgós Soriano and Garcimartín Alférez (2003), p. 125.

[123] For example, the relevant law may require the approval of the court that opens the insolvency proceedings, but they may have been opened in a different member state. To solve this adaptation problem, Article 10a of the Proposal amending the EIR presented by the European Commission on 12 December 2012 [COM(2012) 742 final] suggested that 'the court which opened the insolvency proceedings shall have the competence to approve the termination or modification of these contracts'.

problems may prove insurmountable though, for example should the applicable law stipulate the exclusive intervention of the administrative or labour institution in the country of employment. In such cases, insolvency practitioners have to visit the country in order to take the steps prescribed by the law in question there.[124]

In response to these problems, the European Union has undertaken to harmonise the issue by means of Directive 2008/94/EC of the European Parliament and the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer.[125] Articles 9 and 10 deserve particular attention and deal with insolvent companies with activities in the territory of at least two member states, with a view to regulating the activities of each guarantee institution. Once an insolvency proceeding has been opened in a member state—a question to be decided in accordance with EIR—the guarantee institution in the country where the insolvent company's employees work or habitually provide services will take on their case. For these purposes, workers' rights are governed by the law of the competent guarantee institution.[126] Against this legal background, it is however doubtful whether the path opened by the CJEU to the application of national legislation establishing the right of workers to enjoy wage guarantees provided by national institutions is still applicable—in addition to that provided by the guarantee institution of the country of the habitual workplace—on a complementary or substitutive basis;[127] CJEU case law dealt with previous directives, now abrogated by the 2008 directive in force, which lacks any mention of this issue and thus creates a question mark over the matter.[128] For its part, Article 10 establishes coordination obligations between the guarantee institutions involved in cross-border insolvencies, in particular to share information on employees' outstanding claims to clarify the question of who is to pay them.

This Directive replaces others that previously addressed the issue, specifically Directive 2002/74/EC of the European Parliament and the Council of 23 September 2002, transposed by Spanish Law 38/2007 of 16 November regulating the statutory security for payment of unpaid wage claims in transnational insolvency procedures of companies with activities in more than one member state. The result of the transposition and instructions about how to act in these situations can be found in Sections 10 and 11 of Article 33 of the Spanish Workers' Statute, which places obligations on the Wage Guarantee Fund under Articles 9 and 10 of Directive 2008/94/EC. In Spain, these directives were transposed without excluding share fishermen,[129] whereas Greece, Italy, Malta and the UK actually excluded these workers

[124] Virgós Soriano and Garcimartín Alférez (2004), pp. 2922–2924.

[125] OJ No. 283, 28.10.2008. Comments by Orellana Cano (2009), pp. 469–479.

[126] See Article 9 of Directive 2008/98/EC.

[127] CJ 10.3.2011, Case C-477/09, *Défossez*, para. 35.

[128] For an affirmative response, see *Cour.Cass. (Ch.soc.)*, 4.11.2012, No. 11-22.166, and comments by Boskovic (2013).

[129] The Proposal for a Directive on seafarers presented by the Commission in November 2013 aims at putting an end to fishermen's exclusion from its scope of application [COM(2013) 798 final].

on the basis of Directive 2008/94/EC, whose Article 1(3) authorises states not to include them if other mechanisms offer equivalent protection. In this regard, we agree with the Commission that maritime liens do not provide the same protection since the vessel's value may not reach the minimum amount of outstanding claims allowed by the Directive.[130] In any event, seafarers whose workplace is in a third state are not covered by these directives,[131] and their transposition has not entailed extending their coverage.

The exception laid down in Article 8 of Regulation No 1346/2000 as such is thus limited to the effects of insolvency proceedings on current contracts. However, other aspects typically characterised as insolvency matters are not covered by the exclusion and therefore remain subject to the *lex fori concursus*; examples of these are the ranking of claims resulting from these contracts and creditors' rights once insolvency proceedings are over.[132] Other issues include the protection of worker's claims arising from their employment relationship, i.e., whether they are granted preference over other claims and, where appropriate, the amount of the protected claim and the ranking of the preference, or the lodging, verification and admission of claims.[133]

With respect to the ranking of claims and maritime employment, the 1993 Convention on maritime liens and mortgages comes to the fore,[134] as it prevails over domestic insolvency laws in decisions on these issues.[135] This Convention grants as maritime liens 'claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf', as well as 'claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel'.[136] The Convention does not distinguish between enforcement and insolvency proceedings, and the priority of maritime liens as prescribed in Article 5 in more favourable terms for seafarers than in previous regulations must always therefore be respected.[137]

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[130] See Commission Report to the European Parliament and the Council on the implementation and application of certain provisions of Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer, Brussels, 28.2.2011 [COM(2011) 84 final], p. 3. Information on the transposition of Directive 2008/94/EC has been taken from this Report.

[131] Requesting universal scope for this Directive, see Chaumette (2007), pp. 133–134, on the ground that these credits may be deemed alimony.

[132] See Virgós Soriano and Garcimartín Alférez (2004), p. 2920.

[133] See Virgós and Schmidt Report (1995), para. 128.

[134] Ratified by Germany on 11.7.1994 and Spain on 7.3.2002, among others. With the same object and prior to this, the 1926 and 1967 Conventions, the content of which was updated by the 1993 Convention.

[135] This is controversial in Spain. See, for all, Alonso Ledesma (2012), pp. 294–303; Ruiz Soroa (2007), pp. 119–130.

[136] Articles 4(a) and (b) of the 1993 Convention.

[137] *Cour d'appel* Aix-en-Provence, 15 ch. Civ., 1.2.2001, ship *Beloostrov*.

Seafarers' maritime liens now take priority over registered mortgages, 'hypothèques' and charges while ranking *pari passu* with those listed in Article 4 of the 1993 Convention, except salvage reward claims for the vessel, which take priority over all other maritime liens. In addition to this, the 1993 Convention lays down provisions on the forced sale of the vessel, and Article 12 establishes that costs and expenses arising out of the sale are to be paid before the creditors mentioned above are satisfied; these include, *inter alia*, vessel and crew maintenance costs, wages and other sums and costs referred to in Article 4(1)(a) such as repatriation costs, incurred from the time of the vessel's arrest or seizure.

When establishing the relationship of maritime liens with insolvency proceedings, it should be noted that the preference granted by maritime liens has an expiry date. Article 9 of the 1993 Convention provides for a period of 1 year—and also regulates the point at which this period starts—which can only be interrupted if the creditor entitled to it is not permitted by law to proceed with the arrest or seizure of the ship. After this 1-year period, the 1993 Convention no longer protects the creditor, and the rank and status of the claim in question is determined by the corresponding *lex fori concursus*. For example, in accordance with the Spanish insolvency law, a maritime lien results in the right to separate enforcement over the vessel, in such a way that only the residuary funds of the forced liquidation become part of the estate of the insolvency proceedings.[138] Hence, maritime liens are not affected by the stay of enforcement of security interests on debtors' estates that are associated with their business activities.[139] Holders of maritime liens such as seafarers[140] are then entitled to arrest the vessel, at least for a 1-year period from the date of the opening of the insolvency proceeding. Once this period is over, the classification and ranking of credits is governed by the provisions of the Spanish Insolvency Act.[141] When the arrest of the ship is effected in a country other than that of the opening of the insolvency proceeding, the seized court may proceed to the recognition of the foreign decision ordering the opening of the insolvency proceeding.[142]

The *lex fori concursus* is not always applicable to the effects of insolvency proceedings on maritime liens, however. In addition to granting their holders priority of payment, maritime liens are characterised by the right to obtain *erga omnes* satisfaction from the attached asset.[143] For our purposes, Article 5 of EIR

[138] Article 76(3) of the Spanish Insolvency Law.

[139] Article 56 of the Spanish Insolvency Law.

[140] The scope of application of the 1952 and 1999 Conventions does not fully match that of the 1926 and 1993 Conventions. It is therefore necessary to distinguish between arresting a ship on the ground of a maritime lien and doing so on the basis of a normal loan. For more on the Spanish doctrine, see Rodríguez Ruiz de Villa (2010), pp. 175–198.

[141] Article 76(3), *in fine* of the Spanish Insolvency Act.

[142] Along these lines, see the Venice Tribunal in judgments of 21.12.2010, 23.12.2010 and 24.2.2011, ship *Delphin*, with comments by dal Maso (2011). In France, see *Cour d'Appel* Aix-en-Provence, 29.6.2011, with comments by dal Maso (2013).

[143] Dealing with its nature, see for all Domínguez Cabrera (2010), pp. 145–154.

dealing with third parties' rights *in rem* is important; this applies when insolvency proceedings over employers are opened, provided that both their centre of main interest and the vessel are located in member states.[144] In establishing the ship's location, regard must be paid to Article 2(g) of Regulation 1346/2000, which lays down a general rule that indicates the place where an asset was entered in a public register, therefore to the place where the vessel was registered.[145] When the ship's registration and centre of the debtor's main interests point to a member state, Article 5 is applicable provided that they are different member states; in the absence of one of these prerequisites, national insolvency rules are applicable.

Pursuant to Article 5, third party rights *in rem* are not affected by insolvency proceedings, provided that the asset related to the said right is located in a member state other than the one in which insolvency proceedings have been opened. Therefore, maritime liens falling within its scope are not affected by the insolvency proceedings, and holders may, for example, ignore a temporary stay imposed by the relevant *lex fori concursus*. In contrast, Article 201 of the Spanish *Ley Concursal* or § 351 of the German *Insolvenzordnung* provides for an exception to the application of the *lex fori concursus* as well but submits this issue to the insolvency rules laid down in the *lex rei sitae*. This law decides the effects of the insolvency proceeding on the maritime lien in question. This provision is intended to protect creditors by removing the legal uncertainty generated by the unpredictability of where insolvency proceedings will be opened, and thus which law will decide on the preference granted to creditors holding a right *in rem*, and whether they may effect it or not.

4.3 Connections Provided for in Article 8 Rome I Regulation

4.3.1 Origins and Structure

Although expressed in slightly different terms, Article 8 of the Rome I Regulation follows Article 6 of the Rome Convention, and both are therefore to be interpreted along the same lines due to reasons of consistency in the European Area of Justice, as highlighted by the CJEU in *Koelzsch v Luxembourg*.[146] The latter provision introduces the protection of workers—the weaker party to a contract—into the Rome Convention by establishing measures to counterbalance the other party's dominant position. All those measures are reproduced in Article 8 of the Rome I Regulation, save a few changes arising from the proposals submitted by both the

[144] See Alonso Ledesma (2012), p. 313; dal Maso (2011), pp. 617–618; dal Maso (2013), pp. 202–204.

[145] In these terms, see Virgós and Schmidt Report (1995), para 69.

[146] See CJ 15.3.2011, Case C 29/10, *Heiko Koelzsch v Großherzogtum Luxemburg*.

GEDIP and the Max Planck Institute for Comparative and Private International Law.[147] None of those provisions mentions work performed on board a ship; nonetheless, seafarers' and fishermen's employment contracts are also included within the scope of both provisions, whose connecting factors are to be read in the light of the peculiarities of work at sea.

The first of the measures to put employees and employers on an equal footing is the admission of party autonomy to choose the applicable law, albeit limited to cases in which it benefits workers.[148] By submitting the contract to the chosen law, employers may seek to deprive employees of the protection granted to them by mandatory rules contained in the law otherwise applicable. Worker protection is achieved by their not being deprived of the set of mandatory rules that would govern the contract in absence of choice of law, i.e., the chosen law is applicable as long as it is more favourable to the worker than the law otherwise applicable.[149]

Result-oriented considerations lie behind this particular choice of law, but they are absent from the remaining connecting factors, selected according to the principle of proximity and predictability.[150] In default of choice of law, the country of the habitual workplace comes to the fore as a foreseeable law for both parties, and one that is close to them. Nevertheless, determining this place is not a simple operation when an employee performs services in different countries or in areas that are not subject to sovereignty, as is the case with work carried out on board a vessel. An alternative connecting factor has been established for cases where identifying the habitual workplace is impossible, i.e., when the employee does not discharge duties to the employer in one and the same country; the contract is then subject to the law of the place where the business which engaged the worker is located. This conflict rule is in fact closed by an escape clause to which the seized court is granted discretion to assess whether there is a law that has closer links with the employment contract under the circumstances in question, i.e., a law with more significant contacts with the employment relationship than the law of the habitual workplace or, failing that, the law of the place where the business which engaged the employee is located.

In view of these connecting factors, the law applicable to the employment contract in the absence of choice of law is particularly significant, as it operates not only by default but also when the parties have actually selected a different law

[147] Respectively, GEDIP (2001); and the Max Planck Institute for Comparative and Private International Law (2004), pp. 1–118; Max Planck Institute for Comparative and Private International Law (2007), pp. 225–344. Previously, the work of Gamillscheg (1961), pp. 265–290, 477–498, 677–699, on the development of a bilateral conflict rule in employment contract matters is a key one.

[148] On the historical crystallisation of these connections, see Moura Ramos (1997), pp. 1886–1892.

[149] On party autonomy in general when it comes to protecting the weaker party, see Leclerc (1995), pp. 99–225.

[150] See Gardeñes Santiago (2008), pp. 387–424; Gaudemet-Tallon (2008), p. 195; Mankowski and Knöfel (2011), pp. 524–525. In this sense, while addressing Article 6 of the Rome Convention seeking worker protection, Kaye (1993), p. 221.

to govern the contract. For this reason, when it comes to applying this conflict rule, the *modus operandi* always starts from establishing the applicable law in the absence of choice of law and then proceeds to compare the two legal systems and decide whether the law chosen by the parties to the contract may be applied as more favourable to the worker than the one otherwise applicable.

The following pages are devoted to discussing these connecting factors and their application when the employment relationship is mainly effected on board a vessel. In these cases, the fact that the ship ceased to be considered a territory long ago becomes critical.[151] Nonetheless, both public international law and international labour law are still based on the fiction that the flag state is, *inter alia*, responsible for living and working conditions on board. Preservation of this fiction has to be defended within the framework provided by private international law as well, given that the habitual workplace of seafarers and fishermen is the vessel and the fiction is the only thing that makes this connecting factor meaningful. Although it was ultimately not successful, it is worth bearing in mind that the Proposal for a Rome II Regulation did enshrine this fiction in a rule aiming to provide guidance in the event of damage occurring in a non-sovereignty area.[152] In the same vein, there is a specific reference to the flag state in Article 11(4) of the Regulation (EC) No 883/2004 on the coordination of social security systems.

It has already been indicated here that this dogma is subject to the tensions generated by globalisation, allowing shipowners to choose the applicable law through their choice of country of ship registration. The outcome is an acute case of forum shopping, which in turn encourages another malady, social dumping. In this context and from the standpoint of seafarer's protection, it seems difficult to maintain that the law of the flag state *qua* the law of the habitual workplace is the law governing the employment relationship. Other interpretations have been explored with the aim of providing a more suitable law to govern the employment contracts than the flag law, ranging from directly resorting to the law of the place where the engaging business is located to systematic use of the escape clause, in an attempt to identify the most favourable law to the worker every time. However, the first proposal is based on a connecting factor that can easily be manipulated by the employer, and the second alternative—involving avoiding other connections and always applying the escape clause—clashes with the philosophy behind Article 8, as result-oriented considerations only inform part of the conflict rule laid down there.[153] With the exception of the choice of law, all the remaining connecting factors—including the escape clause—are to be applied according to the principle of proximity and foreseeability, but not with the aim of picking the most favourable

[151] Against the law of the flag state because the flag designates not a territory but a nationality, see Fotinopoulou Basurko (2008), pp. 172–178.

[152] Article 18(b) of the Proposal for a Regulation on the law applicable to non-contractual obligations [COM (2003) 427 final].

[153] Déprez (1995), p. 324, warns against the risks of turning the determination of the applicable law into an equity judgment aimed at protecting the weaker party.

law for the worker. Nevertheless, the escape clause does appear to be an adequate countermeasure to flags of convenience, in particular once the CJEU clarified that this clause had to be understood to be a further connecting factor,[154] not subordinate to the previous ones, and consequently not of exceptional application.

Finally, it must be borne in mind that these factors largely overlap with those in Article 19 of the Brussels I Regulation and the Lugano Convention, 21 of the Brussels I *bis* Regulation, a fact that indicates lawmakers' interest in establishing a coincidence between *forum* and *ius*. With this objective in mind, these common concepts should give rise to an autonomous and above all common interpretation, so for this reason many of the considerations used in the discussions on seafarers' employment contracts and international jurisdiction issues are also valuable in this chapter.

Be that as it may, despite the clear interest in laying down a basis for the seized court to apply its own law, potential deviations between *forum* and *ius* are of course possible, first, because parties to the contract may resort to choice of law and choice of forum clauses are also admitted, but on more restrictive terms than the former; second, because the conflict rule laid down in Article 8 contains an escape clause that can set aside the law of the habitual workplace or, failing that, the law of the business which engaged the employee, in favour of a law that has closer connections with the employment relationship. This is the consequence of the fact that the two sets of rules serve different objectives, which may have also a say in applying the relevant connecting factors.

4.3.2 Party Autonomy

4.3.2.1 Agreement on Choice of Law

The first connecting factor in individual employment contract matters is party autonomy. However, it should be noted from the outset that this only plays a residual role in the case of seafarers.[155] The internationalisation of the maritime and fishing labour markets allows shipowners to resort to other mechanisms that bring about identical results, such as registering vessels in states with poor working conditions or contacting employment and placement agencies in countries with significantly lower labour costs than those shipowners would have incurred by recruiting seafarers at company headquarters. In both situations the issue of the choice of law applicable to the contract is relegated, in the second because the real chances for seafarers or fishermen to file complaints are restricted to the state where they were recruited.

[154] CJ 12.9.2013, Case C-64/12, *Schlecker v Boedecker*, para. 36.

[155] As a matter of fact, choice of law is only exceptionally used in individual employment contracts in general. On this point, see Junker (2007), pp. 20–21; Lorenz (1987), pp. 269–276. In Spain, see Fotinopoulou Basurko (2008), pp. 159–161.

This does not mean, however, that the possibility of selecting the applicable law is not welcome; on the contrary, it has become even more interesting in the current context of the relocation of shipping and fishing businesses.[156] Indeed, against the present background of international mobility, being able to decide on the law governing contracts provides legal certainty as it avoids unforeseeability regarding the applicable law in cases in which employees discharge their duties to their employers in more than one country. In addition to this, parties to a contract are in a better position to decide which law is most closely connected with their relationship. This also applies to seafarers and fishermen, although some kind of limitation on the exercise of party autonomy is unavoidable given the inherently unequal balance of power between the parties to employment contracts. Party autonomy is thus admitted as a connecting factor but also is subject to a serious restriction, namely, that the chosen law will only be applicable as long as it is more favourable than the law that would govern the contract in the absence of such a choice.

The conditions the choice of law clause has to meet to be valid and effective are established in Article 8 of the Rome I Regulation—or 6 of the Rome Convention—by reference to Article 3(1) of the Rome I Regulation, which in turn refers to Articles 10, 11 and 13 laying down respectively the law governing its substantive validity—the law chosen by the parties to the same agreement on choice of law; its formal validity—dependent on the alternatives offered by Article 11; and the capacity to contract, at least among parties located in the same country. This is because, as mentioned above, this issue is generally not governed by either the Rome I Regulation or the Rome Convention and depends on the respective applicable law according to national conflict rules, for example referring the issue to the national law of the person in question, as both Spanish and German laws do. In addition, it is important to emphasise that the choice is always between legal systems, that is, Article 3 does not admit agreements that opt for non-state systems such as the labour rules enshrined in ILO conventions. In such cases, the agreement is characterised as a substantive covenant whose validity depends on the relevant applicable law, but not as a choice of law clause.[157]

More specifically, Article 3 admits both express and tacit choice of law.[158] Here, it is important to highlight that the choice of law clause may also be contained in a collective agreement.[159] In such cases, the choice of law is not among the terms of a

[156] On the grounds of party autonomy today, see Basedow (2011), pp. 32–59, highlighting its contribution to legal certainty. Regarding employment contracts in particular, see Gamillscheg (1983), pp. 313–318.

[157] See Recital 13 of the Rome I Regulation, and Deinert (2013), p. 109.

[158] For example, SSTSJ Canarias, Las Palmas, *Sala de lo Social*, Sección 1, No. 159/2005, and No. 158/2005, 7.3.2005, where the agreement referred to the Spanish law.

[159] See STSJ Galicia, *Sala de lo Social*, No. 2004/2008, 30.6.2008, with comments by Palao Moreno (2008), pp. 937–939, citing previous case law, in particular STS 10.6.1998: after the vessel changed flag, the collective agreement included a clause choosing Bahamian law as applicable to the employment contracts. In Italy in May 1998, the ITF concluded a collective

particular individual employment contract, but a collective agreement applicable to the industry, business or establishment in question, so that the choice of law contained there reaches all employment contracts within its scope of application.[160] This approach raises doubts as to whether it should be the other way around, i.e., first, ascertaining the law applicable to the contract and, second, assessing whether the relevant collective agreement is part of this law.[161] Nevertheless, doubts as to the binding effect of these clauses on particular contracts are dissipated by the fact that a collective agreement is an expression of private autonomy as well.[162] Fewer doubts have been expressed with respect to the choice of law clause included in general terms, as long as the legal conditions arranged to guarantee that the terms are not unfair are met.[163]

The choice of law may also be 'clearly demonstrated by the terms of the contract or the circumstances of the case'. The way in which a tacit choice is asserted is a different matter that may adversely affect the worker, for which reason legitimate doubts arise as to whether it ought to be permitted in employment contracts. The fact that the mandatory provisions of the default law governing the contract are to be applied supports a choice implied from the circumstances as a whole, which at any rate must be 'clearly demonstrated'.[164] In this sense, it is not enough to simply point to some indication that the parties prefer one legal system over others, but rather the terms of the contract or circumstances of the case must point unequivocally to a given legal system.

Recital 12 of the Rome I Regulation is a reminder that choice of forum clauses are relevant when assessing whether a choice of law may be implied from the terms of the contract. The operability of choice of forum agreements is certainly restricted in employment contract matters to the benefit of workers.[165] For that very reason, they should be deemed to be significant indicators that the parties to the contract

agreement covering ships registered in the Italian international registry, which included a clause submitting the employment contracts of non-Community seafarers to the law of their habitual residence. See this information in Zanobetti Pagnetti (2008), p. 197. In Germany, see Franzen (2011), p. 181, para. 11; Magnus (2011), p. 573, paras. 63–64; Plender and Wilderspin (2009), pp. 302–303, paras. 11-005-11-006; Schlachter (2014), para. 7.

[160] For example, LAG Rheinland-Pfalz, 16.6.1981, dealt with a collective agreement adopted by shipping companies, which provided for the application of German labour law, including its collective agreements.

[161] With the same doubts, see Müller (2004), p. 126; Thüsing (2003a), pp. 1304–1305.

[162] See further Deinert (2013), pp. 106–109.

[163] See Martiny (2015), para. 32; Oetker (2009), para. 18; Thüsing (2003a), p. 1304. Nevertheless, see Deinert (2013), pp. 105–106.

[164] See Gardeñes Santiago (2008), p. 402; Müller (2004), pp. 119–121. Denying a tacit choice of law at that time, see Lyon-Caen (1991), p. 54, on the ground of French courts' arbitrariness while dealing with these cases before the entry into force of the Rome Convention. In any event, appreciation must be undertaken *ex officio*. See Jault-Seseke (2005), pp. 259–277, dealing thoroughly with French case law.

[165] Article 21 of the Brussels I Regulation and the Lugano Convention, 23 of the Brussels I *bis* Regulation.

intended to apply the law of the designated forum while simultaneously contributing to the objective of establishing concurrence between *forum* and *ius*, thus avoiding the costs of proof of foreign law.[166]

Other relevant factors emerge when, for example, an employee seeks the payment of claims arising from a particular law[167] or, more generally, when the contract contains typical institutions of a given law and is also written in the language of the state concerned,[168] when the parties settle their disputes in court in accordance with the law of the forum,[169] when the services to be performed are restricted to one particular establishment and the worker's social protection is provided for a given social security system[170] and even in cases where the choice of law results from correspondence between the parties or is contained in a previous contract that has been renewed, without further evidence that modifying the contract has altered the relationship between the parties.[171] Another powerful indication for the purposes of discerning a choice of law from the terms of the contract is any express reference to a collective agreement in the specified country.[172] However, none of these indications in themselves can be considered conclusive evidence of a tacit choice of law. On the contrary, the very fact that there is no express choice reinforces the idea that only in circumstances that clearly point to a particular law is it possible to infer that the parties truly intended it to be applied.

Article 3 of the Rome I Regulation and the Rome Convention also admits a partial choice of law, applicable to just a few aspects of the contract, and provided that it does not compromise the contract's consistency, for which reason the choice of law clause must address a severable part of the contract such as dismissal or certain benefits.[173] The provision also addresses time issues by stipulating that the choice of law can be concluded at any time during the life of a contract and is therefore modifiable or replaceable. Employment contracts are no exception to this

[166] See Deinert (2013), pp. 112–113; Gardeñes Santiago (2008), pp. 402–403. However, noting the weakness of this indication, which must be accompanied by others, see Coursier (1993), pp. 66–67; Wurmnest (2009), p. 489.

[167] BAG 9.10.2002 – 5 AZR 207/01.

[168] As happened in *Corte di Cassazione, S.U.*, No. 10293, 18.10.1993, ship *Rodis Island*, with comments by d'Alessio (1994) and Queirolo (1994); *Corte di Cassazione, S. U.*, No. 10730, 28.10.1998, *La Costa d'Argento Charter Boat GMBH S.R.L c. A. Coli*; or LAG Niedersachsen 4.4.2003 – 10 Sa 1845/01, expressly mentioning the fact that they submit to a German collective agreement.

[169] Among others, Junker (2007), p. 17.

[170] See Franzen (2011), p. 180, para. 11.

[171] See Casado Abarquero (2008), pp. 237–238; Coursier (1993), pp. 70–76.

[172] See BAG, 26.7.1995; LAG Köln, 6.11.1998; Junker (2007), p. 15. Clausnitzer and Woopen (2008), p. 1804, add the cases in which employees' tasks are to be performed only at a given employers' business or they submit to particular rules thereof. In English doctrine, see Collins et al. (2006), p. 1666, and Merrett (2011), para. 6.51, p. 198; and in French doctrine, Fieschi-Vivet (1987), p. 258, also referring to model contracts designed according to a particular legal system.

[173] BAG 23.4.1998. Previously, in contrast, see Gamillscheg (1983), pp. 307–308. In favour, see Leclerc (1995), pp. 138–141; Oppertshäuser (2000), p. 394; Reiserer (1994), pp. 674–675.

rule, and the applicable law may change during their lifetime. Since this is a long-lasting relationship, the issue arises as to when the new law chosen by the parties will be effective. The principle of party autonomy plays a part here, and so the parties may decide whether to apply the choice of law agreement *ex tunc* or *ex nunc* at the time it is entered into. Should they not explicitly address this issue, the bulk of doctrine rightly indicates that the choice of law ought to be interpreted as being operative from the outset of the employment relationship.[174]

4.3.2.2 Limitations to Party Autonomy Based on the Principles of Proximity and Protection

Limitations to party autonomy may be classified according to the principles of proximity and protection, among other criteria.[175] First, the choice of law is restricted to laws that have some relation with the case, that is, to laws connected with the contract whose law is to be established.[176] A limitation of this type is set out in Sections 3 and 4 of Article 3 of the Rome I Regulation with the aim of avoiding the displacement of the mandatory provisions of the law that would have governed the contract had the choice of law not in fact been agreed on. Thus, Article 3(3), like Article 3(3) of the Rome Convention, establishes that when all relevant aspects of the situation are located in a country other than the one whose law has been chosen, 'the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement', i.e., when an employment contract is concluded in Spain between persons domiciled there for the provision of services on board a ship flying the Spanish flag, the parties may choose to submit their relationship to a different law, but this will only govern the contract and its vicissitudes within the framework provided for by Spanish mandatory rules.[177] To assess whether the employment contract is a domestic one, the time at which the choice of law is made has to be considered, although an exception to this rule deserves to be made if the contract is

[174] See, for all, Müller (2004), pp. 124–125.

[175] See Gardeñes Santiago (2008), pp. 399–403.

[176] In fact, this is how the Swiss legislator protects workers, by restricting choice to a list of laws as provided for by Art 121 of the Swiss Act of Private International Law 18 December 1987 (AS 1988 1776). Article 43 of the Law of the People's Republic of China on the Application of Law for Foreign-related Civil Relationships of 28 October 2010; Article 67 of the Tunisian Code on Private International Law issued by Law 98-97, 27 November 1998; and Article 94 of the Panamanian Private International Law Code, issued by Law of 8 May 2014 (*Gaceta Oficial Digital* No 27530, 8.5.2014), do not simply pay regard to choice of law.

[177] In any case, and in the light of Article 8(1) of the Rome I Regulation/6(1) of the Rome Convention, this provision – just like the following one (3.4) – has a very limited scope of application. On this point, see Kaye (1993), p. 230.

concluded with the aim of posting workers abroad.[178] Finally, it is important to observe that if domestic law prevails, this can lead to an outcome that is contrary to the aim of applying the law that is most favourable to the worker. Accordingly, it has been rightly suggested that Article 8(1) of the Rome I Regulation ought to prevail over Article 3(3), meaning that the chosen law should be applied instead of the domestic law whenever it is more favourable to the worker.[179]

Unlike Article 3(3), Article 3(4) of the Rome I Regulation has no equivalent in the Rome Convention. Formulated in a similar way to Section 3, it aims to avoid party autonomy being used to circumvent mandatory provisions enshrined in this case by EU law. The provision thus targets cases where all the relevant elements are located in one or more member states but where the choice of law has been concluded in favour of a third state. Accordingly, the choice of law is not a means to escape from 'the application of provisions of Community law, where appropriate as implemented in the Member state of the forum, which cannot be derogated from by agreement'. The scope of this limitation is debatable,[180] but it refers to provisions laid down in EU instruments that also deal with work at sea. Nevertheless, the rule does not clash with others that determine the scope of application of EU law, that is, it does not prevent the respective directive from being applicable when not all the contacts in the case point to European Union territory, in other words, when its scope of application is broader than that provided for in Article 3(4).

Other limitations to party autonomy directly point to the protection of the weaker party by grading the effectiveness of the choice of law, depending on which legal system is more protective, whether it is the one that is chosen or the one that is otherwise applicable.[181] The protection granted to employees relies on the provisions contained in the law that is applicable in the absence of choice of law and that cannot be derogated from by agreement, meaning all mandatory provisions provided for without exception, for example with regard to the underlying policy: whether they aim to protect workers or target other interests instead.[182] It is

[178] See Junker (1992), p. 253.

[179] See Magnus (2011), p. 570, para. 54; Martiny (2015), para. 127; Schlachter (2014), para. 20.

[180] See Gardeñes Santiago (2008), pp. 400–401. Noting its usefulness, in particular before member states' transposition of directives, see Knöfel (2006), p. 280, who makes his point with the example of discrimination.

[181] Articles 8(1) of the Rome I Regulation, and 6(1) of the Rome Convention. Following this example, see Art 12 of the Japanese Act on the General Rules of Application of Law, enacted by Law No. 87, 21 June 2006; Art 28 of the South Korean Act on Private International Law adopted in 2001, enacted by Law No. 6465, 7 April 2001; Article 27 of the Turkish Act on Private International and Procedural Law No. 5718, 27 November 2007 (as translated by Wilske S and Esin I).

[182] See Gardeñes Santiago (2008), p. 401, note 54; Collins et al. (2006), p. 1666; Junker (1992), pp. 262–267; Kaye (1993), pp. 224–227; Martiny (2015), paras. 36–39; Pocar (1984), pp. 378–379.

important to note here that these provisions may be contained in collective agreements as well or in public law rules that have a certain impact on the employment relationship.[183]

It is even more important to highlight the fact that Article 8(1) of the Rome I Regulation seeks to clearly differentiate between the provisions it refers to—those 'which cannot be derogated from by agreement'—and those in Article 9 dealing with overriding mandatory rules, *lois de police* or *lois d'application immédiate*. In fact, the provisions that Article 8(1) of the Rome I Regulation refers to are in line with those included in Sections 3 and 4 of Article 3 of the Rome I Regulation since all of them deal with mandatory rules. They are not to be confused with overriding mandatory rules, which are applied regardless of the law applicable to the employment contract, as they aim to preserve the forum's core values and essential policy options. This distinction does not mean that the overriding mandatory rules contained in the *lex laboris* are not applicable through Article 8(1), but this rationale does not work the other way around, i.e., the provisions referred to in Article 8(1) cannot be applied via Article 9 of the Rome I Regulation.

The mechanism devised in Article 8(1) of the Rome I Regulation and in Article 6 (1) of the Rome Convention for worker protection obliges more than one legal system to be taken into account, which may lead to a *dépeçage* on one hand[184] and problems of proof of foreign law on the other, making it impossible to tackle the comparison of legal systems as required by the provision at stake.[185] This rule includes a requirement according to which two laws must be compared so that the more favourable of the two can be applied to the worker.

In principle, the comparison should be comprehensive, given that the purpose is not to build an *ad hoc* scheme by picking out the most beneficial provision for the worker from each legal system. Nevertheless, the huge difficulties that the seized court faces in proceeding to such a comprehensive comparison preclude this approach[186] and it has therefore been suggested that what has to be dealt with is the specific issue at hand, and not the rule under discussion, since that would lead to fragmentation of the applicable laws.[187] There are many practical reasons for doing this, in particular that a court cannot be asked to compare all the legal systems

[183] See, for all, Hoppe (1999), p. 96; Junker (2007), p. 19.

[184] Clearly in favour, see Polak (2004), p. 335.

[185] See Wurmnest (2009), p. 487, who nevertheless acknowledges that the parties usually choose the law that is in fact applicable in the absence of such choice.

[186] Differently, see Casado Abarquero (2008), pp. 280–288. The Italian Supreme Court understood it in this way in a case in which Italian law was chosen, rejecting the seafarer's arguments in favour of the law of the flag, Panama. See *Cass.lav.*, Nr. 13053, 1.6.2006, *G. Meglio v. Gracemar S. A.*, Ship *Madeira*. In any event, this judgment deserves to be criticised because it did not apply the protection of the weaker party established at the time in Article 6(1) of the Rome Convention and also because it avoided addressing whether the choice of law was only partial, as the employee suggested.

[187] Explaining the three methods of comparing these laws and the difficulties each involves, see Deinert (2013), pp. 125–128.

involved to assess whether or not one protects workers better than another in general terms.[188] The reasonable and sensible thing to do is to focus on the legal issue raised by the case at hand; more specifically, in assessing whether one legal system is more favourable than another, the comparison should be restricted not to the specific provisions for resolving the issue but to those regulating the institution in question.

The CJEU judgment *Voogsgeerd v Navimer*[189] offers an example of this kind of operation, as the employee claimed protection under Belgian law as the law applicable in the absence of choice of law; the contract was actually submitted to the law of Luxembourg, which sets a shorter time limit on dismissal claims than that established in Belgium and according to which the time limit had already expired. In dealing with the case, the CJEU did not discuss how to compare the two laws, but it is clear that the Court did not consider proceeding to a comprehensive comparative analysis possible. A comparison of the time limits for the opening of proceedings should not be sufficient either. In contrast, the two regulations on dismissal have to be subjected to careful assessment, including the grounds for dismissal, the consequences of a declaration of unfair dismissal and even the rules of evidence.[190] The comparison must be carried out by the seized courts since they have the authority to determine which law is most favourable to the employee. In this regard, the arguments put forward by the worker are not sufficient for concluding which legal system should decide on the case at hand,[191] although they cannot simply be ignored for practical reasons.[192]

[188] With this view, see de Boer (1990), pp. 42–45; Coursier (1993), pp. 249–251; Fieschi-Vivet (1987), p. 259; Franzen (2011), pp. 182–183, paras. 16–22; Gardeñes Santiago (2008), pp. 403–406; Hoppe (1999), pp. 96–98; Magnus (2011), pp. 579–580, paras. 83–89; Martiny (2015), para. 42; Müller (2004), pp. 172–178; Oetker (2009), para. 26; Thorn (2012), p. 2652, para. 8; Thüsing (2003a), p. 1307. Undermining difficulties in comparing, see Pocar (1984), p. 383. Contra, Kaye (1993), pp. 228–229.

[189] CJ 15.12.2011, Case C-384/10, *Jan Voogsgeerd v Navimer SA*.

[190] With this approach, see LAG Baden-Württemberg, 15.10.2002, and comments by Thüsing (2003b), pp. 898–900; Thüsing (2003a), p. 1307. Critical, Junker (2007), p. 20; Junker (1992), pp. 275–279; Morse (1992), pp. 15–16.

[191] See Deinert (2013), pp. 127–128.

[192] See Salvadori (1993), pp. 64–65, mentioning the following example: between readmission and damages, the worker must decide which law most furthers his interests, citing *Cour d'Appel de* Paris, 27.11.1986. See commenting this decision, Lyon-Caen (1988), pp. 322–329.

4.3.3 Applicable Law in the Absence of Choice of Law

4.3.3.1 The *lex loci laboris*

Justification

An individual employment contract's centre of gravity is the location where the work is to be carried out, a place agreed on by employer and employee and consequently known to both parties, which means that both expect this place's law to be applied. Other pro-worker considerations also emerge, as this connection gives priority to the one stable factor within the employment relationship, while simultaneously allowing for equal treatment of all parallel employment contracts since they are all submitted to the same law, i.e., the same law governs the employment relationships of all employees in the same workplace, thereby ensuring equal opportunities for them all[193] and thus avoiding the distortion of competition and the potential social dumping that may result from this distortion.[194]

In favour of this connecting point,[195] it should also be noted that the regulation of the employment relationship is riddled with general and public interests that express national concerns about the regulating of the labour market.[196] The application of the *lex loci laboris* to the entire employment relationship does actually facilitate the work of applicators by avoiding the need to take other laws into consideration,[197] as it must be borne in mind that, in addition to the *lex laboris*, the mandatory rules of the state where the services are performed may come into play when deciding on the employment relationship, via Article 9 of the Rome I Regulation, which actually deals with the overriding mandatory rules of the forum state, as may Article 12(2) dealing with manners of performance and steps to be taken in case of substandard performance. The application of the *lex loci laboris* does reduce the cases in which applicators have to take these other laws into account.

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[193] Claiming that this connection is primarily underpinned by the principle of worker protection and only secondarily by the principle of proximity, see de Boer (1990), p. 42; Polak (2004), p. 326.

[194] In these terms, Zanobetti (2011), p. 356.

[195] Also laid down in Articles 43 of the Law of the People's Republic of China on the Application of Law for Foreign-related Civil Relationships, 12 of the Japanese Act on the Application of Laws, 94 of the Panamanian Private International Law Code, 67 of the Tunisian Private International Law Code; Article 27 of the Turkish Act on Private International and Procedural Law; Article 28 of the South Korean Act on Private International Law; and Article 121 of the Swiss Private International Law Act.

[196] See Leclerc (1995), p. 485; Lorenz (1987), p. 275; Simitis (1977), pp. 155–157.

[197] With this proposal, see Article 3 of the Resolution of the Institut de droit international, 3.8.1971, during the Zagreb session on 'Conflicts of Laws in the Field of Labour Law'. See further Gamillscheg (1983), p. 285; Krebbert (2000), pp. 517–518; Szászy (1968), p. 99; Morgenstern (1987), pp. 40–48, with a list of national laws that laid down this connection before its codification by the Rome Convention, pp. 309–313.

Unlike Article 4 of the Rome I Regulation and the Rome Convention, Article 8 does not take into account the habitual residence of the person carrying out the characteristic performance of the contract. This deviation from what resembles a general rule is explained by the different economic analyses underlying the two provisions. The first conflict rule aims at facilitating international trade for those celebrating contracts with numerous counterparties in different countries, whereas the second focuses on an individual relationship with a party that cannot be simply deemed a supplier and whose protection is to be granted by other means.[198]

As already mentioned, the paramount role granted to the *lex loci laboris* is grounded in considerations of proximity and foreseeability for the parties to the employment relationship. In this context, there is apparently no room left for worker protection; however, the CJEU recently revisited this approach, highlighting the fact that as the *locus laboris* is foreseeable and close to the parties, this in itself is a protection for employees since they are covered by a law they are familiar with.[199]

The advantages of the *locus laboris* in terms of proximity and foreseeability determine its relative priority *vis-à-vis* the connecting factor stipulated for occurrences in which it is not possible to identify a habitual place of work in one country, namely, the place where the business through which the employee was engaged is located. In fact, this connecting point can easily be manipulated by the employer, and this convinced the CJEU of the constant need to identify a habitual workplace, even when a worker provides services in different states, 'to guarantee adequate protection to the employee';[200] in other words, all workers *must* have a habitual workplace, meaning the country with which the work performed 'has a significant connection'.[201]

The position adopted by the Court is somehow questionable because it does not respect the architecture of Article 8 of the Rome I Regulation insofar as it confers a significant discretionary power onto the seized court to decide where the habitual workplace is situated, thus to the detriment of the connecting point, which is

[198] See Gardeñes Santiago (2008), p. 408, note 73.

[199] CJ 13.7.1993, Case C-125/92, *Mulox*, para. 19; 27.2.2002, Case C 37/00, *Weber*, para. 40. As stated in *Mulox*, para. 18, 'in *Ivenel* and *Six Constructions*, the Court took the view that, in interpreting that provision of the Convention, account must be taken of the concern to afford proper protection to the party to the contract who is the weaker from the social point of view, in this case the employee'. See Leclerc (1995), pp. 486–489, already highlighting the significance of connections other than the choice of law, in particular for the protection of workers whose guarantee is ultimately the escape clause.

[200] CJ 15.12.2011, Case C-384/10, *Jan Voogsgeerd v. Navimer SA*, para. 35, and comments by Junker (2012), pp. 41–42; Knöfel (2014), p. 131.

[201] CJ 15.3.2011, Case C 29/10, *Koelszch*, para. 44; 15.12.2011, Case C-384/10, *Jan Voogsgeerd v. Navimer SA*, para 36. Some opinions previous to these judgments criticised focusing on this connection given that it gave rise to fictions, i.e., places that had nothing to do with the provision of services, either temporarily or spatially. See, for all, Hoppe (1999), pp. 144–150, warning against the risk of making the escape clause superfluous (p. 150). On the need to determine the most favourable law for the employee, see Fieschi-Vivet (1987), p. 259.

designed precisely to intervene when problem cases arise. The business through which the employee was engaged therefore becomes a residual connection, on the ground that it does not have the most significant link with the employment relationship. In contrast, the most significant connection with a country leads us to the place where the characteristic performance of the contract is carried out, which is the ultimate justification of the *locus laboris* as a connecting point. The same rationale should explain the relationship between this connection and the escape clause, which allows the seized court to deviate from the habitual workplace and resort to a closer law to the employment relationship.

Finally, when the law governing the employment contract is being established, the interrelationship sought between concepts employed by all instruments linked to the European Area of Justice, such as the Brussels I, Brussels I *bis* and Rome I Regulations, should also be taken into account;[202] these are explained in detail above when dealing with the scope of CJEU case law.

Work Performed at Sea

As seen in the field of international jurisdiction, it is necessary to distinguish between different cases when identifying *locus laboris* in the fishing and shipping sectors. Two clarifications need to be made: the first is connected to public international law to take into consideration the type of waters in which a vessel sails or fishes in pursuit of its objective, while the second focuses on workers who serve on a single vessel or on different ones.

This section deals with seafarers or fishermen who carry out their tasks on one vessel, making it therefore possible—at least in theory—to locate a habitual place of work by taking into account public international law, as shown by the CJEU case law contained in *Weber v Ogden*.[203] When their task of exploiting natural resources is exclusively performed in the territorial waters of one state, maritime or fishing activities are assimilated to any other work performed at a permanent establishment in the country. When the work is performed on the high seas, in an area not subject to state sovereignty or in different maritime areas, public international law supports the application of the law of the flag by 'placing' all matters related to the ship, including maritime employment, under the authority of the flag state, as acknowledged by Article 5 of the Convention on the Law of the Sea, and in particular Article 94 of UNCLOS. This connecting factor prevents the permanent shifting from one law to another depending on the waters through which the vessel is sailing, in addition to submitting all employment relationships on board to the

[202] See Sect. 3.2.3.1.

[203] In this regard, see Magnus (2011), p. 598, para. 147; Martiny (2015), para. 53. Although Górriz (2003), pp. 328–332, differentiates between the maritime area and the ship as a workplace, I understand that public international law only allows playing with the first to determine the applicable law.

same law, in principle guaranteeing equal treatment for all workers on board.[204] All in all, this fiction receives broad doctrinal support[205] and is also underpinned institutionally, as proved by different statements in programmatic[206] and legal texts,[207] as well as case law.[208]

[204] Although provisions on collective redundancies are deemed overriding mandatory rules, it is worth mentioning that the Proposal for a Directive addressing the exclusion of seafarers from Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of member states relating to collective redundancies seeks to include new provisions concerning seafarers and stipulating that the opening of proceedings should be communicated to the public authority of the flag state. See Article 4 of the Proposal of Directive on seafarers [COM(2013) 798 final].

[205] In the literature in favour of this connection, see, *inter alia*, Behr (2009), pp. 88–89; Bonassies (1969), pp. 545–546; Blefgen (2005), pp. 103–118; Coursier (1993), p. 107; Diena (1935), pp. 453–454; Franzen (2011), p. 188, para. 39; Jambu-Merlin (1978), p. 71; Junker (2005), pp. 730–731; Junker (2004), p. 1208; Drobnig and Puttfarken (1989), p. 15; Gamillscheg (1983), p. 323; Geffken (1989), p. 91; Gräf (2012), pp. 580–588; von Hoffmann (1996), p. 1645, para. 58; Iriarte Ángel (1993), pp. 117–122; Junker (1992), pp. 187–188; Magnus (1990), pp. 141–145; Magnus (2011), p. 598, para. 149; Malintoppi (1987), p. 383; Mankowski (2009), pp. 199–200; Morgenstern (1987), p. 54; Müller (2004), pp. 140–143; Polak (2004), p. 331; Schlachter (2004), p. 162; Szászy (1968), pp. 117 and 119; Thüsing (2003a), pp. 1305–1306; Wurmnest (2009), pp. 497–498. Highlighting the difficulties in applying other connections, see Siehr (1983), pp. 314–315; Zanobetti Pagnetti (2008), pp. 143–160; Zanobetti (2011), p. 352.

[206] In these terms, see Article 4(b) of the Resolution of the Institut de droit international, 3.8.1971, during the Zagreb session on 'Conflicts of Laws in the Field of Labour Law', with I. Szászy as spokesperson, and before Article 7 of its Resolution of 2.9.1937 during the Luxembourg session, where D J de Yanguas Messia was the spokesperson.

[207] See a list in Tetley (1993), pp. 150–151. Previous to the Rome Convention, see Article 5 of the French *Code du travail maritime*; Article 1 of the German *Seemannsgesetz*, 26.7.1957; Article 17 of the Belgian Law, 5.6.1928; Article 9 of the Italian *Códice della navigazione*; Article 10(2) in relation to 10(6) of the Spanish *Código civil*; Sección 275 of the *Canada Shipping Act*; Section 16 (2) of the Czech Private International Law code of 1963; Section 4 of the Soviet Merchant Marine Code, 14.7.1929, and Section 265 of the British Merchant Shipping Act of 1894. See also article 68 of the Swiss *Seeschiffahrtsgesetz*. As to international texts, mention should be made of Article 20 of the *Tratado de Montevideo de Derecho comercial internacional* of 1889, binding on Bolivia, Colombia, Peru and Uruguay, although some issues concerning employment contracts are subject to the law of its conclusion (Article 19). Article 20 of the *Tratado de Montevideo de Derecho de la Navegación comercial internacional*, 1940, between Argentina, Paraguay and Uruguay, only refers to the law of the flag state.

[208] In *Lautitzen v Larsen*, Judge Jackson wrote that the application of this law is 'perhaps the most venerable and universal rule of maritime law relevant to our problem'. In Germany, see BAG 30.5.1963; 26.9.1978; OLG Bremen, 9.2.1969; ArbG Bremen, 5.8.1977. Recently, BAG, 24.9.2009 – 8 AZR 306/08, although it deals with international jurisdiction to decide on a claim on grounds of dismissal brought by a German seafarer against two companies, one Greek and the other Liberian but whose head office was in Greece; his work was performed on board a ship flying the Greek flag from Rostock, where he boarded and received instructions, to Finland; the contract was signed on board, written in English and contained a forum selection clause between Finland and Greece, with a similar choice of law clause; social security was paid in Greece. In France, see Cour.Cass. (Ch.soc.), 16.11.1993, No. 90-16030. In Spain, see STSJ Asturias (*Sala de lo Social*), No. 2627/2004, 17.9.2004; STSJ Galicia, *Sala de lo Social*, No. 2404/2008, 30.6.2008; *Juzgado de lo Social de* A Coruña, No. 622/2004, 18.11.2004. The Uruguayan *Tribunal de Apelaciones* No. 387/2012, 19.9.2012, *Marco Antonio Chero Yobera v Pesquerías Marinenses*, denies its

Flags of convenience challenge this equation. Once the assimilation of a vessel to a territory of the flag state is rejected, other arguments seek to strengthen the connection between them,[209] in particular those highlighting the powerful socio-economic bonds between the state and the vessel flying its flag, a connection that becomes weaker when the flag state is a flag of convenience. From a conflict of laws viewpoint, the finding that there is no such close link between the vessel as a workplace and the state whose flag it flies has led to the loss of its central role in establishing the applicable law to an employment contract, as various events show.

The first of these instances is provided by states that have lost their fleet in favour of flags of convenience and have also lost a considerable number of jobs besides, since seafarer's and fishermen's fates are inextricably linked to the ship on which they provide their services, now a vessel flying a foreign flag. When disputes arise, seafarers still lodge their claims at home, and the law of the flag no longer seems to be the most appropriate one to govern maritime employment; consequently, the courts resort to different mechanisms to apply what they think to be the closest law, the *lex fori*.[210]

In the framework of the fight against flags of convenience, it has been suggested that a measure could be introduced involving piercing the veil and thus not recognising the flag when a vessel should in fact be flying a different flag if the shipowner's nationality is taken into consideration. This would amount to establishing a sanction where there is to be no genuine link with the flag state, resulting in the non-recognition of the flag being flown by the vessel in question.[211] A variation of this doctrine is one that directly pushes the law of the flag into the background and brings to the fore the law of the ship's 'base of operations'. This approach has been advocated by the United States of America; for example, the Seamen's Act of 1920 establishes U.S. jurisdiction and the application of the law of the forum to 'a seaman on a foreign vessel when in harbor of United States'.[212]

jurisdiction on the ground that Spanish law applies as the law of the flag of the vessel on board the Peruvian seaman worked.

[209] See an enumeration in Moura Ramos (1991), pp. 930–931, the details of which are discussed in the text.

[210] See Carbone (2009a), pp. 81–89, and thoroughly in Carbone (2009b), pp. 164–195. This statement is apt for US case law and also the Greek case law cited there [Pireaus Labour Court, No. 33, of 1953, cited by Skourtos (1990), p. 88], applying Article 25 of the then in force Civil Code, which required an assessment of all circumstances as a whole to determine the applicable law in the absence of choice of law. See also STS, Sala de lo Social, 9.5.1988.

[211] Pursuing this argument to structure a genuine link between a vessel and a state, see Skourtos (1990), pp. 83–92. Also, Goldie (1963), pp. 254–261; Malintoppi (1987), pp. 383–384.

[212] *Strathearn Steamship Co. v. Dillon*, 252 U.S. 348 (1920), applying this law extraterritorially, which was finally rectified by later decisions analysed by Northrup and Scrase (1996), pp. 403–410.

Fair competition is at stake here and would be damaged if the same standards were not applied to all ships docked at U.S. ports. This background led to the U.S. jurisdiction deciding on the living and working conditions on board the vessel according to the principle of 'base of operations',[213] namely, proving that there is a link between the case and the U.S., taking into account the place where the accident occurred, the place where the seafarer is domiciled and the employer is based, the place where the contract was concluded, the degree of inaccessibility of the foreign forum for the claimant and the *lex fori*.[214] In the same vein, the Australian Fair Work Act 2009 determines its application beyond the Australian exclusive economic zone and continental shelf to any ship operated by an Australian employer and that uses Australia as a base.[215]

The third situation refers to the establishing of second and international registries by traditional seagoing nations to counteract the loss of their maritime and fishing fleets, which also has implications for the flag as a connecting factor.[216] In their endeavours to reduce labour costs, different pieces of legislation break the law of the flag's monopoly over the crew by distinguishing between seafarers and fishermen with habitual residence in the registration state and those without it. With this distinction, crews of convenience—deprived of any of the benefits of the law of the flag as the most favourable to labour rights—make their appearance along with flags of convenience.

These situations merge together to suggest the need to find a different connection to govern employment relationships on board.[217] Before the CJEU *Voogsgeerd v Navimer* judgment, all alternatives proposed for the application of the law of the flag sought to avoid the habitual workplace as a connecting point. Conversely, the Court's decision mentioned above focused on this connection to give it a new twist.[218]

Following the line initiated by the CJEU in *Mulox v Geels* and *Rutten v Cross Medical*,[219] Article 8(2) of the Rome I Regulation was drafted in different terms

[213] See Symeonides (2006). Cases also cited by Skourtos (1990), p. 87. For criticism of this approach, see Ehrenzweig (1970), pp. 641–645.

[214] This doctrine is embodied in the trilogy of cases surrounding the Jones Act, consisting of *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Romero v. International Terminal Operating Co*., 358 U.S. 354 (1958); *Hellenic Lines Ltd. v. Rhoditis,* 398 U.S. 306 (1970). See Currie (1959), pp. 1–78; Goldie (1963), p. 239; Symeonides (2008), pp. 310–313.

[215] Australian Fair Work Act No 28, 2009, Chapter 1, Parts 1-3, Division 3, Section 34(3A).

[216] See Sect. 2.3.2.

[217] See, for all, Carbone (2009b), pp. 164–195.

[218] This approach is also to be found in a Belgian decision, where the court took into account, *inter alia*, where the employee was domiciled, where and in what currency he was paid, which country he was taxed in and which social security law was applicable to him. See Trib.Trav. Liege, 19.9.1997.

[219] CJ 13.7.1993, Case C-125/92, *Mulox*; 9.1.1997, Case C 383/95, *Rutten*, para. 23. Previously, pointing to the law of the business through which the employee was engaged in the international transportation sector, see Lyon-Caen (1991), p. 54.

from Article 6 of the Rome Convention, such that 'the contract shall be governed by the law of the country in which or, failing that, *from which* the employee habitually carries out his work in performance of the contract'. The innovation in this rule is to be found in the italicised words, which provide a legal answer to all cases in which workers perform their tasks in different countries but still have a base of operations, which is what usually happens in the air transport sector. The question here is whether these terms are also applicable to the shipping or fishing venture, covering by extension all those bound by an employment contract to be carried out at sea.[220] The starting point to the discussion is that in principle the explanation accompanying the new provision does not take into account other staff apart from airline personnel who work in non-sovereignty areas.[221]

This discussion seems to have found a tipping point with the *Voogsgeerd v Navimer* case, the main arguments of which are revisited below. The case involved an engineer—a Dutch national—hired by a Luxembourg firm, Navimer S.A., to serve on two vessels owned by the company and operating in the North Sea. In the account of the facts, no reference was made to the flags flown by the two vessels, but Mr. Voogsgeerd's wages were paid by an agency located in Luxembourg, where his pension and sickness contributions were also being paid. The employment contract contained a choice of law clause submitting it to the law of Luxembourg. However, besides these contacts with Luxembourg, the worker had concluded his employment contract at the headquarters of a different company, Naviglobe N.V., based in Antwerp (Belgium), where he had to go for instructions and where he usually returned at the end of his voyages. On the basis of these contacts, when Mr. Voogsgeerd was dismissed he filed a claim against Navimer and Naviglobe in Antwerp under Belgian law, which he found more favourable to his position than Luxembourg law, according to which the time limit for filing a claim had expired.

The preliminary questions put to the CJEU avoided Section (a) of Article 6(2) of the Rome Convention and focused on Section (b), therefore mainly dealing with the notion of the business which engaged the employee. Nevertheless, the CJEU redirected the determination of the law applicable to the contract in the absence of choice of law to the habitual workplace, taking into account that 'the aspects characterising the employment relationship, as referred to in the order for reference, namely, the place of actual employment, the place where the employee receives instructions or where he must report before discharging his tasks, are relevant for

[220] Clearly opposing the application of this rule to maritime employment in the framework of CJ 15.3.2011, Case C 29/10, *Koelzsch*, see Mankowski and Knöfel (2011), pp. 529–530, followed by Lüttringhaus (2011), p. 558. By contrast, suggesting that this interpretation is applicable to all cases in which work is performed in more than one country, including non-sovereignty areas, see Collins et al. (2011), pp. 397–398; Francq (2009), pp. 65–66; Magnus (2011), p. 598, para. 148; Marquette (2009), p. 532.

[221] See Article 6(2)(b) of the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I Regulation) [COM (2005) 650 final], which included a specific reference to non-sovereignty areas. Applauding its non-inclusion in the latest version of the Regulation, see Mankowski (2009), pp. 181–182.

the determination of the law applicable to that employment relationship in that, when those places are situated in the same country, the court seized may take the view that the situation falls within the case provided for in Article 6(2)(a) of the Rome Convention'.[222] Thus, all the circumstances surrounding a worker's tasks should be assessed in order to determine 'whether the employee, in the performance of his contract, habitually carries out his work in any one country, which is that in which or from which, in the light of all the aspects characterising that activity, the employee performs the main part of his duties to his employer'.[223]

The judgment cited and its doctrine are striking in the framework of the ongoing discussion on the law applicable to maritime employment above since at no point do they even mention the law of the flag as the law potentially governing the employment relationship.[224] For this very reason, the judgment does not tackle the issue of flags of convenience and whether or not Luxembourg should be considered one of them. By remaining silent on this issue, the CJEU completely ignored the peculiarities of the maritime world, which were indeed taken into account by the Giuliano-Lagarde Report and the drafters of the Rome II Regulation.

Moreover, by disregarding both precedents, the CJEU put carriers—the subject matter of *Koelzsch v Luxembourg*—and seafarers—the subject matter of *Voogsgeerd v Navimer*—on an equal footing. Thus, it takes for granted that there actually is a base of operations, although this is not easily identifiable in the shipping and fishing sectors, and the alternatives point to places that can be easily manipulated by employers, such as the base port of the ship[225] or the manning agency that recruits seafarers and gives them travel and work instructions. One case can be identified, that of ferries sailing the same route between countries with workers embarking and disembarking at the same port.[226] But in general, the assessment required in *Voogsgeerd v Navimer* is highly flexible in the current framework of growing offshoring trends intensified by free ship registration, business cooperation and the ability to recruit crews all over the world.

However, the main criticism of *Voogsgeerd v Navimer* affects the conflict of laws technique, as it does not acknowledge the *modus operandi* of Article 6 of the Rome Convention or Article 8 of the Rome I Regulation, not only because it undermines the role of the alternative connection to the habitual workplace but also because it obliges the seized court to consider all activities when deciding where the main workplace is, similar to an escape clause. In fact, it could even be

[222] CJ 15.12.2011, Case C-384/10, *Jan Voogsgeerd v. Navimer SA*, para. 40.

[223] CJ 15.12.2011, Case C-384/10, *Jan Voogsgeerd v. Navimer SA*, para. 41. English case law has adopted a similar approach. See Morse (1992), p. 18.

[224] Making this point, see Lavelle (2014), p. 203; Maestre Casas (2012), p. 334. By contrast, assimilating the case discussed here to the case concerning air personnel and carriers, see Geisler (2001), pp. 301–302.

[225] In favour of this connection, see Staudinger (2011), para. 21. See also British case law denying the application of British law as the law of the flag on the ground that seafarers were working outside the United Kingdom: *Royle v Globtik Management Ltd.* [1977] I.C.R. 552; *Wood v Cunard Line Ltd.* [1991] I.C.R. 13.

[226] See Sect. 3.2.3.3. The difficult cases: flags of convenience and mobile workers.

said that it transforms the very nature of this connecting factor—the habitual workplace—which is legal and not factual in that it is necessary to determine the characteristic performance of the contract, *ergo* what type of workers are being dealt with and what the core tasks assigned to them are to then establish where the workplace actually is.[227] In this vein, it does not seem reasonable to accept that a naval engineer's main tasks are picking up his travelling instructions and reporting back to a given business, for example. It seems that lying behind the CJEU's decision was an attempt by the Court to solve the controversy *ex post*, which lacked an appraisal of what is really at stake and of how to avoid conflicts *ex ante*.[228]

Voogsgeerd v Navimer can also be challenged on grounds of the interests at stake, given that it ignores the special features of work at sea, as already noted. Article 8 of the Rome I Regulation and Article 6 of the Rome Convention aim at foreseeability and so prefer a connection that is close to both parties to the contract, employee and employer. In the current context of wild offshoring, these parameters are better met by the law of the flag than by other connecting factors: the flag state is the only one that is internationally obliged to guarantee workers on board ship certain working and living conditions; any other connection leaves it up to the respective state to provide these conditions.

As seen above,[229] the diplomatic struggle to strengthen the link between a state and vessels flying its flag has produced mixed results at best because although all states are still free to grant their flags to vessels under the conditions they themselves impose, indirect controls over flag state activities have increased through the development of uniform legal instruments and port state control measures. MLC, 2006, and WFC, 2007, reflect this trend, which aimed to undermine flags of convenience by specifying flag states' obligations towards seafarers and fishermen and by making port states also responsible for monitoring compliance with these obligations. Despite the counterweights to the flag state, the reading of these Conventions reveals that vessels sailing on the high seas have to primarily organise legal relationships on board according to the law of the country whose flag they are flying.[230]

Furthermore, it is important to be aware of the many difficulties involved in classifying a state as a flag of convenience,[231] which are precisely the same hurdles that can be encountered when deciding on the existence of a genuine link between the flag state and the vessel in question, which means that this problem cannot be

[227] See Malintoppi (1987), pp. 376–377.

[228] Highlighting the significance of such a viewpoint in maritime law, see Braekhus (1979), pp. 262–267, who raises doubts about judgments rendered only on account of the facts of the case since only some cases are brought before the courts, whereas solutions must be provided for them all, including those not decided in court (pp. 274–275).

[229] See Sect. 2.5.

[230] See Carballo Piñeiro (2012), pp. 242–245; Carballo Piñeiro (2014), pp. 38–54; Gräf (2012), pp. 582–583.

[231] This definition is not easy, in particular because it is not true that they attract the worst ships. See Orione (1993), pp. 632–633.

addressed by simply stating that some countries are flags of convenience. In fact, from the conflict of laws viewpoint, it seems more reasonable to address this issue in accordance with Article 8 of the Rome I Regulation: if the law of the flag is not closely connected with the employment contract in question, the seized court must turn to the escape clause to determine the closest law.[232]

Mobile Workers: The *Voogsgeerd v Navimer* Doctrine

Voogsgeerd v Navimer altered the architecture of both maritime and private international laws by failing to consider their peculiarities and techniques. Nevertheless, this judgment's meaning can be put into context by taking into account the series of decisions of which it forms a part, all relating to mobile workers.[233] In the case in question, the worker performed his duties on more than one vessel—although they both shared the same characteristics—and always had to visit a specific business to receive his instructions. Because of this, he was to be deemed to be a mobile worker, meaning that he was the one moving from one workplace to another and his workplaces were in turn located in different states or in areas not subject to territorial sovereignty. In such cases, work is carried out on an unspecified vessel, and the point of reference in the search for the closest connection to the employment relationship must therefore be the company and not the vessel.[234]

The situation is totally different when workers do not actually move from their workplace, which is itself characterised by being mobile;[235] in these cases, the flag must survive as a connecting factor. In contrast, where mobile workers are concerned, the *Voogsgeerd v Navimer* doctrine has to play a leading role because of well-established CJEU case law that underlines the fact that these workers also

[232] Mention must be made here of CJ 27.9.1989, Case C-9/88, *M. Lopes de Veiga*, where this approach was adopted while deciding whether to grant a residence permit in the Netherlands: 'It is for the national court to decide whether the employment relationship of the applicant in the main proceedings has a sufficiently close connection with the territory of the Netherlands, taking into account in particular the following circumstances apparent from the case-file and from the written and oral observations submitted to the Court: the applicant works on board a vessel registered in the Netherlands in the employ of a shipping company incorporated under the law of the Netherlands and established in that State; he was hired in the Netherlands and the employment relationship between him and his employer is subject to Netherlands law; he is insured under the social security system of the Netherlands and pays income tax in the Netherlands' (para. 17).

[233] In particular, CJ 13.7.1993, Case C-125/92, *Mulox*; 9.1.1997, Case C 383/95, *Rutten*; CJ 15.3.2011, Case C 29/10, *Koelzsch*.

[234] In these terms, see Zanobetti Pagnetti (2008), pp. 164–165.

[235] Behr (2009), pp. 90–95, sets out this graphic difference, suggesting it be applied in all cases in which staff work on different means of transportation, ultimately proposing the application of the law of their registration to their employment contracts, as happens with work at sea.

have a habitual workplace, namely the place from where they discharge the essential part of their duties towards their employer.[236] In identifying seafarers' principal place of work, the seized court cannot disregard public international rules, though, as the CJEU seems to take for granted by not making any reference to the flag state in *Voogsgeerd v Navimer*. As a matter of fact, resorting to public international rules is imposed by the concept habitual workplace, as it requires to establish, first, which are seafarers' tasks and, second, the place where the essential part of them are discharged to the employer; should they take place in an area subject to public international law, this has to be taken into account by the seized court.[237]

4.3.3.2 Exceptions to the Application of the *lex loci laboris*: The Law of the State Where the Business Which Engaged the Employee Is Situated

If it is not possible to identify the place where employees habitually or mainly perform their services, the law of the country where the business which engaged them is located takes on an essential role, pursuant to Article 8(3) of the Rome I Regulation, Article 6(2)(b) of the Rome Convention. In the framework of maritime employment, it has been argued that the law of the flag state should always be displaced by this connecting point,[238] although this ignores the significant risk arising from the ease with which it lends itself to manipulation by employers.[239] The country where an engaging business is rests with the employer, who may well resort to a country characterised by poor working conditions.

The secondary role granted to this connecting point is best understood against this background, as has been confirmed by both the current wording of Article 8(3), which highlights its subsidiarity regarding the habitual workplace, and CJEU case law,[240] in particular the *Voogsgeerd v Navimer* judgment. It specifically deals with

[236] A case that should be solved according to the alternative connection, as done by Moura Ramos (1991), p. 1902.

[237] As it happens in CJ 27.2.2002, Case C 37/00, *Weber v Ogden*. See Sect. 3.2.3.3. The difficult cases: flags of convenience and mobile workers.

[238] See Carrillo Pozo (2011), p. 1042; Coursier (1993), pp. 107–108; Deinert (2009), pp. 147–148; Deinert (2013), pp. 166–173; Ebenroth et al. (1989), pp. 138–142; Collins et al. (2006), p. 1670; Eßlinger (1991), pp. 56–62; Hansen (2008), p. 771; Kaye (1993), p. 235; Kühl (1989), p. 94; Lagarde (1991), p. 319; Lorenz (1987), p. 276, note 74; Morse (1992), p. 19; Oetker (2009), paras. 29 and 32; Spickhoff (2011), paras. 24 and 26; Thorn (2012), p. 2652, para. 12. Previously, Micus (1976), pp. 83–115.

[239] See this criticism in von Hoffmann (1996), p. 1646, para. 58; Junker (1992), p. 184; Simitis (1977), p. 173. In Spain, see Fotinopoulou Basurko (2008), pp. 178–180.

[240] Recently, CJ 15.3.2011, Case C 29/10, *Koelzsch*, para. 43. See Junker (2007), p. 24; Kenfack (2007), p. 36; Mankowski and Knöfel (2011), p. 526. Clarifying this point in relation to CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, see Knöfel (2014), pp. 130–136; Pataut (2012), pp. 663–664.

questions on the interpretation of Article 6(2)(b) of the Rome Convention, corresponding to Article 8(3) of the Rome I Regulation, noting that 'the factor linking the employment contract in issue to the country where the employee habitually carries out his work must be taken into consideration first, and its application excludes the taking into consideration of the secondary factor of the country in which the place of business through which he was engaged is situated'.[241]

A remarkable difference between Article 8(3) of the Rome I Regulation and Article 6(2)(b) of the Rome Convention is that the former merely refers to the business 'through which the employee was engaged'. Consequently, the new terms of the Rome I Regulation could point to a business though which the employment contract was not in fact concluded but through which the employee was recruited while the contract was entered into elsewhere.[242] This wording has resulted in the number of interpretations being considerably broadened, as it enables courts to examine which business has the closest connection with the employment relationship in a specific case, for example.[243] In fact, a number of authors suggest focusing directly on the business into whose structure employees are integrated, i.e., where they perform their tasks and from where they are supervised, on the ground that both the place where the contract was entered into and the place where the employee was recruited encourage fraudulent manipulation by the employer.[244] This issue has been ultimately tackled by the Turkish Act on Private International and Procedural Law by indicating that the main workplace of the employer is the establishment to take into account in determining the law applicable to the employment contract of mobile workers.[245]

The different opinions on this issue make sense when there is more than just one business in question,[246] as they help to sort out which one should be taken into account pursuant to Article 8(3). In general, these margins of assessment may be useful to avoid forum shopping by employers, who may be seeking to conclude contracts through businesses situated in countries with poor employment conditions. Nevertheless, the oft-cited *Voogsgeerd v Navimer* judgment resolved this

[241] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, paras. 32 and 34, outlining the hierarchical relationship between the two criteria.

[242] See Garcimartín Alférez (2008), p. 76; Plender and Wilderspin (2009), p. 320, para. 11-054.

[243] See Gardeñes Santiago (2008), p. 413.

[244] See Carrillo Pozo (2011), p. 1043; Deinert (2009), p. 147; Knöfel (2014), pp. 134–135; Junker (2004), p. 1204; Martiny (2015), para. 73; Mankowski (2009), pp. 193–196; Wurmnest (2009), p. 491. Suggesting stability, see Kaye (1993), pp. 235–236.

[245] See Article 27 of the Turkish Act on Private International and Procedural Law No. 5718, 27 November 2007 (as translated by S. Wilske and I. Esin).

[246] See Junker (1992), pp. 185–186. Criticising the lack of definition of business, see Devers (2008), p. 82.

interpretation issue with a further twist by emphasising the role of the habitual workplace, highlighting the secondary role granted to the connection under discussion here even more.[247] In fact, the CJEU provides a literal interpretation of this connecting factor, which actually leads us to the establishment through which the employee was engaged.[248]

More specifically, the CJEU's analysis distinguishes between the two concepts shaping this connecting factor: first, what is understood by the term 'business' and, second, what is meant by the expression 'through which the employee was engaged'. According to the CJEU, this second notion 'clearly refers purely to the conclusion of the contract or, in the case of a *de facto* employment relationship, to the creation of the employment relationship and not to the way in which the employee's actual employment is carried out'.[249] In this sense, the CJEU claims that it is necessary to find out where the contract notice was published and who conducted the interview,[250] which is different from focusing on the business to which the employee is linked by actual occupation. The CJEU's statements may also be useful in cases where the worker is recruited by a manning agency but the contract is entered into on board the vessel where the seafarers or fishermen have been sent following their recruitment by the agency, which has also provided employees with plane tickets for the journey to the vessel.

What it is to be understood by 'business' is a different topic, which stems from the panoply of information accumulated in the *Voogsgeerd v Navimer* case and organised by the CJEU in its answer to the second, third and fourth preliminary questions. First of all—and altering the order followed in *Voogsgeerd v Navimer*—it is important to bear in mind that a business does not need to have legal personality to be deemed as such. However, a certain degree of permanence is required, such that it must include 'every stable structure of an undertaking' like subsidiaries, branches and other units such as offices,[251] including agents who travel to the country where the employer maintains a permanent representation of the undertaking.[252] It may be the case that an employer's agent works in the offices of a

[247] Underlining this subsidiary nature, see Magnus (2011), p. 589, para. 115; Szászy (1968), p. 99, who distinguishes between a *lex loci laboris generalis* and a *lex laboris speciales*, also referring to the place where the employer's head office is located, known as *lex loci delegationis* (pp. 11–118).

[248] It does not prevent resorting to the escape clause if the close link vanishes afterwards. See Geisler (2001), pp. 292–295; Kappelhoff (2011), p. 432. Considering the place where the worker was hired a strong connection, see Franzen (2011), p. 187, para. 36.

[249] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, para. 46. In the same sense, see Blefgen (2005), pp. 72–88.

[250] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, para. 50.

[251] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, para. 54. Para. 55 insists on the stability that must characterise the business.

[252] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, para. 56. Permanence is consequently a relevant factor, although it is also suggested that it ought to be applied liberally. See Collins et al. (2006), p. 1671, citing the *Booth v. Phillips* case, 2004 WL 1476757 Queen's Bench Division (Commercial Court), [2004] EWHC 1437 (Comm.), [2004] 1 W.L.R. 3292, where hiring occurred after the seafarer sent an e-mail from the U.K. to Jordan, where the employer's business was located.

different undertaking. As a general rule, such business should be deemed part of the employer's structure.[253]

If these conditions are not met—for example because the employee is recruited by an employer's agent who is acting as such just for the occasion—the connection has to be filled by reference to the employer's main place of business. This would apply to a captain or master who recruits seafarers or fishermen directly at port due to immediate service needs, for example. Here, the permanence requirement needed to consider the docking port as the place of the employer's business is absent, and hence the business in question can only be identified by resorting to the shipowner's main place of business, an interpretation that is perfectly justified if the powers of representation conferred to the captain or master are taken into account.[254]

In the case that produced the *Voogsgeerd v Navimer* judgment, it appears that a different company was giving the employees their instructions, even though there had been no official transfer of authority from the employer to this particular undertaking. The conclusion to be drawn from the rationale behind the decision is that the rule is to keep companies separate. There is, though, a situation in which one business may be deemed to be another's: 'only if one of the two companies acted for the other could the place of business of the first be regarded as belonging to the second, for the purposes of applying the linking factor in Article 6(2)(b) of the Rome Convention',[255] regardless of the transfer of employer's authority to the second undertaking.[256] With this statement, the Court opened the door to a manning agency being considered a business through which employees were engaged.

This may indeed lead to manipulation with the aim of cutting labour costs, for which reason it may be argued against this interpretation that regard should be given to the employer's main place of business or any other business with a closer link to the employment relationship.[257] The problem lies, however, in this connecting factor being susceptible to manipulation, for which reason its subordinate role has been underlined. In contrast, the line of reasoning leading to the understanding that manning agencies and other employment agencies are an employer's business is a fruitful one as it may enhance employers' access to justice as the concept fills up the forum of the branch as well. The CJEU also considers in its *Voogsgeerd v Navimer* judgment the possibility of lifting the corporate veil and thus whether the Belgian company is the real employer being the Luxembourg one a shell company.[258] This is, however, a different issue from the one here discussed

[253] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, para. 57. Previous to this decision, see Blefgen (2005), pp. 53–71.

[254] See Kühl (1989), p. 94.

[255] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, para. 64.

[256] Martiny (2015), para. 70.

[257] See Schlachter (2014), para. 16.

[258] CJ 2.5.2006, Case C-341/04, *Eurofood IFSC*, para 37.

as it regards the identification of the employer in the employment contract but not the business which engaged the employer.[259]

4.3.3.3 Exceptions to the Application of the *lex loci laboris*: The Escape Clause

The escape clause laid down in Article 8(4) of the Rome I Regulation authorises the seized court to assess the international elements of the employment relationship in question to decide whether there is a closer law than the one that would be applicable in the absence of choice of law. The introduction of this clause allowed a certain degree of flexibility in the application of the otherwise rigid connecting factors designed to ensure both legal certainty and foreseeability.

In view of these objectives, a strict interpretation of the escape clause's role in the conflict rule has been proposed, namely, that it ought to be invoked exclusively (a) when in fact there are more significant contacts with a legal system other than the one designated pursuant to the connecting factors enumerated in Sections 2 or 3 of Article 8 and (b) as long as the latter law is not truly connected with the case.[260] The CJUE, however, follows the position of those in favour of a broad interpretation of the escape clause[261] by omitting the second requirement: in the words of Advocate General Mr. Wahl, the escape clause is actually an open conflict rule, and no further requirements than actually identifying a law that is closer to the employment relationship need to be met.[262]

Consequently, there is no hierarchical relationship between the connections laid down in either paragraphs 2 and 3 of Article 8 or the derogation from them provided for in paragraph 4. The fact that, unlike Article 6 of the Rome Convention, Article 8 of the Rome I Regulation places the escape clause in a separate section would reinforce this interpretation.[263] Nonetheless, it should be highlighted that both share the objective of selecting the law that is most closely linked to the individual employment contract. In this sense, this interpretation does not transform the

[259] See Sect. 2.4.3.3. Piercing the corporate veil. An example is provided by STS, *Sala de lo Social*, 9.2.1987 (RJ 1987\809), where Spanish law is applied to decide a case in which a fisherman was hired by a Spanish consignee to perform his duties to a foreign employer on board a ship flying a foreign flag. The Spanish court indicated that identifying the subject who actually hired the worker was complex and confusing and therefore ultimately maintained that the Spanish consignee was responsible, given that it was the consignee who paid the salaries.

[260] In this sense, Polak (2004), pp. 331–332, following Dutch practice, criticised by de Haan (2013), pp. 38–58, for being too restrictive. On the different interpretations, see Fentiman (2009), pp. 91–98.

[261] CJ 6.10.2009, Case C-133/08, *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV, MIC Operations BV*, paras. 58–63; 12.9.2013, Case C-64/12, *Anton Schlecker v Melitta Josefa Boedeker*, paras. 36–38.

[262] See Opinion of the Advocate General Mr. N. Wahl to Case C-64/12, para. 51.

[263] See Gulotta (2013), *loc. cit.*, p. 591.

modus operandi when applying Article 8 since this has to start by establishing which law is applicable in the absence of choice of law, either the law of the habitual workplace or, failing this, the law of the place of business through which the employee was engaged; once this has been done, either may still be set aside in favour of another law with more significant contacts with the employment relationship.[264]

When it comes to assessing what is really meant by the concept of 'significant contacts', attention should be paid to the legal context of the clause and to the objectives of the instrument where it is inserted.[265] The escape clause laid down in Article 8(4) aims to determine the closest law to the employment relationship and not the most favourable one to the worker,[266] although comments have been made in support of this approach.[267] The principle of worker protection is of relevance when comparing laws pursuant to Article 8(1), should there be a choice of law but there is no other explicit reference to it in subsequent sections of the provision. In the remaining connecting factors, the Regulation gives most weight to the principle of proximity, with a view to reinforcing legal certainty and foreseeability.

The CJEU's judgment in *Schlecker v Boedecker* makes the above-mentioned point clear; this case involved a worker who had served for 11 years in the Netherlands, where she presented her claim on the grounds of unilateral changes to the workplace on the part of her employer, who had forced her to return to Germany. The employee was a German national who was a resident in Germany while performing her services in the Netherlands, her employer was based in Germany, the employment contract was entered into in Germany, wages were paid in accordance with German standards and contributions to social security, insurance, pensions and taxes were all paid in Germany. In line with *Koelszch v Luxembourg* and *Voogsgeerd v Navimer*, the CJEU's ruling in *Schlecker v Boedecker* reinforced the idea that granting appropriate protection for employees amounts to ensuring the application of the law of the country with the closest connection to the contract in question.[268]

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[264] CJ 12.9.2013, Case C-64/12, *Schlecker v Boedecker*, para. 35.

[265] See Fentiman (2009), p. 98.

[266] In this sense, see Carrillo Pozo (2011), p. 1047; Deinert (2013), pp. 154–155; Geisler (2001), p. 303; Junker (1992), pp. 190–191; Krebbert (2000), p. 527; Martiny (2015), para. 79; Merrett (2011), paras. 6.76–8.78, pp. 211–214; Salvadori (1993), p. 68; Zanobetti (2011), pp. 353–355. For a further opinion, see Magnus (2011), pp. 594–595, para. 138.

[267] Considering the escape clause as a corrective factor for the proximity principle, see Déprez (1995), pp. 326–327; Gaudemet-Tallon (2008), pp. 196 and 199; Sabirau-Pérez (2000), pp. 352–355. Gardeñes Santiago (2008), pp. 417–418, criticises the fact that the changes introduced in the Rome Convention to bring the Rome I Regulation to life were not aimed at intensifying worker protection and contributes a number of substantive considerations in this area. Indicating that worker protection is not included there but ought to be taken into account, see Colins et al. (2006), p. 1672; Pocar (1984), p. 388.

[268] CJ 12.9.2013, Case C-64/12, *Schlecker*, para. 34. In this case, the worker invoked the application of Dutch law as both the law of the habitual workplace and most favourable to her interests,

The application of the escape clause raises further questions. The first concerns the necessary degree of connection with a legal system, which can displace the law of the habitual workplace or, where applicable, the law of the business through which the employee was engaged.[269] Unlike Article 4(3) of the Rome I Regulation, Article 8(4) only requires this law to be 'more closely connected', without using the adverb 'manifestly', meaning that the test this clause involves does not need to be as strict.[270] The main difference is to be found both in the Opinion of General Advocate Mr. Wahl,[271] and in the *Schlecker v Boedecker* decision, where the CJEU remarked that 'where it is apparent from the circumstances as a whole that the employment contract is more closely connected with another country', the seized court may set aside the law of the habitual workplace.[272] This phrasing is different from that used in the CJEU's *ICF* judgment dealing with Article 4(3), which allows the operation of the clause 'where it is *clear* from the circumstances as a whole that the contract is more closely connected with a country'.[273] The divergence's *raison d'être* is to be found in the fact that Article 4 is grounded on the principles of legal certainty and foreseeability, while Article 6 of the Rome Convention/8 of the Rome I Regulation gives due consideration not only to those principles but also to the principle of worker protection. As already noted, beyond Section 1 of Article 8, worker protection entails choosing the law of the country that has the closest connection to the contract.[274]

In any event, this should not undermine the foreseeability of the applicable law to individual employment contracts, which is to say, the law of the habitual workplace can only be displaced when the assessment of the circumstances as a whole indicates that 'the centre of gravity of the employment relationship is not located in the country in which the work is carried out'.[275] In this context, the choice of the method used for assessing such significant contacts is absolutely critical. Two proposals have been made so far, one that focuses on the strongest factual connection with a country, while the other operates on an evaluative basis by seeking the most significant contact or contacts with a country.[276] The CJEU also takes a stance here by expressly rejecting a factual and numerical approach and

while the employee, Schlecker, asked for German law to be applied as the law with the closest link to the employment relationship.

[269] The CJ again highlights the residual role of this particular connecting factor in this decision. See CJ 12.9.2013, Case C-64/12, *Schlecker*, paras. 31 and 32.

[270] However, highlighting its exceptional character, in particular because it does not favour the coincidence between *forum* and *ius*, see Junker (2007), pp. 26–27.

[271] See Opinion of the Advocate General Mr. N. Wahl to Case C-64/12, paras. 57–61.

[272] CJ 12.9.2013, Case C-64/12, *Schlecker*, para. 36. This judgment deals with Article 6 of the Rome Convention, but it is assumed that its doctrine is also applicable to Article 8 of the Rome I Regulation referring to it in the sense expressed above in para. 38.

[273] CJ 6.10.2009, Case C-133/08, *Intercontainer Interfrigo SC (ICF)*, para. 63. My italics.

[274] Or, at least, it is suggested by Advocate General Mr. N. Wahl, para. 37 of this Opinion to C-64/12.

[275] See Opinion of the Advocate General Mr. N. Wahl to Case C-64/12, para. 61.

[276] On both approaches, see Fentiman (2009), pp. 92–98, who prefers the evaluative test.

by emphasising that 'the referring court must take account of all the elements which define the employment relationship and single out one or more as being, in its view, the most significant'.[277]

The escape clause has been widely used by courts to deal with cases in which the law of the flag state really did not have significant links with the contract in question,[278] or there was the suspicion that a flag of convenience was being flown.[279] CJEU case law highlights the fact that applying this device is appropriate only if there is another law that is more closely connected to the employment relationship. The first thing to do would therefore be to ascertain the law of the place where the services are being rendered or, if this connection fails, the law of the business through which the employee was engaged,[280] followed by establishing the existence of a closer law.

According to this *modus operandi*, those who advocate paying no regard to the law of the flag state and considering the escape clause to be the regular connecting factor for work at sea[281] cannot be taken into account. This approach must be set aside, as not only does it bring legal uncertainty, but it can also be used as an excuse to apply the *lex fori* every time.[282] However, this does not mean that the escape clause is a residual connection; CJEU case law provides ample room for its application, as it acknowledges the seized court's power to apply the law that is 'most closely connected' to the contract and not the one that is 'manifestly connected' to it. This entails introducing a significant flexibility factor into the conflict rule on individual employment contracts, which requires further clarification for the sake of legal certainty, in particular with regard to the assessment of circumstances as a whole to establish exactly where the contract's centre of gravity is.

Koelszch v Luxembourg and *Voogsgeerd v Navimer* required this kind of assessment, but in order to find out exactly where the habitual workplace was. The similarities between these two tests—one that assesses where the habitual workplace is located and the other determining which law is more closely connected to the employment relationship—led the Advocate General Mr. Wahl to make it clear that the first test does not supersede the escape clause,[283] although it certainly seems to set limits to it. In other words, the tasks that employees have to carry out for their

[277] CJ 12.9.2013, Case C-64/12, *Schlecker*, para. 40.

[278] Suggesting this solution, see Iriarte Ángel (1993), pp. 157–159; Müller (2004), pp. 142–143; Thorn (2012), p. 2652, para. 12; Schlachter (2014), para. 17.

[279] See Wurmnest (2009), p. 498.

[280] In this sense, see Junker (2005), pp. 720–722. Also critical, Mankowski (2005), pp. 60–61.

[281] Giving priority to its application over the law of the flag state, see Hauschka and Henssler (1988), p. 599; Drobnig and Puttfarken (1989), pp. 14–16. Indirectly, Däubler (1987), pp. 250–252.

[282] See Asín Cabrera (2008), pp. 379–381; Schlachter (2014), para. 16.

[283] Opinion of Advocate General Mr. N. Wahl to Case C-64/12, para. 45.

employers cannot be taken into account when establishing whether there is a closer law to the employment relationship.

To this end, in its *Schlecker v Boedecker* judgment, the CJEU suggested some significant links that in fact point to factors falling outside the employment relationship, such as the place where employees pay income tax and where they are affiliated to social security schemes and covered by pension, sickness insurance and disability schemes.[284] *Schlecker v Boedecker* triggered a new reading of the escape clause in that while it was being applied, attention was paid to objective factors arising from the employment relationship and not to factors of a public law nature, such as tax payment or affiliation to social security schemes. In fact, the Court cannot fail to refer to all the circumstances of the contract, in particular the standards according to which wages and other working conditions are fixed.[285] The objective elements of individual employment contracts should certainly prevail, given that the ultimate aim is to establish the contract's centre of gravity and this cannot be decided according to factors that may respond to other considerations. For example, the place where contributions to a social security scheme are paid may have been solely selected on the basis of the employer's interests,[286] whereas the place where income tax is paid may reflect the employee's interests. The significance the CJEU grants these factors seems to rely on the legislation in these matters in force within the European Area of Justice, thus disregarding the fact that this conflict rule is of universal application.[287] Other factors such as nationality, habitual residence or the language of the contract are also worthy of consideration, although the Court stipulates that they are of minor relevance when deciding on the individual employment's contract centre of gravity.[288]

It must be highlighted at this point that the CJEU is of the opinion that the seized court may single out one or more of these factors as being, in its view, the most

[284] CJ 12.9.2013, Case C-64/12, *Schlecker*, para. 41. Along these lines, before the decision, see Fotinopoulou Basurko (2008), pp. 182–190, and later on, Fotinopoulou Basurko (2014), pp. 79–108.

[285] CJ 12.9.2013, Case C-64/12, *Schlecker*, para. 41, *in fine*. In the Opinion of Advocate General Mr. N. Wahl to Case C-64/12, para. 62, the contract was written in German and contained references to German mandatory rules. In addition, wages were paid in German currency until the euro was introduced, and travelling expenses between the employee's residence in Germany and her workplace were also paid.

[286] Despite working the employee on board ships exclusively sailing on Portuguese fluvial waters and being resident in Portugal, her social security contributions were paid by the French company in France. *Tribunal da Relação* Porto, Section 4 (Social), 5.5.2014, understood under the circumstances that the escape clause applied – in addition to the already mentioned, communications were in French and ships were French flagged – while *Tribunal da Relação* Porto, Section 4 (Social), 2.6.2014, specifically contends in a very similar case the significance of the payments to the French social security scheme compared to the fact that the seawoman was performing her tasks on Portuguese fluvial waters.

[287] In the Opinion of Advocate General Mr. N. Wahl to Case C-64/12, para. 68, the purpose is to find out whether the connection to the social protection schemes was made by mutual agreement of the parties or imposed on the worker.

[288] In this sense, Opinion of the Advocate General Mr. N. Wahl to Case C-64/12, para. 70.

significant to disregard the law applicable by default of choice of law. Nevertheless, it must be borne in mind that Article 8 is constructed on the basis that the habitual workplace reveals the contract's centre of gravity, and for this reason, it is highly doubtful whether the escape clause can operate on the basis of a single element.[289]

The factors that courts weigh up to set aside the law of the flag state are mainly the employer's centre of main interests, the place of conclusion of the contract, the language and form of the contract, the habitual residence or domicile of the employee,[290], the base port or ports from which the vessel operates[291], whether there is a law that applies to all workers in the workplace and the validity of the contract in accordance with the applicable law.[292] However,

[289] Also critical of this judgment, see Junker (2014), p. 15; van Hoek (2014), pp. 163–165.

[290] See these factors in Collins et al. (2006), p. 1671, taken from English practice. However, in *Booth v Phillips & Ors* [2004] EWHC 1437 (Admlty), on 17 June 2004 the Court of Appeal sustained that those factors were not enough to avoid the application of Egyptian law to rule on an Egyptian shipowner's responsibility for an accident suffered at work by an English engineer in Egyptian waters. In Germany, the escape clause was applied in a case concerning a German national employed on board a Cyprian ship but managed from Stuttgart. See LAG Baden-Württemberg, 17.7.1980: both parties to the contract were of German nationality, it was concluded in a German business, wages were paid in German currency, the contract was written in German and the behaviour of both parties denoted that they were confident about the application of German law. Other contracts concluded in Germany are not as clear, even though the country's language and currency were also used (BAG 30.5.1963). In a different case involving the provision of services on board a German ship travelling between the UK and Germany, the relevant factors were the fact that the employee was a British national domiciled in the UK, the contract was in English with an English company and the salary was paid in UK currency, for which reasons English law was applied: BAG 24.8.1989. See Junker (2004), p. 1205; Frigessi di Rattalma (1992), p. 850; Magnus (1991), pp. 382–386. In another case, Indian law was applied to Indian seafarers employed on board ships registered in the German international registry, taking into consideration the place where contracts had been signed, the habitual residence of the plaintiffs at the time the contract was concluded, the language of the contract and the currency in which wages were paid. See BAG 3.5.1995 and comments by Franzen (2011), pp. 187–188, para. 40, and Oppertshäuser (2000), pp. 396–397. In the Netherlands, see Hoge Raad, 31.1.2003, in the case sparking off CJ 27.2.2002, Case C 37/00, *Weber v Ogden*.

[291] See Magnus (2011), p. 599, para. 150. The same thing happened in the case dealing with the ship Obo Basak: *Cour d'Appel* Douai (1ª Ch.), 1.12.1997, ship *Obo Basak*, with comments by Chaumette (1998); *Cour d'Appel* Douai, Ch. Reúnes, 17.5.2004, No. 00/06191, *Akyelken et a. v. Sté Marti Shipping et Sté AS Denmar Denizcilik ve Ticarest A*S, where the court paid attention to the fact that seafarers boarded the ship in Turkey, work was performed on a ship flying the Turkish flag, wages were paid in Turkey and the employment contract referred to the Turkish Maritime Code.

[292] See Merrett (2011), paras. 6.06–6.15, pp. 176–181, paras. 6.50–6.51, pp. 197–198. Of particular interest is the case mentioned in the text *Sayers v International Drilling Co*., rendered by the Court of Appeal in London [1971] 1 WLR 1176, with comments by Kovats (1973), pp. 15–22, and Morse (1992), p. 20: a Texan oil company had several subsidiaries, among them the International Drilling Co. Ltd., with an office in London, and the International Drilling Co. N.V., with an office in The Hague. The latter had an agent working in an office of the London subsidiary, and it was he who hired Mr. Sayers on behalf of the Dutch company to provide services on an oil rig in Nigerian waters. The contract included a term restricting damages in case of accident to a scheme paid by the company on the employee's behalf. There was no choice of law clause. Sayers suffered an

it is also argued that consideration should be given to the common nationality of employer and employee, as this would refer to the law of the labour market affected.[293]

The clearest cases for the escape clause to intervene in are disputes between a seafarer and a shipowner when both are either domiciled or habitually resident in the same country but work performed on a non-national flag vessel is involved.[294] Spanish courts have also taken previous relationships between the parties into consideration.[295] Many Spanish judgments affect fishermen initially hired by Spanish companies to work on vessels flying the Spanish flag, which eventually transferred the business to other registries with the aim of gaining access to the fishing grounds belonging to the countries concerned. In these cases, it is not just the vessel's flag that changes but also the employer, whose status is now that of a joint enterprise. The courts then cling to the escape clause and to considerations about business succession, in some cases piercing the veil to track down Spanish companies.

There is a general tendency to resort to the escape clause with a view to applying the *lex fori*.[296] In a context of wild offshoring of maritime and fishing fleets, national courts seek to protect their nationals working abroad. The relocation process may advise them to take into account an additional factor when establishing the law applicable to the employment relationship, namely, the expectations of the parties at the time of the conclusion or at the outset of the performance of the

accident only a fortnight after arriving in Nigeria and claimed for damages in an English court according to English law.

[293] This principle follows on from the considerations made in the BAG judgment of 29.10.1992, distinguishing between primary and secondary factors, classifying this factor in particular as a primary factor and others such as the language of the contract, the place where the contract was concluded, the place where the employee is paid and the currency and the country where contributions to a social security scheme are paid as secondary factors. The decision dealt with the law applicable to a flight attendant's contract. Of the same opinion, see Clausnitzer and Woopen (2008), p. 1804; Deinert (2013), p. 158; Geisler (2001), pp. 302–304; Hoppe (1999), pp. 191–192; Schlachter (2002), p. 1244; Mankowski (1994), pp. 93–94; Mankowski (1999), p. 336; Mankowski (2001), p. 126. From a critical perspective, Thüsing (2003a), p. 1305.

[294] With a similar example, see Junker (2005), p. 731.

[295] See Asín Cabrera (2008), pp. 382–384, who distinguishes between two types of decisions: firstly, those in which the employment contracts affect Spanish seafarers working on board foreign ships [STSJ Galicia, *Sala de lo Social*, 26.4.2004: Spanish fishermen, a Bahamian ship and job offers in Spain, initially hired by a Spanish company which later transferred the workers to a Bahamian undertaking] and, secondly, those in which the provision of services is performed on board ships owned by joint enterprises [STSJ Canarias, Las Palmas, *Sala de lo Social*, No. 431/2003, 21.3.2003, with comments by Otero García-Castrillón (2004); STSJ Canarias, Las Palmas, *Sala de lo Social*, Sección 1, No. 1123/2004, 24.11.2003, with comments by Requejo Isidro (2005); STSJ Canarias, Las Palmas, *Sala de lo Social*, *Sección* 1, No. 1312/2006, 9.11.2006, with comments by Sabido Rodríguez (2006), pp. 903–908; STSJ Canarias, Las Palmas, *Sala de lo Social*, *Sección* 1, No. 1033/2008, 11.7.2008]. With similar motivation before the entry into force of the Rome Convention, see STSJ de Islas Canarias, Las Palmas (*Sala de lo Social*), 17.7.1992, which applies Spanish law on the basis that the hiring and dismissal occurred in Spain.

[296] The Spanish system matches this trend perfectly. See Asín Cabrera (2008), p. 384.

contract, provided that both are based on solid and objective factors.[297] Nevertheless, introducing this subjective factor while deploying the escape clause may lead to confusion as to whether this is really a case for the escape clause or a choice of law is clearly implicit in the terms of the contract or the circumstances of the case.[298] It is then advisable to keep subjective factors separate from the escape clause to avoid confusion and stick to the objective elements mentioned above, including the ones highlighted by the CJEU, while seeking the closest law to the maritime employment relationship.

4.3.3.4 Change of *lex laboris*, Temporary Posting and Interweaving of Destinations

The fact that the employment relationship is a long-lasting bond facilitates potential changes in the applicable law with the passing of time. The modification of the *lex laboris* may occur as a result of an agreement on choice of law, a case acknowledged in Article 3(2) of the Rome I Regulation to which Article 8(1) refers. Beyond the choice of law, the regularity with which services have to be performed in a specific country in order to determine the law applicable to the contract by default generally avoids the problem of time in the conflict rule. Still, this connecting factor may be subject to variations, unlike the connection that refers to the business through which the employee was engaged, the temporal specification of which—at the time of recruitment—neutralises the time factor. Similarly, the escape clause is to be assessed at the time when the dispute arises; hence, the time factor in this conflict rule is an issue exclusively affecting the transfer of the *locus laboris*.

The starting point has to be establishing at what point the location of the habitual workplace is to be identified, and three possibilities emerge for this: (1) when the contract is concluded,[299] (2) when the proceedings are opened and (3) when the facts giving rise to the lawsuit occur.[300] The latter case takes into account a situation in which a worker has moved workplaces but claims for an issue that arose in the former workplace. Taking this time into account would have the advantage of preserving the rights acquired by employees under a specific law, avoiding a scenario where they would be subject to the vagaries of the change of workplace.[301]

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[297] In this sense, see the Opinion of Advocate General, Mr. N. Wahl, to Case C-64/12, paras. 77 and 78. However, the CJ does not take on his opinion in its judgment 12.9.2013, Case C-64/12, *Schlecker*.

[298] See Okoli and Arishe (2012), pp. 524–529, on the discussion in English law as to the separation of both tests in the context of Articles 3 and 4 of the Rome Convention.

[299] See Carrillo Pozo (2011), pp. 1032–1033.

[300] See Junker (2005), p. 736; Morse (1992), pp. 17–18.

[301] In this sense, see Hoppe (1999), pp. 100–101; Plender and Wilderspin (2009), pp. 318–319, para. 11-051; Sabirau-Pérez (2000), p. 345.

This, however, would lead to different laws being applied to the same legal relationship, when the contract should be governed by one and the same legal system,[302] and assessing where the habitual workplace is at the time when the complaint is filed should therefore be advocated.[303] An overall assessment such as this is necessary to take into account whether possible future postings will be either temporary or permanent, for which reason they may in the end be governed by a law other than the one applicable at the time of the conclusion of the contract, as a result of a change of law produced by a permanent posting. In addition, carrying out the assessment at the time that the claim is lodged serves the purpose of establishing the coincidence between *forum* and *ius*, an underlying objective of this conflict rule.

The modification of the law applicable to the employment relationship is explicitly covered by the Rome I Regulation, as it contains a specific reference to the temporary posting of workers, so that 'the country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country'.[304] This approach embraces a commitment to the stability of the legal system governing the employment relationship, as this does not change on the ground that the work is actually carried out somewhere else. The drafters of the Regulation followed the suggestions of the GEDIP in this,[305] although they left the key distinction between temporary and permanent posting, which depends on whether 'the employee is expected to resume working in the country of origin after carrying out his tasks abroad' for Recital 36.

To elaborate further on the idea reflected in Recital 36 of the Rome I Regulation, the *locus laboris* is established according to whether workers move to another state to carry out a specific task there or to work for a limited period of time while always intending to return to their former workplace at some point. This being the case, the posting does not amount to integration into the labour market of the country workers have been transferred to.[306] In any event, workers' habitual workplace

[302] *Depéçage* is only provided for through choice of law.

[303] In this direction, Magnus (2011), p. 606, para. 175.

[304] Article 8(2), *in fine*.

[305] See GEDIP (2001); Max Planck Institute for Comparative and Private International Law (2007), pp. 288–291. With the same approach, see Belgian *Cour de Cassation*, 27.3.1968889, in a case involving a worker who was transferred to Madagascar but in which the parties to the contract had left his return to his job in Belgium open. In similar terms in France, see Sabirau-Pérez (2000), pp. 345–347.

[306] The point is critical for understanding cases not covered by Recital 36, such as the temporary posting of workers even before they begin work in the country in which the provision of services has been agreed on. Assessing different options for classifying a posting as temporary, in particular its duration, which no longer seems relevant, see Blefgen (2005), pp. 45–50; Coursier (1993), pp. 101–105; Gardeñes Santiago (2008), pp. 410–411; Hansen (2008), pp. 768–770; Hoppe (1999), pp. 168–183; Junker (1992), p. 183; Mankowski (2009), pp. 185–189; Martiny (2015), para. 63; Morgenstern (1987), pp. 48–49; Oetker (2009), para. 31; Plender and Wilderspin (2009), pp. 317–318, para. 11-047; Schlachter (2002), p. 1242; Schlachter (2004), pp. 155–159; Thüsing (2003a), p. 1306; Wurmnest (2009), pp. 492–493. Previously, also taking this approach, see Kaye (1993), p. 233; Simitis (1977), pp. 167–171.

may change for good, perhaps because they are permanently transferred to work on board a vessel flying a different flag or on one operating permanently in another state's waters. In such cases, the applicable law of the employment contract does indeed change.[307]

If a posting is characterised as temporary, this is not affected by the fact that once abroad workers take their instructions from a different employer from the one for whom they habitually performed their duties; to all intents and purposes, they are still under the latter's instructions.[308] In these cases, the employer instructs the workers to carry out the tasks assigned them by a different employer, thus preserving the legal relationship with the former, as may happen while carrying out a time charter.

An analogous situation is found in other cases covered by Recital 36, which refers to successive contracts or employers belonging to the same group of companies[309] and states that 'the conclusion of a new employment contract with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily', i.e., the continuation of the previous employment relationship is not to be disregarded, in particular when it can be assumed that the employee will return to the previous job.[310] Furthermore, there may even be a chain of contracts between businesses that do not belong to the same group of companies—maybe working in networks or on common projects, such as maritime consortia—so the solution for these cases is identical to that proposed for groups of companies, although Recital 36 does not expressly refer to such cases.[311]

The conditions under which the posting occurs—including whether an employer can impose the transfer on employees—are determined by the *lex laboris* in force at the time of the posting, whether this is on a permanent or a temporary basis.[312] In the case of temporary postings, and in spite of what has been said above as to the law applicable to the employment relationship, the law of the place where the temporary performance of services is carried out does have a say, either through overriding mandatory rules or in the European Union through Directive 96/71 of 16 December 1996 concerning the posting of workers in the framework of the provision of services, whose applicability is expressly indicated in Recital 34 of the Rome I Regulation.[313] Article 1(2) of this Directive excludes seafarers from its

[307] See Sabirau-Pérez (2000), p. 344; Thüsing (2003a), pp. 1306–1307; Plender and Wilderspin (2009), p. 317, para. 11-046.

[308] See Thüsing (2003a), p. 1306.

[309] See Junker (1992), pp. 213–219.

[310] GEDIP proposed considering successive contracts concluded with companies in the same group as a mechanism that may help neutralise the *Pugliese* doctrine, which had been strongly criticised for leading to more than one country pursuing the connection of the habitual workplace. Previously, Junker (1992), p. 220, pointing out that in many cases there are two contracts, one active and the other passive (p. 216).

[311] See Mankowski (2009), pp. 191–193; Wurmnest (2009), pp. 493–495.

[312] See, among others, Schlachter (2002), p. 1242.

[313] This Directive is the cornerstone for the construction of the domestic market to the extent that it helps develop a level playing field, avoiding unfair competition arising from substantial wage

scope of application, although it does include fishermen, and it is also understood to be applicable to maritime cabotage; nevertheless, there are serious doubts about its provisions' practical effectiveness.[314] International agreements may play a similar role, however, as they set out international minimum labour standards, in line with the terms of the Directive.

4.4 Overriding Mandatory Rules

The Rome I Regulation and the Rome Convention are characterised by the fact that they envisage different types of mandatory rules while always leaving the door open for the *lex contractus* to be displaced by the application of the overriding mandatory rules laid down by the *lex fori*. In accordance with Article 9(1) of the Rome I Regulation,[315] overriding mandatory rules, *lois de police* or *lois d'application immediate* as they are also known, set out 'the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation'. Hence, they are not provisions that pursue the mere protection of one of the parties to the contractual relationship. In fact, the latter provisions are covered by the law referred to in Article 8(1) of the Rome I Regulation,[316] which is of a different nature from the rules covered under Article 9. While Article 8(1) guarantees minimum protection for workers on the basis of all provisions that cannot be derogated by agreement of the parties contained in the law governing the employment contract in the absence of choice of law, overriding mandatory rules involve the expression of a higher degree of authority, beyond the protection afforded by Article 8(1).

In this sense, the interrelationship between Articles 8 and 9 raises further problems of interpretation. Should the law designated by Article 8 coincide with the *lex fori*, Article 9(2) will not have enough room for application since it is only reasonable to assume that the *lois de police* provided for there are applicable *qua lex contractus* and not *qua lex fori*. Conversely, these would come into play when the

differences among member states. See the Opinion of Advocate General Mischo to Case C 164/99, *Portugaia*, para. 44, finally confirmed by the CJ in its judgment of 24.1.2002.

[314] Recital 17 of the Preamble of Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (O.J. No. L 300, 14.11.2009) clearly established the application of this Directive to maritime cabotage. See in detail van Hoek and Houverzijl (2011), p. 16. This study also indicates that Germany, the Netherlands and the U.K. apply the Directive to maritime transportation (pp. 36–40). This is not the case in Spain, where Article 1(2) of the Law 45/1999 expressly excludes the maritime merchant fleet in line with the Directive.

[315] Taken from CJ 23.11.1999, Case C-369/96, *Arblade*, which was in turn inspired by Francescakis (1966), pp. 1–18.

[316] In contrast to this stance, see Collins et al. (2006), pp. 1667–1668.

applicable law according to Article 8 does not match the *lex fori* and there is therefore no overlap between Articles 8(1) and 9(2) of the Rome I Regulation.[317]

From the private international law perspective, overriding mandatory rules are applicable regardless of the law designated by the conflict rule, in this case the *lex laboris*. They are not applicable to all cases though, as their unilateral nature confers them with their own scope of application,[318] i.e., within their own terms overriding mandatory rules displace the provisions contained in the *lex contractus*.

In addition to this, it is important to bear in mind that the *lois de police* are of exceptional application given that they set aside the law otherwise applicable and are thus incompatible with conflict rules and the international harmony of decisions that they somehow aim to achieve. As a result of this, their application is restricted to cases where there is a link between the facts and the forum, i.e. *Inlandsbeziehung*,[319] for which reason these rules normally determine their territorial scope of application themselves.[320]

Nevertheless, there is a proviso to the statement that they set aside the *lex contractus*, and this becomes apparent when these rules seek to protect a party to the contract through, for example, establishing a minimum wage.[321] Against this background, it is worth wondering whether the priority of an overriding mandatory rule of the forum has to be maintained when it is less beneficial than those provided for in the designated law pursuant to the conflict rule. The CJEU addressed this issue when interpreting Directive 96/71/EC, concluding that while the rules referred to there are also *lois de police*, and thus to be observed in all cases, they do not prevent the application of other more favourable provisions. In other words, the principle of worker protection through the choice of the most favourable law also plays a role in this relationship,[322] so that the overriding mandatory rules of the *lex fori* will not displace the substantive law designated by Article 8 in the event that it is more favourable to the worker.

The main issue of interpretation here is what is to be understood as an overriding mandatory rule.[323] The point is that each state decides which rules are to be deemed overriding mandatory rules, and so they have to be identified within a given legal

[317] Highlighting this point, see Krebbert (2000), p. 531; Morse (1992), pp. 16–17.

[318] See Marques dos Santos (1991).

[319] See de Boer (1990), pp. 57–61; Thüsing (2003a), p. 1308. In general, on the shortcomings of these provisions when it comes to protecting the weaker party, see Leclerc (1995), pp. 192–200.

[320] For a thorough treatment, see Plender and Wilderspin (2009), pp. 322–328, paras. 11-059 to 11-072.

[321] See Gardeñes Santiago (2005), p. 393.

[322] For a thorough treatment, see Magnus (2011), pp. 613–615, paras. 203–210; Martiny (2015), para. 46; Spickhoff (2011), para. 15¸ Staudinger (2011), para. 5. Taking the middle ground, see Oetker (2009), para. 51; Plender and Wilderspin (2009), pp. 354–355, para. 12-043, both differentiating between a rigid rule and another more limited one establishing a minimum standard.

[323] It is easy to find decisions in national case law that confuse the different types of mandatory rules. See Corneloup (2012), pp. 569–572. In Spain, STSJ, *Sala de lo Social*, Oviedo, No. 230/2013, 1.2.2013, with comments by Carballo Piñeiro (2013).

system via a case-by-case examination. Nevertheless, this approach is currently restricted by European Union legislative activity, acting as a limit to such national power,[324] and by the fact that Article 9(1) encodes a definition of *lois de police* that requires autonomous interpretation.[325]

The characterisation of these rules is highly controversial in an area where worker protection is also highly relevant to a state's social organisation. For example, the right to rest and holidays has a role in worker protection and also contributes to improving public health and well-being in general, as it prevents accidents in the workplace, and therefore contributes to a country's social organisation.[326] Rules tailored in accordance with the principle of worker protection are normally in line with the public interests behind states' political, social or economic organisation, as they help in the organisation of the labour market.[327] This could give rise to the idea that rules aiming to protect workers are of an overriding mandatory nature. However, *lois de police* are exceptional, and the difference between the protection afforded by the rules to which Article 8 of Rome I refers, including restrictions on the choice of law, and overriding mandatory rules must be underlined. In addition to this, when establishing what an overriding mandatory rule is, it should be borne in mind that it is always possible to resort to the public policy exception when the result of the application of the *lex contractus* in question contradicts the legal system's fundamental values.[328]

Within this framework, two criteria have been suggested for identifying such rules: first, whether the rule in question is of constitutional origin, such as those dealing with the prohibition of discrimination[329] and, second, whether it involves a public law matter, such as provisions for social security, health and hygiene, and risk prevention at work,[330] or even collective redundancies, as the socio-economic organisation of a country is at issue.[331] Spain, for example, considers *lois de police*

[324] As is made it clear by CJ's judgments 23.11.1999, Case C-369/96, *Arblade*, and 15.3.2001, Case 165/98, *Mazzoleni*. See further Hess and Pfeiffer (2011), pp. 41–43.

[325] On the advantages and disadvantages of this rule, see Bonomi (2009), pp. 112–119.

[326] See Mankowski (2009), pp. 205–207; Müller (2004), p. 187; Thüsing (2003a), p. 1308. Indicating the preference of Article 6 of the Rome Convention over Article 7, although in favour of accumulation where appropriate, see Kaye (1993), pp. 230–231 and 237–238. Also on the difficulties in its determination, see Lyon-Caen (1991), pp. 59–62.

[327] For a detailed treatment, see Gardeñes Santiago (2005), pp. 381–413; Harris (2004), pp. 295–297. On more restrictive terms analysing German case law, see Junker (2007), pp. 28–31.

[328] See Junker (2004), pp. 1211–1214; Montfort (2008), pp. 82–83, underlines the BAG judgment of 12.12.2000, with comments by Gragert and Drenckhahn (2003), pp. 305–308.

[329] A clause on compulsory retirement accepted by the Bahamian law governing the employment contract was held to be against the Spanish legal system by breaching the prohibition of discrimination on grounds of nationality. See STSJ Galicia (*Sala de lo Social*), 26.4.2004, with comments by Michinel Álvarez (2004); STSJ Canary Islands, Las Palmas, *Sala de lo Social*, *Sección* 1, No. 158/2005, 7.3.2005; STSJ Canary Islands, Las Palmas, *Sala de lo Social*, *Sección* 1, No. 159/2005, 7.3.2005.

[330] See Junker (2004), pp. 1212–1214; Junker (2009), p. 95; Krebbert (2000), pp. 531–535.

[331] See, for all, Deinert (2013), pp. 373–374.

to be all rules whose aim is to preserve the dignity and privacy of workers.[332] Meanwhile, the UK as well as Portugal characterise *lois de police* as rules dealing with unfair dismissal,[333] whereas Germany has rejected such an approach but gives consideration to provisions aimed at protecting mothers and the disabled.[334]

Nevertheless, it must be highlighted that Article 9(1) ought not to be studied in the framework of the public–private law distinction since private standards also qualify as overriding mandatory rules.[335] It is worth mentioning in this respect that the CJEU's *Arblade* judgment, which inspired the concept of overriding mandatory rules laid down in Article 9(1), indicates that rules on workers' social protection such as those dealing with the minimum wage are an excellent example of some of the pivotal reasons relating to the public interest that may restrict the exercise of freedom of movement.[336] Nor is the characterisation as an overriding mandatory rule at odds with the fact that the provision in question favours the weaker party, in addition to primarily pursuing a public policy. Protecting the weaker party is not an objective pursued by overriding mandatory rules, however, so the seized court cannot understand a rule to be of an overriding nature on the grounds of worker protection, as some commentators have suggested.[337]

Overriding mandatory rules can also be contained in collective agreements. This issue was a moot point for many years, but the application of Directive 96/71/EC resolved the discussion in the affirmative, as long as the collective agreement at stake has normative effects and can therefore generate this kind of rule.[338]

These rules can also of course be contained in international conventions such as those developed by the ILO with the well-known purpose of establishing a set of

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[332] Article 3(1)(g) of Spanish Law 45/1999.

[333] Questioning this classification, see Merrett (2010/2011), pp. 238–243. According to Article 53 of the Portuguese Constitution, not only dismissal must be fair but also the final outcome of a proceeding in order to grant the employee's rights to be heard and to defence. See *Tribunal da Relação* Porto, Section 4 (Social), 2.6.2014: although the seawoman was protected by the Portuguese law as the law of the habitual workplace, it was contended by the French company that the closest law was the French one, for which reason the court argued that, even in that case, Portuguese law would override French law given that the employee was not granted a fair dismissal proceeding by the company in the case at hand.

[334] See Deinert (2009), pp. 151–152; Deinert (2013), pp. 204–205; Gräf (2012), pp. 611–612, both with a list of the items included.

[335] On the debate in Germany, see for all Deinert (2013), p. 190. Previously, Bonomi (2009), pp. 116–119.

[336] See CJ 23.11.1999, Case C-369/96, *Arblade*, paras. 32 and 51.

[337] The gaps in Article 8 of the Rome I Regulation/6 of the Rome Convention, the basis of which is the principle of worker protection, have been filled in by this means. Along the same lines, see Pocar (1984), pp. 403–408, followed by Gardeñes Santiago (2005), p. 392.

[338] See Deinert (2013), pp. 198–201; Schlachter (2002), pp. 1244–1245, and CJ 28.3.1996, Case C-272/94, *Guiot, Climatec SA*; 23.11.1999, Case C-369/96, *Arblade*; 15.3.2001, Case 165/98, *Mazzoleni*; 25.10.2001, Cases C-49/98, C-50/98, C-52/98 to C-54/98, C-68/98 to C-71/98, *Finalarte*; 24.1.2002, Case C-164/99, *Portugaia Construçoes*.

minimum international labour standards. Nevertheless, despite their undeniably mandatory nature, it is in fact questionable whether they can be deemed overriding mandatory rules *per se*. In a judgment on 9 May 1980, the German Supreme Court[339] ruled against granting ILO Convention No 139 of 1974 on occupational cancer *loi de police* status, in a case brought by German producers against imports of asbestos-containing products from South Korea. Their claim was based on an infringement of German foreign competition law on the ground that the foreign producers had not fulfilled the requirements laid down in the Convention. The German *Bundesgerichtshof* rejected this claim, arguing that South Korea was neither an ILO member at that point nor a contracting party to the Convention in question. Consequently, while South Korea was not obliged to implement the Convention, Germany was equally not entitled to impose it while importing products on the grounds of its overriding mandatory nature. Nonetheless, the ILO itself currently discriminates between conventions that do contain minimum standards and those that do not, a highly illustrative example of this being the 1998 Declaration on Fundamental Principles and Rights, through which the organisation sought to underline the core nature of freedom of association as well as the prohibition of forced and child labour and discrimination in the workplace.

The issue of exactly what are to be deemed overriding mandatory rules in the shipping and fishing sectors[340] is no less controversial. In line with what has already been pointed out, national courts do not apply the rules of the forum dealing with protection against dismissal as *lois de police for example*, nor do they apply those dealing with the transfer of a company's registered office or the rules on enrolment and entitlement to paid leave[341]; in fact, they do not fit the guidelines provided for Article 9(1).

The ILO conventions may help clarify this issue; MLC, 2006, and WFC, 2007, established a set of minimum labour standards with the primary goal of ensuring decent working conditions on board ships, dealing with the minimum requirements for working on a ship, conditions relating to employment, accommodation, recreational facilities, food and catering, health protection, medical care and welfare and social security protection. The fact that they provide internationally acknowledged standards aimed at levelling competition in a highly globalised framework, and that the standards are subject to labour inspection, assists in the task of characterising these provisions as overriding mandatory rules. However, the rules must be looked at on an individual basis, as both the precision requirement and that of connection with the forum state must be fulfilled.

In accordance with these clarifications, provisions laid down in the mandatory part of MLC, 2006—similar to those provided for in WFC, 2007—are suitable to be qualified as *lois de police*. For example, both conventions stipulate a minimum

[339] BGH 9.5.1980, 1 ZR 76/78. Critical, see Muchlinski (2007), pp. 500–501.

[340] On the role of these rules in cases of flags of convenience, see Simitis (1977), p. 171, footnote 68, citing *Hellenic Lines v. Rhoditis*, 412 F. 2d 919 (5th Cir. 1969) and Carbone (1979), p. 164.

[341] BAG 24.8.1989 and 3.5.1995, and Franzen (1997), pp. 1055–1074; Mankowski (1994), pp. 94–96.

employment age and a number of work and rest hours in line with other relevant international conventions on the topic, such as the STCW and the STCW–F conventions, which have significant provisions for maritime safety and which are also of overriding mandatory nature in the sectors involved. The provisions also cover the right to repatriation and all rules on safety, health protection and hygiene. They also establish the need for a minimum wage, but the rule in question does not elaborate on the amount involved. The payment of a minimum wage is linked to social welfare issues, but its application as an overriding mandatory rule seems to be restricted to cases in which the amount of salary paid goes *contra bonos mores*.[342] However, the CJEU stated that the provision laying down a minimum wage consists of an overriding mandatory rule in the context of Directive 96/71/EC, provided it is clearly established. MLC, 2006, and WFC, 2007, merely require a minimum wage, and it will therefore be up to the applicable national law to determine whether or not the corresponding provision is an overriding mandatory rule.

More doubts are raised by what kind of connection is needed with the forum in order to apply an overriding mandatory rule with its origin in these conventions. The issue can be resolved by bearing in mind that MLC, 2006, and WFC, 2007, contain rules applicable to non-contracting states as well: first, although their provisions are primarily aimed at flag states, port states must also ensure that they are generally complied with by either the flag states or shipowners, and second, vessels flying the flag of a non-contracting party to the conventions must also comply with their requirements as they are also subject to port state control, with a view to preventing social dumping. In short, there is always a connection with the forum as these minimum standards cannot be ignored by non-contracting states, regardless of vessel in question's link with the forum.[343]

Finally, Article 9(3) of the Rome I Regulation states that 'effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful'. This provision is the result of a consensus, and its scope is narrower than that of Article 7(3) of the Rome Convention, as it no longer refers to 'another country with which the situation has a close connection', but to the country where the contract is fulfilled, in order to avoid the reservation contained in Article 22 of the Rome Convention, which, for example, was used by Germany.[344]

The notion of overriding mandatory rule is that contained in Article 9(1), though it is no longer that of the *lex fori* but of the *lex loci solutionis*. Where employment contracts are concerned, this situation will arise in particular when a habitual place

[342] As suggested by Gamillscheg (1983), pp. 326–327.

[343] Carbone (2009b), p. 197, qualifies these standards as *erga omnes*.

[344] On the effects of the difference between the two rules on employment contracts, see Basedow (2013), pp. 403–404, for whom it is in any case difficult to see any country's overriding mandatory rules other than the rule referring to the fulfilment of the contract applicable.

of work cannot be identified, when the applicable law is determined pursuant to the escape clause or in the context of the posting of workers. The seized court will examine the legal system of the state where the contract is carried out to determine whether, from the latter's perspective, the case in question entails applying an overriding mandatory rule pursuant to state law.

Nevertheless, the application of third states' *lois de police* to the case is not mandatory,[345] inasmuch as the court is empowered to apply it if the rule in question renders the performance of the contract unlawful. In this sense, it may give effect to foreign rules on working hours and on workers' health and safety, for example.[346] The same applies to rules that require work permits to operate in the country concerned if they are required for the sector involved.

4.5 The Public Order Exception

The role of mandatory provisions of the law governing employment contracts is of such paramount importance that there is little room for the public order exception to operate.[347] However, this does not preclude its intervention, in particular in cases where core values of the forum's legal system are seriously violated,[348] such as in cases of discrimination, shamefully low wages, prohibitions on joining or contacting trade unions, 'lifting of the contractual veil' in the sense that employment contracts may be disguised under other contractual arrangements,[349] when workers are given no reason for their dismissal[350] or when this occurs without compensation,[351] among other cases. The clause has also been invoked to reject

[345] See d'Avout (2008), pp. 2165–2168, on the options opened by the restrictions introduced in Article 9(3) of the Rome I Regulation for avoiding the overriding mandatory rules of a third state by selecting the competent court.

[346] See Thüsing (2003a), pp. 1308–1309. Against the application of third states' *lois de police* on grounds of the legal uncertainty it may generate, see Harris (2004), pp. 269–290.

[347] Along these lines, see Junker (1992), pp. 313, 315–317; Martiny (2015), para. 180; Simitis (1977), pp. 157–159; Spickhoff (2011), para. 30. On the differences between overriding mandatory rules and the *ordre public* clause, see Basedow (2013), pp. 432–444, challenging this difference; de Miguel Asensio (2001), pp. 2857–2881.

[348] See Gamillscheg (1983), pp. 303–304; Gamillscheg (1961), pp. 686–699.

[349] See Birk (2006), pp. 21–31. As a simple problem of characterisation, see Mankowski (1997), pp. 469–472.

[350] In this sense, see *Corte di Cassazione*, Sez.Lav., No. 2622, 9.3.1998, setting aside Liberian law, which was the law chosen and the law of the flag. For a critical approach to this decision, see Ruggiero (2000), pp. 137–145. Also *Pretore* Genova, 15.9.1998, *G. Basciano c. Renaissance Cruises Inc., F.lli Cosulich S.p.a.*; and *Corte di Cassazione*, S.U., No. 15822, 11.11.2002, with comments by Clerici (2003), seeking a justification on Article 30 of the EU Charter on Fundamental Rights (pp. 821–825).

[351] See Deinert (2013), p. 378.

rules relegating the priority of wage claims in insolvency proceedings, on the basis of the interpretative principle *pro laboratoris*.[352]

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[352] See *Tribunale di* Ravenna, 29.12.2006, *F.R. c. M/N Father's Blessing, V. Pertsinis ed altri*: when the ship, which was flying the Honduras flag, had been sold, the seafarers' wages were paid first, as the sale was challenged by a lawyer who argued that according to Honduran law his claim was prior to the others. Clerici (2003), pp. 816–820, rejects the application of this principle in the framework of the Rome Convention.

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Chapter 5
Collective Labour Relations and Private International Law

5.1 Introduction: The Role of Trade Union Activities in the Maritime Sector

The organisation of collective labour relations is still in state hands, and states are responsible for setting the conditions under which workers and employers can use the mechanisms of self-organisation, self-legislation and self-governance within their own territory. The traditional unilateralist approach to the rights to collective bargaining and industrial action is clearly behind the idea that stakeholder action needs to be assessed in the light of the legal system of reference. This system is selected on the basis of the territoriality principle, as evidenced by the fact that legislative power in the field of labour relations remains at state level even in an area of supranational integration such as the European Union.[1] The result is a model designed to operate in a territory, the frontiers of which have, however, been surmounted by the transnational nature of all the stakeholders involved, including both companies and workers. It is therefore necessary to move forward towards the international regulation of these rights and overcome the current localism.[2] There have already been some movements in this direction, but they are of little consequence from a regulatory perspective.

At the forefront of this trend is the maritime sector, the first area to feel the tensions behind globalisation and the consequent need to look for valid counterbalances in the face of national inability to impose domestic policies on companies operating internationally. Flags of convenience that allow shipowners to save on taxes and labour costs have facilitated the avoidance of domestic law, as is well known. In this framework, the ITF has provided a new approach to the issue in its fight against these flags: in addition to intense diplomatic activity to find a clear

[1] Article 153 TFEU.

[2] See, for all, Jaspers (2007), pp. 23–74, grounding his proposal in the European Social Charter and its interpretation by the supervisory committee.

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definition of the 'genuine link' between the flag state and the vessel, the ITF has set up an innovative strategy based on trade union coordination, which counts among the earliest reactions to capital mobility.[3]

This policy is based on the concept of beneficial ownership of the vessel, stemming from the assumption that the country where the beneficial ownership is located will also be the country where trade union activity will in fact be most effective. In a transnational context, measures are adopted with the aim of protecting workers' interests, for example, by preventing shipowners from registering the vessel in a different country and taking the jobs somewhere else and by improving the living and working conditions of workers on board the vessel regardless of their nationality.

According to this policy, only unions operating at the place where the beneficial owner of the vessel is based have the necessary legitimacy to engage in collective bargaining and are therefore responsible for taking action if the company is not willing to negotiate. This would clearly be impossible in such an internationalised sector without the union coordination activity carried out by the ITF, which asks other unions to refrain from bargaining on the vessel or vessels concerned and, where appropriate, to undertake secondary industrial action such as sympathy or solidarity actions. As a matter of fact, these actions are essential for resolving international conflicts of interests and often lie behind shipowners agreeing to sign collective agreements consistent with ITF-imposed requirements.[4]

From an organisational perspective, the transnational character of companies and workers raises the question of how effectively freedom of association and trade unionism can be asserted at both individual and collective levels. In the current framework of state control over national labour markets, trade unions' cross-border operations are limited by the unquestionable fact that, just like any other legal person, they are subject to the law of the country of incorporation or administration, which generally also determines their capacity to represent workers in a specific territory.

These limitations can be overcome through union coordination with the intervention of supranational union bodies such as the ITF,[5] but more specifically with the support provided to unions' international activity by the broad panoply of international instruments dealing with the rights and freedoms at stake here: beyond the scope of the relevant national legislation, international standards endorse union representation in cases that occur far away from their territory and that also involve non-union members. The following section provides an overview of the main international instruments in this area and of how they can contribute to supporting the role of ITF inspectors in preserving living and working conditions on ships that call at foreign ports.

[3] On this strategy, see further Fitzpatrick (2007), pp. 85–92; Lillie (2004), pp. 47–67.

[4] Further examples in other industrial and commercial sectors are found in Warneck (2007), pp. 75–84.

[5] See Carril Vázquez (2003); Muchlinski (2007), pp. 492–501.

Conventional international law recognises freedom of association and the right to collective bargaining and industrial action, but each individual nation develops these rights and freedoms according to the specific features of its own labour market. Domestic legislation therefore focuses on collective labour relations within the country's boundaries, but does not address their international dimension. Nevertheless, globalisation provides numerous examples of international cases, which in the maritime domain are at the heart of the ITF campaign: among all the jurisdictions concerned, unions in the beneficial ownership state are in charge of collective bargaining on the ship or fleet in question. In these cases, the existence, validity and even scope of collective agreements signed under these conditions can be challenged, as they aim to bind workers who are neither members of the bargaining union nor resident in the state where the negotiations are being carried out.

As a matter of fact, these cases split into two distinct problems. While the existence and validity of a transnational collective agreement can be challenged, which involves establishing which courts will be seized and which law will decide on these issues, the collective agreement's binding effect on workers depends on the law governing the relevant employment contract. Hence, concluding a collective agreement for a vessel does not mean it is applicable to each and every seafarer or fisherman on board, which depends on its being recognised by the relevant *lex laboris*; given that as many laws as there are workers on board may be applicable, the collective agreement's scope remains uncertain. This stumbling block can be avoided by trying to match the law applicable to collective agreements with that affecting employment contracts and by resorting to general principles on the matter.

If a ship is flying a flag of convenience, ITF policy is to pursue industrial action by warning shipowners that if they do not agree to a standard collective agreement with the ITF, they will risk a ship boycott at any port in the world by any local union participating in the organisation. If an agreement is concluded, owners are given a blue certificate, which is a guarantee that the ship will not be immobilised. This strategy generates significant controversy, even within the European Area of Justice, where it has in fact been overtly rejected. The CJEU's *Viking* judgment—and in fact three other decisions, namely, *Laval*, *Rüffert* and *Commission v Luxembourg*[6]—directly attacks ITF strategy,[7] highlighting the fact that the right to go on strike cannot hinder freedom of establishment and the freedom to provide services, for example in cases in which industrial action aims to prevent a change of flag,[8]

[6] CJ 23.5.2007, Case C-341/05, *Laval un Partneri Ltd vs. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggetan and Svenska Elektrikerförbundet*; 3.4.2008, Case C-346/06, *Dirk Rüffert, acting as liquidator in Objekt und Bauregie GmbH & Co. KG c. Land Niedersachsen;* 19.6.2009, Case C-319/06, *Commission v Luxembourg*.

[7] CJ 11.12.2007, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*.

[8] As happened in the CJ 11.12.2007, Case C-438/05, *Viking* case. These cases are highly remarkable, taking into account that Sweden and Finland are both countries in which sympathy actions are largely allowed. See Northrup and Rowan (1983), pp. 56–70.

making it patently obvious that there are also flags of convenience in the European Union.[9] The right to strike is therefore limited by EU market freedoms, and a subsequent section of this chapter is devoted to this confrontation.

If the proportionality test between the contradictory fundamental freedoms and rights imposed by CJEU case law is not exceeded, industrial action may result in a right to compensation in favour of any company whose freedom of establishment or provision of services has been infringed, a right that is acknowledged by Article 9 of the Rome II Regulation on the law applicable to non-contractual obligations. Before examining this conflict rule, the issue of which law should decide on the legality of industrial action needs to be addressed, following which issues of international jurisdiction and the law applicable to the consequences of an illegal strike, such as tort liability, will be tackled.

No explicit transnational problems have arisen with respect to the rights to collective representation or assembly, information, consultation and participation in the activities of a company, perhaps due to the influence of the territoriality principle in this field. Nevertheless, they pose particular problems with respect to transnational companies, and these have led the European Union to draft various directives. Beyond harmonisation, the issue of the conflict of laws seems to have been resolved by giving prevalence to the law of the place where the headquarters of the company or the business is located. The law of the flag also comes into play in the shipping and fishing sectors, and the last section of this chapter is devoted to a discussion of the issues involved.

This chapter does not deal with the relationship between trade unions and their members or the question as to whether the latter have rights while serving abroad. Union activity in defence of members abroad is really quite frequent in the maritime field, but only rarely does it result in a dispute between the two parties. A good example of this is provided by a German judgment concerning a rescue ship flying the Cypriot flag, operating in Panamanian waters and registered by its owner in Hong Kong. The captain, who was German, had an accident at work, which, in tandem with other disagreements with the company, led him to lodge a claim in Panama. He requested the legal support of his trade union in Germany, which provided this by hiring a lawyer in Panama and undertaking the preemptive seizing of the ship, resulting in the shipowner being obliged to satisfy various wage claims in the captain's favour. The captain still wished to claim compensation for the accident at work, but when he contacted the Panamanian lawyer to begin the process the union unilaterally decided not to dispute the proposed lifting of the ship's arrest, and this cost the captain the opportunity to sue in Panama.[10] All in all, union rights and obligations towards their members are generally subject to the law

[9] For a critical approach, see Fotinopoulou Basurko (2009), pp. 40–58; Muir-Watt (2008), pp. 400–405; Raison and Chaumette (2009), pp. 794–808; Reich (2008), pp. 125–161.

[10] See BGH, 8. 5. 2000—II ZR 182/98, with comments by von Hein (2001), pp. 567–572. A similar case is dealt with by OLG Hamburg, 25.1.2008—1 U 176/95.

governing the former, including the obligation to provide services and support to members working abroad.

5.2 Freedom of Association and the Rights to Collective Bargaining and Industrial Action

5.2.1 International Treaties

Freedom of association, the right to collective bargaining and the right to collective action—including the right to strike—are not conceived as a single set of freedoms and rights so as such are not recognised as a unit, although they are closely intertwined. They are acknowledged by democracies the world over, as is demonstrated by freedom of association's being incorporated into Article 22 of the International Covenant on Civil and Political Rights, as well as Article 8 of its counterpart, the International Covenant on Economic, Social and Cultural Rights, both of which specify the right to form trade unions as laid down in Article 23(4) of the 1948 Universal Declaration of Human Rights. A number of international instruments address these freedoms and rights more thoroughly and are therefore likely to have a greater impact on the way in which industrial relations are regulated within national boundaries: the regulatory models are certainly very different, but these instruments provide a lowest common denominator, especially in Europe. This minimum standard is particularly relevant when industrial action has a transnational impact, as the legitimacy of the action may be subject to different systems with differing consequences for those involved. Some international instruments benefit from the activity of interpretative bodies, and this helps increase the value of their rules in industrial relations management at state level.

Neither MLC, 2006,[11] nor WFC, 2007,[12] includes these rights within their scope, but they were referred to by a number of specific pre-existing ILO agreements on the matter, among which the 1948 ILO Convention No. 87 on freedom of association and protection of the right to organise and No. 98 on the right to organise and collective bargaining in 1949 are especially worthy of note. Both Conventions are of mandatory application for contracting nations and countries that have joined ILO Convention No. 147 on Merchant Shipping, as the latter classifies these freedoms and rights as minimum standards in this sector. In sectors other than merchant shipping, the ILO 1998 Declaration on Fundamental Principles and Rights needs mentioning as it considers freedom of association both essential and indispensable,

[11] Maritime Labour Convention, 23 February 2006, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:91:0::NO:91:P91_INSTRUMENT_ID:312331:NO.

[12] ILO Convention No. 188, 14 June 2007 concerning work in the fishing sector, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312333:NO.

while ILO Convention No. 135 and Recommendation No. 143, which complement these Conventions and concern the protection and facilities to be afforded to workers' representatives in companies, should also be mentioned.

More specifically, ILO Convention No. 87 lays down the freedom to create an association and to join one, which actually entails the absence of a prior authorisation scheme, as well as the freedom to choose a union to join. Further guarantees of trade union activity are enshrined in the Convention, for example the guarantee that only the courts can order the suspension and termination of a trade union. The right to strike is not explicitly referred to, but after extensive reading the Committee on Freedom of Association considered that the right was included.[13] It should also be noted that the personal scope of application covers all workers with no distinction of any kind, particularly on nationality grounds.[14] This convention rule also serves the purpose of protecting ITF inspectors' access on board ship, as their activity corresponds to workers exercising their freedom of association.[15]

The Council of Europe provides two relevant instruments in this area. The first is the European Social Charter, which is of minor significance as it is a programmatic text. However, this was not an obstacle to its being taken into account in Article 151 of the TFEU, for which reason the Charter is given specific consideration in the establishing of European Social Policy. Articles 5 on freedom of association and 6 (4) on the right to strike, which also appears in the revised version,[16] and Article 31 (1) are especially noteworthy. According to the latter, neither these rights nor their exercise can be subject to restrictions or limitations that are not specified in the Charter, 'except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals'.

The *auctoritas* of both this instrument and its supervisory committee has afforded them major influence over the interpretation of other international instruments, in particular the second instrument issued by the Council of Europe, the European Convention on Human Rights,[17] and the interpretation rendered by the European Court on Human Rights.[18]

Article 11 of the ECHR enshrines the right to freedom of assembly and association, including the right to set up and join unions as well as the protection of their members' interests. The article does not refer to further rights, and ECtHR case law

[13] By interpreting Article 3 of Convention No. 87. See ILO (2006), para. 131, pp. 520–676.

[14] In this regard, see Charbonneau (2009), pp. 474–478.

[15] See Chaumette (2009), pp. 185–187.

[16] European Social Charter signed in Turin on 18 October 1961. The amendment was made in Strasbourg on 3 May 1996.

[17] 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and 14, and complemented by Protocols No. 1, 4, 6, 7, 12 and 13.

[18] In countries without constitutional rules on the right to strike, Article 6(4), of the European Social Charter is the basis on which jurisprudence recognises the right: in the Netherlands, Hoge Raad, 30.5.1986; in Germany, BAG, 10.12.2002—1 AZR 96/02; and in Belgium, *Cour de Cassation*, 21.12.1981. See Dorssemont (2007), p. 251.

did not help broaden its scope until very recently. Despite a certain degree of reluctance at the outset, ECtHR judgments soon reaffirmed both positive and negative aspects of freedom of association, i.e. the right to associate and the freedom not to associate with others.[19] However, it was far less generous in protecting other rights that the ILO, for example, considers intrinsically linked with this freedom, namely, the rights to collective bargaining and industrial action.[20] This stance has fortunately been reviewed,[21] and in its judgments on Turkey's attacks on government employees' freedom of association the ECtHR accepted that both the right to collective bargaining[22] and the right to strike are corollary rights to that of freedom of association, also enshrined in Article 11 of ECHR.[23] As a consequence, ITF inspectors are also likely to invoke the ECHR in order to get access to vessels.[24]

The entry into force of the European Charter of Fundamental Rights involves an explicit acknowledgment of a number of rights that had already been mentioned by the TFEU, but only to emphasise that the European Union did not have legislative competence on these matters. Prior to this, the Charter of Fundamental Social Rights of Workers of 9 December 1989, where freedom of association and collective bargaining are explicitly enshrined, as well as the right to strike and to take other industrial action (item 13) is worth mentioning. However, this document's programmatic nature required a much more binding statement, such as the one now provided by the European Charter of Fundamental Rights; the new Charter's binding nature has not prevented European Union intervention on this issue from being piecemeal though, as the Union in fact lacks legislative competence on these matters. The European Union has however taken steps that involve explicit

[19] Although not immediately, given that the principle of negative freedom of association was not finally acknowledged by the ECtHR until its judgments 30.6.1993, *Sigurdur A. Sigurjonsson v Iceland*; 25.4.1996, *Gustafsson v Sweden*.

[20] On the evolution of this jurisprudence, see Rodríguez-Piñero Bravo-Ferrer and Rodríguez-Piñero Royo (2009).

[21] The *Schmidt and Dahlström* judgment against Sweden of 6.2.1976 stands out among ECtHR decisions, given that Swedish law does not deny trade unions the rights to collective bargaining and strike action, but neither were deemed essential for their tasks, and thus they were not included in Article 11 of the ECHR.

[22] Before this, the ECtHR only acknowledged the freedom to start collective bargaining negotiations and the consequent security that one would not be prosecuted for it, but not the right as such. See ECtHR 2.6.2002, *Wilson v. the United Kingdom*.

[23] ECtHR 21.11.2006, *Demir and Baykara v Turkey*; 27.3.2007, *Karaçay v Turkey*; 17.7.2007, *Saltimis and al. v Turkey*; 12.11.2008, *Demir and Baykara v Turkey*. ECtHR 21.4.2009, *Enerji Yapi-Yol Sen v Turkey*, takes a step forward by stating that 'le droit de grève est reconnu par les organes de contrôle de l'Organisation internationale du travail (OIT), comme le corollaire indissociable du droit d'association syndicale protégé par la Convention C87 de l'OIT sur la liberté syndicale et la protection du droit syndical et rappelle que la Charte sociale européenne reconnaît aussi le droit de grève comme un moyen d'assurer l'exercice effectif du droit de négociation collective' (No. 34). Later on, ECtHR 30.7.2009, *Danilenkov v Rusia*; 15.9.2009, *Saime Özcan v Turkey*; 15.9.2009, *Kaya and Seyhan v Turkey*; 13.7.2010, *Cerikci v Turkey*.

[24] In this sense, see Chaumette (2010), pp. 307–310.

recognition of these rights in one way or another, such as addressing employee participation in the works councils of businesses set up according to EU Regulations on European companies.[25]

The EU has made progress in collective bargaining, and the maritime sector in particular has benefited from this major breakthrough: it is clear from Article 155(2) of the TFEU, formerly 139(2), that social dialogue can lead to an EU instrument being introduced, as evidenced by the transformation of ILO Conventions into EU legislation. For example, an agreement between ECSA and FST on 30 September 1998 led to the European Union issuing Directive 1999/63/EC,[26] based on ILO Convention No. 180, on seafarers' working hours. The European Union's adoption of MLC, 2006, was also followed by a directive,[27] and the same path is being taken to incorporate WFC, 2007.[28]

The European Union therefore promotes cross-border collective bargaining and seeks to guarantee workers' rights to information, consultation and participation. However, throughout this process no steps forward have been taken to regulate the right to industrial action in cross-border cases, which is expressly excluded from the scope of Article 153(5) of the TFEU. Article 28 of the European Charter of Fundamental Rights confirms this exclusion; as previously mentioned, it acknowledges the rights, but in terms that are a good example of the limits of EU law: 'Workers and employers, or their respective organisations, have, *in accordance with Community law and national laws and practices*, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action'.[29]

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[25] See Council Directive 94/45/EC of 22 September 1994 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 (OJ No. L 254, 30.9.1994. Corrigendum, OJ No. L 103, 23.4.2009); Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of Member States relating to collective redundancies (OJ No. L 225, 12.8.1998); Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (OJ No. L 294, 10.11.2001); 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—Joint declaration of the European Parliament, the Council and the Commission on employee representation (OJ No. L 80, 23.3.2002).

[26] Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organization of working time of seafarers concluded by the European Community Shipowners' Association (ECSA), and the Federation of Transport Workers' Unions in the European Union (FST),—Annex: European Agreement on the organization of working time of seafarers (OJ No. L 167, 2.7.1999).

[27] 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/EC (OJ No. L 124, 20.5.2009.

[28] See European Commission—Press release 'Working conditions in fisheries: key agreement signed by social partners', Brussels, 21 May 2012. Available at http://europa.eu/rapid/press-release_IP-12-493_en.htm. Accessed October 2013.

[29] My emphasis.

The following sections provide an overview of the different legal approaches to the rights in question, paying particular attention to industrial action and its vicissitudes within the European Area of Justice.

5.2.2 *Regulatory Models and Resulting Legal Diversity with Special Reference to Industrial Action*

Freedom of association is structured around two models: one single-tier and one two-tier. In the single-tier model, trade union activity is restricted to intervening in company life, whereas in the two-tier model they are allowed greater social participation and can play a part in forums outside the particular company or group of companies whose workers they represent.

A number of different systems of classifying collective bargaining, which have minor differences, have been suggested. A more general proposal only includes two models—one of a contractual nature and the other of a constitutional one—whereas a more specific proposal depicts three[30]: (1) a contractual model with no general rules according to which industrial relations are articulated through collective agreements by means of which industrial action, including the right to strike, is also regulated; examples of this model are Germany, Austria and Belgium; (2) in contrast, other states establish these rights constitutionally without major legislative developments, as is the case in Denmark and France; and (3) other nations, like Ireland and the Czech Republic, have a legal approach. Models (2) and (3) in fact comprise the constitutional model of the more general proposal, and many states combine both approaches, i.e., in addition to protecting these freedoms and rights constitutionally, nations such as Finland, Hungary, Lithuania, Portugal, Spain and Sweden legally regulate the conditions of their exercise.

All in all, the key difference between countries adopting either a contractual or a constitutional model is based on the fact that some nations have not undertaken a comprehensive legal development of industrial relations at national level, instead entrusting their exercise to self-regulation, i.e., relying on stakeholder involvement to resolve the conflicts of interest at stake, while other countries do have statutory provision for the conditions under which collective bargaining is conducted and industrial action undertaken.

Different approaches arise from these distinct models, in particular to the right to strike.[31] In the non-interventionist model, both industrial action and the conditions of its exercise are left in the hands of the parties to the conflict, and their development is largely determined by case law. For example, in Germany the right to call a

[30] On the general proposal, see Baylos Grau (2010), pp. 25–40. On the specific proposal, see Petrylaite (2010), pp. 423–424.

[31] Comparative analysis taken from Dorssemont (2007), pp. 245–273, in a book including national reviews, and Petrylaite (2010), pp. 424–434, studying most EU member states.

strike is granted exclusively to unions, and the conditions under which strike action can be declared, such as whether a vote is required, are regulated by the union's articles of association. In Sweden, this is deemed a collective right that can be exercised by trade unions, employers and employers' associations. The French Constitution, for its part, conceives this to be an individual right, although it can only be exercised collectively, leaving the technicalities to case law. In Denmark, strikes can only be called by unions but must be previously approved by 75 % of their members; in any event, giving employers prior notice is mandatory. These peculiarities are also legally regulated in other states such as Spain: in addition to Article 28 of the Spanish Constitution, the key piece of regulation is Royal Decree No. 17/1977, which covers the peculiarities of industrial action and allows not only unions but also groups of workers or the works council in a company to call strikes restricted to a particular business sector, while only unions are allowed to call general strikes; the company and the Ministry of Labour must be given prior notice, and negotiating is mandatory from that moment on.

This legal diversity has led in turn to different interpretations of the notion of industrial action depending on the legal system of reference.[32] Germany and Austria, for example, consider the right to strike a corollary of the right to collective bargaining, as a result of which the former can only be exercised to improve the living and working conditions of workers and not for other purposes, such as the political and socio-economic demands accepted in Spain. Collective action can take the form of different initiatives, including boycotts, occupying the workplace, stoppages and go-slows, the legality of which varies from country to country. The most questionable actions are boycotts and occupying the workplace, which is not allowed, for example, in Germany or the UK. In contrast, other countries such as Holland, Spain and Italy give broad coverage to measures other than strikes themselves.

The most relevant differences for the purposes of organising cross-border collective action concern the admissibility of solidarity actions. Apart from in the UK, there is no legal regulation in this area as these measures are not directed against employers themselves. As their name suggests, they are shows of solidarity among workers in the same sector. In this sense, they may also be a kind of secondary action to the extent that they are organised in support of a primary action, namely, industrial action truly undertaken against an employer with a view to improving workers' living and working conditions. Nevertheless, it should be noted that sympathy or solidarity actions do not always depend on primary actions since workers in whose support solidarity is exercised may not be able to organise a strike.[33]

Solidarity actions are not allowed in the UK,[34] where shared professional interests are not considered sufficient to free workers from fulfilling their contractual obligations. They have been the object of restrictive interpretation in

[32] See Dorssemont (2007), pp. 254–257.

[33] See Dorssemont (2007), p. 260.

[34] See Ewing (2007), pp. 218 and 222.

France[35] and Germany,[36] while countries such as Belgium, Spain, Finland, Holland and Italy encourage a much broader interpretation and Sweden even more so. In this context, it is worth recalling that 'a general prohibition of sympathy strikes could lead to abuse and workers should be able to take such action provided that the initial strike they are supporting is itself legal',[37] according to the ILO Committee on Freedom of Association.

Solidarity and sympathy actions have an important role in the maritime sector, usually adopting the form of boycotts directed against shipowners who refuse to sign collective agreements or pay wages or who are bound by a standard collective agreement in force yet apply less favourable working conditions when hiring seafarers on an individual basis.[38] In these cases. other workers such as dockers can show their sympathy with the crew by refusing to provide services to shipowners.

In fact, these actions play a key part in the ITF-launched campaign against flags of convenience; the ITF thus became the first union association to provide an organised response against the high mobility of capital.[39] However, and as a consequence of the legal divergence mentioned above, this campaign has experienced serious setbacks in court,[40] in particular in England and also in the Netherlands.[41]

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[35] See Palli (2007), pp. 128–130, where boycotts carried out by dockers in solidarity with foreign seafarers are deemed legal.

[36] See Däubler (2007), pp. 142–143, a country where solidarity action is restricted to cases in which the subject carrying out the action is asked to do the strikers' job or cases in which there is an 'economic unit' between the employer of workers beginning solidarity action and those on strike.

[37] See ILO (2006), para. 534.

[38] This is also the practice, e.g., in Finland [Bruun (2007), pp. 115–119], in Germany (BAG 19.10.1976; *ArbG* Bremen, 7.10.1999—9 Ga 79/99), in the Netherlands (*Hoge Raad*, 15.1.1960) and in Sweden, where the boycott of the ship 'Britannia' in the 1980s with the aim of concluding an ITF collective agreement for the crew—at that time covered by an agreement concluded in the Philippines—gave rise to a law supporting sympathy actions (Britannia Case AD 1989, No 120). In the same vein, see Swedish Employment Court judgment No. 29/93, 19.2.1993, *Union European Car Carriers v. Swedish Seamen's Union*, ship *Estoril*, with comments by Chaumette (1993), pp. 315–319, involving a French-flagged vessel registered in Kerguelen with a crew consisting of Spanish and Portuguese seafarers covered by collective agreements from their respective countries, for which Swedish trade unions demanded the conclusion of an ITF collective agreement. Both decisions dealing with the boycotts against the ships 'Britannia' and 'Estoril' established that those sympathy actions were illegal until they were finally recognised as lawful in the *Britannia* law.

[39] Although it has not been free from criticism in cases where ships were boycotted solely on the ground that they were flying flags of convenience and thus attention was not paid to real working conditions on board. See Lucifredi (1991), pp. 1161–1164, and the judgments *ArbG* Hamburg, 6.4.1983; *Norhordland Sorenskrivarembete*, 2.5.1990, *Ultramar Madrid Limited v Norwegian Seamen's Union et al*. The same was held in US courts, as explained in Note (1959/1960), pp. 498–530.

[40] As happened in the *Merkur Island Shipping Corp. v Laughton, Shaw and Lewis* case, [1983] 21.4.1983 (House of Lords), where the stevedores' union was sentenced on grounds of tort arising out of a solidarity action undertaken to support the Philippine seafarers' strike on board the ship.

[41] *President Rechtbank Rotterdam*, 24.10.1972, where a boycott against a Chilean ship, previously boycotted in France, was declared illegal.

The ITF headquarters are in London, and so shipowners have often resorted to this forum to apply for injunctions against planned primary or secondary industrial action by a union located in a different country, to claim damages arising from industrial action undertaken in another country or to request the nullifying of a collective agreement signed as a result of industrial action also carried out in a country other than the UK, on the basis that such action may amount to duress.[42] The English courts' response has been progressively restrictive, limiting the possibility of undertaking solidarity initiatives, through introducing legislation confining industrial action to cases in which workers act against their own employer, in addition to imposing procedural requirements that an organisation such as the IFT cannot meet, including any action needing to be approved by a given number of members.[43]

There have been some noteworthy cases in which solidarity action was legal under the law of the country where it was undertaken, but not according to English law in view of the above restrictions, which in turn entails some assessment of the validity of the collective bargaining agreement concluded as a result of the action. One such case is the *Dimskal* case[44] against the ITF, where the subject matter was the declaration of annulment of a binding collective agreement that had been concluded after the intervention of Swedish trade unions in Sweden, where the contested action had been considered legal; the English courts found that the collective agreement was governed by English law, which led to its being declared invalid once the duress suffered by the company as a result of the sympathy action had been proved. Had the British courts applied Swedish law as the law governing the industrial action, the outcome of the case would have been totally different as Swedish law deemed the sympathy action to be lawful. In contrast, the finding of duress on the ground that such actions are illegal according to English law was a key element in this case.

Occupying the workplace as a form of industrial action also has special significance in the shipping and fishing industries, as it is about taking control of the vessel. The Spanish Supreme Court has ruled in three cases involving both Spanish and foreign seafarers employed by Spanish shipowners on board vessels flying the Spanish flag, who decided to go on strike in response to a call from their union.[45] In all three cases, the crew remained on board the vessel, which was understood to be occupation of the workplace.

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[42] See *Hanseatic Ship Management v ITF* [1974] ICR 112; *Monterrosso Shipping Co Ltd v. ITF* [1982] ICR 675; *Dimskal Shipping Co. v. ITF* [1992] 2 A. C. 152; *Patrick Stevedores Operation Pty Ltd v. ITF* [1998] Lloyd's L Rep 523; *White Sea and Omega Shipping Co v ITF* [2001] 1 Lloyd's L Rep 421; *ITF v. Viking Line* [2005] EWCA 1299.

[43] On this issue in the UK, see Ewing (2007), pp. 222–243. Previously, Lucifredi (1984), pp. 654–670.

[44] *Dimskal Shipping Co. v ITF* [1992] 2 A. C. 152.

[45] See SSTS 23.10.1989; 24.10.1989; 13.12.1989.

The Supreme Court's stance was consistent with its previous jurisprudence in this sphere; it considers occupations lawful as long as they are peaceful, for which reason the authorities can only evict seafarers from the vessel if their occupation might cause disproportionate damage to other constitutional rights, such as property rights. The Supreme Court particularly emphasised that non-acceptance of the occupation would deny seafarers the opportunity to exercise their right to strike. In addition, the court highlighted the fact that the ship is indeed their place of accommodation. As a matter of fact, strikes on board generally involve occupying the ship, among other reasons because this kind of action helps workers avoid the risk of being replaced by another crew.[46]

Occupation of the workplace is generally allowed, with some restrictions,[47] i.e., provided that the activity of workers who choose not to go on strike is not disrupted and the production process is therefore not disturbed or interrupted. However, seafarers are a case apart, and in the light of this the Spanish Supreme Court's conclusions on the ship's condition as the centre of seafarers' lives takes on a whole new dimension.

The Spanish Supreme Court is also to address the issue of what happens with shipowners' obligation to provide the crew with food during industrial action, i.e., whether non-provision might be comparable to non-payment of wages during strikes: this obligation is characterised as secondary in individual employment contracts but cannot be suspended during strikes for obvious reasons.[48] Its link with issues affecting health and hygiene on board makes it deserving of different treatment, reinforced by the fact that the obligations to maintain security and safety on board vessels are binding on seafarers and fishermen and hence are not suspended during strikes.[49]

[46] In *ArbG* Husum, 18.2.1983, the court granted the shipowner the right to replace the crew, after the original crew would not let them board the ship. Likewise LAG Hamburg, 26.8.1983; *ArbG* Hamburg, 25.3.1983.

[47] As in France (see Palli 2007, pp. 130–131) or in Germany, although there seafaring is not deemed an occupation (see Däubler 2007, pp. 144–145), and in the Netherlands (*Rechtbank* Amsterdam, 30.11.1978, ship 'Tropwind'); *Gerechtshof* Amsterdam, 12.4.1982, ship 'Barada'. There are exceptions as well in the UK such as *Phestos Shipping Co. Ltd. v Kurmiawan* [1983] S.L.T. 388, where the Edinburgh Court of Session granted the shipowner an injunction against the crew's occupation of the ship.

[48] In these terms, see *ArbG* Bremen, 5.8.1977, where only Nigerian crew members went on strike, while the Greek captain, officers and crew members kept out of the action. Regarding ordering food to be provided, see *President Rechtbank* Rotterdam, 12.6.1981; *Gerechtshof* Den Haag, 23.4.1982, ship 'Saudi Independence'.

[49] See further Dorssemont (2007), pp. 267–269 and Italian jurisprudence reported by Orlandini (2007), pp. 165–167.

5.2.3 *Industrial Action and EU Market Freedoms*

5.2.3.1 The Root Causes of the Conflict

The right to take industrial action is not unlimited; on the contrary, it is likely to be restricted for the sake of other collective interests. The legal or illegal nature of industrial action is determined on the basis of this rationale and within the boundaries established in accordance with the regulatory models already outlined.[50] Industrial action is usually understood to be the last resort in attempts to reach a collective agreement; at the same time, the need for this type of compromise means that it is not allowed by peace obligations while a collective agreement is in force or that industrial action might be suspended if the parties agree to take their differences to arbitration.

The regulation of industrial action, including the right to strike, is based on a thorough assessment of the interests and rights at stake, and at the moment this assessment is undertaken only at national level, as already mentioned. The opening up of borders and the globalisation of markets for goods, services and capital lie behind forms of industrial action going beyond the borders of the territory for which the assessment was originally undertaken; the actions therefore have a cross-border impact, in the same way business operations do, so their lawfulness is subject to different legal systems. When industrial action occurs in the framework of an economically integrated area, the prevailing rules there can also determine the legality or otherwise of industrial action. The question is especially relevant in the context of the European Union, in particular with reference to the way that EU market freedoms interact with the right to strike. Many rules and a great deal of case law and literature have already been produced on the topic, and given their relevance to maritime trade they will be described in the following section.

Because of the way the European Union has developed, the first contradictions arising over the right to industrial action were related to the free movement of workers and goods.[51] Companies can try to alleviate the consequences of strikes by hiring foreign workers to replace strikers; manoeuvres of this type have normally received due response from domestic law, usually in favour of the right to strike and prohibiting this type of employment. Conversely, the European Union has responded far more directly when the free movement of goods has been at stake since this involves cross-border transfer and strikes in sectors such as transport are likely to drastically restrict this freedom.

Following the farmers' riots in France and the CJEU judgment of 9 December 1997,[52] the European Union enacted Council Regulation (EC) No. 2679/98 of 7 December 1998 on the functioning of the domestic market in relation to the

[50] See Sect. 5.2.2.

[51] On the contradiction between the European Social Agenda and the competition logic informing the construction of the domestic market, see Guzmán Zapater (2008), pp. 258–261.

[52] Case C 265/95, *European Commission v. French Republic*.

free movement of goods among the member states.[53] As its name indicates, the Monti Regulation, as it is also known, enables governments to take measures against actions that may severely disrupt or hamper the free movement of goods, whether actively or by omission. Omissions are defined in Article 1(2) as cases 'when the competent authorities of a Member state, in the presence of an obstacle caused by actions taken by private individuals, fail to take all necessary and proportionate measures within their powers with a view to removing the obstacle and ensuring the free movement of goods in their territory'. If states do not act to restrict the untrammelled activities of individuals, the result can be a complaint from the European Commission for violating the principle of free movement of goods.

The Monti Regulation's innovation lies in the fact that it expressly refers to the right to strike for the purpose of excluding it from the range of 'acts or omissions' likely to disturb or hinder the free movement of goods. Article 2 specifically states that the Regulation's provisions cannot be interpreted 'as affecting in any way the exercise of fundamental rights as recognised in Member states, including the right or freedom to strike', so that 'these rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member states'. These provisions therefore aim to complement international recognition of the right to industrial action, so that market freedoms cannot simply prevail over these fundamental rights.

5.2.3.2 The Outbreak of the Conflict: *Viking*, *Laval*, *Rüffert* and *Commission v. Luxembourg*

Following the Monti Regulation and the CJEU judgment referred to above, it was understood that the foundations for market freedoms to coexist with the right to strike had been laid in the European Union. Nevertheless, subsequent CJEU interventions linked with the freedom to provide services and freedom of establishment have certainly challenged the guidelines for the free movement of goods, which did seem to work.

The first and most important decision for our purposes is the *Viking* judgment on 11 December 2007,[54] as the member states' freedom to reflag was at stake. The case arose as a consequence of the Finnish shipping company Viking Line voicing its intention to replace the Finnish flag flown by the ferry 'Rosella' with a different flag that would enable the company to scale down the labour costs to which it was obliged by a collective agreement signed with the Finnish Seamen's Union (FSU). The ferry sailed between Tallinn (Estonia) and Helsinki (Finland), and the company intended to reflag it either in Estonia or Norway, as both nations allowed crews to be employed on lower wages.

[53] OJ No. L 337, 12.12.1998. In the same journal, see the Resolution of the Council and of the Representatives of Member States Governments, Council meeting of 7 December 1998 on the free movement of goods.

[54] CJ 11.12.2007, Case C-438/05, *Viking*.

Once notified of Viking's intentions, the Finnish union expressed its opposition to the reflagging, or at least to the termination of the Finnish collective agreement and the possible redundancies involved. Viking rejected its claims, and the FSU was driven to undertake industrial action along ITF policy lines, of which it was a member. As seen above, the key instrument among the range of policies aimed at counteracting flags of convenience is one according to which only unions in the country where a vessel's beneficial owner is based are authorised to conclude collective agreements relating to the vessel and its crew. As a result, even though Viking decided to reflag the vessel, the FSU would still be the only union with exclusive authority to negotiate working conditions on board the 'Rosella'. The ITF was duly informed of the initiation of industrial action by the FSU and consequently sent a circular to all its union partners advising them to desist from working with Viking. ITF's intervention was followed by a series of actions that culminated in the company committing itself not to leave Finland.

However, the case was given a new twist in 2004 when Estonia joined the European Union: Viking went back to its original decision and decided to sue both the FSU and the ITF in London, the latter's base, for infringement of the freedom of establishment under Article 43 EC, now 49 of the TFEU, as the circular issued by the ITF and directed at all its members was still in force, thereby depriving the company of the benefits granted by the freedom of establishment such as reduced labour costs as a consequence of reflagging the vessel.

If the *Viking* case deals with freedom of establishment, the *Laval* and *Rüffert* cases concern the freedom to provide services under Articles 12 and 49 TEC, now 18 and 56 of the TFEU Treaty; both judgments deal with the posting of workers covered by Directive 96/71/EC, which includes fishermen but not seafarers, as already noted. Laval un Partneri was a Riga-based company (Latvia). In 2004, it moved to Sweden to carry out various construction works, among which was the building of a school in the city of Vaxholm. The work was done by Latvian workers subject to collective agreements signed in Latvia. Once work began, the Swedish trade unions Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1 and Byggettan contacted Laval to sign the Swedish collective agreement for construction. Various disagreements immediately arose, stemming from the peculiarities of the Swedish legal system according to which wages and other working conditions can only be negotiated after the collective agreement has been signed. Laval refused to sign it, as there was no wages agreement, and their refusal sparked off industrial action, including solidarity action by the electricians' union Svenska Elektrikerförbundet. Laval ended up losing its contracts in Sweden as a result of these actions and became insolvent, resorting to the Swedish courts to ask them to declare the unions' industrial action illegal, to remedy the infringement of the freedom to provide services, and for compensation for the damage inflicted.[55]

[55] CJ 18.12.2007, Case C-341/05, *Laval*.

The *Rüffert* case pitted the German state of Lower Saxony against Objekt und Bauregie, a German company that had won the tender put out by Lower Saxony for the building of a prison. The contract concluded by the two parties included provisions on working conditions, which specified that they had to be granted in accordance with the collective agreements in force at the place where the work was carried out. Objekt und Bauregie outsourced to a Polish company, and during the course of the work it emerged that the company was paying the Polish workers lower wages than were due to them according to the collective agreements. Under the circumstances, Lower Saxony wanted to terminate the contract with Objekt und Bauregie and required payment of the penalty scheduled for breach of conditions. In this context, the seized German court asked the CJEU whether the contractual imposition of a collective agreement establishing a salary that exceeds the minimum to which the Directive 96/71/EC refers infringes the freedom to provide services as granted by Article 49 TEC.[56]

Also apropos Directive 96/71/EC, the CJEU issued a judgment on 19 June 2009 assessing the adequacy of its transposition into Luxembourg law.[57] The law interpreted the notion of national public policy broadly, thereby guaranteeing a series of labour rights contained in various legal and administrative sources, as well as in collective agreements. In line with *Rüffert* and *Laval*, the CJEU reaffirmed the restrictive nature of public order, particularly the idea that only the rights listed in Article 3(1) of the Directive can be imposed on foreign companies. In the case in question, the obligation imposed by the Grand Duchy on foreign companies to appoint an *ad hoc* agent resident in Luxembourg with a view to verifying compliance with Luxembourg working conditions by companies based in other member states was specifically rejected.

The CJEU response in all these cases accepts that individuals may also violate market freedoms,[58] and it is therefore possible that other individuals will seek redress against them in addition to declaring an infringement. This gives rise to a conflict rule that will be analysed in a later section of this chapter. Over and above this assertion, it is worth remarking at this point that the CJEU considers that the exercise of the right to strike and other industrial actions may indeed infringe both freedom of establishment and the freedom to provide services within the European Union, therefore rejecting the possibility that such action may be among the cases that justify the restricting of these freedoms, in a similar manner to the Monti Regulation. The CJEU is thus rejecting the possibility of resorting to industrial action to improve the living and working conditions of cross-border employees on the ground that companies' interests in participating in other markets by taking advantage of the benefits provided by differences between legal systems, and more precisely by differences in labour costs, should be encouraged. In other words, the

[56] CJ 3.4.2008, Case C-346/06, *Rüffert v Niedersachsen*.

[57] CJ 19.6.2009, Case C-319/06, *Commission v Luxembourg*.

[58] CJ 11.12.2007, Case C-438/05, *Viking*, para. 33–34; 23.5.2007, Case C-341/05, *Laval*, para. 98.

CJEU seems to support the race to the bottom within the internal market.[59] On the other hand, it does not take into account the fact that its case law puts companies that sign and stick to collective agreements at competitive disadvantage *vis-à-vis* companies that refuse to do so.[60]

The arguments put forward by the defendant unions and various governments in order to exclude industrial action from the range of measures to protect the freedoms of establishment and provision of services were rejected on the ground that 'although the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, *the exercise of that right may none the less be subject to certain restrictions*. As Article 28 of the Charter of Fundamental Rights of the European Union reaffirms, those rights are to be protected *in accordance with Community law and national law and practices*'.[61]

Under the umbrella of these potential restrictions, the CJEU sets aside the objection raised by the defendant unions on the ground that industrial action in itself involves a violation of the freedoms of movement; a decision on whether it is allowed or not is therefore needed. In addition, industrial action is known to be part of the body of fundamental rights and cannot therefore be opposed on the ground that it clashes with market freedoms. The CJEU decision rejected this approach by focusing on the principle of proportionality, i.e., on the need to determine when restricting the freedoms of establishment and provision of services almost inevitably stemming from industrial action is necessary, proportionate and justified to the purpose intended.

The question of whether the restrictions on the freedoms in question caused by industrial action have a legitimate objective compatible with the TFEU and can be justified by overriding reasons of general interest must therefore be examined.[62] While recognising that worker protection may meet these requirements,[63] the Court demands that industrial action be filtered through the screen of the principle of proportionality, so the seized court must decide whether it is necessary for the purpose intended—to ensure the protection of workers—instituting the use of an objective test: whether jobs and working conditions are being compromised or

[59] As acknowledged by the CJEU itself in its judgment 11.12.2007, Case C-438/05, *Viking*, paras. 72 and 73.

[60] As highlighted by the European Parliament in its Resolution on challenges to collective agreements in the EU, No. 12.

[61] My italics. See CJ 11.12.2007, Case C-438/05, *Viking*, para. 44, which ends up asserting 'In addition, as is apparent from paragraph 5 of this judgment, under Finnish law the right to strike may not be relied on, in particular, where the strike is *contra bonos mores* or is prohibited under national law or Community law'.

[62] CJ 30.11.1995, Case C-55/94, *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, para. 37.

[63] CJ 11.12.2007, Case C-438/05, *Viking*, paras. 77–79.

seriously threatened or not in the case in question.[64] Once this test has been passed, 'it would then have to ascertain whether the collective action initiated by FSU is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective',[65] which also implies that industrial action is deemed a last resort action.

The CJEU itself applies the test to ITF policy, and even though it agrees that it certainly seeks to protect workers' interests, it does not consider the policy adopted by ITF to fight against flags of convenience a proportionate measure: 'in the context of its policy of combating the use of flags of convenience, ITF is required, when asked by one of its members, to initiate solidarity action against the beneficial owner of a vessel which is registered in a State other than that of which that owner is a national, irrespective of whether or not that owner's exercise of its right of freedom of establishment is liable to have a harmful effect on the work or conditions of employment of its employees. Therefore, as Viking argued during the hearing without being contradicted by ITF in that regard, the policy of reserving the right of collective negotiations to trade unions of the State of which the beneficial owner of a vessel is a national is also applicable where the vessel is registered in a State which guarantees workers a higher level of social protection than they would enjoy in the first State'.[66] Exactly what the Court intended to convey in this section is unclear,[67] but it is necessary to point out that it seriously compromises the viability of ITF strategy within the European Area of Justice without providing solid arguments to justify its restriction, given that it can be essential for worker protection.[68]

The reasoning in *Laval* and *Rüffert* is similar but is shaped by the applicability of Directive 96/71/EC, which leads the Court to the predictable conclusion in this context that 'without prejudice to the right of undertakings established in other Member states to sign of their own accord a collective labour agreement in the host Member state, in particular in the context of a commitment made to their own posted staff, the terms of which might be more favourable – the level of protection which must be guaranteed to workers posted to the territory of the host Member state is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, unless, pursuant to the law or collective agreements in the Member state of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that

[64] CJ 11.12.2007, Case C-438/05, *Viking*, para. 81. On the basis of this argument, the ITF was able to continue its fight against flags of convenience, as stated by Fütterer (2011), p. 509. The point is that this is not the only justification that those with an interest in initiating industrial action must provide.

[65] CJ 11.12.2007, Case C-438/05, *Viking*, para. 84.

[66] CJ 11.12.2007, Case C-438/05, *Viking*, para. 89.

[67] This may well be a reference to the criticism of this policy voiced by Northrup and Rowan (1983), pp. 149–151, since it questions freedom of association, given that it is the ITF that decides which union is entitled to bargain, regardless of the opinion of the employees concerned.

[68] Astonished by the CJEU assessment—which breaks its own rule of sending such assessments back to national courts—see Reich (2008), pp. 147–150 and 159.

provision'.[69] In short, when claims pursued by social partners exceed the minimum requirements set out by the Directive, any kind of industrial action they undertake will always infringe the freedom to provide services.[70]

5.2.3.3 Consequences

The position advocated by the CJEU puts collective bargaining in a very difficult position. A company can simply transfer its operations to the other side of the border to escape the obligations imposed by the domestic collective bargaining framework, a situation that seems to lie behind the *Laval* case. Laval is a Latvian company that owned 100 % of the shares in a Swedish company, which then subcontracted Laval to perform the work procured in Sweden.[71] At European level, the lack of regulation of self-governance mechanisms such as the right to strike is a major obstacle for the resolution of this kind of situation, which can only be currently addressed at state level. Even in cases where industrial action is lawful according to the relevant legal system, CJEU case law requires the principle of proportionality to be strictly applied, on pain of incurring liability for infringing the freedoms of provision of services and establishment.[72] Thus, precedence is given to market freedoms over social rights, not only severely restricting the social partners' capacity to act but also thwarting policies linked to corporate social responsibility, such as the introduction of contractual clauses requiring certain collective agreements to be applied, either the collective agreements in force at the place the activity is carried out, as was the case in *Rüffert*,[73] or an ITF agreement.

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[69] 23.5.2007, Case C-341/05, *Laval*, para. 81; 3.4.2008, Case C 346/06, *Rüffert*, para. 34.

[70] Reich (2008), pp. 140–147, suggests a consistent explanation for the *Laval* case, drawing attention to the incompatibility of the *Lex Britannia* with EU law to the extent that it excludes peace obligations in collective agreements concluded in other member states from peace obligations taken into consideration, which is a clear example of discrimination within the European Area of Justice. In the same vein, Swedish unions seem to disregard the use of other potential dispute resolution mechanisms established by Directive 96/71/EC (see Articles 5 and 6). The CJEU's decisions merited criticism, in particular the Directive's impact on national law and the right to strike, given that the EU lacks legislative competence on the matter, but with this case law it questions a system built upon collective agreements as the Swedish system is. See in particular Joerges (2010), pp. 392–400, to whom these are diagonal conflicts (pp. 391–392).

[71] The European Parliament advocates prosecuting abuses such as that described here, which are known as 'mail-undertakings' and involve companies without any real activity in the country of origin that are mainly established to operate in the country of destination. See Resolution on Challenges to Collective Agreements in the EU, No. 34.

[72] Franzen (2009), pp. 240–244, restricts the scope of CJEU case law to cases in which industrial action is intended to avoid company relocation, cases in which the action will not be deemed proportional even when it aims at the establishing of measures to hinder relocation such as the institution of a qualifications regime. With another opinion, see Konzen (2009), pp. 474–475.

[73] The CJEU's assertion is even more striking if ILO Convention No. 94, concerning Labour Clauses in Public Contracts, in particular Article 2, is taken into consideration. Spain ratified this Convention on 5.5.1971.

The rationale should be precisely the opposite: given the fundamental nature of the right to collective bargaining and to strike, it is in fact the restricting of these rights that requires careful justification.[74] A brief overview of the different international instruments dealing with these rights clearly shows that they are not completely unlimited rights, but they can only be restricted in cases where health, public order or other equally relevant factors are at stake.[75] Apart from the peace obligations during the life of collective agreements and the use of arbitration, such limits are certainly modulated through the imposition of minimum services, which can only cancel out the impact of a strike in cases involving the provision of essential services. Granting preference to market freedoms over these considerations is equivalent to eviscerating these fundamental rights, therefore making it even clearer how urgently EU regulation in this area is needed, running—at least—in parallel with the development of the manifold financial regulations and instruments established for the operations of the domestic market.[76]

Evidence of the magnitude of the attack on collective bargaining rights and industrial action was provided by the European Parliament's reaction in the Resolution of 22 October 2008 on challenges to collective agreements in the EU,[77] which expressly underlined that 'freedom to provide services is not superior to the fundamental rights contained in the Charter of Fundamental Rights of the European Union and in particular the right of trade unions to take industrial action, in particular since this is a constitutional right in several Member states. It therefore emphasizes that the abovementioned CJEU rulings in *Rüffert*, *Laval* and *Viking* demonstrate that it is necessary to clarify that economic freedoms as established in the Treaties should be interpreted in such a way as not to infringe upon the exercise of fundamental social rights as recognised in member states and by Community law, including the right to negotiate, conclude and enforce collective agreements and to take collective action, and not as infringing the autonomy of social partners when exercising these fundamental rights in pursuit of social interests and the protection of workers' (at No. 5).

In the same Resolution the European Parliament calls for a more balanced treatment of the relationship between market freedoms and social rights while focusing on a potential revision of Directive 96/71/EC. The ending of the transposition period of Directive 2006/123/EC on services in the domestic market[78] has

[74] Schmid (2010), pp. 295–314, esp. pp. 297–300 and 305–307, deems the CJEU partial, as it sides with EU objectives and does not assume the constitutional role required by the EU law's current situation. Fundamental rights are undermined as a consequence.

[75] See in particular ILO Conventions No. 87 and 98.

[76] With this proposal for overcoming national restrictions, see Germanotta and Novitz (2002), pp. 67–82. Criticising the lack of criteria offered by the CJEU while deciding when industrial action is intended to protect workers at European level, see Konzen (2011), pp. 245–246, and with a constructive proposal reinterpreting the proportionality test, see Barnard (2012), pp. 131–135.

[77] 2008/2085(INI). OJ No. C 15, 21.1.2010.

[78] Directive 2006/123/EC, 12.12.2006 (OJ No. L 376, 27.12.2006). Article 1.7 establishes that 'This Directive does not affect the exercise of fundamental rights as recognised in the Member

given a new dimension to the case law reported here and has led the Commission to propose a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services,[79] seeking to establish a clause in this area similar to the Monti Clause included in Regulation No. 2679/98. The fact is, though, that Article 2 of the proposal is nothing more than simply an emphatic statement, so is thus unable to resolve the dilemma posed by CJEU case law: 'The exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms'.

The Commission's proposal has been rejected by several member states.[80] Among the most relevant objections is that it infringes the principle of subsidiarity since in accordance with Article 153(5) of the TFEU, the European Union cannot deal with such issues as they are a matter for individual member states. Another especially noteworthy objection is that it subverts the relationship between constitutionally enshrined rights in some EU member states such as Spain, where the right to collective bargaining and the right to strike are laid down in Article 28 of the Spanish Constitution, enjoying a protection that was not conferred on the economic rights set up in Article 38.

In a similar vein, it is crucial to emphasise the major step taken by the ECtHR to protect the right to industrial action. *Demir and Baykara* is a leading judgment in assessing the right to strike as a corollary of the right to collective bargaining, both linked to the freedom of association protected by Article 11 ECHR. Paragraph two of this provision notes that 'no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others', in line with rights otherwise proclaimed in the European Social Charter and ILO Convention No. 87.

It has already been pointed out that the CJEU interpretation imposes a significant restriction on these social rights by granting priority to the freedoms of provision of services and establishment. The doctrine contained in the *Demir and Baykara* judgment requires a reassessment of the scope of this interpretation, taking into account not only EU accession to the ECHR but also the mandate contained in Article 52(3) of the European Charter of Fundamental Rights: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention

States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law'.

[79] Brussels, 21.3.2012 [COM(2012), 130 final].

[80] On doubts about the proposal, see Bruun and Bücker (2012), pp. 1136–1141; Castelli (2012), pp. 147–170. The European Commission withdrew the proposal on 11.9.2012.

for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.[81]

EU accession to the ECHR reinforces the meaning of this provision, and in this context recent ECtHR case law becomes even more relevant by encouraging a shift in the EU mindset, i.e., this is not about assessing when industrial action is proportionate and therefore compatible with market freedoms, but the other way around: the question that needs to be answered is when market freedoms may justify restrictions on the exercise of fundamental social rights.[82] After all, the *Viking* and *Laval* doctrine is based on Article 28 of the European Charter of Fundamental Rights,[83] and, accordingly, the interpretation of this provision must necessarily be adapted to the ECHR's evolution.

There has been no express ECtHR pronouncement on this interaction so far, but some have been issued by other supervisory bodies such as the Committee on Freedom of Association operating within the ILO, which has condemned the Australian Trade Practices Act's interference with the right to undertake solidarity actions under the ITF campaign against flags of convenience, as well as the Act's implementation by the Australian Competition and Consumer Commission. The Committee rejected the allegation of interference with trade and commerce and threat to cause significant damage to the economy as sufficient reasons to restrict strike action.[84] Given the ongoing dialogue between the ECHR and this body, as well as with those responsible for overseeing the European Social Charter,[85] this is the path ECtHR doctrine has chosen to take, and European legislation should join it on its journey.[86]

[81] However, Article 51 of the European Charter of Fundamental Rights simply lays down that its provisions will only be taken into consideration when applying EU law. On this issue, and with a new interpretation of the *Viking* and *Laval* cases, see Hendrickx (2011), p. 1073.

[82] See further, Fütterer (2011), *passim*, esp. pp. 514–517. Along the same lines, see also Veldman (2013), pp. 104–117.

[83] CJ 11.12.2007, Case C 438/05, *Viking*, paras. 43–44; 23.5.2007, Case C 341/05, *Laval*, para. 90 y 93.

[84] See Report No. 320, Case No. 1963 (Australia)—Date of the filing of the complaint: 7.5.98, the International Confederation of Free Trade Unions (ICFTU), the International Transport Workers' Federation (ITF), the Australian Council of Trade Unions (ACTU), and the Maritime Union of Australia (MUA).

[85] The European Committee on Social Affairs is also in favour of strict control of the principle of proportionality when it comes to restricting the right to strike. See, for example, its Conclusions on Germany, XVIII-1, Vol. 1, 2006, Section 140/194, on Article 6(4) ESC.

[86] There are precedents, such as that furnished by the CJ 21.9.1999, Case C 67/96, *Albany*, where collective agreements are excluded from the application of anti-trust law. Supporting a similar approach, see Novitz (2006), pp. 242–256. Nevertheless, the CJEU has not acknowledged that this case law is relevant in these matters, as expressed in its *Viking* judgment of 11 December 2007 (paras. 48–55).

5.3 Cross-Border Collective Agreements

5.3.1 Classification of Problems: The Extraterritorial Application of National Collective Agreements and Transnational Collective Agreements

The different regulatory models mentioned above also have an impact on the existence, validity and scope of collective agreements,[87] leading to legal discrepancies between countries. The sharpest differences are to be found in their scope of application, as a collective agreement can be binding exclusively on both parties or on third parties or have an *erga omnes* effect. This normally depends on who is allowed to engage in collective bargaining and the conditions under which they are allowed to do so. In some countries, the party or parties bound by the agreement depends on how representative the relevant trade union is, whether it is limited to its members or not and whether the agreement is signed by a trade union association or an employers' association. A further relevant factor is the role granted by the legal system in question to the principle of non-discrimination between employees, which may oblige employers to apply a collective agreement to their entire workforce.[88]

Moreover, a collective agreement can be automatically incorporated into an individual employment contract as long as it has a normative effect, it can specifically require a compulsory and direct effect or it can be considered a gentleman's agreement as in the UK, where such agreements are not binding unless explicitly declared part of an employment contract. As a consequence of all these differences, there are different types of collective agreement, but no significant problems of characterisation are posed insofar as these agreements continue to be the products of negotiations between social partners, who are granted the capacity to conclude them as they are considered equals in form and substance and thus enjoy equal bargaining power.

The terms in which collective bargaining is carried out depend on the legal system of reference, which generally constrains the existence, validity and scope of a collective agreement to the social partners who negotiate it and on condition that certain specific formal requirements, such as publication in an official journal, are met. In view of these constraints, the transnational nature of collective agreements has been approached from a unilateralist standpoint such as those in France[89] and Germany,[90] where in the absence of specific conflict rules national courts decide on

[87] See the comparative law analysis by Deinert (2013), pp. 387–398. Further information available at http://www.eurofound.europa.eu/.

[88] Specifically in the maritime sector in Italy, *Cass.civ*. No. 5194, 25.8.1986, with comments by de Simone (1988). In general, see Orlandini (2007), pp. 171–174.

[89] The following work is essential: Lyon-Caen (1964), pp. 260–264.

[90] See Junker (2007), pp. 32–33; Junker (2004), pp. 1315–1316; Kappelhoff (2011), p. 426.

the scope of application on grounds of the principle of territoriality, among other reasons, because collective agreements usually start with a clause along the following lines: it applies to all establishments in the country where the collective agreement has been approved, irrespective of their appurtenance to national or international companies and of the law governing the employment contracts of the workers providing services for these establishments.

This unilateral approach works smoothly when the employment contracts point to a single country. However, international contacts lead to considerations relating to the potential extraterritorial application of collective agreements, in particular in the light of the situation of workers posted to other countries. In this regard, by interpreting the personal scope of application of collective agreements, the German courts have resorted to the notion of *Ausstrahlung*—already used in relation to social security law—with a view to justifying extraterritoriality. The same interpretation has been used in France[91]: if the employees work abroad, the application of the relevant collective agreement rests on the maintenance of sufficient contacts with the country of origin and with the company located there.[92] As a general rule, contacts are not held to be sufficient when employees spend all their time abroad, but exceptions have been made for cases in which the employment contract stipulated the right to return.

The debate on the establishment of a German international registry revealed this discussion to be present in the maritime and fishing sectors as well. The relevant law emphasised that seafarers who were not resident in Germany did not necessarily have to submit to the law of the flag, and the question then arose as to whether German unions could represent non-resident seafarers and conclude collective agreements on their behalf and whether foreign unions could conclude collective agreements with German shipowners subject to German law to be applied to vessels flying the German flag. The German Constitutional Court gave an affirmative response, although with the clarification that collective agreements in Germany could be applied to seafarers' employment contracts if included in the law that governed the contracts.

This opens the door to the application of foreign collective agreements in another country, as it is not a matter of territoriality but of the law governing individual employment relationships; in other words, it applies if the law acknowledges the relevant collective agreements.[93] Directive 96/71/EC on the temporary posting of workers supports this conclusion as it primarily embraces the application

[91] See Rodière (1986), pp. 15–17; Rodière (1997) *passim*. In German doctrine, see Walz (1981), pp. 147–148. And in the Spanish one, see Palao Moreno (2000), pp. 142–147; Palao Moreno (2002), pp. 318–319.

[92] In BAG 11.9.1991, pp. 44–46, p. 46, the German Federal Labour Court asserted the application in Mexico of the collective agreement concluded in Germany between German unions and the Goethe Institute, making it clear that Mexican overriding mandatory provisions prevailed, although the agreement was applicable anyway as Mexican law also operates on the basis of the *pro laboratoris* principle.

[93] This is highlighted by BAG 9.7.2007, which rejected the application of a German collective agreement to contracts subject to a foreign law on the ground that its normative effects mean that it is only binding on the parties to the employment relationship when a contract is subject to German law.

of the *lex laboris*, usually the law of employees' country of origin, including its collective agreements, except for cases in which the law of the destination country improves specific workers' rights, including cases in which these rights were granted by collective agreements. In short, the application of collective agreements to specific employment contracts depends on the law governing the latter and whether it recognises the agreement as such. Nevertheless, it should be noted that the scope of a collective agreement is equally relevant as it may exclude the contract in question, as it will apply on its own terms. At any event, it is important to bear in mind that, as a source of rights and obligations, the provisions of collective agreements may be applicable as overriding mandatory rules.

The problem identified above—collective agreements' scope of application—concerns the nature of an agreement as a potential source of rights and obligations. As a collective agreement, it is likely to give rise to other disputes that are not related to it as a governance mechanism but whose subject matter is the collective agreement itself. According to Gérard Lyon-Caen,[94] a collective agreement is both a source of rights and obligations as well as an instrument providing standards for employment relationships while at the same time being subject to rules to decide on its existence, validity and scope. The latter type of litigation requires establishing the law applicable to collective agreements as such.

In this regard, a bilateral instead of a unilateral approach is preferred, as the latter does not pay attention to truly transnational cases, i.e., those involving a company or group of companies operating in more than one state. A new category of collective agreement may therefore be established, transnational agreements, whose scope should not be made to depend on the rules applicable to national agreements as they are supposed to be applied in different countries. Against this background, what appears to be the first bilateral conflict rule on the matter has come into existence, Article 92 of the 2014 Panamanian Private International Law Code,[95] whose wording reads as follows: 'International collective agreements shall be governed by any clauses agreed between trade unions and the employer or, failing that, by the law of the place of performance'.[96]

Agreements of this kind are not unknown on this side of the Atlantic. Transnational collective agreements are currently part of European Social Policy and the subject of European social dialogue, as well as of numerous studies aimed at providing the *ad hoc* answer required by the topic in question,[97] although rather unsuccessfully thus far. However, the prospects are not entirely gloomy, given that collective bargaining has flourished under the umbrella of Article 155 of the TFEU.

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[94] See Lyon-Caen (1964), pp. 250–251. Similarly, Junker (1992), pp. 408–410; Walz (1981), pp. 138–146.

[95] The Code has been issued by the Law of 8 May 2014 (*Gaceta Oficial Digital* No. 27530, 8.5.2014).

[96] My translation.

[97] It is to highlight the Report written by Ales et al. (2006). Later on, Even (2008). In 2011, the Directorate-General for Internal Policies of the European Commission published a study on *Cross-border Collective Bargaining and Transnational Social Dialogue* authored by Eichhorst et al. (2011).

European social dialogue has been fruitful and produced Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Association (ECSA) and the European Transport Workers' Federation (ETF) with respect to MLC, 2006. So far there is no directive along these lines in the fishing sector, but the European Union has already requested and granted authorisation for member states to ratify WFC, 2007.[98] In line with MLC, 2006, trade unions and business associations have reached an agreement at European level on its application that should enable the European Union to issue a directive with a view to harmonising the provisions laid down in WFC, 2007, within the European Area of Justice.[99] This commitment to the Work in Fishing Convention is highly necessary, and we can only hope that it will soon come into force.

5.3.2 Transnational Collective Agreements and Private International Law

5.3.2.1 Introduction

The inadequacies of the division in national labour markets are obvious in cases involving seafarers and fishermen. It is easy to find collective agreements between an employer and a union where those represented are not union members. Furthermore, collective bargaining may take place hundreds or even thousands of nautical miles away from the employer's company headquarters and the crew's country of origin, and their employment contracts may also be subject to different laws. This background is in fact at the heart of the ITF-initiated campaign against flags of convenience, which is based on coordinated trade union action to avoid inter-union competition for a larger market share.

This coordination has prompted ITF trade unions to pull in the same direction, and although the process has been very uneven, the result is that shipowners sailing under what the ITF considers being a flag of convenience have been successfully pushed to sign one of the standard collective agreements drawn up by the ITF itself. Shipowners agreeing to do this are given a blue certificate, which means that ITF inspectors will refrain from impeding the respective vessel from sailing; otherwise, hurdles might well crop up in the form of boycotts or other industrial actions if the minimum living and working conditions on board as guaranteed by the collective agreement are not respected.

[98] Council Decision 2010/321/EU of 7 June 2010 authorising member states to ratify the International Labour Association's Work in Fishing Convention, 2007 (Convention No. 188), in the interests of the European Union.

[99] See European Commission. Press Release 'Working conditions in fisheries: key agreement signed by social partners', Brussels, 21 May 2012 (available at http://europa.eu/rapid/press-release_IP-12-493_es.htm?locale=en).

The crew itself can bring about the signing of a collective agreement by resorting to strike action if necessary, or an agreement can be the result of action by a third party such as dockers, who might refuse to load and unload a vessel as a pressure tactic. All this may happen in a port other than the one where the ship is based or in a country other than the one where the vessel is registered. Hence, the signing of a collective agreement under these conditions may lead to various types of litigation, the most relevant being in cases where workers seek to bring about its implementation, for example if owners do not fulfil their obligations in terms of the wages established in the agreement. In principle, these are considered individual claims and are referred to in other sections of this book, as the applicability of a collective agreement depends on the law governing individual employment contracts. Nevertheless, and given the transnational nature of this kind of collective agreement, in addition to establishing its applicability to the employment relationship in question—decided in accordance with the relevant *lex laboris* as said before—it may be necessary to examine the collective agreement's existence, validity and scope and, hence, what the applicable law there is.

The Canadian jurisdiction provides a useful example of this type of litigation[100]: a Filipino crew was employed on a ship flying a Liberian flag after a collective agreement had been signed between an Australian trade union and the shipowner in Australia. The crew had been recruited by the shipowner's agent in the Philippines, meaning that the individual employment contracts were subject to Philippine law, and the crew was paid lower wages than those fixed by the collective agreement in question, which had been drawn up according to ITF standards. During a port stop in Montreal the crew decided to request the arrest of the vessel and claim the payments due in accordance with the collective agreement. In answer to the question as to whether shipowner and crew were bound by the collective agreement signed in Australia, the court concluded that the applicable law to decide on the existence, validity and scope of the agreement was the law of the flag, in this case Liberian law, although in the end the scope of the agreement was examined in the light of Canadian law, as the foreign law was not proved at the proceedings. The decision upheld the seafarers' petition on the ground that the ITF is a representative trade union and the collective agreement was therefore also applicable to seafarers recruited after its conclusion.

The existence, validity and scope of a collective agreement may also be directly challenged by the owner seeking a declaration of invalidity, for example, on the ground that the agreement was concluded under duress.[101] Another example of this

[100] See *The Ship "Mercury Bell" v Amosin* [1986] 3 F.C. 454, 27 D.L.R. (4th), 641, 66 N.R. 361.

[101] In France, see *Cass.Soc*. 8.11.1984. This judgement was upheld by the Boulogne *Tribunal de grande instance* on 28.11.1980, with comments by Lucifredi (1982), pp. 111–121, with the individual employment contracts of Indian seafarers on board a Liberian-flagged ship subject to an Indian collective agreement authorised by the Indian Government before the strike; ITF liability in the matter according to French law was decided on there; *Cour d'Appel* Rouen (2ª Ch.civ.), 1.7.1985, ship 'Nora': strike by Indian and Pakistani seafarers in France on board a ship flying the Panamanian flag; the US shipowner argued that her signature on the ITF agreement signed in Haifa was to prevent a boycott, which the French court accepted in accordance with French law.

kind of litigation is a case involving the Norwegian shipowner of a vessel owned by a Maltese company, flying a Maltese flag and crewed by Norwegian officers and Spanish seafarers. A Spanish union had concluded a standard ITF collective agreement—to which the trade union was affiliated—on behalf of the Spanish seafarers. The vessel operated between Swedish ports, an argument put forward by a Swedish union in order to request the ITF to include a clause that committed the shipowner to recruit Swedish seafarers in the agreement. The ITF agreed to denounce the collective agreement signed on its behalf by the Spanish trade union, but the union, which disagreed with the clause, instead renewed it on the ITF's behalf. The vessel was boycotted on its arrival in Sweden, sparking off a dispute between the Norwegian company and the ITF in London, the key point of which was the scope of the collective agreement signed by the Spanish trade union on behalf of the ITF. The British Court of Appeal determined the law applicable to the collective agreement by taking into account the closest link, which led them to Spanish law.[102]

The problems of international jurisdiction and conflict of laws posed by disputes dealing with the existence, validity and scope of a collective agreement are discussed below. They are covered by EU Regulations on private international law[103] and so need to be examined in the light of the provisions of the Brussels I *bis* Regulation[104]—the Lugano Convention[105] is thus applicable here—and the Rome I Regulation[106]: despite differences between legal systems, there is a certain degree of consensus as to the fact that collective bargaining gives rise to a contract. English case law expressly stated this in two cases involving the ITF,[107] while CJEU case law supports this conclusion by a broad interpretation of the term 'contractual matters', including situations in which one identifiable party voluntarily assumes obligations towards another identifiable party.[108]

[102] See *Monterosso Shipping Co v International Transport Workers' Federation (The Rosso),* [1982] 3 All E.R. 841.

[103] See Deinert (2013), pp. 399–412; Junker (1992), pp. 430–436; Leclerc (1995), pp. 680–694; Gardeñes Santiago (2008), pp. 392–393, for agreements that generate reciprocal obligations. Likewise, Kaye (1993), pp. 221–222. With the understanding that neither the Rome Convention nor the Rome I Regulation is applicable, see Fudickar (2005), pp. 115–138. Nevertheless, later on the same author proposes a conflict rule based on the party autonomy and, in its absence, on the application of the law with which the collective agreement has the closest connection (pp. 224–234).

[104] Regulation (EU) No. 1215/2012, of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ No. L 351, 20.12.2012).

[105] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, held at Lugano on 30 October 2007 (OJ No. 147, 10.6.2009).

[106] Regulation (EC) No. 593/2008 of the European Parliament and of the European Council of 17 June 2008 on the law applicable to contractual obligations (OJ No. L 177, 4.7.2008).

[107] As in *The Rosso* and *Dimskal Shipping Co. v. ITF* [1992] 2 A. C. 152. Opposing, see Franzen (2011), p. 178, para. 4; Krebbert (2000), p. 507. In favour, Plender and Wilderspin (2009), p. 302, para. 11-003.

[108] CJ 27.9.1988, Case 189/87, *Kalfelis* and elaborating upon it, see van Hoek and Hendrickx (2009), pp. 17–19.

5.3.2.2 International Jurisdiction

Disputes arising from collective agreements *per se* are also covered by the Brussels–Lugano system,[109] as they are characterised as civil and commercial matters and are not among the exclusions mentioned in Article 1 of the Brussels I *bis* Regulation and the Lugano Convention. As is already known, the application of these legal instruments depends on the defendant's domicile being located in a member state,[110] but they are also applicable in the event that there is a choice of a member state's forum.[111]

Following the structure of the Brussels–Lugano system, and given that this is not an exclusive matter, the first thing that needs to be checked is whether there has been a tacit submission or a choice of forum.[112] In the absence of these, plaintiffs can choose to file their claims either before the courts of the defendant's domicile or the courts determined according to the principle of proximity to the matter in dispute, in this case those dealing with contractual matters.[113] The lodging of a claim against a co-defendant before the courts where the defendant is domiciled is also foreseen,[114] as this head of jurisdiction has already been resorted to bring the trade union in charge of carrying out the boycott before the courts of the ITF's headquarters, with the aim of examining whether or not the collective agreement signed by the shipowner under the pressure of ITF strategy is valid, as occurred in the *Dimskal* case mentioned above.[115]

Signing a collective agreement necessarily involves the parties' consent, and so the special head of jurisdiction on contractual matters may come into operation to determine whether the agreement is valid or not. The paradox here is that if the collective agreement is declared void, there would have been no consent. Nevertheless, the CJEU has already clarified that non-existence and invalidity issues also fall within the scope of Article 5(1) of the Brussels I Regulation and Lugano Convention, 7(1) of the Brussels I *bis* Regulation, since the real issue at stake is precisely the existence and validity of a contractual obligation.[116]

Further problems emerge when it comes to specifying the competent court, as the place where the obligation that is the basis of the lawsuit was, or is to be, fulfilled has to be determined. The head of jurisdiction—as stated in the provision

[109] See, for all, Mankowski (2009), pp. 585–586.

[110] Article 2 the Lugano Convention, Article 4 of the Brussels I *bis* Regulation. For the territorial scope of application of the Brussels–Lugano system, see Sect. 3.1.

[111] Articles 23 and 24 of the Lugano Convention, Articles 25 and 26 of the Brussels I *bis* Regulation.

[112] Respectively, Articles 24 and 23 of the Lugano Convention, Articles 26 and 25 of the Brussels I *bis* Regulation. Opposed to this, Walz (1981), pp. 169–174, as regards the normative part of collective agreements.

[113] Articles 2 and 5 of the Lugano Convention, Articles 4 and 7 of the Brussels I *bis* Regulation.

[114] Article 6(1) of the Lugano Convention, Article 8(1) of the Brussels I *bis* Regulation.

[115] *Dimskal Shipping Co. v. ITF* [1992] 2 A. C. 152.

[116] CJ 4.3.1982, Case 38/81, *Effer v Kantner*.

mentioned above—contains two presumptions, but these only apply to the international sale of goods and provision of services. In all other cases, the seized court has to proceed to identifying the contractual obligation that gave rise to the lawsuit. When the existence and validity of a contract is in question, this obligation is the characteristic performance of the contract.

The point is that a collective agreement gives rise to complex obligations, none of them simply involving one party's obligation to pay the other, and serious problems therefore arise regarding the determining of the characteristic performance of the contract, i.e., establishing the obligation that is at the root of the lawsuit.[117] In view of the contents of collective agreements, it is advisable to identify this connection by locating the agreement's centre of gravity, which suggests an approach based on the principle of proximity, i.e., seeking the closest link. Given the transnational nature of these agreements as well as their contents—focusing on improving workers' living and working conditions—that could be the place where the employer has to fulfil these obligations, i.e., the habitual workplace.

If the defendant is not domiciled in a member state, the international jurisdiction must be determined according to national law. In the Spanish legal system, Article 25 of LOPJ states that in social matters, the Spanish courts have jurisdiction to deal with the legality of collective agreements entered into in Spain and with claims arising from collective labour disputes lodged in Spain. This provision seems to confirm the unilateralist approach prevailing in this area. In fact, Spanish lawmakers do not even address cases where disputes arise in respect of collective agreements that are potentially subject to a foreign law, for example if a collective bargaining dispute based on a transnational collective agreement is initiated against an employer domiciled in Spain. As a matter of fact, there is no case law here since no umbrella organisations are based in Spain—unlike England, which hosts the ITF headquarters in London. However, the assimilation of a collective agreement to a contract opens the door to Spanish jurisdiction for cases that not fall within the strict terms of Article 25(2). In these cases, Article 25(1) of LOPJ, which deals with individual employment contracts, may be of use and may provide a head of jurisdiction where stakeholders can discuss transnational collective agreements based, for example, on the fact that the terms of a foreign collective agreement have to be met in Spain.

5.3.2.3 The Law Governing Collective Agreements

Choice of Law Agreements

The relevant instrument in the conflict of laws field is the Rome I Regulation. Party autonomy is also admitted as a conflict rule, and Article 3 supports both the express

[117] See Drobnig and Puttfarken (1989), pp. 44–45; Ebenroth et al. (1989), p. 145; Eßlinger (1991), p. 150; van Hoek and Hendrickx (2009), pp. 24–25.

and the implied choice of law.[118] Collective agreements may contain a choice of law clause, but this is most likely to appear tacitly inasmuch as collective agreements usually contain a reference to the relevant national legislation such as the Spanish Workers' Statute.[119] Other important factors implying a choice of law are the signatories, i.e. the intervention of unions and business associations based in a given territory and, if applicable, the place where the collective agreement was published, since in countries where these agreements have normative force, publication in the relevant official gazette and other formalities are indeed required. In this regard, an implied choice could be inferred from the ITF's conclusion of a collective agreement to be applicable to all ships flying the flag of the negotiating state.[120] Along the same lines, the fact that owner and crew come from the same country has been considered a tacit choice of law.[121]

However, it is debatable whether party autonomy is indeed admissible in this matter, as it can be contradictory to the normative effects of some collective agreements: collective bargaining is designed to achieve social peace in a given territory, which is why the relevant market needs to be identified, not to give the parties the opportunity to choose the governing law and thereby avoid the social and economic order of reference.[122] On the basis of this rationale, distinguishing between the normative and obligatory parts of a collective agreement has been proposed to limit the possibility of choosing the applicable law to the obligatory part, as it is only binding on the contracting parties.[123]

Other approaches have been suggested for the normative part of the agreement, such as considering these provisions overriding mandatory rules,[124] or as a problem of the legal reception of a foreign rule, once again requiring the collective agreement's territorial scope of application to be determined such that only an agreement signed by a party with representation in the territory where it will be effective would be enforceable. Against this background, union capacity to conclude

[118] Article 92 of the Panamanian Private International Law Act accepts the choice of law agreement reached between trade unions and employers. The choice of law for collective agreements has been legally admitted by German § 21.IV *Flaggenrechts verordnung* as well.

[119] With this proposal, Lyon-Caen (1964), p. 260; Lyon-Caen (1991), p. 151. In broader terms, see van Hoek and Hendrickx (2009), pp. 22–24, even arguing in support of *depeçage*.

[120] As in Italy and many other states. See Zanobetti Pagnetti (2008), pp. 194–200.

[121] In the Netherlands, *Gerechtshof* Den Haag, 20.5.1983, ship 'Pacifico': Greek shipowner and crew. In Germany was admitted by the BAG 11.4.1977, dealing with the application of a German collective agreement to all *Goethe-Institut*, regardless of the country in which they operate.

[122] See Krebbert (2000), pp. 537–538; Ludewig (2012), pp. 150–151. BAG 16.2.2000, 4 AZR 14/99, does not admit party autonomy.

[123] See Löwisch and Rieble (2012), paras. 342–348; Magnus (2011), pp. 627–628, paras. 255–256; Walz (1981), pp. 166–167. Indirectly, see Thüsing (2003), pp. 1311–1312.

[124] See the discussion in Ludewig (2012), pp. 200–219, who rejects this alternative.

collective agreements with effects in countries other than the one where they are based has been challenged.[125]

The proposal to split agreements into their obligatory and the normative parts for conflict of laws purposes has been contested on the ground that this differentiation is very difficult and only helps to denature collective agreements. In fact, as collective agreements are shaped in legal systems that grant them normative effect, the obligatory part only seeks to ensure the efficacy and effectiveness of the normative part, for which reason it would be meaningless to subject the two parts to different laws. Furthermore, normative collective agreements do not merit special treatment with respect to other legal sources, the application of which depends on conflict rules as well, i.e., the mandatory rules of a given legal system can be avoided in accordance with the country's private international law system. In the same vein, the fact that a collective agreement has normative effects cannot be enough to invalidate choice of law as a connecting point, given that there is no consistent reason to consider the provisions dealing with collective bargaining as overriding mandatory rules.[126] The mere possibility that private stakeholders might conclude a collective agreement suggests that choice of law clauses must be allowed in this area.

A third approach makes the point that distinguishing between the obligatory and normative parts of a collective agreement is indeed possible and it is hence equally feasible to determine the laws applicable to each of them separately, provided that the parts are severable, namely, that their differentiation does not break the internal harmony of the collective agreement.[127] However, with the exception of this point, this stance concludes that the Rome I Regulation, including its conflict rule on party autonomy, should be applied to the normative part of collective agreements as well, on the grounds of the reasons mentioned above. All in all, there is no consistent reason for preventing choice of law clauses for collective agreements; indeed, Article 92 of the Panamanian private international law code has already enshrined this connecting point.

In any event, the discussion is of little practical consequence as the parties tend to apply for the closest law.[128] The features of collective bargaining, linked to a labour market that is generally territorially bounded, for the most part leave no choice as to

[125] See Walz (1981), pp. 163–165. Further, Zwanziger (1994), pp. 126–134, proposing applying the law of the ITF's headquarters to all agreements signed with its support. See also Ludewig (2012), pp. 149–185.

[126] See Ebenroth et al. (1989), p. 145; Drobnig and Puttfarken (1989), pp. 42–43; Eßlinger (1991), pp. 147–149; Fudickar (2005), pp. 225–230; Junker (1992), pp. 418–423; Magnus (2011), p. 627, para. 252; Martiny (2015), para. 183; Schlachter (2000), p. 64; Schlachter (2014a), para. 32; Spickhoff (2011), para. 12.

[127] See Deinert (2013), pp. 402–403 and 406–412.

[128] Considering a choice of law qualified by the closest connection to the agreement, see Wimmer (1992), pp. 54–59. In similar terms, Oetker (2009), para. 121.

the law applicable to the collective agreement. When parties to the collective agreement decide to submit it to a foreign legal system in spite of this, the limitation to party autonomy imposed by Article 3(3) of the Rome I Regulation comes into operation, so that all mandatory provisions of collective labour law in force in the state to which all relevant elements of the case refer are applicable. The same must be held for Article 3 (4) of the Rome I Regulation, taking into account EU law on these matters.

The Law Applicable to Collective Agreements in the Absence of Choice of Law

With respect to the Rome Convention, the Rome I Regulation modified the conflict rule through which the law applicable by default of choice of law is determined.[129] But in essence, the law of the habitual residence of the party who has to perform the characteristic obligation remains as the general rule. The difficulties in identifying the characteristic performance in a collective agreement have already been highlighted;[130] thus, the law applicable cannot be determined in accordance with paragraphs 1 or 2 of Article 4 but by resorting to the law of the country that the collective agreement has the closest connection with.

Commentators have identified a number of factors to be considered when establishing the closest law to the case in question, such as the territorial scope of the collective agreement, the state in which most employment relationships covered by the agreement are performed,[131] nationality and habitual residence of the parties to the collective agreement,[132] the language of the agreement and the contents of the provisions,[133] the law applicable to most individual employment contracts covered by the agreement[134] and the law of the place where the obligations set out in the agreement will be carried out.[135]

[129] Article 4 of the Rome I Regulation and the Rome Convention. Seeking to apply the rule drafted for employment contracts in these matters by analogy, see Drobnig and Puttfarken (1989), pp. 44–45, the main objection being that there is no weak party here, for which reason it cannot work.

[130] See Sect. 5.3.2.2.

[131] Referring to the place where the establishment is located, see Gamillscheg (1983), pp. 333–334.

[132] See Schlachter (2000), p. 64.

[133] See, among others, Coursier (1993), p. 140; Fudickar (2005), pp. 230–234; Kappelhoff (2011), pp. 436–438; Merrett (2011), para. 6.26, p. 186; Schlachter (2000), p. 64; Deinert (2013), pp. 411–412, undermines the language factor while highlighting the shipowner's headquarters.

[134] See Gamillscheg (1959), p. 492.

[135] See Krebbert (2000), pp. 536–538. Submitting collective agreements to the law of the place where they are enacted as laid down in Article 92 of the Panamanian Private International Law Act seems to involve the obligations established there.

For our purposes, the common domicile of shipowner and union is relevant,[136] as well as the place of origin of the crew benefited by the collective agreement[137] and, in particular, the location of the workplace where it is to be applied.[138] The *Nervion* case[139] is a good example of how to determine the applicable law in these cases even though at that point neither the Rome I Regulation nor the Rome Convention was in force. The vessel, which was registered in Panama, manned by a Polish crew and owned by a company registered in Panama, was boycotted by a Swedish union and the ITF in a successful bid to improve the crew's living and working conditions. The employer did not comply with the resulting agreement and was sued by the crew in Sweden. The defendant pleaded the invalidity of the collective agreement, and the court applied the law of Panama to decide on the issue, emphasising the fact that it was also the law governing the individual employment contracts. In a similar vein, a German decision also pointed to the flag state as the centre of gravity of the collective agreement in question.[140]

5.3.2.4 Public Order and Overriding Mandatory Rules

The application of the law governing the collective agreement may be corrected by both overriding mandatory rules, as set out in Article 9 of the Rome I Regulation and the public order clause enshrined in Article 16 thereof. In the *Nervion* case, for example, the Swedish court applied Panamanian law exclusively, considering the collective agreement in question invalid as the industrial action behind it was illegal. This was the consequence of the Swedish court also submitting the latter issue to Panamanian law, for which reason the agreement was set aside in the end. Paradoxically, the industrial action had been carried out in Sweden, and the boycott would have been considered legal had Swedish law been applied. The decision was heavily criticised for this reason, and the outcome of the resulting dissatisfaction was a new provision in the law governing collective labour relations in Sweden, indicating that the invalidity of the collective agreement cannot be pleaded when

[136] See Eßlinger (1991), p. 150, locating a collective agreement's centre of gravity at the company's headquarters, although he is aware that this solution does not work properly in the maritime sector, for which reason he ultimately comes down on the side of the law of the union headquarters (pp. 154–156).

[137] See *Monterrosso Shipping Co Ltd v. ITF* [1982] ICR 675, whose doctrine is defended by Deinert (2013), p. 412, suggesting the seat of the shipowner in cases of great divergence. Similar, *Rechtbank* Rotterdam, 16.1.1987, ship 'Fraternity'.

[138] See Junker (1992), pp. 423–426; Wimmer (1992), pp. 52–53. On collective agreements applicable to transnational undertakings, van Hoek and Hendrickx (2009), pp. 25–26, suggest the closest link to be the place of the head office of the company to which the agreement is applied, in particular if it is reinforced by the presence of the European Work Council in the country.

[139] Quoted by Malmberg (2007), pp. 422–423.

[140] See BAG 16.2.2000, 4 AZR 14/99.

the industrial action is undertaken legally in Sweden. This provision is deemed an overriding mandatory rule in the light of Article 9.[141]

5.3.2.5 Scope of the Law Governing a Collective Agreement

As the Rome I Regulation is applicable, the scope of the law governing collective agreements is to be found in Article 12, which establishes that it governs their conclusion, content, modification and termination. The *lex contractus* consequently establishes the conditions under which a collective agreement is to be concluded, including non-existence and nullity; its contents, including the legal obligations attached to it, i.e. those inherent to the agreement even without the intervention of the parties' consent, such as peace obligations and respect for the terms of the agreement; its interpretation; fulfilment of the obligations agreed on; the consequences of infringement; and the termination of the agreement. The same law governs the personal scope of the agreement, which may be binding exclusively on the contracting parties and their affiliates, and also on third parties.

In many jurisdictions, especially in countries in mainland Europe, collective agreements are legally characterised by their normative effect, which has raised many doubts with respect to determining conflict of laws issues, as seen previously.[142] At this point, it must be emphasised that these normative effects impose certain conditions on the conclusion of collective agreements, in particular that the signatories have to be deemed to be representative by the legal system of reference and that they must follow a specific procedure, including, where appropriate, the publication of the collective agreement in an official journal. Thus, given the connection required between the scope of the collective agreement and the capacity to conclude it, as well as the publication requirement, the question arises whether these issues should be subject to the *lex contractus* as well.

The *lex contractus* does specify who is entitled to enter into a collective agreement—whether individual workers, trade unions or chambers of commerce—since this is not an issue of legal capacity or legal personality but rather an essential element of collective bargaining, which cannot be submitted to any law other than the one applicable to the agreement resulting from the bargaining process.[143] Other opinions point to the law governing the union,[144] i.e., the one

[141] See Malmberg (2007), pp. 422–423.

[142] See Sect. 5.3.2.3.

[143] See Deinert (2013), pp. 412–413; Ebenroth et al. (1989), pp. 146–147; Junker (1992), pp. 427–429; Magnus (2011), p. 627, para. 254; Martiny (2015), para. 173; Morgenstern (1987), pp. 140–142; Schlachter (2000), p. 64; Schlachter (2014a), para. 32. In the same direction, Demarne (1999), pp. 194–195. By contrast, applying for a functional approach by taking into account this law and the law of the seat of the contracting party according to the circumstances at hand, see Fudickar (2005), pp. 236–240.

[144] See different opinions in Eßlinger (1991), pp. 150–152, who ultimately considers these issues to be subject to the law governing the collective agreement (pp. 152–153). Otherwise, Gamillscheg (1983), p. 333; Lyon-Caen (1991), pp. 145–146.

dealing with the existence and features of the trade union in question. However, this law has no bearing on the problem under discussion—the bargaining power to conclude a collective agreement—since this issue is linked to the very existence, validity and scope of the agreement.

The same cannot be applied, though, to special requirements of form such as publication of the collective agreement in specific journals. Form requirements are submitted to the conflict rule provided by Article 11 of the Rome I Regulation, not establishing any special rule on collective agreements for which reason either the *lex contractus* or the *lex loci celebrationis* decides on this issue.

5.3.2.6 Collective Agreements and Plurality of *Leges Laboris*

Collective agreement themselves may determine their personal, territorial and temporal scope of application, but their application to employment relationships depend on the law governing the latter. Thus, if a crew demands that a collective agreement be applied to their individual employment contracts, the first step is to find out about each *lex laboris*, as collective agreements are part of this.[145] In fact, the problem is that each employment contract may be subject to a different law, and the collective agreement aimed at covering all seafarers or fishermen on board a ship or a fleet may itself be subject to a different law from the law or laws governing the employment contracts.

In view of the fact that applying a collective agreement to all individuals working on board depends on the relevant *lex laboris*, it cannot be taken for granted that the agreement is binding on all seafarers. This is the reason why a number of doctrinal opinions seek to avoid this dissociation by submitting the collective agreement to the law of the negotiating union's headquarters in the absence of choice of law and on the understanding that employment contracts are subject to the same law.[146] It has also been suggested that as many collective agreements should be concluded as *lex laboris* might be involved.[147] This opinion entails a collective agreement's legal reception by each law governing an employment relationship, which runs the risk of 'nationalizing' the collective agreement, i.e., submitting it to the same requirements and conditions that would apply if it had been concluded in the country. The relevant law should therefore not be applied too strictly, to contribute to the legal reception of the collective agreement in question. This approach has the advantage of the ITF's proved representativeness,[148] which means that it is accepted as a party with authorisation to conclude collective

[145] See STSJ Galicia (*Sala de lo Social*), 26.4.2004, applying a collective agreement recognised by the Bahamian law governing the employment contract.

[146] See Ebenroth et al. (1989), p. 146.

[147] See Thüsing (2003), p. 1312.

[148] See this approach from German law in Ludewig (2012), pp. 149–184; Zachert (2000), pp. 121–124.

agreements. However, this does not solve the problem of the fragmenting of the collective agreement, i.e., its more than likely non-application to all employment contracts on board a vessel.

The connections set out in Article 8 of the Rome I Regulation enable us to reduce the number of cases of dissociation between the laws governing employment contracts on board and the law governing the collective agreements.[149] Employment contracts may be subject to different laws, but these can never deprive employees of the protection afforded to them by provisions that cannot be derogated from by agreement under the applicable law in the absence of choice of law, including the provisions contained in collective agreements. As seen above, this is usually the law of the habitual workplace, which leads us to the law of the flag in the maritime sector. As to collective agreements and in the absence of choice of law, the conflict rule resorts to the closest law, which may also point to the jurisdiction of the flag. In cases where there is a law that is closer to the employment relationship than the law of the place of the ship's registration, this law comes into play through the escape clause set out in Article 8(4) and Article 4(4) of the Rome I Regulation with regard to collective agreements as this provision submits them to the law of the country with which they are most closely connected.

Such a coincidence is desirable and can be achieved, but not always. Divergences between the two laws can be overcome by resorting to the principle of equal treatment of workers who are subject to different employment laws but employed in the same workplace and by the same company.[150] The standard collective agreements drawn up by the ITF appear to be moving in this direction, as they seek to modify individual employment contracts by imposing obligations on employers with the aim of achieving equal living and working conditions for all those on board.[151] In these cases, the workers' implicit consent to the agreement is taken for granted, assuming that the working and living conditions guaranteed them by the collective agreement are more favourable than the ones already applicable.[152] The case law to date is contradictory, and these agreements have not always been

[149] See Deinert (2013), pp. 414–420.

[150] See Deinert (2013), p. 427 in relation to *Ausstrahlungen*.

[151] 'This Agreement is deemed to be incorporated into and to contain the terms and conditions of employment of any seafarer to whom this Agreement applies whether or not the company has entered into an individual Contract of Employment with the seafarer' (Term 1.2 ITF Uniform TCC Collective Agreement for Crews on Flags of Convenience). Term 1.3 further specifies that 'The Special Agreement requires the Owners (*inter alia*), to employ the seafarers on the terms and conditions of an ITF approved agreement, and to enter into individual employment contracts with any seafarer to whom this Agreement applies, incorporating the terms and conditions of an ITF approved Agreement. The Company undertakes that it will comply with all the terms and conditions of this Agreement. The Company shall further ensure that signed copies of the applicable ITF approved Agreement (CBA), and of the ITF Special Agreement are available on board in English'.

[152] As specified by STSJ Galicia, *Sala de lo Social*, No. 2004/2008, 30.6.2008, with comments by Palao Moreno (2008), pp. 937–939, citing previous case law, in particular STS 10.6.1998, and highlighting that they are not the usual collective agreements.

enforced,[153] but a change of interpretation needs to be advocated here, backed by the *pro laboratoris* principle, a general principle in both the shipping and fishing sectors, as can be inferred from Article 19(8) ILO Constitution, the MLC, 2006 Preamble, and Article 6(2) of WFC, 2007.

5.4 Industrial Action and Private International Law

5.4.1 The Lawfulness of Industrial Action

5.4.1.1 Introduction

Different legal systems approach the right to take industrial action from equally different perspectives, in particular with respect to different types of measures and the cases and ways in which they may be adopted. Various disputes have therefore arisen around a core issue: the lawfulness or unlawfulness of industrial action.

The following scenarios are the most typical: first, industrial action is announced—or sometimes initiated—and the employer then seeks to prevent it or put an end to it by asking for an injunction, which can only be granted after a summary assessment of the lawfulness of the action in question. Second, the employer may ask the court to declare the action illegal; the main issue at both stages of the procedure is to assert the lawfulness of the industrial action. But this may also appear as a preliminary issue. Third, after an unsuccessful invitation to the employer to participate in the collective bargaining process, industrial action is taken, ending up with the conclusion of a collective agreement, which the employer then challenges by claiming that it was signed under duress.[154] For a decision on this issue to be made, the question as to whether the workers' industrial action is lawful or not has to be answered, as the appreciation of duress often depends on such an assessment. Fourth, after being duly notified of the intention to undertake industrial action, the employer not only asks for the action to be declared illegal but simultaneously or subsequently seeks damages resulting from the threat or carrying out of the industrial action. Fifth, workers' participation in the industrial action may

[153] This approach was not accepted by BAG 16.2.2000, 4 AZR 14/99, which dismissed a wage claim brought by a German cook employed on board a ship registered in the German international registry on the ground of an ITF agreement, even rejecting the argument that it was a contract in favour of third parties on the basis that it would also impose obligations on third parties, i.e., workers. The agreement in question obliged the shipowner to conclude a new contract with the seafarer, for which reason it was also remarked that the claim ought to have been aimed at achieving this goal and not directly at a wage claim. Following this decision, see BAG 14.4.2004—4 AZR 322/03, regarding a Filipino seaman.

[154] In addition to English case law arising out of lawsuits against the ITF, there is a Swedish Supreme Court decision, cited and commented on by Malmberg (2007), pp. 418 and 421–423, where it is asserted that the mere fact that the action is unlawful does not make the collective agreement invalid.

have consequences on their individual employment contracts, as it may be considered breach of contract and consequently result in workers being dismissed or other kinds of retaliation. In this context, it is usually the workers who are interested in questioning the measures adopted by employers on the assumption that the industrial action was unlawful.

In all these cases, industrial action may end up taking on an international dimension since employers and workers in different states are pitted against each other, including the cases in which none of them have any contacts with the country where the conflict arises or with a country in which workers show solidarity with those in another state by beginning industrial action aimed at helping the latter improve their working conditions. The maritime sector provides numerous examples of international collective labour disputes resulting from the fact that crews normally undertake strike action in a port away from the flag state, or the sympathy or solidarity action occurs in a port state other than the flag state or other than the crew's country or countries of origin. Such actions are usually carried out under the ITF umbrella;[155] as this is based in London, another internationalising factor thus enters the conflict.

In contrast, coordinated action against multinational corporations with establishments in different states is not labelled international, precisely because it involves the coordinating of national actions sharing the common feature of being directed against the same employer, or at least against employers belonging to the same corporate group. The legality of this concerted action and its potential consequences do not receive identical treatment, as they are considered legally independent from each other and therefore treated as domestic cases. In the other cases mentioned above, it is necessary to discover which law is applicable to the determining of the legality of the industrial action and its consequences.

The first problem to be addressed now is how the law governing the lawfulness of a strike or a similar action is determined since the conflict of laws issue has generated the liveliest discussion in these matters. The debate has not arisen in the issue of international jurisdiction because the lawfulness of a strike usually crops up as an incidental question, that is, the relevant head of jurisdiction is determined by taking into account the main issue, not on the basis of whether industrial action is legal or not. That is why the traditional order of issues to be dealt with has been altered.

5.4.1.2 Conflict of Laws Issues

In the cases commented on above, the issue that has to be resolved is whether industrial action is lawful or not, either as a main question or as an incidental question to the main claim, such as readmission to the workplace, compensation for damage resulting from the action or the declaration of invalidity of the collective agreement reached after the industrial action. All in all, the legitimacy of industrial

[155] See an analysis of French, Norwegian, Swedish, English, Finnish and Italian case law up to 1993 in Orione (1993). Also addressing the most significant cases, see Northrup and Scrase (1996), pp. 403–420. Domestic decisions mainly focus on the lawfulness of boycotts.

action may be questioned separately or in connection with other claims, but in all cases it is decided according to the same law. Determining this law does not appear to be a controversial issue since all instances in which the issue has been dealt with take for granted that this law is closely linked to a fundamental right, even when it merits further regulation. In this framework, it is easy to turn to the law of the place where industrial action occurs or may occur.

The conclusion that the *lex loci actus* applies is arrived at on the basis of a unilateralist rather than a bilateral approach, given that the latter is not truly appropriate for an issue whose characterisation is complex: industrial action may arise in the context of a contractual relationship, but this does not mean that it is a contractual matter, nor that it is a non-contractual matter in cases in which unlawful action generates compensable damages.[156] Rather, it is a fundamental right that is limited by ordinary legislation and whose territorial scope of application has to be determined. Accordingly, decisions on conflict of laws issues are reached in accordance with the principle of territoriality, which decides on the applicability of a particular legal system to industrial action, and on the basis of which the system providing for the organisation and practice of the action also decides on its lawfulness.[157] This approach is underpinned by the fact that the provisions dealing with the conditions of its exercise are likely to be deemed overriding mandatory rules,[158] as can be confirmed by the previous discussion about their clashing with fundamental economic freedoms within the EU.[159]

In this regard, a number of commentators have supported applying the law of the place where the industrial action was taken,[160] with reference to the law of the flag or the port in accordance with the industrial action in question and the place where it

[156] In this regard, see Birk (1987), pp. 14–17, p. 15; Drobnig and Puttfarken (1989), pp. 30–31. Garofalo (1982), p. 734, characterises it as juridical fact. However, on the side of a non-contractual characterisation, although leading to the *lex loci laboris*, see Wintrich (1970), pp. 19–21 and 65–68.

[157] See Birk (1987), p. 16; Coursier (1993), pp. 141–142; Gamillscheg (1959), pp. 365–366; Krebbert (2000), pp. 539–540; Pataut (2004), pp. 802–806; Siehr (1983), pp. 315–318. Hergenröder (1987), pp. 192–226, suggests the application of the legal system that the industrial action is trying to change, which is to be determined by taking into account the underlying interests at stake (pp. 203–226).

[158] In the words of Lyon-Caen (1991), pp. 132–133, they would be *lois de police* or *de application immediate*. This is the US approach in tackling the application of the National Labor Relations Act, 1935, to cases dealing with foreign-flagged ships, although always asserting the priority of the law of the flag governing the ship's internal affairs. See Karmel (1961), pp. 1342–1370; Northrup and Scrase (1996), pp. 403–410.

[159] See Sect. 5.2.3.2.

[160] See Birk (2004), pp. 1069–1070; Däubler (1978), pp. 234–235, as regard to solidarity actions; Deinert (2013), pp. 455–456; Gamillscheg (1997), pp. 961–963; Gamillscheg (1983), p. 335; Garofalo (1982), pp. 734–743; Gaudemet-Tallon (1986), pp. 8–9; Geffken (1979), pp. 390–417; Gitter (1971), pp. 144–150; Junker (1992), pp. 472–484; Laborde (1999), p. 157; Laborde (2001), pp. 716–717; Lyon-Caen (1991), pp. 139–141; Staudinger (2012), para. 30. For Swedish doctrine and case law, see Malmberg (2007), p. 420. In Spain Fotinopoulou Basurko (2010a), pp. 51–53; Fotinopoulou Basurko (2013), pp. 117–120, seems to advocate this stance.

occurred.[161] This viewpoint has been backed up by some—albeit rather scarce—decisions assessing the issue.[162] In the maritime sphere, courts justify applying the law of the flag on grounds of the weakness of its connection to the port state[163] and on the assumption that the internal affairs of the vessel are subject to the law of registration.[164]

Nevertheless, the interconnection between the lawfulness of industrial action and its consequences has generated a discussion as to whether the incidental question should be referred to the law governing events resulting from the illegality of the action. Doubts have mainly been raised in relation to the impact of industrial action on individual employment contracts, and these can best be summarised by the criticism expressed with respect to a small number of old cases decided by French courts. Commentators on these judgments assert that the *lex laboris* is better placed to protect workers' rights than the *lex loci actus* as it provides for a stronger connection with obligations discharged towards the employer and the place where these are habitually performed.[165] In the cases reviewed, workers were posted abroad by French companies and allegedly participated in strikes in their host countries, which turned out to be illegal according to local regulations: the French Supreme Court declared the dismissals lawful by applying the law of the place

[161] See Eßlinger (1991), pp. 163–168; Medina (1975), pp. 262–273.

[162] See ArbG Hamburg, 5.12.1979 and 29.5.1981: in both cases, strikes in German ports and application of the Panamanian law; *Tribunale di* Genova, 6.11.1974, applying Liberian law. In the Netherlands, the law of the flag was applied by all courts dealing with the vessel 'Bernhard Oldendorff': Rechtbank Middelburg, 23.2.1981; Rechtbank Middelburg, 24.6.1981; Rechtbank Middelburg, 30.6.1982; Rechtbank Middelburg, 23.2.1983; Rechtbank Middelburg, 10.10.1984. However, see ArbG Hamburg, 15.3.1983, challenged before the LAG Hamburg, 26.8.1983, the main issue being the bareboat charterer's status to apply for an injunction against strikers; in the end, German law was applied as the law of the place where the industrial action was carried out, in view of the lack of contacts between the parties and the country of the flag. Likewise, see ArbG Hamburg, 6.4.1983, with comments by Birk (1987), pp. 14–17. In both cases, Philippine law prohibiting industrial action was avoided.

[163] See ArbG Bremen, 5.8.1977; Cour.Cass. 17.6.1982; ArbG Bremen, 7.10.1999—9 Ga 79/99; Cour.Cass. (Ch.soc.), 16.6.1983. Asserting its lack of jurisdiction to decide on a strike initiated in a French port, see *Cour d'Appel* Rennes, 13.2.1996, with criticism by Chaumette (1997): the seafarers were violently removed away from the vessel and replaced by another crew without the intervention of the French authorities. However, applying for the law of the port state, see Birk (1987), p. 16.

[164] As asserted by the Danish court deciding on the case *DFDS Torline* after the CJEU judgment. Commenting on the history of the case, see Evju (2007), pp. 901–902.

[165] Cour.Cass.(Ch.soc.), 8.10.1969, with comments by Simon-Depitre (1970), asserted that the *lex contractus* was applicable as the law governing the performance of the contract, but in this case that law was the same one that governed the strike. In the same vein, applying this connection Rechtbank Amsterdam, 30.11.1978, ship 'Tropwind', flying the Singapore flag but owned by the Swiss Tropwood AG; Rechtbank Middelburg, 25.7.1985, ship 'Serrai'; Kantong Amsterdam, 16.7.1955, ship 'Amstelstad'.

where the industrial action was undertaken, the same law that had decided on the action's legality.[166]

In these cases, two laws seem to have come into play to decide on the workers' dismissals; therefore, the potential non-adjustments of these laws need to be avoided, for example by applying one of them exclusively,[167] and to this end, the *lex laboris* is deemed the most suitable for protecting workers' interests.[168] However, given the final outcome, the question arises as to which of the laws in fact requires the worker's dismissal, whether it is the law governing the lawfulness of the strike or the *lex laboris*. In this light, it becomes apparent that the law applicable to the employment contract does not really have any chance of modifying the consequences of an illegal strike amounting to a breach of the employment relationship by employees who participate in it.[169]

In addition to this, the prevalence of the *lex loci actus* is underpinned by the characterisation of the claim at stake: the suspension of the obligation to pay wages during the period of conflict, the suspension or dismissal of workers on the grounds of the industrial action and the obligations to reemploy workers are all key parts of the industrial action itself.[170] So, the fairness or otherwise of dismissal following a strike will escape from the *lex laboris* and be submitted to the law governing industrial action.[171] Nonetheless, further consequences deriving from the termination of the employment relationship, such as the right to compensation, are submitted to the law governing the contract.

A similar discussion emerges in relation to the existence and validity of a collective agreement concluded in the framework of industrial action. The private nature of collective agreements and their assimilation to contracts determine their invalidity in the event of lack of consent. Duress is therefore frequently argued to support the invalidity of agreements whose conclusion has been preceded by some

[166] See Cour.Cass. 17.6.1982: the strike had taken place in Gabon, where the burdensome procedure required to obtain permission for it had not been complied with; *Cour.Cass. (Ch. soc.),* 16.6.1983, with comments by Simon-Depitre (1985), on a strike carried out in South Africa, where, despite the fact that striking was illegal, French public order did not intervene on the ground of lack of contacts with France.

[167] See Hergenröder (2007), pp. 321–322.

[168] Garofalo (1982), pp. 752–753, also applies for the *lex contractus* instead of the law where the strike is carried out, suggesting a characterisation dependent on the main question. Venturi (2007), pp. 344–350. Chaumette (1990), pp. 293–294, adopts an ambivalent position, as although his starting point is the *lex laboris*, he supports the application of the law of the place where the strike is carried out—according to him, the port—over the law chosen by the parties if the strike has been prohibited.

[169] With these doubts, see Lyon-Caen (1977), p. 279, suggesting the application of the *lex laboris* only when it is more favourable than the law governing the industrial action. For assessing the lawfulness of the industrial action—including solidarity actions—he proposes taking into consideration the collective and international perspective of the action at hand, seeking a solution tailored to each individual case (pp. 289–299). Similarly, Pataut (2007), p. 305.

[170] See Junker (1992), pp. 491–493; Oetker (2009), para. 127.

[171] See Deinert (2013), pp. 462–463.

form of industrial action. Two laws are involved here, the law of the strike or the action undertaken and the law of the collective agreement. This is exemplified by the *Dismkal* case, brought in the United Kingdom against the IFT and a Swedish union that had carried out a solidarity action in Sweden. While this action was considered legal in Sweden, the English court ruled that the collective agreement signed after the action was invalid on the ground that the agreement was governed by English law and it was also up to this law to decide on the lawfulness of the industrial action. The same happens in Sweden, where the legality of an industrial action is not deemed an incidental question, so it is understood that the issue will be resolved by resorting to the *lex contractus*, the law governing the collective agreement.[172] The Dutch courts provide further examples in cases where employers refuse to comply with the standard agreement signed after ITF boycotts, after which the law governing the seafarers' employment contracts was applied to decide on both issues, i.e., the lawfulness of the industrial action and the validity of the agreement.[173]

Interaction between industrial action and collective agreements does not end at this point since the former's lawfulness may well depend on an incidental question as well, namely, whether or not the parties were bound by the peace obligations arising from a collective agreement in force since industrial action taken in violation of this is generally held to be unlawful. It is important to note at this point that the incidental question could end up subsuming the main issue such that the strike's unlawfulness would merely be a consequence of the application of the law governing the relevant collective agreement, i.e., once the peace obligations' binding effect on the social partners is established.[174] However, the unacceptability of this rationale was evidenced by the Swedish *Lex Britannia*.

Lex Britannia was drafted in response to the boycott launched by Swedish unions and coordinated by the ITF against the vessel M/S Britannia, which was sailing under a flag of convenience with the overt aim of concluding an ITF agreement on behalf of the crew on board. Since a valid collective agreement had already been signed in the Philippines, the seized Swedish court found that the solidarity action undertaken should be deemed illegal, as it was intended to subvert an agreement already in force. The subsequent discussion on social dumping was at the heart of the *Lex Britannia*, which limits the functionality of peace obligations to those falling within the territorial scope of the law governing collective labour relations in Sweden. The CJEU had already abolished the difference between Swedish and other collective agreements in the *Laval* judgment, on the ground of

[172] See Malmberg (2007), pp. 421–423.

[173] See the 'Pacifico' case: Rechtbank case, Rotterdam, 18.12.1981; Gerechtshof Den Haag, 20.5.1983; Rechtbank Rotterdam, 7.2.1986; Gerechtshof Den Haag, 10.10.1989. Also, Rechtbank Rotterdam, 16.1.1987, ship 'Fraternity'.

[174] See Garofalo (1982), pp. 751–752.

the prohibition of discrimination.[175] However, it becomes apparent from this case and the law mentioned above that the relevant issue is the close connection between peace obligations and the right to strike, such that it is advisable to adopt a functional approach aimed at placing these obligations within the law governing industrial action and not within the law applicable to the collective agreement.[176] Whether or not peace obligations are relevant for deciding on the lawfulness of an industrial action thus depends on the *lex loci actus* and not on the *lex contractus* governing the collective agreement.

This discussion also comes to the fore with respect to non-contractual obligations arising out of unlawful industrial actions. The *DFDS Torline* case, which in the end was decided by the CJEU,[177] can illustrate this issue. A Danish shipping company claimed damages against two Swedish unions on the ground that notice of a boycott that was allegedly unlawful in Sweden forced it to replace the ferry covering the route between Sweden and the UK. The Court of Justice had to pronounce on the heads of international jurisdiction to decide on the question of damage claims, despite the fact that when the incidental question was addressed to the CJEU the Danish courts had been asked for a declaration of unlawfulness exclusively for the industrial action. However, the Court decided on the merits on the basis that the declaration should be interpreted as a preventive damages action and both the lawfulness of the industrial action and of the tort claim should thus be allocated to the jurisdiction of the same state. Following a similar rationale, applying the law governing tort to the lawfulness of the industrial action was suggested.[178] Nevertheless, the dangers emerging from this possibility sparked intense political activity aimed at introducing a special conflict rule into the Rome II Regulation[179]—Article 9—excluding precisely the question of the lawfulness of industrial action from its material scope of application. In accordance with Recital 27 of Rome II Regulation, as a general principle the European Union accepts that the law of the country where the industrial action was planned should apply.

All in all, subjecting the incidental question to the main question has to be dismissed for reasons of legal certainty, which also support the separate treatment of the lawfulness of industrial action to ensure the foreseeability of the applicable

[175] CJ 23.5.2007, Case C-341/05, *Laval*. On the principle of non-discrimination in these cases, see Fallon (2008), pp. 781–818. In general, see Basedow (2008), pp. 230–251.

[176] See Deinert (2013), pp. 454 and 458–459.

[177] CJ 5.2.2004, Case C 18/02, *DFDS Torline A/S v SEKO Sjöfolk Facket för Service och Kommunikation*.

[178] In this regard, see Zwanziger (1994), pp. 134–140, who prefers the law of the port. As will be seen later, this proposal leads to a country that may lack contacts with the parties involved, for which reason the application of the law governing the employment contracts has been suggested. See Drobnig and Puttfarken (1989), pp. 34–41.

[179] Regulation (EC) No. 864/2007 of the European Parliament and of the European Council of 11 July 2007 on law applicable to non-contractual obligations (OJ No. L 199 of 31.7.2007).

law,[180] hence regardless of whether this issue appears as a main or an incidental question in the dispute.[181] Otherwise, different legal systems may be called to decide on the legality of the same industrial action, i.e., the lawfulness of a strike on board a ship flying a flag that is not the flag of the port where the action is undertaken may be subject to English law if ITF liability is claimed, but may also be subject to the law of the port if the claim is against the national union calling for the action, or to the law of the flag if deemed appropriate. Should the industrial action lead to a collective agreement being signed, its validity might be disputed and the law applicable to the agreement might also therefore come into play. Furthermore, if the owner decided to dismiss the seafarers or take some other kind of retaliation measures against them, the legality of the strike would depend on the law applicable to the corresponding individual employment contract, with the peculiarity that crew members might be treated differently even though the industrial action taken was the same. The same question could thus be decided in accordance with at least three different laws. In addition to reasons of legal certainty, attention should be paid to the fact that the application of a single law also serves to give propriety to the collective nature of the rights in question, giving due consideration to social dialogue and, since collective interests are at stake, to social peace.

Accordingly, the separate treatment given to the lawfulness of industrial action for conflict of laws purposes should also be applied in solidarity or sympathy actions, which are so common in the maritime sphere.[182] These actions' legality often depends on the lawfulness of the main action that they support; the relationship of dependence between primary and secondary actions requires the law governing the lawfulness of them both to be determined, and it also needs to be established whether both actions should be subject to the same law. There is in fact case law on the matter that applies the law governing solidarity actions to decide on the lawfulness of the primary action.[183] However, the collective interests mentioned above advocate analysing both the legality of the primary and secondary actions in accordance with the law of the place where either one or the other was called for.

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[180] See Drobnig and Puttfarken (1989), pp. 17–22; Even (2007), pp. 378–398.

[181] See van Hoek (2007), pp. 445–446, and on the application of the rule nowadays laid down in the Rome II Regulation (pp. 446–447).

[182] These cases do not only arise under the ITF's aegis. German history provides an example in which a multisectoral public services, transport and traffic union, *Gewerkschaft Öffentliche Dienste, Transport und Verkehr* (*ÖTV*), called for a boycott by its foreign partners against the German maritime industry not organised in maritime conferences with the aim of concluding a collective agreement. See BAG 19.10.1976, where German law is applied to assess the lawfulness of the boycott while dealing with a pre-contract that was binding on the conclusion of the collective agreement. It did not, however, take the boycott carried out in Denmark into consideration.

[183] In this regard, see Pankert (1977), pp. 82–83, citing ArbG Wuppertal, 24.11.1959, on the unlawfulness of a solidarity action on the ground that the primary action taken in France was against the German Constitution.

5.4.1.3 International Jurisdiction

The *DFDS Torline* judgment[184] gave the CJEU the opportunity to characterise the damage claims arising from the exercising of the right to strike as non-contractual, following well-established case law,[185] and consequently tort liability stemming from industrial action became subject to the Brussels–Lugano system. This case dealt with the prevention of and compensation for damages arising out of industrial action, but the ruling did not address the conditions affecting the action itself and whether they were subject to the Brussels Convention in force at the time. According to Article 153(5) of TFEU, the right to strike is outside the legislative competence of the EU, and Recitals 27 and 28 of the Rome II Regulation seem to pay due respect to this provision by recalling that industrial action and the conditions of its exercise are covered by national law. It could then be concluded that an injunction taken out against a trade union to prevent a strike is not subject to the Brussels–Lugano system either.[186]

This conclusion does not stand up under close scrutiny though, as industrial action cannot easily be characterised as anything other than a civil matter. However, it is true that the reverse could also be argued, on the ground that industrial action seems to fall somewhere in a grey area between public and private laws; for example, injunctive relief amounts to assessing whether a fundamental right may be exercised under the circumstances in question, and so the action may be characterised in different ways depending on where the emphasis is placed. The CJEU disregarded the public dimension of the *DFDS Torline* case, for example, when it concluded that an action seeking to prevent the occurrence of damage, such as the action claiming the illegality of industrial action, is to be deemed a non-contractual matter and within the scope of the Brussels–Lugano system.[187] This assertion seems to have been amended in Recitals 27 and 28 of the Rome II Regulation, which pay due regard to the public dimension by acknowledging that this is about a fundamental right, for which reason the conditions of exercise of industrial action must be placed under the relevant national law.

Nevertheless, industrial action is to be deemed a civil matter as it ultimately concerns relationships between private individuals.[188] The point to be made here is that it should not be taken to be a non-contractual matter, as declaring industrial action illegal is neither a contractual nor a non-contractual issue, as acknowledged in the Rome II Regulation.

In short, the Brussels–Lugano system is applicable in claims seeking the declaration that industrial action is unlawful. Setting express and implied submission to one side, though, plaintiffs may only resort to the courts of the defendant's

[184] CJ 5.2.2004, Case C 18/02, *DFDS Torline*.

[185] CJ 27.9.1988, Case C 189/87, *Kalfelis*.

[186] Arriving at this conclusion with respect to Dutch law, see Even (2007), pp. 365–369.

[187] CJ 5.2.2004, Case 18/02, *DFDS Torline*, paras. 23–28.

[188] Grušic (2013), pp. 413–430.

domicile, where they are allowed to claim against co-defendants as well, according to Article 6(1) of the Brussels I Regulation and the Lugano Convention, 8(1) of the Brussels I *bis* Regulation.

As seen above, the latter provision has been widely invoked in cases of industrial action conducted under the umbrella of an international trade union association such as the ITF and has led to a situation where the lawfulness of an industrial action may be assessed by a jurisdiction other than that of the country where it actually occurs or may occur. This outcome is largely unwelcome, given that assessing the way in which fundamental rights are exercised in one country is carried out in a foreign court, with the likely outcome that the country will apply its public policy clause when enforcing the foreign decision.

Like any other international trade union organisation, the ITF plays the role of a facilitator, i.e., it is neither the main character nor the actor who performs a planned action. Given its supporting role, a teleological interpretation of Article 8(1) is advocated here, in line with the interpretation enshrined in Article 11(1)(c) of the Brussels I *bis* Regulation, opening the courts of the leading insurer's domicile to other co-insurers but not vice versa. Along similar lines, only the jurisdiction of the leading actor, i.e. the union actually carrying out or intending to carry out industrial action, attracts claims against co-operators. Abuse of procedure considerations are also of use in justifying this teleological interpretation.

With respect to injunctive relief, the appropriate forum seems to be the one established in Article 35 of the Brussels I *bis* Regulation, for precautionary measures when the action occurs in a country other than that of the defendant's domicile. The case is likely to arise in the maritime sphere since strikes can be undertaken at any port.

In the event that the defendant is not domiciled in a member state, consideration should be given to national law, leaving room for the application of rules such as Article 25 of the LOPJ.

In contrast, the international jurisdiction to decide on the consequences of industrial action depends on what these consequences are. Therefore, when what is at stake is the termination or suspension of an employment contract as a result of participation in a strike, the dispute is submitted to the rules of international jurisdiction and applicable law on individual employment contracts discussed above.[189] For the purpose of this conclusion, it is irrelevant if the reason for dismissal has been qualified as an issue to be decided by the law governing industrial action and not by the law of the contract, as the termination of an employment relationship goes beyond merely assessing the fairness of the reasons for dismissal. The same reasoning can be applied when the subject matter of a claim is the challenge of a collective agreement, and so readers are referred to the section of this book dealing with collective agreements and international jurisdiction issues.[190] The same is also applicable to tort liability arising out of industrial action, the subject matter of the next section.

[189] See Pataut (2007), p. 295.

[190] See Sect. 5.3.2.2 and Heinze (2009), p. 776; van Hoek (2007), p. 434.

5.4.2 *Industrial Action and Non-contractual Obligations*

5.4.2.1 International Jurisdiction

Non-contractual obligations stemming from industrial action are subject to the Brussels–Lugano system. In its *Viking* judgment, the CJEU clearly insisted that if it is proven that individuals or unions can infringe market freedoms with their actions, the necessary conclusion is that companies can claim against them as a result.[191] According to the Brussels–Lugano system, plaintiffs may apply to the courts where the defendants are domiciled or, alternatively, to courts with jurisdiction on non-contractual matters. Before that, the litigant may try to settle an agreement on choice of forum, although this is not likely to be achieved against the current background, and the possibility of a tacit submission appears to be more feasible.

In addition to these heads of jurisdiction, Article 8(1) of the Brussels I *bis* Regulation allows claims to be lodged against co-defendants domiciled in a member state in the jurisdiction of the defendant's domicile. As mentioned above, this situation is fairly common in cases where an international trade union organisation has intervened in support of industrial action, and the ITF is the most relevant of these organisations. A good example of this is the *Dimskal* case referred to previously,[192] in which the ITF was sued at its headquarters in London, where the Swedish unions that had effectively called for the industrial action in question were also sued as co-defendants. Something similar happened in the CJEU *Viking* judgment: the ITF was sued jointly with the Finnish union FSU in London on the ground that a circular calling for solidarity with the latter's actions was issued from there.

Against this background, it is important to underline the fact that Article 8(1) cannot be used to accumulate claims of a different nature from the claim lodged against the main defendant; more specifically, it cannot be used to seek the termination of the individual employment contract or other retaliation measures against workers resulting from the industrial action being unlawful. It should be recalled that Section 5, Chapter II, of the Brussels I Regulation/Lugano Convention contains no reference to Article 6(1)—an absence that was amended by the Brussels I *bis* Regulation, but only to the extent that this forum was made available for employees. Of particular relevance is the fact that the CJEU has already ruled on there being insufficient connection between contractual and non-contractual claims for them to be dealt with jointly by the courts to which Article 6(1)/8(1) grants jurisdiction.[193]

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[191] CJ 11.12.2007, Case C 438/05, *Viking*, paras. 56–66.

[192] *Dimskal Shipping Co. v. ITF* [1992] 2 A. C. 152.

[193] CJ 27.10.1998, Case C 51/97, *Réunion européenne SA v. Spliethoff's Bevrachtingskantoor BV et al*, para. 50.

With the exception of the head of jurisdiction on non-contractual matters, these criteria are not truly controversial, for which reason the following lines focus on Article 7(2) of the Brussels I *bis* Regulation.

The CJEU confirmed the applicability of Article 5(3) of the Brussels I Regulation to non-contractual obligations arising from industrial action in its *DFDS Torline* judgment. The case involved an unlawful industrial action taken by Sjöfolk Facket för Service och Kommunikation (hereafter SEKO), a Swedish trade union, against DFDS Torline, a Danish shipping company. The industrial action in question concerned the vessel 'Tor Caledonia', registered in the Danish International Register under Danish law and manned by a Polish crew whose employment contracts were submitted to a framework agreement concluded between several Danish unions and shipowners. SEKO initially approached DFDS Torline with the aim of obtaining a collective agreement for the Tor Caledonia; the company refused, and SEKO then announced industrial action and asked its members not to perform any tasks for the vessel. It also requested solidarity action, and the Swedish Federation of Transport Workers, Svenska Transportarbetareförbundet, complied; the latter announced its intention to DFDS Torline, who went to court in Denmark with the aim of having the action declared illegal. The industrial action was preventively suspended by the unions, and in the end the 'Tor Caledonia' was withdrawn from its normal route between Gothenburg (Sweden) and Harwich (UK) and was replaced by another vessel that was rented for the purpose.

DFDS Torline's main aim in going to court in Denmark was to claim for the resulting losses, although the Danish procedural system obliged them to lodge a previous action for both the main and sympathy actions to be declared unlawful, as seen above. Among other questions, the court with which the claim for the lawfulness of the industrial action was lodged asked the CJEU whether a preventive action for damages fits in the terms established in Article 5(3). As said, the query arose from that peculiarity of the Danish judicial system, which submits jurisdiction over the legality of industrial action and the resulting action for damages to different courts. In the case in question, the latter claim had not yet been filed, whereas the first had, which drove both unions to suspend *motu proprio* the industrial action they had announced. In fact, the defence argued the absence of damage arising from industrial action since the action itself had not in fact been undertaken.

However, the CJEU concluded that there could be a causal link between the notice of industrial action and the 'Tor Caledonia' being replaced by another vessel and that there was therefore sufficient criteria to establish SEKO's liability. The Court in Luxembourg redirected the preliminary questions to the issue of whether a preventive action for damages is included within the scope of Article 5(3) and finally answered that it was,[194] in line with its previous case law.[195] The provision

[194] CJ 5.2.2004, Case 18/02, *DFDS Torline*, paras. 27–28 and 32–33.

[195] As already asserted in CJ 1.10.2002, Case C 167/00, *Henkel*, paras. 46 and 48.

itself—redrafted in the Brussels I Regulation—currently leaves no doubt, indicating that lawsuits may be brought 'where the harmful event occurred or may occur'.

Having addressed the issue of the scope of the special forum on non-contractual matters, it now remains to establish in which courts damage caused by industrial action can be claimed. Article 5(3) of the Brussels I Regulation and the Lugano Convention, 7(2) of the Brussels I *bis* Regulation, refers to the courts of the place where the harmful event occurred. The forum has been interpreted by the CJEU to mean both the courts in the place where the harmful event occurred or may occur and the courts in which damage caused by the event actually took or may take place,[196] but always with the proviso that both countries have to be foreseeable for the parties since foreseeability and therefore proximity to the sources of evidence is the basis of the special heads of jurisdiction laid down in Article 5/7 as an alternative to the *forum rei*.

Since we are dealing with the question of industrial action, establishing the place where the damaging event occurs would seem to be a simple task: the place where the event occurs or where it has been announced—in the event that it has not yet been carried out—ought to be easy to identify, and both the CJEU[197] and the legislative activity following this judgment confirm this. As already noted, after the decision, a conflict rule on the matter was introduced into the Rome II Regulation; at that point, the connecting factor used was the 'country where the action is to be, or has been, taken', thus underpinning the doctrine established by the CJEU in this judgment.

If the actions to be coordinated by an international trade union organisation, one might wonder whether the place of production of the harmful event is the one where the organisation is actually based, on the ground that the coordinated activity was planned there. This interpretation does not, however, match the justification of this forum—based on closeness to the sources of the evidence—and must therefore be rejected. The CJEU did not contemplate this possibility in its judgment, but the statement is supported by the fact that Article 9 of the Rome II Regulation points to the physical place of occurrence, not to the place where the action was coordinated. Thus, not taking the latter into account when applying this head of jurisdiction may ensure a match between *forum* and *ius*.[198]

Establishing the place where the damage caused by industrial action with cross-border implications occurs is more difficult, however. DFDS Torline sued the Swedish union that responded to SEKO's call for solidarity action against the 'Tor Caledonia' in Denmark despite the fact that the notice had been issued in

[196] CJ 7.3.1995, Case C 68/93, *Fiona Shevill*.

[197] CJ 5.2.2004, Case 18/02, *DFDS Torline*, para. 41: 'In this case, the event giving rise to the damage was the notice of industrial action given and publicised by SEKO in Sweden, the Contracting State where that union has its head office. Therefore, the place where the fact likely to give rise to tortious liability of the person responsible for the act can only be Sweden, since that is the place where the harmful event originated'.

[198] See Pataut (2004), pp. 807–808; Pataut (2007), pp. 294–295, for whom a specific head of jurisdiction would be desirable; Heinze (2009), p. 775.

Sweden, where the action would have been undertaken. Against this background, the issue at stake was whether damage resulting from industrial action announced or undertaken by a union of a member state against a vessel flying the flag of another member state can be understood as having occurred in the latter state.

The Court of Justice emphasised that this question could only be answered by taking into consideration what type of damage was involved, in this case pure economic loss arising from the detention of the ship and its replacement by another ship. Indeed, the problems entailed in establishing when pure economic loss occurs have led plaintiffs to seek a coincidence between this place and the centre of the victim's main interests, with the aim of building a *forum actoris*. In the *DFDS Torline* judgment, for example, the shipowner intended to sue the unions in the place where the company was based. However, the CJEU clearly aborted this strategy by rejecting the interpretation,[199] instead demanding an assessment of all relevant factors and circumstances in the case so that the place could be located.[200] One of the variables in fact pointed to the ship; it was not clear, though, whether damages could be located on board, although the Court did leave the door open for this conclusion for cases in which the consequences of the action do have an impact on board, in which case the flag of the vessel ought to be taken into consideration,[201] as the Danish court in charge of this case finally decided.[202]

When the Brussels–Lugano system is not applicable, domestic law comes to the fore, as is the case with Article 25 LOPJ. As previously noted, Article 25(2) only intervenes in industrial action disputes occurring in Spain. A solution must be found for other cases, and the Spanish Supreme Court has already addressed the issue in this respect by resorting to Article 25(1) LOPJ, which deals mainly with employment contract matters. In the case underlying its judgment,[203] industrial action was initiated on the ground of the illegal transfer of workers to a foreign air travel company. As the transfer directly concerned obligations stemming from employment contracts, the Supreme Court asserted the Spanish jurisdiction, although all factors pointed to the United States.

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[199] CJ 10.6.2004, Case C 168/02, *Rudolf Kronhofer v Marianne Maier, Christian Möller, Wirich Hofius, Zeki Karan*.

[200] CJ 5.2.2004, Case 18/02, *DFDS Torline*, para. 43.

[201] CJ 5.2.2004, Case 18/02, *DFDS Torline*, para. 44: 'In the course of that assessment by the national court, the flag state, that is the State in which the ship is registered, must be regarded as only one factor, among others, assisting in the identification of the place where the harmful event took place. The nationality of the ship can play a decisive role only if the national court reaches the conclusion that the damage arose on board the *Tor Caledonia*. In that case, the flag state must necessarily be regarded as the place where the harmful event caused damage'. Critical, Palao Moreno (2004), p. 851.

[202] Danish *Arbejdsrettensdom*, 31.8.2006.

[203] STS, *Sala de los Social*, 20.7.2007.

5.4.2.2 Applicable Law: Article 9 of the Rome II Regulation

Background

The legislative history of Article 9 of the Rome II Regulation is closely linked to the *DFDS Torline* case. The fact that the consequences of industrial action could be addressed in a jurisdiction that was not the one where the action took place—or where it might have taken place—led the Swedish Government to insist on the inclusion of a conflict rule on the matter in the proposal for a Regulation on the law applicable to non-contractual obligations, which was still at the discussion stage.

The first draft of the Regulation lacked any reference to this tort,[204] but following the Swedish suggestion the European Parliament advocated introducing an additional rule, which reads as follows: 'The law applicable to a non-contractual obligation arising out of industrial action, pending or carried out, shall be the law of the country in which the action is to be or has been taken'.[205] In line with the concerns expressed by the Swedish Government following the *DFDS Torline* doctrine, the justification provided for the conflict rule insisted on the idea that 'the rights of workers to take collective action, including strike action, guaranteed under national law must not be undermined'. Similar concerns were voiced in the document of the Council of the European Union following the EU Parliament report,[206] but the Commission was less receptive to the wording proposed by the Parliament, on the ground of lack of flexibility.[207]

However, Sweden's efforts in the Council of the European Union paid off. After much discussion on the recitals that ought to shed light on the conflict rule,[208] the Council proposed a draft rule on the matter. It was not until the Common Position of 25 September 2006 that Article 9 appeared in its current version, though[209]: 'Without prejudice to Article 4(2), the law applicable to a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer

[204] Brussels, 22.7.2003 [COM(2003), 427 final].

[205] Report of the European Parliament on the proposal, presented the 27.6.2005, with Diana Wallis as spokesperson (Document A6-0211/2005). Proposal amendment No. 15 includes Recital 18a and amendment No. 31 to Article 6bis quoted above.

[206] Council Document No. 8498/06, 2.5.2006. Recital 14a reads as follows: 'Taking industrial action is a fundamental right of workers and trade unions and the exact concept of industrial action varies from Member state to Member state. Therefore, this Regulation takes as a general principle that the law of the country where the industrial action was taken should apply, irrespective of the place where the damage could occur, aiming to protect the rights and obligations of the workers and trade unions that exist in the country where the industrial action was taken'.

[207] Revised proposal presented in Brussels, 21.2.2006 [COM(2006), 83 final], amendment 31.

[208] Council Document No. 8498/06, 2.5.2006.

[209] Common Position (EC), No. 22/2006 of 25 September 2006 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II) (2006/C 289 E/04) (OJ No. C 289, 28.11.2006).

or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken'. The differences are clear, lying firstly in the reference to the law of common habitual residence of the parties involved and, secondly, in the inclusion of a list of persons who can be held liable. Both additions helped overcome the EU Commission's reluctance, still dissatisfied with the ambiguity of the phrasing, as it does not make it clear that the conflict rule cannot be extended to third parties.[210]

Against this background, it becomes clear that the promoters of the conflict rule fully understood the consequences resulting from the fragmenting of the industrial action regulation—including the right to strike.[211] Behind the teleology of this rule lies an interest in establishing a coincidence between the law governing the legality or illegality of such action and the one determining its consequences. Constitutional and political considerations support this coincidence, which also prevents the courts from having to resort to mechanisms such as overriding mandatory rules, the public order exception or the proof of foreign law.[212] The obligation to give notice of industrial action prior to its start often drives the parties involved to seek an *interim* suspension, making the possibility of avoiding the need to find out about foreign law in situations requiring a swift decision even more appealing. Furthermore, since the rules governing the action are known in advance, the parties can anticipate the consequences of their behaviour; the rule promotes prevention over compensation, which is only rarely asked for in this context.[213]

Material Scope

The material scope of the provision consists in 'a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out'. Three issues can be emphasised here: first, that the issue of the lawfulness of an industrial action is not within its scope; second, that an objective element—the industrial action itself—can give rise to tort liability; and, third, that there is also a subjective element, the actor responsible for its

[210] Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2), of the EC Treaty concerning the common position of the Council on the adoption of a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), Brussels, 27.9.2006 [COM(2006), 566 final], p. 4.

[211] See Dickinson (2008), p. 477, para. 9.16, outlining the huge divergences in this field when it comes to organising collective labour relations in individual domestic market.

[212] See Deinert (2013), p. 434; Heinze (2009), p. 781. Advocating for the *lex fori*, see Krebbert (2000), pp. 539–540, but only for non-contractual liability and not for the determining of the lawfulness of the industrial action.

[213] With these thoughts, see Junker (2010), para. 2.

undertaking. Different claims may arise from a specific event, but only those claiming non-contractual liability fall within the scope of this provision.[214]

More specifically, the conditions for undertaking industrial action fall outside the scope of Article 9. In accordance with Recital 28, the Rome II Regulation does not deal with a matter that involves the exercise of a fundamental right and is deemed to pertain to the organisation of the relevant labour market. The legality of industrial action is therefore not included in the scope of the Rome II Regulation,[215] as this is not a non-contractual matter.[216] Taking into account that this is about a fundamental right, the reference to national law in Recital 28 is to be understood as a reference to the substantive law of the forum and not as a reference to its conflict of laws rules.[217]

This delimitation of the material scope of application of Article 9 affects the scope of the law governing the tort, in accordance with the clarifications made in Article 15 of the Rome II Regulation. This provision submits 'the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them' to the designated law pursuant to the Rome II Regulation. However, this sentence needs to be interpreted in accordance with the terms of Recital 28,[218] i.e., neither the basis of tort liability—dependent in this case on the illegality of industrial action—nor the legal status of trade unions or business organisations is subject to the law designated by this rule.

The discussion above on the right to take industrial action shows that the European Union has no legislative competence in this area,[219] whereas EU Member states are responsible for legal implementation taking into account international instruments in this respect. It has also been ascertained that there is ample diversity in the legal field, with Recital 27 of the Rome II Regulation charting the right course by vetoing an autonomous interpretation of the concept of industrial action,[220] and so the concept has to be interpreted in accordance with the relevant national law.

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[214] See Knöfel (2008), pp. 234–235.

[215] Among others, see Fotinopoulou Basurko (2010a), pp. 52–53; Ludewig (2012), pp. 187–190. Against: implicit, see Palao Moreno (2007), p. 120. Crespo Hernández (2008), pp. 1–13; Deinert (2013), pp. 454–456; Morse (2009), p. 725, suggests that Article 9 also deals with the lawfulness of industrial action.

[216] See Sect. 5.4.1.2.

[217] See Zelfel (2011), pp. 118–119. Apparently also understanding it, thus, Schlachter (2014b), para. 1. With the opposite view, i.e. referring this issue to the domestic conflict rules, see Illmer (2011), p. 279, para. 35, and Junker (2010), para. 20.

[218] See Dörner (2012), paras. 1 y 2; Junker (2010), para. 36; Zelfel (2011), pp. 117–121. Against, see Magnus (2011), p. 635, para. 280.

[219] See Sect. 5.2.1.

[220] 'The exact concept of industrial action such as strike action or lock-outs varies from one Member state to another and is governed by each Member state's internal rules. Therefore, this Regulation assumes as a general principle that the law of the country where the industrial action was taken should apply, with the aim of protecting the rights and obligations of workers and employers'. In this regard, see Morse (2009), pp. 727–728. By contrast, confident in its future development, see Plender and Wilderspin (2009), pp. 671–672, para. 23-008.

There is a burning debate in the literature aimed at determining precisely which law that may be, and with a whole sector pointing to the *lex fori*.[221] Taking into account the objectives of the rule, we have to agree with another sector, which argues that it is more appropriate to use an *ex lege causae* characterisation,[222] thus avoiding problems of adaptation. It should be recalled that this recital builds upon the *DFDS Torline* doctrine, which identifies different heads of international jurisdiction for tort claims arising from industrial action. Accordingly, while the tort claim may be brought in different jurisdictions, an autonomous concept of such action cannot be provided to avoid forum shopping. The latter may however be promoted if the applicability or non-applicability of Article 9 is made dependant on the relevant *lex fori* and its concept of industrial action; thus, reasons of legal certainty also back up the *ex lege causae* characterisation of the issue. Finally, it is important to note that the concept of industrial action is not restricted to any particular type of action, as the list in Recital 27 is indicative rather than exhaustive. In particular, Recital 28 applies to all kinds of industrial action, including sympathy or solidarity actions.[223]

As regards the subjective element that makes up the material scope of this provision, the high degree of legal diversity present in these matters is taken into account: whereas in certain EU countries only unions have the standing to call for industrial action, in other countries workers' groups and even individual workers may also undertake such action, so therefore both collective and individual actions are covered. Given that unions and employers' organisations have their own governing bodies, for the provision's purposes their members may also be held liable,[224] as may be individuals involved in the action, including ex-workers, scabs and strike breakers.[225]

The point made in Article 9 is important because it solves the problem of the delimitation between conflict rules: the question of who can engage in industrial action and therefore against whom action on tort liability arising from the illegality of this action may be brought is subject to the law governing the merits, while the

[221] See Knöfel (2008), pp. 241–242; Pfeiffer et al. (2011), para. 1.

[222] See Deinert (2013), pp. 436–437; Dickinson (2008), p. 478, para. 9.19, although with limits for cases involving action against government policies, para. 9.20, a limitation based on a particular notion of action for which it ought to be rejected; Heinze (2009), pp. 782–783; Illmer (2011), pp. 266–267, paras. 8 and 9, who is also against the inclusion of political industrial action (p. 268, para. 12); Junker (2010), para. 15; Rödl (2011), pp. 491–492; Zelfel (2011), pp. 27–44. It is understood thus by Calvo Caravaca and Carrascosa González (2008), p. 170. Alternatively, see Schlachter (2014b), para. 2.

[223] This means that the main action's role in determining the secondary action's legality depends on the same legal system, responsible for deciding on the latter question, either because it chooses to apply the principle of separability or because it chooses to decide on both.

[224] Article 15(a) of the Rome II Regulation. See Deinert (2013), pp. 460–461; Dickinson (2008), p. 480, para. 9.25; Heinze (2009), p. 784; van Hoek (2007), p. 452; Illmer (2011), p. 270, para. 17; Schlachter (2014b), para. 1; Zelfel (2011), pp. 69–71. Excluding these, but suggesting the application of Article 4(3) of the Rome II Regulation to have the law applied, see Junker (2010), para. 25.

[225] As may be the case when a company tries to break a strike by hiring workers from abroad. For this example, see Birk (1980), pp. 36–37, who also subjects this issue to the law governing the strike.

legal status of trade unions or other organisations representing workers' interests is determined by the relevant national law, as stated in Recital 28, whose wording needs completing by adding organisations representing employers' interests. For our purposes, the exclusion is not only with regard to their legal situation but also in relation to the conditions required for exemption from liability for industrial action, as the two issues are intrinsically linked.[226] In fact, as this is one of the conditions for industrial action to be undertaken, the issue has to be submitted to the law of the place of its performance rather than to the place where the union is based.

As the Commission noted, the provision does not expressly refer to third parties.[227] These include suppliers affected by the strike, as well as those who are close to the conflict but are not interested parties. Applying the general rule on tort liability laid down in the Rome II Regulation could be preferable for these cases, taking into account the provision's legislative history.[228] In claims against a union whose call for a strike against port authorities caused the loss of the cargo on board the vessel—thus inflicting injury on someone else who is not a party to the industrial action—the conflict rule would therefore submit the case to the *lex loci damni* and not to the *lex loci actus*.

However, this approach could be a major impediment to the trade union cause, and so the fact that third parties have been left outside the scope of Article 9 is a question for debate. In fact, the provision's wording does not allow this exclusion as, even when it may concern third parties, the facts regard non-contractual obligations to be attributable to a person—an employee, an employer or even an organisation—representing their professional interests for damages caused by past or future industrial action, thus included within its scope of application.[229]

With a view to illustrating this statement, it may be useful to recall that both The Hague–Visby Rules and the Rotterdam Rules deem a strike, lock-out, stoppage or any other hurdles that totally or partially impede work for any reason to be disclaimers of the carrier's obligations vis-à-vis the charterer.[230] The terms of the disclaimer were preceded by French judicial opinions that debated whether a strike may be deemed as force majeure in order to disclaim shipowners' liability vis-à-vis third parties; these opinions understood that such an interpretation could only be

[226] See Rödl (2011), p. 490. Differently, see Dickinson (2008), p. 482, para. 9.30.

[227] Against, Crespo Hernández (2008), p. 7; Fotinopoulou Basurko (2010a), p. 55.

[228] See Heinze (2009), p. 784; Plender and Wilderspin (2009), pp. 675–676, para. 23-018. In previous literature, see Drobnig and Puttfarken (1989), p. 18, and *Cass.mixte*, 4.12.1981, *Compagnie Générale Maritime v Compagnie Française de Raffinage*.

[229] See Deinert (2013), pp. 461–462; Dickinson (2008), pp. 480–481, para. 9.26; Illmer (2011), pp. 272–273, para. 21; Junker (2010), para. 24; Rödl (2011), p. 490; Zelfel (2011), pp. 71–77. In this regard, but asking for a pronouncement from the CJEU, see Morse (2009), pp. 730–731.

[230] Articles 4(2)(j) of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25.8.1924, as amended by 1968 and 1979 Protocols (The Hague–Visby Rules), and 17(3)(e) of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules), Resolution approved by the General Assembly 63/122.

backed up in exceptional situations, such as cases of political strikes that did not directly seek the enhancement of workers' rights at a particular establishment; otherwise, industrial action would be deemed part of the entrepreneurial risk assumed by the carrier.[231]

Both The Hague–Visby Rules and the Rotterdam Rules go far beyond these opinions inasmuch as the carrier's disclaimer proceeds whatever the cause of industrial action preventing goods from being delivered, with one proviso, that of the carrier being able to avoid it.[232] Proof of this proviso makes the difference between the carrier's claiming liability vis-à-vis the union, striking workers or a third party, where appropriate.[233] In any event, the latter's liability ought to be determined pursuant to the same law, irrespective of who is claiming, for which reason Article 9 of the Rome II Regulation must be held applicable in both cases.

The provision does leave out cases where establishing a causal link is just not feasible, even though they occurred in the context of industrial action. This applies, for example, to fights between participants in strikes or crimes against property, cases in which the general rule laid down in Article 4 of the Rome II Regulation applies.[234]

Once again, it should be noted that the consequences of industrial action on individual employment relationships are not included in this provision; likewise, the relationship between the action, collective agreements and other arrangements relating to—or arising out of—the industrial action via which the parties agree to suspend or terminate the action is also excluded.[235]

Article 9 excludes all claims based on the unjust enrichment of one of the parties to industrial action, those based on *negotiorum gestio*, and claims based on *culpa in contrahendo* arising from collective bargaining in this context.[236] The *Dimskal* case once again furnishes a good example, as the owner claimed for the refund of a number of payments made to the ITF as a result of the conclusion of a standard collective agreement; as it was declared invalid as a result of unlawful industrial action, this would imply that there was no legal reason for paying the fees either. Although it has been advocated that such claims should be included in the provision mentioned here,[237] the structure of the Rome II Regulation does not support this interpretation: in addition to a special conflict rule for unjust enrichment, the case of

[231] See *Cass.mixte*, 4.12.1981, *Compagnie Générale Maritime v Compagnie Française de Raffinage*, with comments by Jambu-Merlin (1982), pp. 636–638; Durry (1982), pp. 609–611, and Achard (1982), pp. 131–139; *Cour.Cass. (Ch.civ.),* 11.6.1996, *Syndicat des entrepreneurs de manutention de Marseille et de Fos et autres v Port autonome de Marseille*, with comments by Antonmattéi (1997).

[232] See Sánchez Calero (2010), p. 430.

[233] In this regard see Carril Vázquez and Fotinopoulou Basurko (2011), pp. 17–18.

[234] See Dickinson (2008), p. 482, para. 9.28; Heinze (2009), pp. 784–785; Illmer (2011), pp. 271–272, para. 20; Junker (2010), para. 20; Zelfel (2011), pp. 63–64.

[235] See Illmer (2011), pp. 269–270, para. 15; Junker (2010), para. 12.

[236] See Junker (2010), para. 11.

[237] See Morse (2009), pp. 731–733.

the violation of intellectual property rights is expressly excluded from this specific rule through Article 13; *contrario sensu*, in other cases we must turn to the connections provided in Article 10 of the Rome II Regulation in order to be able to determine which law governs unjust enrichment, including when this occurs in the framework of industrial action.[238] The provision refers to the law of the relationship between the parties—such as a contract or tort—and it is thus possible to understand that this law is the law of the place where the industrial action in whose framework the transfer of wealth occurred was carried out.[239]

Finally, Article 9 of the Rome II Regulation includes non-contractual liability resulting from future industrial action, clearly referring to the preventive actions that give rise to most cases in this area, as the *DFDS Torline* case shows. The wording of this provision is repetitive since Article 2 of the Rome II Regulation already fulfils this function and makes it clear that injunctions are also included in its scope.[240]

Structure of the Conflict Rule

Unlike the first draft of the provision proposed by the European Parliament, the current Article 9 is totally integrated into the structure of the Rome II Regulation, that is, it endorses the Regulation's rationale in that priority is given to party autonomy, and the law of the parties' common habitual residence is applicable by default; the special connection provided for in Article 9 is only applicable failing a choice of law and in the absence of a common residence for the parties. Only then is tort liability submitted to the law of the place where action is, or may be, taken. However, there is no room in this conflict rule for the escape clause otherwise included in Article 4 of the Rome II Regulation.

The conflict rule's final structure is compatible with criticism voiced by the Commission over the Parliament's proposal on the ground of its lack of flexibility. This appraisal is reinforced by the residual role of party autonomy, which actually leaves the parties' common habitual residence as the only real exception to the application of the *lex loci actus*. As the legislative *iter* shows, the latter aims at protecting collective and government interests, in that it is states' task to pursue social peace and the fair organisation of the labour market. In contrast, the other connections do not acknowledge the underlying interests.

Nevertheless, the *lex loci actus* is not always the law that is best suited to govern a labour dispute that may have little to do with the place where industrial action is undertaken; once again, the maritime sector provides outstanding examples of this dissonance. Flexibility mechanisms are indeed needed, and it is legitimate to pose

[238] See Illmer (2011), p. 269, para. 14; Siehr (2010), pp. 151–152, with a similar example to *Dimskal*, *Universe Tankships v. ITF* [1983] 1 A. C. 366 (H. L.); Zelfel (2011), pp. 60–63.

[239] In this regard, see Morse (2009), pp. 732–733.

[240] See Junker (2010), paras. 21–22; Zelfel (2011), pp. 64–67.

the question of whether the parties' common habitual residence is sufficient to fulfil this role, given that the escape clause has been ruled out. This omission is intended to strengthen the position of the *lex loci actus*, avoiding the judicial discretion inherent in the clause.

The sacrifice of a device such as the escape clause can be interpreted differently though since it deprives the applicant of an important tool for ensuring that the case is resolved in accordance with the closest law, i.e., the law that has most interest in ruling on the collective labour dispute in question.[241] For example, the escape clause itself could have enabled one single law to be applied in decisions about cases of coordinated industrial action against the same transnational corporation and cases dealing with tort and contractual liability claims against the same worker, first one being submitted to the law of the place where the industrial action occurred and the second to the law governing the employment relationship.[242]

The Special Rule: The *Locus Actus*

In relation to Article 4 of the Rome II Regulation, Article 9 lays down a special connecting factor. Unlike the former, which focuses on the place where the damage caused is manifested as the key connection, the latter takes into account the place where the event leading to the damage occurs, or may occur, that is, where industrial action is, or may be, actually carried out. As seen above, the proliferation of international heads of jurisdiction resulting from the CJEU *DFDS Torline* judgment could end up with a dispute being submitted to the law of a country other than that where the strike took place. Against this background, Sweden pushed for a specific conflict rule; in fact, its reaction is a good example of the government interests at stake, driven by an aspect that this rule does not tackle directly: the lawfulness of industrial action. What worried Sweden was not the liability of the unions involved, but the incidental question. Under these circumstances, the *locus actus* emerges as the most appropriate connecting factor to decide on this liability.[243]

Resorting to the law of the place of the industrial action entails avoiding the need of having to systematically apply the public order exception, which inevitably intervenes when the strike is accompanied by picketing, blockades or occupation of the workplace and also when enforcing foreign court's decision on the consequences of industrial action undertaken in the destination country. Other problems of the same type may arise when the *lex causae* prohibits the exercising of the right

[241] In most cases, the *lex loci actus* works properly, maritime employment being the exception. Exploring the principle of separability with regard to groups of companies, see Junker (1992), pp. 496–507.

[242] See the examples in Heinze (2009), p. 787; Illmer (2011), pp. 277–278, para. 33; Zelfel (2011), p. 107.

[243] In this regard, Evju (2007), pp. 903–904; van Hoek (2007), pp. 448–451.

to industrial action or sets excessive restrictions on it. This connecting factor therefore responds not only to the collective interests of workers and employers but also to government interests resulting from state policies on social and labour matters. These interests manifest themselves in the place where the action is, or may be, taken, while other states remain passive even in countries where there is no legal right to strike, on the ground that they lack standing to intervene in a foreign legal system.

Establishing the place where industrial action occurs, or may occur, is generally a straightforward operation except when the shipping and fishing sectors are involved. Theoretically, industrial action can be carried out on the high seas, which would pose the traditional problems of establishing the applicable law in an area that is not subject to state sovereignty, *ergo*, opening the door to understanding the *lex loci actus* to be the law of the flag. However, in practice, these cases are almost non-existent since the strict limitation of industrial action on board is informed by reasons of safety and security to avoid endangering the ship itself and maritime safety in general. As a matter of fact, crossing the red thin line of union responsibility in this area and entering the field of criminal law are all too easy, as most states consider mutiny to be a crime. The most typical case is therefore industrial action in the port where the ship is docked.

Against this background, courts dealing with strikes on board ships in ports within their jurisdiction face the dilemma of deciding where the industrial action has actually occurred, i.e., where the *locus actus* is. As previously seen,[244] national courts take different stances, some resolving the issue according to the law of the port, others turning to the law of the flag or to the law governing the employment contracts of the striking crew because of the weakness of the case's connection with the port where the conflict erupts. This is a powerful argument against the law of the port, and another is the possible boost to forum shopping as a result of this factual choice of law.[245] A particularly decisive factor that would seem to weigh against considering the port to be the country where industrial action takes place is that the rationale underlying this connection does not support the intervention of a legal system with a labour market and social structure that is not affected by the labour dispute in question and that therefore has no real interest in it.[246]

In contrast, it can be understood from the CJEU *DFDS Torline* judgment that when industrial action is undertaken on board the vessel, it is considered to occur in the flag state. According to public international law, the flag state stands as the holder of jurisdiction over the vessel not only on aspects of public law but also on those of private law where appropriate. Following this line of reasoning, this state

[244] See Sect. 5.4.1.2.

[245] See Eßlinger (1991), p. 168; Evju (2007), p. 903; van Hoek (2007), p. 457; Junker (1992), p. 482.

[246] With a different approach, giving consideration to the physical place of performance, see Knöfel (2008), pp. 235–237, which leads him to conclude in favour of the application of the law of the port (pp. 244–246).

would be deemed the *locus actus* when industrial action is begun aboard.[247] The problems caused by flags of convenience immediately become apparent but are not sufficient to prevent this interpretation. As is known, the ITF has its own classification of what a flag of convenience is and of which countries match the definition, but the list has no legal impact.[248] In fact, identifying the 'genuine link' has become a difficult task, making the dividing line between flags of convenience and others increasingly weaker. From a private international law viewpoint, the important question is the lack of contacts between the flag state and the parties to the employment relationship, which is to say, the flag becomes just one more factor in identifying the habitual workplace of workers who perform their duties on board ship, not the main one. A similar approach should inform the identification of the place where the industrial action occurs, but this clashes with the absence of an escape clause in the structure of the conflict rule on the one hand and with the legal diversity of employment relationships on board on the other; hence, identifying a connection that is closer than the flag is prevented.

Where identifying a closer law is concerned, it has been suggested that when industrial action begins on board an aircraft or ship, the law of registration only ought to be deemed applicable if it coincides with the place of habitual residence,[249] but this proposal fails in the face of cases involving crew members from different countries. In the English case *Independence Sinai*,[250] this proximity was sought through applying the law governing the contracts of the striking crew; in this particular case, the law was common to them all, but that will not always be the case. Finally, returning to the law of the port as the *lex actus* has been suggested,[251] but this interpretation of the connecting point raises similar problems to the law of the flag: the weakness of the link with the country it refers to. For cases such as these, it would have been desirable for Article 9 to contain an escape clause, but paradoxically this was ruled out for reasons of legal certainty.

As mentioned above, solidarity actions are particularly relevant in the maritime field. Sometimes they are not actually preceded by a primary action if the crew has been prevented from beginning the planned action, and sometimes there is indeed a strike that is supported by action initiated by third workers. It is therefore feasible to have different but closely related actions taken against the same employer or

[247] See Dickinson (2008), p. 483, para. 9.31, note 51; Heinze (2009), p. 786; Magnus (2011), pp. 634–635, para. 277. Suggesting the application of the law of the flag before the Rome II Regulation, see Eßlinger (1991), pp. 169–170; Hergenröder (1987), pp. 243–247.

[248] Questioning this kind of flag's effects on the application of the law of the flag, see Evju (2007), p. 906; Zelfel (2011), pp. 92–95.

[249] See Palao Moreno (2007), p. 122.

[250] See *Gerechtshof* Den Haag, 23.4.1982, ship *Saudi Independence*.

[251] See Deinert (2013), pp. 451–452; Geffken (1979), pp. 399–413; Junker (2010), para. 28; Magnus (2011), p. 635, para. 278. Clearly, Rödl (2011), pp. 495–496, who completely rejects the law of the flag even on the high seas, suggesting the application of the law of the destination port. Also, Illmer (2011), p. 276, para. 30, applying the law of the flag only when the ship is in transit.

employers. However, the current state of affairs does not allow for unitary legal treatment of coordinated actions, as the considerable legal divergence on the matter provides examples such as that of Sweden, where the lawfulness of secondary action depends on the legality of primary action, whereas other countries such as Italy assess secondary action regardless of primary action.[252] The solution provided in Article 9 focuses on single actions, i.e., tackling them as if they were independent from each other.[253] Consequently, port state law applies when the industrial action is not a strike by the crew but a solidarity or sympathy action, as these take place not on board ship but in the port; accordingly, they must be subject to port state law.[254]

Finally, the fact that the *locus actus* is not the place from which action is coordinated or planned needs to be highlighted.[255] For example, the *Viking* case was brought before the courts in London on the basis that the ITF headquarters were there, and this was also where the Finnish union that asserted that it was the only valid stakeholder to negotiate with the beneficial owner of the vessel, in line with ITF policy, was also sued. The ITF has been faced with similar lawsuits in London, most of which have been resolved in accordance with English law, even in instances where the industrial action had taken place in a different country. Article 9 of the Rome II Regulation is also applicable to these situations, and it now therefore has to be determined whether the place from which the action was planned or coordinated qualifies as the *locus actus*. However, the purpose and rationale underlying this provision prevents such a broad interpretation, insofar as this connecting factor must be understood in physical terms. Similarly, when actions against the same employer or a multinational corporation are coordinated in different countries, each action has to be looked at separately to establish where the *locus actus* is, so it is therefore impossible to decide on them according to one single law.

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[252] Highlighting this issue, see Hergenröder (2007), pp. 314–315, and in the jurisprudence, LAG Schleswig-Holstein, 24.3.2005—2 Sa 130/05. Secondary action undertaken by Dutch workers in support of foreign workers is treated as an internal affair and is thus subject to Dutch law. See Rechtbank Amsterdam, 26.8.1998; Kort Geding, 1998, Nr. 257, pp. 672–677, case 'KLM'; *Hoge Raad*, 15.1.1960, case 'Panhonlibco', as a result of an ITF call to boycott flags of convenience.

[253] It also ought to inform the law applicable to the primary action when its legality would be dependent on the lawfulness of a secondary action undertaken in another country, as is the case in Germany and Sweden. On the debate in Germany previous to the Rome II Regulation, see Hergenröder (2007), pp. 326–327; Junker (1992), pp. 485–491. Interpreting in this direction the Rome II Regulation, see Joubert (2008), p. 77, note 68.

[254] At domestic level the issue is controversial, as this submission is accepted by Norway but not by Denmark, which resolved the *DFDS Torline* case in accordance with Danish law, which was applied to a boycott undertaken in Sweden. See Norwegian information and jurisprudence in Evju (2007), p. 905, who also advocates the law of the port together with Dickinson (2008), p. 483, para. 9.31; Magnus (2011), pp. 634–635, paras. 277–279; Rödl (2011), p. 493; Siehr (2010), pp. 149–151; Zelfel (2011), p. 91. Embracing this law previous to the Rome II Regulation, see Geffken (1979), pp. 414–415; Hergenröder (1987), pp. 389–390.

[255] See Deinert (2013), pp. 450–451; Heinze (2009), p. 786; Illmer (2011), p. 276, para. 29; Knöfel (2008), p. 244; Morse (2009), p. 728; Rödl (2011), p. 495; Zelfel (2011), pp. 81–82. It does not matter where the international union organisation is based. See Hergenröder (1987), pp. 381 and 388–389.

The Common Habitual Residence of the Parties to the Collective Dispute

The *lex loci actus* only comes into operation when the parties to the industrial action do not habitually reside in the one and same country. A number of cases have been identified above in which this connection may be relevant, for example when a labour dispute emerges between a company and workers temporarily posted to another country but normally resident in the place where the employer is based.[256] For our purposes, and regardless of the flag state or port where the strike actually takes place, of great interest are cases in which crew and shipowner share the country of habitual residence, for which reason liability arising out of industrial action is governed by the law of the common country.[257]

Article 23 of the Rome II Regulation tackles the question of where the habitual residence of the parties actually is, among other issues, specifying that professionals' place of residence is to be located at their main place of business. This authoritative interpretation is not applicable to workers who do not have a main place of business but do have a habitual residence, i.e., the place where they actually live. The question is whether this place is really relevant for the purposes of deciding on torts arising out of industrial actions. In this regard, it could have been more appropriate for Article 23 to contain a further specification for workers, in line with that provided for individual professionals, pointing to the *locus laboris*.[258] Failing that, it is worth trying to bring workers inside the scope of Article 23(2), which deals with professionals. This would solve some of the problems arising out of this connection: workers' habitual residence should be located at their habitual place of work.

Where employers are concerned, their main place of business needs to be ascertained. Should an employer operate in different places, the main place of business is where the employees receive their instructions.[259] In the same vein, when an employer is a legal person or equivalent, the factor to take into account is the place where the central office is located, that is, where the branch, agency or establishment is when it is the same as the place where industrial action occurs. A good example of this might be the case of a ship operating from a port situated in a country other than the one where the shipowner's headquarters are.[260] Whether or not a manning agency is considered to be a shipowner's establishment depends to a great extent on whether it acts on an employer's behalf, as already discussed.[261]

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[256] See this case in Pataut (2007), p. 303, extracting French case law in this matter from it. Likewise, Illmer (2011), p. 275, para. 26.

[257] Among others, see Deinert (2013), p. 449.

[258] See Deinert (2013), p. 449, suggesting the application of the law of the workplace, provided that the worker resides at least temporarily in the same place.

[259] See Deinert (2013), p. 449.

[260] This example can be found in Dickinson (2008), p. 483, para. 9.32, note 54.

[261] See Sects. 3.2.3.4 and 4.3.3.2.

This connection gives rise to problems of application, as it does not fit in with the collective dimension of the relationships in question and the fact that the conflict rule's ultimate aim is to protect collective interests;[262] on the contrary, this connecting point involves a rather individual perspective. All industrial action involves a number of different stakeholders: the employer and businesses organisations on the one hand and national or international trade unions and workers on the other. Against this background, the habitual residence of each of the parties involved has to be determined, and doubts therefore arise as to who should be taken into consideration when it comes to establishing the applicable law pursuant to the 'common habitual residence' factor. From a practical perspective, the seized court cannot but take into consideration the habitual residence of all the parties to the dispute or complaint arising from the industrial action in question; *ergo*, if damages are claimed against the unions, the place where their central office and, where appropriate, the workers' respective habitual residences will be relevant.

Unlike the *lex loci actus*, the law of common habitual residence therefore risks the fragmentation of the law governing industrial action. For example, an English shipowner may claim against both the ITF in London and the union carrying out solidarity action in a foreign port;[263] the former's responsibility is measured according to the law of common habitual residence, whereas the latter's is submitted to the *lex loci actus*. The rationale underlying this provision values personal responsibility for one's own behaviour over a collective approach, supporting separate treatment for those allegedly responsible for tort.

The Residual Role of Party Autonomy

Article 9 does not exclude choice of law, and so Article 14 of the Rome II Regulation is also applicable here. The choice of law is valid as long as the agreement is reached after the conflict has arisen and provided that it does not harm third parties. In contrast, the provision's first paragraph, which accepts choice of law agreements concluded prior to an event giving rise to damage, cannot operate in this context as only traders may enter into it, *ergo* this scenario is not available to workers or other social partners.[264] In the second paragraph, in which parties agree on the applicable law after the event giving rise to the damage occurs,

[262] As noted by van Hoek (2007), pp. 454–456; Illmer (2011), p. 276, para. 28; Siehr (2010), p. 149; Zelfel (2011), pp. 104–106. Highlighting its fortuitous nature, see Joubert (2008), pp. 79–80.

[263] Suggesting that this connection should not be applied, with this case as an example, see Fotinopoulou Basurko (2010b), p. 41. However, the application is inevitable and thus worthy of criticism. See Dickinson (2008), p. 483, para. 9.32; Junker (2010), para. 31; Morse (2009), pp. 726–727; Rödl (2011), pp. 492–493.

[264] In this regard, see Illmer (2011), p. 274, para. 24; Junker (2010), para. 35; Magnus (2011), p. 633, marg. 276; Zelfel (2011), pp. 113–114. However, with misgivings, see Crawford and Carruthers (2013), p. 28.

the Regulation acknowledges both express and implied choice of law. In fact, the latter is the most likely, as in cases in which the defendant responds to the plaintiff's claim in accordance with the law serving as the basis for the lawsuit, usually the *lex fori*.

A typical example would be the lodging of a damages claim following a strike—or notice of a strike—on board a vessel in accordance with the law of the port where the ship is docked.[265] In these cases, regard should be given to the limitation established in Article 14(2), according to which the choice of law cannot be used to circumvent the law of the country where all the relevant elements of the situation are located at the time when the event giving rise to the damage occurs. In contrast, Article 14(3) is of no use in these situations, as the right to strike and other forms of industrial action are not within the scope of EU legislative competence.

These limits and conditions have turned the role of party autonomy in these matters into a residual one. In addition, problems similar to those arising with regard to the common habitual residence of parties to industrial action may arise from its application. Once again, the problem is identifying those deemed as parties able to agree on the law applicable to non-contractual liability arising from industrial action. While the parties to the dispute are likely to be the relevant ones again, the collective dimension of the underlying situation is neglected. Against this background, one union may agree on a choice of law that might not be suitable for another party; this party does not therefore have to enter into the agreement, in which case different laws will be applicable to tort liability arising from the same industrial action. Again, personal responsibility for one's own behaviour is prized over collective interests.

Choice of law agreements may also play a role in cases where the dispute concerns the law applicable to an agreement terminating the strike.[266] Such agreements are the result of a negotiation process and may include commitments regarding areas such as employees returning to work, the non-introduction of sanctions by the employer, withholding wages, the recovery of working days for non-strikers, etc. As this kind of relationship has been freely established by the parties, the question of the applicable law should be subject to the Rome I Regulation. However, it is obviously connected to the strike, for which reason Article 14 could be used to ensure that the same law is applied to both questions, the law applicable to tort liability arising from industrial action and the one governing the agreement terminating it.

[265] See Junker (2010), para. 34; Zelfel (2011), p. 112.

[266] As seems to be the case in France. See with this proposal Joubert (2008), pp. 80–81.

5.4.2.3 Overriding Mandatory Provisions, Rules on Safety and Conduct, and Public Policy of the Forum

Except in cases where employer's and employees' habitual residence coincide or where the choice of law is concluded after the event giving rise to the damage occurs, Article 9 submits the tort liability of parties to industrial action to the law where the action occurs, or may occur, aiming for a coincidence with the law that governs the conditions for the exercise of the collective action. After all, the rights to strike and to take industrial action are protected by the constitution in many countries, which may mean that the provisions governing these rules are included among those 'the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation'. This definition is taken from Article 9(1) of the Rome I Regulation, which also serves to clarify the meaning of the overriding mandatory rules under Article 16 of the Rome II Regulation.

In many cases, the coincidence with the law that decides on the legality of the collective action prevents us from resorting to the latter provision, thus avoiding the application of the *lois de police* of the forum. The overriding mandatory rules of the forum are applied when the industrial action was undertaken in the same country; otherwise, they do not apply because the situation does not fall within the forum's scope. The underlying principle of territoriality in collective labour relations requires that government interest in giving expression to its own perception of the strike and other measures only affect a certain territorial area, so that in principle the law of the forum will not intervene when industrial action takes place in another country.[267] The submission of tort liability to the *lex loci actus* significantly reduces the number of cases where this kind of rule intervenes.[268]

Still, there can be room for the overriding mandatory rules of the forum when the law governing liability does not coincide with the law that decides on the legality of the industrial action, as may happen in cases of the liability of workers posted abroad striking in the destination country. The shipping and fishing sectors also provide clear examples of dissociation between the law governing the conditions of exercise of industrial action and the law deciding on specific behaviour with influence on the public policy of the place where they are carried out, involving third parties and perhaps even requiring police intervention. The fact that some of these actions may even be punishable justifies regarding these provisions as *lois de police*. For example, a port state's safety and conduct rules may come into play in cases requiring police intervention, such as picketing and blockades organised in support of a striking crew or the occupation of a vessel.[269] Likewise, rules imposing

[267] See Laborde (1999), pp. 157–158. Pointing out that the Spanish law would apply as *loi de application immediate*, see Cuartero Rubio (2007), pp. 405–406.

[268] See Zelfel (2011), pp. 124–125.

[269] Although supporting its secondary nature vis-à-vis the law of the flag, see Junker (1992), pp. 483–484.

minimum services associated with the safety of both a ship and the port where it is docked are to be deemed overriding mandatory provisions as well.[270]

Article 17 of the Rome II Regulation dealing with overriding mandatory rules of states other than the forum may also be of use. This provision states that 'in assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and insofar as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability', thus recalling a situation where liability is claimed in a country other than the one in which the industrial action occurred. Furthermore, the rules of the country where the action unfolded may come into play in assessing actions concurrent with industrial action, such as picketing, demonstrations and occupation of the vessel, as well as the rules of safety and security covering them.

Finally, the usual reservation of public policy is provided for in Article 26 of the Rome II Regulation; it is strictly worded since it only operates in cases where the application of the law designated by the corresponding conflict rule leads to a result that is 'manifestly incompatible with the public policy (*ordre public*) of the forum'. In this respect, and considering the international conventions ratified by EU member states, this clause is likely to come into operation in the event that liability is sought on the ground that the right to strike is not recognised in the country where the strike occurred.[271] Some national decisions have also called for the clause to intervene when restrictions on the exercise of the right to strike were considered excessive[272] or when a closed-shop rule obliging an owner to employ only union members was imposed.[273]

5.4.2.4 The Right to Strike and the Theory of the Second Step

Thus far the maritime labour sector has provided most of the examples of cross-border industrial action. The right to strike and to take industrial action is exercised in accordance with specific requirements, such as the obligation to provide notice within a specific time frame or to exhaust the use of alternative methods of dispute resolution, including arbitration, prior to the strike. In some cases, these requirements are deliberately complex, as a careful reading of the Labor Code of the

[270] With this example, see Deinert (2013), p. 464; Zelfel (2011), pp. 123–124.

[271] See Laborde (1999), p. 158, welcoming the French judgment that does not apply it with regard to South Africa; this would also be the situation in Liberia and Myanmar. *Ibidem* in Laborde (2001), pp. 717–719. See Zelfel (2011), p. 129. Coursier (1993), p. 142, excluding the public order exception when the right to strike has been prohibited.

[272] ArbG Hamburg, 29.5.1981: as Panamanian law was applicable, the German court held the imposing of mandatory conciliation mechanisms to be pursued in Panama to be contrary to German public order, in particular to the right to collective bargaining, to the extent that they give rise to delay in initiating industrial action, or even its impossibility.

[273] See Zelfel (2011), p. 129.

Philippines confirms.[274] Meeting them all may be very difficult, indeed almost impossible when the strikers are on board a vessel or docked at a foreign port. Requiring strict compliance with all these requirements can then amount to making it legally impossible to exercise the right to strike. Against this background, the theory of the second step can be useful, as it holds that once the applicable law and its contents have been established they need to be adapted in the light of the international nature of the legal relationship in question.

The Dutch courts, to which we owe the development of this theory, provide good examples of how to adapt substantive provisions to the international nature of specific cases.[275] A number of proceedings were initiated before the Middelburg courts in relation to a strike on board the ship 'Bernard Oldendorff', docked at the port of Vlissingen. As the law of the flag, Panamanian law was applicable to the case, which set out three conditions for the proper exercise of the right to strike: (1) that a strike would never take place after the ship had left the port of origin and before it had reached the port of destination, (2) that a conciliation procedure should necessarily be carried out before the strike, and (3) that employers seeking a ruling on a strike's legality should submit their application to the competent authorities in Panama within 3 days from the beginning of the strike. Fulfilling these conditions in the case in question was clearly difficult, and the Dutch court reacted by ruling that the last two conditions could not be required, thus only taking into account the crew's not striking before reaching port.

The other case concerns a strike supported by the ITF on board the ship 'Tropwind' in the port of Amsterdam. The competent Dutch court did not apply the law of the flag, in this case that of Singapore, but the law of the port. However, the court understood that Dutch law was not applicable such as it was but that it required adjustments to take into account the peculiarities of the case, i.e., that it exclusively concerned foreign parties, that there had been no prior consultation between shipowner and the ITF, that the labour market in the workers' country of origin was against the right to strike and that the strike included the occupation of the workplace. The court's judgment stated that the strike was lawful as it aimed to update wages that had not been increased for 4 years and were well below ITF standards. In order to reach this conclusion, the court ignored the notice period prior to the start of the strike—as imposed by Dutch law—allowing that the owner had only been told of the ITF and crew's intentions 2 days beforehand. In its ruling, the court emphasised the fact that ITF agreements were well known to shipowners in general, and therefore the employer in this case should have been able to anticipate the action and thus provided with a motive to voluntarily begin negotiations to improve the crew's working conditions. With respect to the occupation of the ship, the court found that it was an inevitable consequence of the right to strike because otherwise the shipowner could circumvent a strike's efficacy by replacing the crew with another one.

[274] Title VIII. Presidential Decree No. 422, available at the Department of Labor and Employment, Republic of the Philippines, 29 September 2011, http://www.dole.gov.ph/labor_codes.php?id=34. By contrast, Article 476 of the Panamanian Labour Code is less demanding.

[275] See commenting on these cases, Even (2007), pp. 396–397.

5.5 Information, Consultation and Negotiation with Employees

5.5.1 National Models and EU Provisions

Like other businesses, maritime and fishing companies have to be organised in such a way as to enable their workers to intervene in decisions that have an impact on their own living and working conditions. The applicable legal system decides on issues including the appointment of staff representatives; the need to constitute a works council, the scope of its powers and of the persons who may be elected as members; the possibility of staff representatives enjoying some kind of protection against dismissal, as well as time off from their normal duties on account of their position; and further legal obligations such as the protection of secrets.[276]

Two main models have been established in these matters: one is two-tiered, and German law can be named as the best example,[277] namely, the defence of workers' interests within a company is attributed not only to unions but also to staff members who have been elected for the purpose, and the other is single-tiered, i.e., the unions have the main role, and Spain is a good example of this model.[278] On the basis of these divergent starting, the different legal systems acknowledge different rights and diverse modes of consultation and participation in a company's operating. It is also important to distinguish between rights focused on discussing living and working conditions in the company and others concerning worker participation in the company's governing bodies, a difference that has an impact on the selection of the applicable law. The matter has also been partially harmonised by the European Union.

EU law has played a minor role through introducing a number of directives that have the common feature of not applying to seafarers. This exclusion is currently being reviewed, as no good reasons could be provided for its being maintained; first of all, there are no significant obstacles to implementing the directives in the shipping and fishing sectors and, second, extending their implementation would not result in disproportionate costs for the companies involved.

In contrast, amending the directives to include seafarers would amount to sending a message to young people who may be interested in the profession that no jobs are of lower quality or condition than others. The most powerful evidence of this is that various traditional maritime nations such as Spain or France extended the directives' scope of application at the time of their transposition, and no problems arising out of their implementation and application have been detected so far. On the contrary, their shipping and fishing fleets have made substantial recoveries in

[276] See Deinert (2013), pp. 492–496; Magnus (2011), p. 632, para. 272.

[277] The essential components of the system are contained in the *Betriebsverfassungsgesetz*, 15.1.1972, as amended on 25.11.2001 and partially amended on 20.4.2013.

[278] See Title II of the Labour Statute, Articles 61–81, and in the literature for all, see, Galiana Moreno and García Romero (1998), pp. 13–30.

recent years;[279] a highly relevant fact that emphasises the idea that granting these rights to seafarers and fishermen does not necessarily involve adding incentives for shipowners to migrate to flags of convenience.

After duly assessing the circumstances from which the above statements were concluded,[280] the European Commission submitted a Proposal for a Directive of the European Parliament and of the Council on seafarers by amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/CE, 2001/23/EC,[281] aiming to include seafarers within their scope, although with differing impacts depending on the specific directive. What they all indeed have in common is the need to ensure compliance with Articles 27 and 31 of the European Charter of Fundamental Rights, which guarantee the right to information and consultation of employees in the company and fair working conditions respectively.

Article 2 of Council Directive 98/59/EC of 20 July 1998 on the approximation of member state laws relating to collective redundancies[282] requires employers to accept certain obligations regarding information and consultation for workers' representatives, with a view to reaching agreements that prevent—or at least reduce—redundancies and mitigate their consequences, for example through the use of additional social measures intended, *inter alia*, to help in the redeployment or retraining of dismissed staff members. The European Commission has proposed ending workers on seagoing vessel's exclusion from this Directive's scope, as well as possibly amending Article 3 to include the obligation to provide the public authority of the flag state notice of any proposed collective dismissals, taking into account the fact that workers whose individual employment contracts may be subject to different laws are often employed on board the same vessel. Other additional issues have been proposed for inclusion within the Directive, in relation, for example, to the purchase and sale of ships and the potential negative effects that the period of reflection granted to workers prior to the decision to sell the vessel would have on this market, as in addition to labour costs, the now unmanned vessel will need to be replaced.[283]

The concept of transfer has also been modified in line with the terms of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of Member states relating to the safeguarding of the rights of workers in the event of transfers of undertakings, businesses or parts of undertakings or businesses.[284] The

[279] See Commission Staff Working Document on Impact Assessment accompanying the proposal for a Directive of the European Parliament and the Council on seafarers, Brussels, 18.11.2013 [SWD(2013), 462 final], p. 37.

[280] See Commission Staff Working Document on Impact Assessment [SWD(2013), 462 final], spec. p. 12 suggesting some reasons for justifying these exclusions, in particular the mobile nature of ships and communication problems.

[281] Brussels, 18.11.2013 [COM(2013), 798 final].

[282] OJ No. L 225, 12.8.1998.

[283] See Commission Staff Working Document on Impact Assessment [SWD(2013), 462 final], pp. 44–45.

[284] OJ No. 82, 22.3.2001.

information and consultation procedure with workers' representatives in the event of the transfer of a company is harmonised with provisions relating to the safeguarding of jobs and the improvement of measures for the protection of workers' representatives, as provided for by the relevant legal system should their period in office expire with the transfer. As with the Directive on collective redundancies, seafarers are also excluded from its scope; the Commission proposes removing this exception and introducing specific provisions to take into account these rights' interactions with the market for the sale of ships.[285]

In both cases, there is a special rule referring to the sale or transfer of a single or a given number of seagoing ships, and to the exploitation of a single seagoing ship by a company, so that member states can decide whether or not the rights granted by the respective Directives fully apply to those specific cases. This treatment is ultimately justified by the desire to prevent the Directive's implementation discouraging owners from registering their ships in member states' registries and therefore to avoid a possible flight to flags of convenience.

Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for the information and consultation of employees in the European Community is broader.[286] The harmonisation sought aims to enhance social dialogue through promoting worker participation in running businesses and in the decisions affecting them, on the basis that this strengthens employment opportunities, improves risk prevention and the organisation of work and access to training and reinforces company competitiveness. Given its comprehensive nature, the European Commission's proposal to include seafarers does not mean imposing the Directive's direct application on them but requires member states to provide an equivalent level of protection. Thus, national law is left a certain amount of leeway to adapt itself to the peculiarities of work at sea, particularly with regard to communications between the company and crew of a seagoing ship.

The Directive's general scope has led to explicit declarations of its complementary nature *vis-à-vis* the directives outlined above, as well as with any other information and consultation rights, including those arising from Directive 2009/38/EC of the Council of 22 September 1994 on the establishment of a European Works Council, and on the procedure for informing and consulting employees in undertakings and groups of undertakings with a EU dimension.[287] Only merchant sailors are excluded from this Directive, meaning that the Commission's proposal is limited to removing this exclusion. If it is approved, its provisions will also affect shipping companies with a thousand or more workers and with at least a 150 workers in one or more of the member states where they operate.

[285] Selling the ship together with the crew would mean a significant discount on the final ship's final price. See Commission Staff Working Document on Impact Assessment [SWD(2013), 462 final], pp. 45–46.

[286] OJ No. L 80, 23.3.2002.

[287] Text with EEA relevance. OJ No. L 122, 16.5.2009.

To these rights, which are primarily related to living and working conditions in companies, it is necessary to add others concerning worker participation in the running of a company, which would enable them to be involved in the decisions affecting company finances, structure and daily activities in one way or another. The European Union is referring to this type of right in its regulating the setting up or transformation of shipping or fishing businesses that participate in the new *societas europaea*[288] or European cooperative company.[289] National information, consultation and participation systems are downplayed in the procedure to establish these businesses, but the EU does not impose a predetermined pattern in view of the substantial differences between member states. For this reason, the EU has issued Regulations for setting up this new type of company, along with Directives regulating the procedure through which decisions about the kind of rights and participation that workers will have in the resulting company are to be made.[290]

The management of participating companies is obliged to negotiate the provisions relating to worker involvement in the resulting *societas europaea* or European cooperative companies with employees' representatives. To this end, a negotiating committee has to be established and enabling mechanisms to effectively guarantee workers' rights to transnational information and consultation should negotiations break down, as well as their participation in the relevant bodies of the European *societas*, have to be put in place if such participation already existed in the company involved before the *societas* was set up.

The issue of workers' participation rights in the merging companies is addressed by Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. The Directive indicates, firstly, that participation rights in a company that is the outcome of a merger emanate from the law of the member state where the business's registered office is and, secondly, that if the level of participation is not the same as in the extinguished company, a procedure similar to the one outlined above for *societas europaea* should be provided to guarantee those rights.[291] No companies are excluded from this Directive's scope.

[288] Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ L 294, 10.11.2001).

[289] Council Regulation (EC) No. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (OJ No. L 207, 18.8.2003).

[290] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (OJ No. L 294, 10.11.2001), and Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees (OJ No. L 207, 18.8.2003).

[291] OJ No. L 310, 25.11.2005. See in particular Recitals 13 and 14, and Articles 5(j), 9(2), 11 (1) and 16 of the Directive.

5.5.2 International Jurisdiction Issues

The establishment of international jurisdiction to deal with employees' rights to information, consultation and participation and the corresponding obligations relies on the Brussels–Lugano system. While they are neither contractual nor non-contractual matters, there can be no doubt as to their characterisation as 'civil and commercial matters',[292] especially considering the fact they concern private parties acting as such, and so without the involvement of any kind of state power. Accordingly, if the defendant is domiciled in a member state or there is a tacit or express submission to the jurisdiction of a member state, either Brussels I *bis* Regulation or the Lugano Convention comes into operation within their respective temporary and personal scopes of application; otherwise, national law takes the lead.

The Brussels–Lugano system refers to the courts of the country to which the parties have submitted their controversies, either tacitly or expressly, or of the country of the defendant's domicile.[293] Should there be several co-defendants, Article 8(1) of the Brussels I *bis* Regulation, may be of use. As to the special heads of jurisdiction, both the forum on contractual matters as well as that on non-contractual matters must be discarded, inasmuch as that is about legally established rights,[294] as stated previously. The forum of the branch, agency or establishment may in fact have a say, though. In the shipping and fishing sectors, these heads of jurisdiction may be insufficient, however, because of the fact that a ship is the workplace for the purposes of applying at least participation and consultation rights.[295]

5.5.3 Conflict of Laws Issues

The convergence of interests that is discernible behind workers being granted these information, consultation and participation rights—clearly linked to social and competition policies—has traditionally justified the applicable law being

[292] Against, see Juárez Pérez (2000), pp. 56–60.

[293] See Articles 2, 23 and 24 of the Lugano Convention, 4, 25 and 26 of the Brussels I *bis* Regulation.

[294] On the *actio pauliana*, see CJ 10.1.1990, Case 115/88, *Reichert v Dresdner Bank*; 26.3.1992, Case 261/90, *Reichert v Dresdner Bank*.

[295] For example, CJ 7.12.1995, Case 499/93, *Rockfon v SID*, tackles the notion of establishment to which Council Directive 75/129/EEC, 17.2.1975, on the approximation of the laws of the Member States relating to collective redundancies (OJ L 48, 22.2.1975), applies: 'The term "establishment" appearing in Article 1(1)(a) of the aforesaid directive must be understood as meaning, depending on the circumstances, the unit to which the workers made redundant are assigned to carry out their duties. It is not essential, in order for there to be an "establishment", for the unit in question to be endowed with a management which can independently effect collective redundancies'.

established on the basis of the principle of territoriality.[296] Companies' current transnational character and the fact that workers are frequently posted abroad seem to be indicative of a different approach that focuses on bilateral conflict rules, in particular because maintaining their public law nature is no longer feasible. Their allocation to private law does not, however, serve to fit them into the Rome I and Rome II Regulations since they are neither contractual nor non-contractual obligations.

In some countries, they are contained in collective agreements and it has therefore been suggested that they should be decided in accordance with the law applicable to the latter. This submission is not acceptable, though, since collective representation and participation obligations are characterised by their applying to all staff members indiscriminately, and collective agreements are not necessarily binding on all staff in the same workplace. The proposal to link these rights to the law governing employment contracts is not acceptable either, for the same reason.[297] On the contrary, a specific conflict rule must be established for these rights.

When it comes to the right to participate in company management bodies, the conflict rule points to the law applicable to the relevant undertaking, thus the law that determines the company management bodies and who integrates them. That law is determined by the appropriate domestic law, possibly with the corrections made by CJEU doctrine on the basis of the principles of freedom of establishment and respect for the country where the company was founded.[298]

As for rights to information and consultation, the law of the workplace where they are to be effected is advocated,[299] which would also cover workers temporarily posted abroad.[300] In opting for this connection, consideration has been given to the fact that these rights are of supra-individual nature and therefore cannot depend, for example, on every worker's *lex laboris* or on a choice of law that would require the consent of each and every one of them.

German law has a specific provision for maritime and fishing companies that establishes its application when the company's headquarters are in Germany and all the company's ships fly the German flag.[301] Problems inevitably arise when the ships fly a different flag, which, in turn, does not match that of the country where the company is based, to which the existing problems raised by flags of convenience are added. In this context, there is a proposal that points to the law of the company

[296] See, for example, BAG 20.2.2001—I ABR 30/00.

[297] See Gamillscheg (1959), pp. 370–373, followed by Fisher (2002), pp. 161–167.

[298] See Magnus (2011), p. 630, para. 263. Deinert (2013), pp. 505–513, advocates the law of the company's head office, given that granting these rights to all workers in the same territory does not amount to a restriction of the freedom of establishment; Staudinger (2012), para. 11.

[299] See Deinert (2013), pp. 478–487; Eßlinger (1991), p. 145; Kappelhoff (2011), p. 436; Krebbert (2000), pp. 538–539; Magnus (2011), pp. 630–631, para. 265; Martiny (2015), para. 163; Rodière (1986), p. 17; Schönbohm (2014), para. 38; A. Staudinger (2012), para. 11.

[300] See Deinert (2013), pp. 488–492; Kappelhoff (2011), p. 436; Magnus (2011), p. 631, para. 268; Martiny (2015), paras. 164–165; Schönbohm (2014), paras. 40–41.

[301] See § 114 *Betriebsverfassungsgesetz*, and Eßlinger (1991), pp. 145–146.

headquarters,[302] but this is not consistent with the fact that the workplace is the ship itself. That is why, as noted,[303] the proposal from the European Commission to amend Directive 98/59/EC on collective redundancies indicates that the company's intentions need to be communicated to the flag state authorities. Bearing in mind that it is the flag state that establishes living and working conditions on board and that the discussion here is about participation in the decision-making process affecting them, this indeed seems to be the connection to be taken as a reference point.

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[302] See Deinert (2013), pp. 485–486.

[303] See Sect. 5.5.1.

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At present, *Prof. Dr. Dr. h.c. Jürgen Basedow* and *Prof. Dr. Ulrich Magnus* serve as speakers of the Research School.