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## CHAPTER 5

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

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



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

## 1. Introduction

This chapter explores important legal and practical questions that have emerged since the entry into force of the Maritime Labour Convention, 2006<sup>2</sup> (MLC, 2006) and with it, the application of the seemingly simple obligation placed on a ratifying State to adopt laws or regulations requiring that «seafarers working on ships that fly its flag shall have a seafarer employment agreement signed by both the seafarer and the shipowner or representative of the shipowner».<sup>3</sup> In addition, «[e]ach Member»<sup>4</sup> (the ratifying State) must also, *inter alia*, adopt laws and regulations specifying the matters that are to be included in the seafarers' employment agreement (SEA) which shall «in all cases contain» the particulars with respect to eleven enumerated items.<sup>5</sup> Importantly the SEA requirement is a matter that must be inspected by flag States for each ship operating under its flag and, for ships that are also subject to certification,<sup>6</sup> certified. It may also be the subject of an inspection on a ship when entering a foreign port<sup>7</sup> (port State control (PSC)). Since problems identified during a flag State

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2) It was adopted by the 94th (Maritime) Session of the International Labour Conference (ILC) of the International Labour Organization (ILO) on 23 February 2006. The MLC, 2006 entered in force on 20 August 2013, 12 months after the 30th ratification. At that time those 30 States had a total share of the world's gross tonnage of ships of nearly 60 per cent. As of February 2016 it has been ratified by 70 States (in fact 71 States had ratified but, rather unusually, in October 2015 the ratification of Lebanon was removed apparently because it had not been registered by the International Labour Office because information regarding social security protection as required under Standard A4.5 of the MLC, 2006 had not been provided) including those with international responsibility (as flag States) for more than 80 per cent of the world's gross tonnage of ships. The text of the Convention ([http://www.ilo.org/global/standards/maritime-labour-convention/text/WCMS\\_090250/lang-en/index.htm](http://www.ilo.org/global/standards/maritime-labour-convention/text/WCMS_090250/lang-en/index.htm)) and related documents are available on the ILO's dedicated MLC, 2006 website at: <[www.ilo.org/mlc](http://www.ilo.org/mlc)>.

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

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

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

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

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

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

7) MLC, 2006 Standard A5.2.1 paragraph 2 and Appendix A5-III. See also a recent report from the Paris Memorandum of Understanding (MOU) on PSC. Available at: <[http://www.safety4sea.com/images/media/pdf/Paris\\_MoU\\_-\\_Addendum\\_detailed\\_MLC\\_figures\\_2014.pdf](http://www.safety4sea.com/images/media/pdf/Paris_MoU_-_Addendum_detailed_MLC_figures_2014.pdf)> which shows that 238 problems were identified during PSC in 2014 related to SEAs, constituting 4.33 per cent of the total MLC, 2006 deficiencies. Of these 9.2 per cent of SEA deficiencies (22 cases) were considered «detainable». In other regions for example, on 9 January 2015 the Australian maritime administration (AMSA) banned a ship from accessing Australian ports for 3 months because of MLC, 2006 related deficiencies including

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

In fact the requirement that seafarers have some form of employment agreement is not new: an international Convention<sup>11</sup> with substantially and substantively the same provisions as the MLC, 2006 on this topic was adopted by the ILO in 1926 and entered it force in 1928 - nearly a century ago. However, as noted above, in the last

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expired SEAs. This was the second MLC, 2006 related ban by Australia: <[https://www.amsa.gov.au/media/documents/09012015-AMSA-Media-Release-Meratus\\_Sangatta-Ban.pdf](https://www.amsa.gov.au/media/documents/09012015-AMSA-Media-Release-Meratus_Sangatta-Ban.pdf)>

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

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

10) See the amendments to the Code of the MLC, 2006 relating to Regulation 2.5 –Repatriation. The *Amendments of June 2014* are expected to enter into force in January 2017 and are available at: <[http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—relconf/documents/meetingdocument/wcms\\_248905.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_248905.pdf)>

11) *Seamen's Articles of Agreement Convention, 1926* (No. 22)>Available at: <[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312167:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312167:NO)>  
The Convention was ratified by 60 States, 31 of which have now automatically denounced it on ratifying the MLC, 2006.

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

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

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

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

[https://www.routledge.com/products/9780415704458?utm\\_source=adestra&utm\\_medium=email&utm\\_campaign=sbu1\\_lsb\\_3rf\\_1em\\_6law\\_cla15\\_x\\_77549\\_hbmaritimeregaug15](https://www.routledge.com/products/9780415704458?utm_source=adestra&utm_medium=email&utm_campaign=sbu1_lsb_3rf_1em_6law_cla15_x_77549_hbmaritimeregaug15)

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

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

This chapter argues that the SEA requirement of the MLC, 2006 can be understood as a strategic and pragmatic solution to the significant structural and legal changes that have occurred in, and are still occurring, for ships and seafarers engaged in international voyages. The delicate balances struck and the solutions offered under what is described in this chapter as the «system» of the MLC, 2006, were negotiated on an international tripartite basis in meetings spanning half a decade. From a public international law perspective the flag State, as the responsible actor under the 1982 *United Nations Convention on the Law of the Sea*<sup>15</sup> (LOSC) and under the more specific «regulatory» Conventions adopted by the ILO, particularly the MLC, 2006, for this globalized workforce, is now increasingly the central, perhaps the only site of certainty<sup>16</sup>, in an industry with multijurisdictional, mobile, often short term, workers, employers and workplaces.

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

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

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

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

the relationship and ascribing primary regulatory and jurisdictional responsibility to the flag State.

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

## 2. Overview of the system of the MLC, 2006

In this chapter it is possible to provide only a brief overview of the MLC, 2006 «system» with a focus on the elements that particularly relevant to the SEA requirement.<sup>18</sup>

The MLC, 2006 is a «framework»<sup>19</sup> international Maritime Labour Convention that is

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

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

In addition the ILO's dedicated MLC, 2006 website, <[www.ilo.org/mlc](http://www.ilo.org/mlc)>, contains links to numerous resources including the Preparatory Reports (travaux préparatoires which the ILO calls «Provisional Records (PR)» and other documents leading the adoption of the MLC, 2006 <[http://www.ilo.org/global/standards/maritime-labour-convention/text/WCMS\\_153447/lang-en/index.htm](http://www.ilo.org/global/standards/maritime-labour-convention/text/WCMS_153447/lang-en/index.htm)> as well as reports and documents with respect to events after 2006 related to the adoption of guidance on various matters <<http://www.ilo.org/global/standards/maritime-labour-convention/monitoring-implementation-tools/lang-en/index.htm>> and, in 2014 the documents and record of the meeting to adopt the amendments to the Code of the MLC, 2006 <<http://www.ilo.org/global/standards/maritime-labour-convention/special-tripartite-committee/lang-en/index.htm>>; and see also approval of the amendments : <[http://www.ilo.org/ilc/ILCSessions/103/reports/WCMS\\_248905/lang-en/index.htm](http://www.ilo.org/ilc/ILCSessions/103/reports/WCMS_248905/lang-en/index.htm)>

19) In the same sense as other major multilateral framework Conventions such the LOSC it sets out

over 100 pages in length and brings together (consolidates)<sup>20</sup>, and in some cases, updates, 37 of the maritime labour Conventions<sup>21</sup> and related Recommendations, adopted by the ILO since it was established in 1919, to set international minimum standards covering for almost every aspect of working and living conditions for seafarers.

It should be noted that the Convention is intended to protect a wider group of workers as seafarers and a larger number of ships with less discretion than provided in the predecessor Conventions on the question of scope of application. It has an inclusive definition of a seafarer<sup>22</sup>, ship<sup>23</sup> and shipowner<sup>24</sup> with no minimum tonnage and

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general principles in many areas and envisages the development of the text on details in the future.

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

See: <[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312292:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312292:NO)>

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

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

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

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

relatively few exclusions from application.<sup>25</sup>

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

The general point to be taken from this is that the MLC, 2006 largely reflects industry devised solutions that respond in, in a pragmatic way, to many of the problems that had been identified as connected to poor flag State regulatory enforcement and lack

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of whether any other organizations or persons fulfil certain of the duties or responsibilities on behalf of the shipowner.

25) There are a few well accepted exceptions to the scope of application to «ships», assuming the ship comes within the definition of a ship which adopts spatial parameters to the Convention's application. The exceptions are for ships of traditional build (e.g., dhows or junks), fishing vessels, warships and ships not ordinarily engaged in commercial activities and reflect exclusions that are found in most Conventions in this sector. It is, therefore, surprising to note academic commentary that is critical of these exclusions (see: Piñeiro, *ibid.*, note 12, p.48 ). In fact the move to also clearly include most of the domestic fleet, irrespective of tonnage, was a major step forward to cover ships that for the most part had not been covered by international standards. The exclusion of fishing vessels (which does not prevent a flag State from applying the MLC, 2006 to fishing vessels under its flag), recognizes the fact that during the development of the MLC, 2006 a decision was made to develop a separate instrument following the approach of the MLC, 2006 but specifically designed to respond to the particularities of the sector: see the *Work in Fishing Convention, 2007* (No. 188) which, as of October 2015, has been ratified by five States and is not yet in force as it requires «the ratifications of ten Members, eight of which are coastal States, have been registered with the Director General» (Article 48 paragraph 2) It is available at:

<[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312333:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312333:NO)>

The question of the status of offshore resource extraction vessels, such as mobile offshore drilling rigs (MODUs) is difficult and is not fully resolved. It was the subject of extensive discussion during the development of the Convention but no agreement was reached and the decision was that the Convention would be silent on the matter. The legal result is that they would be covered if they are considered under the law of the State to be a ship. On this question national practice varies and is largely related to the water area in which vessel operates and the fact that, although they may navigate, these vessels are also usually attached the seabed and may also be under coastal State jurisdiction. This is essentially the same situation as expressly addressed in Article 1 paragraph 4 (c ) of Convention No. 147.

26) McConnell et al, (2011) *ibid.* note 18, p. 51. As result of website changes and the passage of time some documents are no longer available however the solutions are reproduced in the *Final report. Appendix «Chairperson's Summary:», Section B at point 2, High Level Tripartite Working Group on Maritime Labour Standards, First Meeting 17- 21 December 2001. ILO Doc. No. TWGMLS/2001/10. Available at:*

<<http://ilo-mirror.library.cornell.edu/public/english/dialogue/sector/techmeet/twgmls01/twgmls-fr.pdf>>

27) McConnell et al, (2011) *ibid.* note 18, p. 48 and also Chapter 5.

of capacity and the increasingly complex corporate configurations in the sector. With the international character of the sector these solutions were also intended to achieve as close to universal ratification as possible based on «firmness on principles» and «flexibility with respect to the means of implementation»<sup>28</sup>. The latter aspect is mainly, but not completely<sup>29</sup>, explained in an innovative negotiated «Explanatory Note» which is located in the Convention but it is not a legal obligation. However it authoritatively explains the structural and legal relationships between the parts of the Convention.

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28) *Final report. Appendix «Chairperson's Summary»* at p.24, High Level Tripartite Working Group on Maritime Labour Standards, First Meeting 17-21 December 2001. ILO Doc. No. TWGMLS/2001/10 available at: <<http://ilo-mirror.library.cornell.edu/public/english/dialogue/sector/techmeet/twgmls01/twgmls-fr.pdf>>

29) In particular there is also flexibility on questions of scope and on the details of application based on national tripartite consultation (for e.g., MLC, 2006 Article II paragraphs 3, 5 and 6 and also many examples in Standard A3.1) to make «national determinations». In addition, it is possible in certain circumstances for Governments to implement the Code provisions in Titles 1 to 4 of the MLC, 2006 using of the concept of «substantial equivalence» set out in Article VI, paragraphs 3 and 4. While not the subject of this Chapter it is important to note the *General Observations* on this point made by the ILO's supervisory system Committee of Experts on the Application of Conventions and Recommendations (CEACR) in 2014 (published 104th session of the ILC in 2015) after examining the first set of country reports on national implementation of the MLC, 2006. See: *Report of the Committee of Experts on the Application of Conventions and Recommendations* (Report III (Part 1A) (2015) at page 479, available at:

<[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100\\_COMMENT\\_ID,P13100\\_LANG\\_CODE:3236210,en](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:3236210,en)>

[...]

In addition, the Committee recalls that the concept of substantial equivalence is not a matter for administrative discretion but is a matter to be decided by a Member that must first make sure, in accordance with paragraphs 3 and 4 of Article VI, that it is not in a position to implement the rights and principles in the manner set out in Part A of the Code of the MLC, 2006. Unless expressly provided otherwise in the Convention, the Member may implement the Standards in Part A of the Code in laws and regulations or other measures if it satisfies itself that the relevant legislation or other implementing measures «is conducive to the full achievement of the general object and purpose of the provision or provisions of Part A of the Code concerned» and «gives effect to the provision or provisions of Part A of the Code concerned». The Member's obligation is principally to «satisfy itself», which nevertheless does not imply total autonomy, since it is incumbent on the authorities responsible for monitoring implementation at the national and international levels to determine not only whether the necessary procedure of «satisfying themselves» has been carried out, but also whether it has been carried out in good faith in such a way as to ensure that the objective of implementing the principles and rights set out in the Regulations is adequately achieved in some way other than that indicated in Part A of the Code. It is in this context that ratifying Members should assess their national provisions from the point of view of substantial equivalence, identifying the general object and purpose of the provision concerned (in accordance with paragraph 4(a) of Article VI) and determining whether or not the proposed national provision could, in good faith, be considered as giving effect to the Part A of the Code provision as required by paragraph 4(b) of Article VI. Any substantial equivalences that have been adopted must be stated in Part I of the DMLC that is to be carried on board ships that have been certified. As stated in the practical guidance (paragraph 7) at the beginning of the national report form for the MLC, 2006, explanations are required where a national implementing measure of the reporting Member differs from the requirements of Part A of the Code. In connection with the adoption of a substantial equivalence, the Committee will normally need information on the reason why the Member was not in a position to implement the requirement

### **Explanatory note to the Regulations and Code of the Maritime Labour Convention**

1. This explanatory note, which does not form part of the Maritime Labour Convention, is intended as a general guide to the Convention.
2. The Convention comprises three different but related parts: the Articles, the Regulations and the Code.
3. The Articles and Regulations set out the core rights and principles and the basic obligations of Members ratifying the Convention. The Articles and Regulations can only be changed by the Conference in the framework of article 19 of the Constitution of the International Labour Organisation (see Article XIV of the Convention).
4. The Code contains the details for the implementation of the Regulations. It comprises Part A (mandatory Standards) and Part B (non-mandatory Guidelines). The Code can be amended through the simplified procedure set out in Article XV of the Convention. Since the Code relates to detailed implementation, amendments to it must remain within the general scope of the Articles and Regulations.
5. The Regulations and the Code are organized into general areas under five Titles:
  - Title 1:* Minimum requirements for seafarers to work on a ship
  - Title 2:* Conditions of employment
  - Title 3:* Accommodation, recreational facilities, food and catering
  - Title 4:* Health protection, medical care, welfare and social security protection
  - Title 5:* Compliance and enforcement
6. Each Title contains groups of provisions relating to a particular right or principle (or enforcement measure in Title 5), with connected numbering. The first group in Title 1, for example, consists of Regulation 1.1, Standard A1.1 and Guideline B1.1 relating to minimum age.
7. The Convention has three underlying purposes:
  - (a) to lay down, in its Articles and Regulations, a firm set of rights and principles;
  - (b) to allow, through the Code, a considerable degree of flexibility in the way Members implement those rights and principles; and
  - (c) to ensure, through Title 5, that the rights and principles are properly complied with and enforced.
8. There are two main areas for flexibility in implementation: one is the possibility for a Member, where necessary (see Article VI, paragraph 3), to give effect to the detailed requirements of Part A of the Code through substantial equivalence (as defined in Article VI, paragraph 4).
9. The second area of flexibility in implementation is provided by formulating the mandatory requirements of many provisions in Part A in a more general way, thus leaving a wider scope for discretion as to the precise action to be provided for at the national level. In such cases, guidance on implementation is given in the non-mandatory Part B of the Code. In this way, Members which have ratified this Convention can ascertain the kind of action that might be expected of them under the corresponding general obligation in Part A, as well as action that would not necessarily be required. For example, Standard A4.1 requires all ships to provide prompt access to the necessary medicines for medical care on board ship (paragraph 1(b)) and to «carry a medicine chest» (paragraph 4(a)). The fulfilment in good faith of this latter obligation clearly means something more than simply having a medicine chest on board each ship. A more precise indication of what is involved is provided in the corresponding Guideline B4.1.1 (paragraph 4) so as to ensure that the contents of the chest are properly stored, used and maintained.
10. Members which have ratified this Convention are not bound by the guidance concerned and, as indicated in the provisions in Title 5 on port State control, inspections would deal only with the relevant requirements of this Convention (Articles, Regulations and the Standards in Part A). However, Members are required under paragraph 2 of Article VI to give due consideration to implementing their responsibilities under Part A of the Code in the manner provided for in Part B. If, having duly considered the relevant Guidelines, a Member decides to provide for different arrangements which ensure the proper storage, use and maintenance of the contents of the medicine chest, to take the example given above, as required by the Standard in Part A, then that is acceptable. On the other hand, by following the guidance provided in Part B, the Member concerned, as well as the ILO bodies responsible for reviewing implementation of international labour Conventions, can be sure without further consideration that the arrangements the Member has provided for are adequate to implement the responsibilities under Part A to which the Guideline relates.

This structure expressly adopts a treaty design approach that has been successfully used by the International Maritime Organization (IMO) in its Conventions, with the more technical or detailed provisions implementing the Articles and Regulations set out in a «Code» that can be updated as needs arise using a more rapid amendment procedure based on «tacit acceptance» rather than express ratification for entry into force.<sup>30</sup> This allow for adjustments on matters of detail rather than principle as the Convention is put into operation on board ships<sup>31</sup>, or to fill «gaps» on matters that were not settled<sup>32</sup> at the time it was adopted, as well as meeting new or emerging issues in the industry<sup>33</sup>.

However, the balances within the Convention's system are subtle and go beyond this approach of «firmness and flexibility» and the structural framework which reinforces the substantive solutions. Embedded within the MLC, 2006 are many other solutions, particularly in connection with the SEA, as a strategic response to problems related to globalization and the increasing level industry corporate

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in Part A of the Code, as well as (unless obvious) on the reason why the Member was satisfied that the substantial equivalence met the criteria set out in paragraph 4 of Article VI.

30) The procedure under Article XV of the MLC, 2006 also has some ILO specific procedural features. However it is a new process for ILO Conventions. It has already been used with the adoption of the Amendments of June 2014 (to enter into force January 2017): Available at: <[http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—relconf/documents/meetingdocument/wcms\\_248905.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_248905.pdf)>

31) For example, the second meeting of Special Tripartite Committee under Article XIII of the MLC, 2006 to be held in February 2016 will consider a proposal from the Shipowners' group for an amendment to the ship certification provisions to include the possibility of extension of an expired certificate to allow for delays when a ship has been inspected for renewal but the onboard documents may not be issued by the flag State for several months : See the proposal at: < [http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—normes/documents/genericdocument/wcms\\_386809.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—normes/documents/genericdocument/wcms_386809.pdf)>

32) For example, the issue of shipowners' liability for abandonment and for financial security to address death or injury were not resolved by an Ad Hoc IMO ILO working group until after 2006.

33) For example the Seafarers' group proposed amendments that were considered at second meeting of the Special Tripartite Committee under Article XIII of the MLC, 2006 in February 2016. These amendments are intended to address workplace bullying as an issue for occupational safety and health and also to clarify the contractual situation and wages for seafarers that have captured by pirates: The amendments with respect to occupational safety and health were adopted however the amendments related to piracy were sent to working group with a view to consideration at the next meeting of the Committee which is anticipated for 2018. For the text of both proposals see:

[http://www.ilo.org/global/standards/maritime-labour-convention/special-tripartite-committee/WCMS\\_386796/lang—en/index.htm](http://www.ilo.org/global/standards/maritime-labour-convention/special-tripartite-committee/WCMS_386796/lang—en/index.htm)

For the text that was adopted see:

«Amendments adopted to the Code relating to Regulation 4.3 of the MLC, 2006»

<[http://www.ilo.org/global/standards/maritime-labour-convention/events/WCMS\\_451730/lang—en/index.htm](http://www.ilo.org/global/standards/maritime-labour-convention/events/WCMS_451730/lang—en/index.htm)>

For the resolution with respect to the working group on inter alia the amendment related to wages and piracy see:

<[http://www.ilo.org/global/standards/maritime-labour-convention/events/WCMS\\_452072/lang—en/index.htm](http://www.ilo.org/global/standards/maritime-labour-convention/events/WCMS_452072/lang—en/index.htm)>

complexity<sup>34</sup> and the related jurisdictional issues.

For purposes of this Chapter the most important of the strategic solutions in the MLC, 2006 is the system of ship inspection and certification, including the use of ROs and PSC and the procedures for complaints to be made to flag State and port States, as well as on-board ship, about a ship/shipowner failure to conform to the requirements of the Convention. The impact of this system was noted above in section 1. This system is «backed up» by the ILO's supervisory system which also considers information arising from the system of the MLC, 2006, particularly from PSC (Regulations 5.2.1 and 5.2.2 and the Code). The fact that the flag State must inspect almost all matters and, for ships that are to be certified<sup>35</sup> (essentially the majority of

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34) For example the recent (Nov. 2014) UNCTAD *Review of Maritime Transport 2014*, <[http://unctad.org/en/PublicationsLibrary/rmt2014\\_en.pdf](http://unctad.org/en/PublicationsLibrary/rmt2014_en.pdf)> comments, in the Executive Summary (p.xi), that data shows that «the largest fleets by flag of registration in 2014 are those of Panama, followed by Liberia, the Marshall Islands, Hong Kong (China) and Singapore. Together, these top five registries account for 56.5 per cent of the world tonnage.» More significantly the data identified a trend to relocate to third countries, leading the Review to introduce a new analysis regarding a third level of nationality for ships:

As regards the ownership of the fleet, this issue of the *Review of Maritime Transport* introduces a novel analysis and distinction between the concept of the «nationality of ultimate owner» and the «beneficial ownership location». The latter reflects the location of the primary reference company, that is, the country in which the company that has the main commercial responsibility for the vessel is located, while the «ultimate owner's nationality» states the nationality of the ship's owner, independent of the location. Just as today most ships fly a flag from a different country than the owner's nationality, owners are increasingly locating their companies in third countries, adding a possible third dimension to the «nationality» of a ship.»

The data in chapter 2 of the *Review* and commentary explains (at page 38):

A typical example may be a Greek national (the ultimate owner's nationality is Greece) whose shipowning company is based in the United Kingdom (the beneficial ownership location is the United Kingdom). For 11.8 per cent of the world fleet (dwt), the ultimate owner's nationality is different from the beneficial ownership location, while for 88.2 per cent of the fleet, the owner's nationality and the location of the beneficial owner are one and the same. The top five shipowning countries are the same under both criteria, notably Greece, followed by Japan, China, Germany and the Republic of Korea.

[...]

As mentioned above, for the majority of vessels, the ultimate owner's nationality and the beneficial ownership location are still the same – but the trend appears to be towards a more frequent distinction between the two. A similar situation existed 40 years ago as regards the national flag and the ownership of ships. Historically, a vessel would fly the same flag as the nationality of its owner. Today, however, almost 73 per cent of the world fleet are foreign flagged (see also section D: Registration of ships). The tonnage owned by the 20 largest shipowning countries/economies and the share that is foreign flagged is illustrated in figure 2.5. With the exception of Singapore, Hong Kong (China), Italy and India, all the top 20 shipowning countries/economies have far more than half of their fleet registered abroad, that is, most of the nationally owned tonnage is flagged out.

35) Regulation 5.1.3, paragraph 1. This applies to all ships 500 Gross Tonnage (GT) and above that are engaged in international voyages or voyages between ports in jurisdictions other than the flag State. The Maritime Labour Certificate (MLC) and attached Declaration of Maritime Labour Compliance (DMLC) part I and II are carried on board ship and constitute *prima facie* evidence of compliance with the national law or other measures implementing the requirements of the MLC, 2006 in the flag State. This

ships that not operating exclusively in the domestic trade of the flag State), certify a list of areas<sup>36</sup>, including the SEA itself and several matters which now, and in the future, constitute the substantive content of the terms in the SEA, means that the flag State has a central interest in ensuring that the SEA of seafarers on its ships at a minimum meet the requirements of the MLC, 2006. Under the MLC, 2006 the flag State is the relevant State to be contacted by PSCOs in the event of on board implementation problems. This is a very important factor. For these reasons the SEA requirement has been described as the 'heart' of the MLC, 2006 because of the multiple 'arterial' connections to many other regulations in the Convention and in regard to the compliance and enforcement system set out in Title 5 of the MLC, 2006.<sup>37</sup>

The clear acceptance under the MLC, 2006 of a Government's decision to use ROs for inspecting MLC, 2006 requirements is also an important step in recognizing the fact that this is a well-established practice for other maritime inspections and certifications.<sup>38</sup> This is not simply a capacity issue for developing economies. Most developed economy countries now face reductions in government staff and technical capacity rely on private sector «recognized organizations»<sup>39</sup> to carry out the technical surveys/inspections and also, often certification, which is paid for by the shipowner concerned. ROs, most of which operate internationally, with inspectors in all major ports areas of the world, increasing play an important role in ensuring certain level

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approach, while new for labour and social matters is the essentially the central approach under the maritime Convention adopted by the IMO. The MLC, 2006 was explicitly designed to integrate with this wider ship inspection and certification systems.

36) The current list of 14 areas is set out in Appendix A5-I and A5-III of the MLC, 2006: Minimum age; Medical certification; Qualifications of seafarers; Seafarers' employment agreements; Use of any licensed or certified or regulated private recruitment and placement service; Hours of work or rest; Manning levels for the ship; Accommodation; On-board recreational facilities; Food and catering; Health and safety and accident prevention; On-board medical care; On-board complaint procedures; Payment of wages.

37) McConnell, et al (2011) *ibid.*, note 18 p. 291.

38) Perhaps an anathema from a traditional labour inspection perspective, the use of third party private sector actors such a ship classification societies or other similar organizations, now collectively known as «Recognized Organizations» (ROs) to carry out on behalf of flag State's the inspections/surveys as required by IMO conventions, and now for MLC, 2006, is a well-established aspect of international maritime industry practice. While on one view this could be seen as situation of conflict of interest in that ROs are paid by shipowners to carry out the survey/inspection to certify the ship, at the same time, as with all auditing firms in other sectors, the value of the auditor's name is based on their reliability and integrity and standards. One important aspect is that rather than relying on national administration which often do not have the capacity to carry out the necessary inspection or respond to issues that may arise in all ports that ships may voyage to, these organization, which operate internationally, provide a certain degree of uniformity in their approach and are themselves subject, albeit voluntary, to accreditation by industry associations (e.g., International Association of Classification Societies).

39) While not necessarily international ship classification societies these are the main organizations involved.

uniformity in the application of international standards in the maritime sector.<sup>40</sup>

Another important innovation, which reinforces the primary role of the flag State and the shipowner with respect to the SEA and its content, is the use of an economic or «market» solution to address the potential problem of enforcement where a seafarer's employer does not fulfill its responsibilities. Irrespective of the existence of any outside or third party employer for the seafarer concerned, the flag State must require that the ship or shipowner provide financial security to ensure seafarers are repatriated<sup>41</sup> and for shipowners' liability for compensation for death or long term-disability of a seafarer due to an occupational injury or illness or hazard<sup>42</sup>. In the future documentary evidence of financial security system allowing seafarers direct access will also be required to cover the economic impact of abandonment of seafarers. Although repatriation and shipowners' liability are important terms of a SEA and must be inspected by the flag State they are not currently on the list of areas to be certified. They will be added to the list for the on board ship certification documents (the DMLC) along with requirements for other on-board documentation, in 2017 when the *Amendments of 2014* dealing with abandonment and with financial compensation in the case of the shipowners' liability provisions enter into force.<sup>43</sup>

The MLC, 2006 also introduced a further economic requirement specifically aimed at providing seafarers with an effective solution to possible SEA enforcement problems arising from the increased role of private recruitment and placement services acting as the intermediary between the seafarer and shipowner or even acting as the employer. It builds upon the requirement in the predecessor *Recruitment and Placement of Seafarers Convention, 1996* (No. 179) that the country in which a private service operates regulate these services and, *inter alia*, require that they have a system of protection by way of insurance or other equivalent measure to compensate seafarers for monetary loss they may incur as result of the failure of the service to meet its obligations to them.<sup>44</sup> The MLC, 2006 added to this obligation by

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40) The IMO has adopted an approach that recognizes the technical expertise and role of these organizations in proposing what are called «unified interpretations» in the application of IMO conventions. This is not in place in the ILO and such an approach at least at a formal level may be problematic as the ILO already has the supervisory system for considering the application of its instruments.

41) MLC, 2006 Regulation 2.5, paragraph 2. See also the amendments to the Code of the MLC, 2006 relating to Regulation 2.5 –Repatriation. The *Amendments of June 2014* are expected to enter into force in January 2017 and are available at: <[http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—relconf/documents/meetingdocument/wcms\\_248905.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_248905.pdf)>

42) MLC, 2006 Standard A4.2, paragraph 2. *The Amendments of 2014*, *ibid* note 41, which also relate to Regulation 4.2. provide the details for this security for what are also described as «contractual claims» including the requirement that flag States require that documentary evidence of this security be carried on board (see *Amendments of 2014* Standard A4.2 paragraph 11).

43) *Ibid*, notes 41 and 42.

44) Convention No. 179, Article 4, paragraph 4. Available at: <<http://www.ilo.org/dyn/normlex/en/>>

requiring that the system of protection to be provided by the private service also cover a failure by «the relevant shipowner under the seafarers' employment agreement»<sup>45</sup>, thus closing a potential gap in protection of seafarers. As will be discussed in the section 4, while possibly problematic for implementation from a legal point of view, this additional element provides the logical counter balance to the system of holding the shipowner responsible for employment rights even if the seafarer has a third party employer, that has failed to fulfill its obligations. From a pragmatic point of view, irrespective of the corporate or employment arrangements or legal or jurisdictional issues involved, insurance or an equivalent measure is required to provide a further layer of protection for the seafarer to counteract the potential difficulties a seafarer may face in identifying and claiming from the responsible party.

### 3. The Law of the Sea and the revitalization of the role of flag States

Beyond its important role in the ILO panoply of standards, the MLC, 2006 must also be understood within the wider international legal system of the law of the sea and maritime law perspective. As explained by McConnell et al<sup>46</sup>:

Viewed from a public maritime law perspective the MLC, 2006 also constitutes a further elaboration of the international maritime regulatory regime under the LOSC as it pertains to conditions on ships voyaging on the high seas and constitutes an effort to fill a significant gap in the LOSC – long considered the «constitution for the oceans». Despite its constitutive character which was «[p]rompted by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea» and aimed at «...establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans»<sup>47</sup> the drafters of the LOSC failed to do more than peripherally address the use of the ocean, particularly the high seas, as a workplace or a site for human rights.<sup>48</sup> .....[T]hese matters are simply left to the «default» jurisdiction of the relevant flag State with a «genuine link» to the ship and its general obligation to «effectively exercise its jurisdiction and control in administrative, technical,

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45) MLC, 2006 Standard A1.4 paragraph 5 (c) (vii).

46) McConnell et al, (2011) *ibid*, note 18 at pp. 6-7, 24-25 .The footnotes in the original text are retained with some additions and numbering has been altered for use in this chapter

47) *Preamble*, LOSC

48) (original text footnote 15) There are, however, some human rights provisions relating to slavery and genocide although human security rights are also encompassed in connection with for example the provisions governing the protection of the marine environment, or living resources.

and social matters over ships flying its flag».<sup>49</sup>

[...]

The problem with this approach is evidenced in the much criticized failure to tackle the thorny international law problem of the «genuine link»<sup>50</sup> and flag State jurisdiction over the globalized economic activities of shipping and fishing. However, it is equally difficult, from a legal perspective, to envisage a viable alternative to flag State jurisdiction.

The MLC, 2006 while not an amendment to the LOSC itself, is an important step to develop this obligation into a more effective regime.<sup>51</sup> It develops, in detail and

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49) Article 92- 94ff LOSC.

50) See: McConnell, M.L., (1987) «Business As Usual: An Evaluation of the 1986 United Nations Convention on Conditions for Registration of Ships» 18 *Journal of Maritime Law and Commerce* 435; McConnell, M.L. (1985) «Darkening Confusion Mounted Upon Darkening Confusion: The Search for the Elusive Genuine Link» (1985) 6 *Journal of Maritime Law and Commerce* 365. See also, for example, the resurrected call for a definition of the «genuine link» or even, in the fishing sector, a new Convention to «define» the genuine link: Resolutions 58/240 (at paragraph 42) and 58/14 adopted by the General Assembly of the United Nations at its fifty-eighth session invited the IMO and other relevant agencies to study, examine and clarify the role of the «genuine link» in relation to the duty of flag States to exercise effective control over ships flying their flag, including fishing vessels. Resolutions 59/24 (paragraph 41) and 59/25 (paragraph 30) also requested the Secretary-General to report to the General Assembly at its sixty-first session on the study undertaken by International Maritime Organization (IMO) in cooperation with other competent international organizations on the role of the genuine link and the potential consequences of non-compliance with duties and obligations of flag States described in relevant international instruments. The IMO reported on 23 June 2006 and the lengthy report comprising reports from the various organization concerned was reported to the General Assembly of the United Nations, Document A 61/160, 17 July 2006, Item 69(a) of the provisional agenda in connection with Oceans and the law of the sea. Despite some resurgence of interest in the meaning of the genuine link in cases before the International Tribunal on the Law of the Sea., that report commented, *inter alia*,

28. Participants in the Meeting took the view that the exclusivity attached by the United Nations Convention on the Law of the Sea to the right of States to fix conditions for the grant of nationality, as reaffirmed by the authoritative interpretations of the International Tribunal for the Law of the Sea in the *M/V Saiga* (No.2) and subsequent cases, as well the other agreements referred to in section 2 above, indicated that the questions relating to the precise criteria or conditions adopted by a State with respect to the grant of its nationality to a ship were a matter beyond the purview of the organizations participating in the Meeting. However, participants in the Meeting also considered that issues relating to securing the objective and purpose of the «genuine link» requirement, that is, assuring the ability of the flag State to effectively exercise its jurisdiction over ships flying its flag, were matters of central concern to all of the organizations and formed a substantial part of their programmes of regulatory initiatives and technical cooperation activities in the shipping and fishing sectors.

Comments from the ITF in 2007 indicate there is a shift in its strategy for dealing with flags of convenience (FOC): «ITF softens FOC stance», *Fairplay Daily News*, July 24, 2007

«SINGAPORE 24 July – The ITF has apparently softened its stand against the flags of convenience system. «Just because the vessel is registered in Panama or Liberia does not mean that it is a substandard vessel,» the federation's maritime co-ordinator Stephen Cotton told the Singapore Organisation of Seamen yesterday...»

51) See generally papers in for e.g., *The Effectiveness of International Environmental Regimes: Causal*

at the level of what will be a widely ratified comprehensive multilateral convention, explicit responsibilities for both flag States, in connection with the inspection and certification of labour conditions on ships, and for port States that choose to inspect foreign ships. It also introduces a new player in the flag State, coastal/port State jurisdictional web - States with labour-supply responsibilities that arise independently of those of the flag State.

Recent judgments of the ITLOS<sup>52</sup> in connection with cases of disputed flag State claims under the LOSC for prompt release of ships (and the seafarers on board) that have been arrested in foreign waters or ports for alleged violations of coastal State law, have continued to raise the question of the «genuine link» requirement and legitimacy of the flag State's claim to represent the ship and the seafarers. The «genuine link» requirement under the LOSC is set out in Article 91 «Nationality of ships» of the LOSC:

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship....

As discussed in depth elsewhere<sup>53</sup> ever since the introduction<sup>54</sup> of this concept in the law of the sea in one of the predecessors to the 1982 LOSC, the 1958 *Geneva Convention on the High Seas*<sup>55</sup>, the requirement has been controversial<sup>56</sup>.

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*Connections and Behavioural Mechanisms*, Ed. by O. Young, (Cambridge, MA: MIT Press, 1999).

52) *Ibid.*, note 17.

53) *Ibid.*, note 50, see also *ibid.*, note 18, McConnell, M. L., (2012) and sources cited therein; See also *infra* note 56.

54) The term was drawn from the International Court of Justice (ICJ) decision in *The Nottebohm Case (Liechtenstein v. Guatemala)* [1955] ICJ Rep. 4, a case that did not deal with ship nationality. Rather the case involved the question of whether Liechtenstein could bring a claim for compensation for damage to one of its nationals (Nottebohm), a German national by birth, who had obtained naturalization on the basis of a three week residence in Liechtenstein, but had lived for 34 years in Guatemala. The ICJ pronounced (at p. 23):

«[N]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties.

The validity of using the phrase, the genuine link, has been queried for a number of reasons, including the fact that the case was arguably dealing with a situation of dual nationality and that, as against Guatemala, Liechtenstein had a relatively weaker claim.»

55) Geneva, 29 April 1958, 450 *U.N.T.S.* 82, available at <[http://untreaty.un.org/ilc/texts/instruments/english/conventions/8\\_1\\_1958\\_high\\_seas.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf)>

56) In 1960 influential publicists McDougal, M.S., Burke, W. T., Vlasic, I.. «The Maintenance of Public Order at Sea and the Nationality of Ships», *American Journal of International Law* 54 (1960) 105 at 115, warned:

The ITLOS decisions on this point have, however, continually reinforced the view that *prima facie* the flag State has jurisdiction and although on the facts of a particular case questions may be raised about the validity of registration and attribution of nationality, the flag State will be presumed to be the relevant State for purposes of international legal claims and also responsibility for protection of the ship and, while posing a somewhat more complex legal question,<sup>57</sup> also for the seafarers on board the ship.

The Tribunal's most recent decision<sup>58</sup> on this issue was the *M/V «Virginia G» Case* (Panama/Guinea-Bissau).<sup>59</sup> The case posed a number of procedural and other issues but the relevant facts are that the «M/V Virginia G», an oil tanker, was registered in Panama and owned by a Panama registered company but chartered, through an Spanish intermediary company, to an Irish company that supplied oil to fishing vessels and in this case to vessels registered in Mauritania that were operating in the Exclusive Economic Zone (EEZ) of Guinea-Bissau. Under the laws of Guinea-Bissau bunkering required a permit and was also potentially subject to taxation by the Guinea-Bissau.

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«It is not yet demonstrated that any conceivable good for the common interest of peoples could attend the introduction of this new-found requirement of genuine link ... It has not, in sum, been established that the proposed innovation would serve any common interest which would counterbalance the grave risks and dangers which it would entail. On the contrary, it would seem reasonably clear that the only purposes it would serve are those of disruption, controversy and anarchy ...»

Or see, in this century, considering wider development in the international maritime, Oude Elferink, A.G. (2003), «The genuine link concept: Time for a post mortem?», in Dekker.I.F., & Post, H.H.G, eds., *On the Foundations and Sources of International Law* Den Haag: TMC Asser Press, 41-63.

57) *The M/V «Virginia G» Case* (Panama/Guinea- Bissau), Judgment, 14 April 2014. The judgment is available at: <[https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.19/judgment/C19-Judgment\\_14.04.14\\_corr2.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment/C19-Judgment_14.04.14_corr2.pdf)>

58) Although not dealing with the genuine link issues specifically, the 2015 advisory opinion the *Request submitted to the Tribunal by the Sub-Regional Fisheries Commission* (SRFC) (2 April 2015), also continued to affirm the responsibility of flag States (albeit a complementary responsibility) in the EEZ to the coastal State, this time in the context of illegal, unreported and unregulated (IUU) fishing. ITLOS commented *inter alia*,

119. It follows from the provisions of article 94 of the Convention that as far as fishing activities are concerned, the flag State, in fulfilment of its responsibility to exercise effective jurisdiction and control in administrative matters, must adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities which will undermine the flag State's responsibilities under the Convention in respect of the conservation and management of marine living resources. If such violations nevertheless occur and are reported by other States, the flag State is obliged to investigate and, if appropriate, take any action necessary to remedy the situation.

Available at: <[https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.21/advisory\\_opinion/C21\\_AdvOp\\_02.04.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion/C21_AdvOp_02.04.pdf)>

59) *The M/V «Virginia G» Case* (Panama/Guinea- Bissau), Judgment, 14 April 2014. The judgment is available at: <[https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.19/judgment/C19-Judgment\\_14.04.14\\_corr2.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment/C19-Judgment_14.04.14_corr2.pdf)>

The ship was arrested, the cargo of oil seized and the crew held in port for failure to have the requisite permit to supply the fishing vessels. The crew was from various countries as noted by ITLOS:

57. At the time of the arrest, the captain of the vessel was Mr Eduardo Blanco Guerrero, a national of Cuba. There were eleven crew members on board, seven of whom were nationals of Cuba, three of Ghana, and one of Cape Verde (now «Cabo Verde»).

There were various legal issues raised by the two parties but essentially Panama as the flag State claimed under the LOSC for prompt release of the ship, oil and crew and actual and moral damages for the wrongful arrest and seizure and for interference with Panama's right to freedom of navigation in the EEZ under the LOSC<sup>60</sup> while Guinea-Bissau contested Panama's right to make these claims for various reasons including the lack for genuine link as a flag State and no right under international law to seek damages regarding the non national crew and that the bunkering of fishing vessels in the EEZ constitutes a fishing related activity requiring authorization by Guinea-Bissau.<sup>61</sup>

Although a number of individual opinions were also issued, the majority judgment of the Tribunal on the «genuine link» issue,<sup>62</sup> after considering its previous case law on the matter, concluded with respect to the meaning of the genuine link under the LOSC and its application in the case (emphasis added):

109. The Tribunal observes that under article 91, paragraph 1, of the Convention a State enjoys a right to grant its nationality to ships and recalls that in the M/V «SAIGA» (No. 2) Case it recognized this exclusive right of the flag State when it stated:

Article 91 leaves to each State exclusive jurisdiction over the granting of its nationality to ships. In this respect, article 91 codifies a well- established rule of general international law. Under this article, it is for Saint Vincent and the Grenadines to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag. These matters are regulated by a State in its domestic law. Pursuant to article 91, paragraph 2, Saint Vincent and the Grenadines is under an obligation to issue to ships to which it has granted the right to fly its flag documents to that effect. The issue of such documents is regulated by domestic law.

(M/V «SAIGA» (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, at pp. 36-37, para. 63)

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60) *Id.* para. 54.

61) *Id.*

62) *Ibid.*, note 59. The position of the two parties is set out in paragraphs 102-107. The Tribunal's analysis and decision on the issues is set out in paragraphs 107-118.

110. The Tribunal considers that article 91, paragraph 1, third sentence, of the Convention requiring a genuine link between the flag State and the ship should not be read as establishing prerequisites or conditions to be satisfied for the exercise of the right of the flag State to grant its nationality to ships.

111. The Tribunal observes in this respect that article 94 of the Convention requires the flag State to «effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag». Paragraphs 2 to 5 of that article set out the different measures which the flag State is required to take to exercise effective jurisdiction and control, including such measures as are necessary to ensure safety at sea, which must conform to generally accepted international regulations, procedures and practices. Paragraph 6 of that article outlines the procedure to be followed where another State «has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised». As stated by the Tribunal in the M/V «SAIGA» (No.2) Case, «[t]here is nothing in article 94 to permit a State which discovers evidence indicating the absence of proper jurisdiction and control by a flag State over a ship to refuse to recognize the right of the ship to fly the flag of the flag State» (M/V «SAIGA» (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, at p. 41, para. 82).

112. As further stated in the M/V «SAIGA» (No. 2) Case, the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States. (M/V «SAIGA» (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, at p. 42, para. 83)  
The Tribunal reaffirms the above statement.

113. In the view of the Tribunal, once a ship is registered, the flag State is required, under article 94 of the Convention, to exercise effective jurisdiction and control over that ship in order to ensure that it operates in accordance with generally accepted international regulations, procedures and practices. This is the meaning of «genuine link».

114. The Tribunal notes that, on the basis of information available to it, there is no reason to question that Panama exercised effective jurisdiction and control over the M/V Virginia G at the time of the incident.

115. The Tribunal observes that Panama's legislation sets out the conditions for granting Panamanian nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Under Panamanian law, ship-owners are required to take specific actions, to carry out certain activities and to submit substantial

information and documentation to fulfil all these requirements, in line with Panama's international obligations. The Tribunal in this regard notes that the M/V Virginia G obtained the required documents and technical certificates. It further notes that Panama imposes on owners of vessels specific conditions such as the requirement of a continuous synopsis record, in accordance with the International Convention for the Safety of Life at Sea, 1974 (SOLAS 1974).

116. The Tribunal also notes that Panama exercises its right to delegate the conduct of an annual safety inspection and the issuance of technical certificates to one of the recognized organizations (Panama Shipping Registry Inc.) in accordance with relevant IMO conventions. The Tribunal finds in this regard that the M/V Virginia G meets the international standards set out in the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78).

117. In light of the above, the Tribunal concludes that a genuine link existed between Panama and the M/V Virginia G at the time of the incident.

As this lengthy extract illustrates, the evidence of national regulatory control exercised by the flag State, as required under international conventions, served also to establish the flag State as the relevant State with jurisdiction and responsibility for exercising authority over the ship and acting on behalf of the ship in question. Although the Tribunal considered a list of IMO regulatory Conventions, in principle, the effective implementation of the MLC, 2006 requirements, also often using the same ROs as the IMO Conventions, such as those relating to the control over the SEA, could also constitute evidence and be considered on the same basis.

But even more central to the inquiry in this chapter, the Tribunal was also asked to consider the more complex international law question regarding flag State jurisdiction and the right to also make a claim for damages for moral harm to the flag State as a result of the actions taken against the seafarers on board the ship. The issue had arisen in the first ITLOS case, the «*M/V Saiga (No.2)*»<sup>63</sup>, also a prompt release case, with respect to the question of whether the flag State could bring a claim for redress on behalf of seafarers who are not its not nationals. In the «*M/V Virginia G*» the question shifted to the whether a flag State could claim damages on its own behalf. The question involved a point that is not clear in the *Draft Articles on Diplomatic Protection* adopted by the International Law Commission in 2006<sup>64</sup>, which, in a section

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63) *Ibid.* note 17, Judgment available at: <[https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_2/merits/Judgment.01.07.99.E.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/Judgment.01.07.99.E.pdf)>

64) Available at: <[http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_8\\_2006.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf)> Article 18 and commentary which noted (footnotes removed) that (emphasis added):

(1) The purpose of draft article 18 is to affirm the right of the State or States of nationality of a ship's crew to exercise diplomatic protection on their behalf, while at the same time acknowledging that

the State of nationality of the ship also has a right to seek redress on their behalf, irrespective of their nationality, when they have been injured in the course of an injury to a vessel resulting from an internationally wrongful act. It has become necessary to affirm the right of the State of nationality to exercise diplomatic protection on behalf of the members of a ship's crew in order to preclude any suggestion that this right has been replaced by that of the State of nationality of the ship. At the same time it is necessary to recognize the right of the State of nationality of the ship to seek redress in respect of the members of the ship's crew. Although this cannot be characterized as diplomatic protection in the absence of the bond of nationality between the flag State of a ship and the members of a ship's crew, there is nevertheless a close resemblance between this type of protection and diplomatic protection.

(2) There is support in the practice of States, in judicial decisions and in the writings of publicists, for the position that the State of nationality of a ship (the flag State) may seek redress for members of the crew of the ship who do not have its nationality. There are also policy considerations in favour of such an approach.

(3) The early practice of the United States, in particular, lends support to such a custom. Under American law foreign seamen were traditionally entitled to the protection of the United States while serving on American vessels. The American view was that once a seaman enlisted on a ship, the only relevant nationality was that of the flag State. This unique status of foreigners serving on American vessels was traditionally reaffirmed in diplomatic communications and consular regulations of the United States. Doubts have, however, been raised, including by the United States, as to whether this practice provides evidence of a customary rule.

(4) International arbitral awards are inconclusive on the right of a State to extend protection to non-national seamen, but tend to lean in favour of such right rather than against it. In *McCready (US) v. Mexico* the umpire, Sir Edward Thornton, held that «seamen serving in the naval or mercantile marine under a flag not their own are entitled, for the duration of that service, to the protection of the flag under which they serve». In the «I'm Alone» case, which arose from the sinking of a Canadian vessel by a United States coast guard ship, the Canadian Government successfully claimed compensation on behalf of three non-national crew members, asserting that where a claim was on behalf of a vessel, members of the crew were to be deemed, for the purposes of the claim, to be of the same nationality as the vessel. In the *Reparation for Injuries* advisory opinion two judges, in their separate opinions, accepted the right of a State to exercise protection on behalf of alien crew members.

(5) In 1999, the International Tribunal for the Law of the Sea handed down its decision in *The M/V «Saiga» (No. 2)* case (*Saint Vincent and the Grenadines v. Guinea*) which provides support for the right of the flag State to seek redress for non-national crew members. The dispute in this case arose out of the arrest and detention of the *Saiga* by Guinea, while it was supplying oil to fishing vessels off the coast of Guinea. The *Saiga* was registered in St. Vincent and the Grenadines («St. Vincent») and its master and crew were Ukrainian nationals. There were also three Senegalese workers on board at the time of the arrest. Following the arrest, Guinea detained the ship and crew. In proceedings before the International Tribunal for the Law of the Sea, Guinea objected to the admissibility of St. Vincent's claim, inter alia, on the ground that the injured crew members were not nationals of St. Vincent. The Tribunal dismissed these challenges to the admissibility of the claim and held that Guinea had violated the rights of St. Vincent by arresting and detaining the ship and its crew. It ordered Guinea to pay compensation to St. Vincent for damages to the *Saiga* and for injury to the crew.

(6) Although the Tribunal treated the dispute mainly as one of direct injury to St. Vincent, 261 the Tribunal's reasoning suggests that it also saw the matter as a case involving the protection of the crew something akin to, but different from, diplomatic protection. Guinea clearly objected to the admissibility of the claim in respect of the crew on the ground that it constituted a claim for diplomatic protection in respect of non-nationals of St. Vincent. St. Vincent, equally clearly, insisted that it had the right to protect the crew of a ship flying its flag «irrespective of their nationality» In dismissing Guinea's objection the Tribunal stated that the United Nations Convention on the Law of the Sea in a number of relevant provisions, including article 292, drew no distinction between nationals and

devoted to specific issues, appears to envisage potentially concurrent rights by the flag State and the State of nationality and programmatic solution, in the event the two differ. In the «*M/V Virginia G*» Case ITLOS noted (emphasis added):

119. Panama argues that it «is bringing this action against Guinea Bissau within the framework of diplomatic protection» and that it «takes the cause of its national and the vessel VIRGINIA G with everything on board, and every person and entity involved or interested in her operations, which, it is claimed, has suffered injury caused by Guinea Bissau».

120. In support of its position, Panama refers to paragraph 106 of the Judgment in the *M/V «SAIGA»* (No. 2) Case, where the Tribunal stated:

The provisions referred to in the preceding paragraph indicate that the Convention considers a ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of the Convention. Thus the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant. (*M/V «SAIGA»* (No. 2) (*Saint Vincent and the Grenadines v. Guinea*), ITLOS Reports 1999, p. 10, at p. 48, para. 106)

121. Panama also relies on article 18 of the Draft Articles on Diplomatic Protection

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non-nationals of the flag State. It stressed that «the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant».

(7) There are cogent policy reasons for allowing the flag State to seek redress for the ship's crew. This was recognized by the Law of the Sea Tribunal in Saiga when it called attention to «the transient and multinational composition of ships' crews» and stated that large ships «could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such a person is a national, undue hardship would ensue». Practical considerations relating to the bringing of claims should not be overlooked. It is much easier and more efficient for one State to seek redress on behalf of all crew members than to require the States of nationality of all crew members to bring separate claims on behalf of their nationals.

(8) Support for the right of the flag State to seek redress for the ship's crew is substantial and justified. It cannot, however, be categorized as diplomatic protection. Nor should it be seen as having replaced diplomatic protection. Both diplomatic protection by the State of nationality and the right of the flag State to seek redress for the crew should be recognized, without priority being accorded to either. Ships' crews are often exposed to hardships emanating from the flag State, in the form of poor working conditions, or from third States, in the event of the ship being arrested. In these circumstances they should receive the maximum protection that international law can offer.

(9) The right of the flag State to seek redress for the ship's crew is not limited to redress for injuries sustained during or in the course of an injury to the vessel but extends also to injuries sustained in connection with an injury to the vessel resulting from an internationally wrongful act, that is as a consequence of the injury to the vessel. Thus such a right would arise where members of the ship's crew are illegally arrested and detained after the illegal arrest of the ship itself.

adopted by the International Law Commission in 2006, which provides:

Article 18 Protection of ships' crews

The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.

122. Guinea-Bissau contends that «the framework of diplomatic protection does not give Panama locus standi referring to claims of persons or entities that are not nationals of Panama» and that «Panama is therefore not entitled to bring this action against Guinea-Bissau within the framework of diplomatic protection». Guinea-Bissau further contends that «there is not a single person or entity related to the vessel VIRGINIA G which is of Panamanian nationality» and that «Panama asserts protection before the Tribunal for all crew's members and for the owners of ship and cargo» while «[i]t is undisputed here that none of these persons are nationals of Panama».

123. In relation to the M/V «SAIGA» (No. 2) Case, Guinea-Bissau maintains that this is not a case involving vessels where a number of nationalities and interests are concerned, therefore the judgment of the M/V SAIGA No. 2 Case quoted by Panama is not applicable. In fact, neither the owner nor even a single member of the crew of VIRGINIA G is of Panamanian nationality.

124. As regards article 18 of the Draft Articles on Diplomatic Protection, Guinea-Bissau further maintains that this article only refers to the right of the State of nationality of a ship to seek redress on behalf of the crew members of that ship, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act, which is not the case here.

125. The Tribunal considers that the request of Panama is to be understood in the light of the object of its claim, namely, claims made in respect of alleged violations of provisions of the Convention which resulted in damage caused to, inter alia, the ship, the ship-owner, persons and cargo on board.

126. In this regard, the Tribunal recalls its finding in the M/V «SAIGA» (No. 2) Case that, under the Convention, the ship is to be considered as a unit «as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States» (M/V «SAIGA» (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, at p. 48, para. 106).

127. The Tribunal finds that the M/V Virginia G is to be considered as a unit and therefore the M/V Virginia G, its crew and cargo on board as well as its owner and every person involved or interested in its operations are to be treated as an entity linked to the flag State. Therefore, Panama is entitled to bring claims in

respect of alleged violations of its rights under the Convention which resulted in damages to these persons or entities.

128. The Tribunal observes that, in accordance with international law, the exercise of diplomatic protection by a State in respect of its nationals is to be distinguished from claims made by a flag State for damage in respect of natural and juridical persons involved in the operation of a ship who are not nationals of that State. As stated by the Tribunal in the M/V «SAIGA» (No. 2) Case, «[a]ny of these ships could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such person is a national, undue hardship would ensue» (M/V «SAIGA» (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, at p. 48, para. 107).

129. Accordingly, the Tribunal rejects the objection raised by Guinea-Bissau to the admissibility of Panama's claims based on the fact that the owner of the vessel and the crew are not nationals of Panama.

As the foregoing extract indicates and, as also indicated in the commentary of the International Law Commission, public international law has adopted a pragmatic solution to the problem of the role of the flag State and numerous nationalities on board ship and potentially numerous jurisdictional claims. In effect, as argued above, given the many States that might have jurisdiction the flag State seems the sensible and, indeed, the obvious State to have the primary role and responsibility for the ship and for the seafarer onboard as a «unit».

However this is clearly a public international law view and based largely on public policy. Questions may, therefore, fairly arise as to whether this can be reconciled with concepts of contract law, including traditional approaches to jurisdiction based on contract formation, and respect for freedom of contract and party autonomy. Or should the two legal approaches simply co- exist and operate largely in isolation from each other?

As suggested earlier, the MLC, 2006 requirement for the SEA provides a pragmatic solution that is largely based on flag State responsibility but still allows for the possibility of party autonomy on matters of choice of law and forum, subject to recognition of the flag State's overriding interest. The next section provides a discussion of the role of the SEA in the «system» of the MLC, 2006 including considering examples of national legal approaches to implementation.

## 4. The role of the SEA in the system of the MLC, 2006 and national implementation

### 4.1 The role of the SEA

As noted above in section 1, the SEA requirements in Regulation 2.1 and the Code (Standard A2.1 and Guideline B2.1), of the MLC, 2006 seems a simple, indeed even obvious, employment requirement and essentially reproduces the international standards that have been in place since the 1920s. The high level of current interest stems more from the interaction with the system of the MLC, 2006 and the innovative solutions as discussed above in section 2. The now wider coverage<sup>65</sup> of seafarers and ships combined with the establishment of the mandatory flag State inspection and ship certification system which explicitly includes the use of ROs and the increased prominence for the role of PSC are the driving force for this heightened interest. As already mentioned, since at least the 1920s, seafarers have usually had an individual contract or collective agreements or could point to a document in some form attesting to the terms of their employment. However, as mentioned earlier in sections 1 and 2 and as has been widely noted by many scholars, the impact of corporate organizational changes in the sector has meant the establishment of various layers in ownership/operation of ships and in addition also the employer of the seafarer may not be the entity that is operating or owns the ship. Many private sector actors (with various names e.g., manning agencies, crewing agencies) not only identify and recruit and place seafarers with employers/shipowners they may also be the employer of all of or many of the seafarers on a ship. In addition, in the case of the cruise ship sector, often the workers on board are employed by land based companies with a concession/license («concessionaires») to operate on the ship (for example, gift ships or health spas).<sup>66</sup> In the case of seafarers working internationally, the rapid resolution of employment issues such as a failure to provide for repatriation or pay wages or

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65) Although under the MLC, 2006 the SEA is a requirement for all ships, its function may differ for ships and seafarers operating only in the domestic trade of the flag State (unless the State allows foreign seafarers to work on its ships operating in its domestic trade) in that, from a legal point of view questions of jurisdiction and enforcement are probably less complex. In many cases ships operating only in the domestic trades and, in some regions, the regional /inter-island trade, have not necessarily been covered by the international maritime Conventions. Usually these are small ships and may operate on day trips only or short voyages. This means the SEA is a new requirement for this sector, which may also have other difficulties in meeting the MLC, 2006 requirements. Since these ships are not subject to PSC this is a sector where the ILO supervisory system will play a central role in considering questions of implementation on board ships and nationally.

66) This situation presents some specific legal difficulties. For example, USA case law under the relevant US statute, has found that the workers are considered seafarers, but the shipowners have not been considered liable as the shipowner was not the «employer». The «employers» on the other hand, have argued that they are not liable as the issue is a shipowner responsibility under the statute: Ssee: Middleton, P. G. (2010) «Concessionaires», Chapter VIII, *Benedict on Admiralty* (LexisNexis) at Section 8.06. In fact this situation is one of the issues the SEA requirement under the MLC, 2006 is intended to address.

medical costs etc. can be difficult, particularly where, as is often the case, the flag State has no jurisdiction over third party employers or recruitment and placement services or crewing agencies operating in another country. This creates a problem for seafarers as they will have difficulty obtaining a remedy until returning home and, even then, may have to resort to a court process and encounter jurisdictional issues. Equally it presents a problem for the flag State and ships/shipowners where ships are detained or face problems with inspection and certification because of the actions of a third party employer based in a country other than the flag State.

Despite the concerns that had been voiced for now well over half a century about the problem of «flags of convenience» administrations and, presumably, also the ships and shipowners operating under these flags, the MLC, 2006 squarely places responsibilities for almost all aspects of seafarers' working and living conditions on the «shipowner» and the flag State<sup>67</sup> The *travaux préparatoires* is clear on the intention of the drafters regarding the definition of a shipowner and the relationship to the SEA and the shipowner's role. As explained by McConnell, et al.<sup>68</sup>

The term 'shipowner' in Article II, paragraph 1(j) is aligned with the IMO conventions and is almost identical to the definition of 'company' found in the ISM Code to SOLAS and the STCW. It also based on, *inter alia*, the definition in the ILO's Convention No. 179. This comprehensive and complex definition has been designed to capture all known variations on corporate organizational, management, and operational practices in the sector. Importantly it specifically reflects the principle that 'shipowners' (as defined) are the responsible employers under the Convention with respect to all seafarers on board a ship.<sup>69</sup>

At the 94<sup>th</sup> ILC, the last clause of MLC, 2006 Article II, paragraph 1(j), which defines a shipowner, was amended, to add «. . . regardless of whether any other organization or persons fulfil certain of the duties or responsibilities on behalf of the shipowner» and the word 'agent' was proposed but not agreed as a deletion<sup>70</sup> The following

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67) MLC, 2006 Article II, paragraph 1(j).

68) McConnell (2011), *ibid*, note 18, p. 189-190.

69) ILO, Report I(1A), Note 3 (Article II) *Adoption of an Instrument to Consolidate the Maritime Labour Standards, ILC 94th Session, Geneva, 2006* : <http://www.ilo.org/public/english/standards/reIm/ilc94/rep-i-1a.pdf>

6. . . . The definition reflects the principle that shipowners are the responsible employers under the Convention with respect to all seafarers on board their ships, without prejudice to the right of the shipowner to recover the costs involved from others who may also have responsibility for the employment of a particular seafarer. This is expressly stated in Standard A2.5 (paragraph 4) on repatriation.

70) By the EU countries .See: ILO, *Report of the Committee of the Whole, 94<sup>th</sup> Session ILC, 2006, PR7 (Part I)*. <<http://www.ilo.org/public/english/standards/reIm/ilc94/pr-7-i.pdf>>

125. The Chairperson opened a general discussion on the issues raised in amendment D.8, submitted by the Government members of Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland,

extract of the discussion is admittedly lengthy but is important in terms of the range of countries expressing the shared views and the view of the shipowners and seafarers.<sup>71</sup> (emphasis added):

126. The Government member of the United Kingdom explained that the amendment comprised two elements. The deletion of the word «agent» was proposed solely for the sake of consistency, since a very similar definition of «shipowners» was provided in the International Safety Management (ISM) Code, 1993. The additional text had been drafted to clarify the provision and remove any uncertainty regarding the definition of a shipowner.

127. The Employer Vice-Chairperson supported the deletion of «agent», given its use in the ISM Code, as well as the inclusion of additional text proposed. This would clarify the point that the person ultimately responsible under the Convention was the shipowner, irrespective of the entity or person who represented him.

128. The Worker Vice-Chairperson recalled that the term «agent» was used in the Recruitment and Placement of Seafarers Convention, 1996 (No. 179) and therefore was not redundant. The responsibilities under the proposed Convention were significant and the shipowner was ultimately responsible. The speaker did not challenge the intent of the amendment, which was meant to facilitate identification of those responsible for ensuring compliance with the proposed Convention. The wording of the amendment led to confusion, however.

129. The Government member of Japan indicated that he would oppose the amendment, which would modify wording which was basically that contained in several international Conventions, including the SOLAS and STCW Conventions, the International Ship and Port Facility Security (ISPS) Code and ILO Conventions No. 179 and the Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No.180). By introducing new language, there was a danger that serious administrative difficulties could be caused if the meaning of the term «shipowner» differed from that used in other related instruments. Moreover if, as indicated by the sponsors of the amendment, there was no intent to introduce a substantive change, the amendment was not needed. Rather than increasing clarity, its effect would be to amplify uncertainties. The problem arose in situations in which a particular shipowner («A») decided to delegate certain operating or managerial responsibilities to another party («B»), who would then pass certain responsibilities to a third party («C») making it extremely difficult for the seafarer or the public authorities to identify the party truly responsible for fulfilling the obligations under the Convention, for example in relation to the payment of wages. The risk was that the proposed new wording would create a situation in which

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France, Germany, Greece, Iceland, Ireland, Italy, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Spain, Sweden and United Kingdom...

71) ILO, *Report of the Committee of the Whole*, 94<sup>th</sup> Session ILC, 2006, PR7 (Part I). Emphasis added. <<http://www.ilo.org/public/english/standards/relm/ilc/ilc94/pr-7-i.pdf>>

responsibilities could be endlessly passed from one party to another and in which it would be very difficult to identify the actual shipowner. The inclusion of such a clause would help unscrupulous shipowners to avoid their responsibilities.

130. The Government member of Egypt expressed opposition to the deletion of the term «agent», which was contained in other Conventions that needed to be taken into account in the present instrument. In practice, port state authorities very frequently contacted agents and representatives of shipowners, especially in the case of ships flying foreign flags, as it would otherwise be very difficult to identify the shipowner. The proposed additional text failed to clarify the original text and was likely to create further confusion.

131. The Government member of Norway indicated that the problem lay with the very structure of the shipping industry, and the need for definitions to be adapted to current realities, rather than the other way round. It was very common for functions, such as manning, technical management or commercial operation, to be subcontracted to other entities. In such a situation, it was necessary to be able to identify the party with the final responsibility. In a context of shared or subcontracted responsibilities, the amendment sought to make it easier to identify the single responsible entity, irrespective of any subcontracting arrangements which might be in place.

132. The Government member of the United Kingdom affirmed that the purpose of the amendment was to provide greater clarity and precision in identifying the ultimate single responsible entity in a complex situation in which the management of ships often involved many subcontracting arrangements. Referring to the example given by the Government member of Japan, he stressed that the intent was to be able to identify party «A». He recalled that in the proposed maritime labour certificate and sample declaration of maritime labour compliance, there was only a single line to enter the details of the shipowner. If any of the wording was causing confusion, such as the term «irrespective», which might be clearer in the French and Spanish versions of the amendment, the input of the Drafting Committee would be welcome.

133. The Government member of France confirmed that the intent of the amendment was to avoid any dilution of responsibility, especially in triangular employment relationships. The French version of the proposed amendment was clear.

134. The Government member of Germany added that the amendment sought to ensure that the responsibilities set out in the Convention could not be avoided through delegation or subcontracting arrangements. It was not the aim of the amendment to reduce the responsibilities of shipowners, but to define them more clearly.

135. The Government member of Singapore believed that the present text of subparagraph 1(j) was sufficiently clear. It should not be modified.

136. The Government member of Spain believed that the proposed amendment served an important purpose in taking into account the real situation in today's

world in social and labour relations. The shipowner needed to be clearly identified as the ultimately responsible party, regardless of any subcontracting arrangement. The Spanish version might need to be referred to the Drafting Committee, as a minor inconsistency had slipped into the text as compared to the English and French versions.

137. The Government member of Malta proposed that the term «irrespective» in the English version of the amendment, which appeared to be causing some confusion, could be brought closer to the French and Spanish versions, for example by using a term such as «independently».

138. The Government member of Japan reaffirmed his opposition to the amendment. It was the duty of governments to protect the rights of seafarers, even where necessary, by making use of administrative or judicial proceedings. Objective criteria were therefore required for the identification of the shipowner. The wording used in the Convention should be that used in other ILO and IMO instruments so as to prevent any dilution of the protection afforded to seafarers, or any blame being attached to national authorities for failure to protect their rights. The word «irrespective» seemed to be a source of confusion.

139. The Government member of Panama supported the comment made by the Government member of the United Kingdom. The main issue was to ensure that the responsibility of the shipowner was not diluted.

140. The Government member of South Africa said that the amendment created confusion as to the entity ultimately responsible for the vessel. The amendment would also dilute the protection provided under joint and several liability.

141. The Government member of Denmark said that the amendment was essential. The objective was to define the shipowner so as to clearly show who was ultimately responsible for discharging the responsibilities set out in the Convention. Shared responsibility was often weakened responsibility.

142. The Government member of Greece said that the amendment did not encourage subcontracting. However, in cases where subcontracting did exist, the competent authority needed to be able to identify the entity ultimately responsible for the operation of the ship.

143. The Government member of Australia stated that a specific party would have to request the maritime labour certificate from the government, and would be required to provide all relevant information. As with the IMO ISM Code, 1993, finding the entity whose name was on the certificate would not be difficult, since that entity had approached the authorities originally to obtain the certificate.

144. The Government member of Benin agreed with the Government members of Japan and Singapore that it would be best to be consistent with the definitions used in other international instruments. Rather than adding clarity, the amendment created greater confusion.

145. The Employer Vice-Chairperson noted that the proposed language allowed for many interpretations. The Convention would be harmed by this kind of ambiguity. The Committee's intent was that the responsibility should remain

ultimately with the shipowner. Perhaps the Drafting Committee could assist in clarifying the language while maintaining this intent.

146. The Worker Vice-Chairperson said that some clarity had been provided by the discussion. The Workers' group was aware of issues such as flags of convenience and beneficial owners, and therefore supported any wording which made it easier to identify the true responsible entity. However, there appeared to be a problem with the drafting of the proposed amendment. It might be clearer, for example, if the various sections of subparagraph (j) could be broken up, perhaps using dashes, so as to make it clear that the phrase «irrespective of any subcontracting to other organizations or persons to perform certain duties and responsibilities on his or her behalf» referred to all of the possible entities identified. The Workers' group could support the amendment if it served the purpose for which it was intended. However, it did not yet do so and would therefore need to be submitted to the Drafting Committee for possible restructuring. The Workers' group opposed the deletion of the word «agent».

147. The Government member of the United Kingdom agreed that the matter could be referred to the Drafting Committee, with the understanding that the discussion of the issue would resume within the Committee subsequent to the advice provided by the Drafting Committee.

148. The Chairperson noted the Committee's agreement on the intended meaning of subparagraph (j) and referred the matter to the Drafting Committee.

149. The Drafting Committee proposed the following wording for Article II, paragraph 1(j):

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

150. The Employer and Worker Vice-Chairpersons supported the proposal.

151. The Committee adopted proposal C.R./D.4 from the Drafting Committee. As a result, amendment D.8 fell.

152. Subparagraph 1(j) was adopted as amended.

As the foregoing clearly indicates there was tripartite consensus involving many major flag States and, importantly, the shipowners' representative that the ultimate point for responsibility, irrespective of any individual or corporate contractual arrangements is the shipowner and therefore the flag State which also has international responsibility for the ship.

This emphasis on shipowner responsibility is reinforced by the obligations, as discussed earlier in section 2, on flag States to require some form of financial security

from ships/ shipowners to address responsibilities for repatriation and shipowners' liability in the event of seafarer illness or injury and, in the future, to also provide evidence of protection of seafarers in the case of abandonment.

Why would an instrument that was negotiated on an international tripartite basis with strong seafarer representation and an equal vote to shipowners support this approach?

The answer appears to lie with the shared view and agreement between the representatives of the shipowners and the seafarers and also the wider industry view that, with the decline in interest in seafaring as a profession, conditions in the sector needed to improve. As explained earlier they developed what can be described as a «strategically pragmatic» approach involving the interplay of above noted elements of the Convention. There was agreement that the approach must be to ensure a level playing field so that shipowners and flag States applying these international standards are not disadvantaged and, arguably, have an advantage, particularly in connection with PSC. In the face of the various options as to which actor in a web of corporate actors could or should be held responsible in a way that helps ensure the fastest most effective solution for seafarers, the decision to strengthen the role and responsibilities of the shipowner and the flag State can be seen as the simplest and perhaps most certain solution in this globalized context, and where the responsible entity captured by the term «shipowner» is easily identified in the SEA. This is evident in the core requirement that the SEA must be signed by the shipowner (or a representative of the shipowner<sup>72</sup>) and seafarer thereby establishing a contractual relationship between the two.<sup>73</sup>

The interesting aspect of this development is that the industry practice regarding use of manning agencies or the existence of outside employers, particularly for example in the cruise ship sector, was well understood and debated at length, mainly, but not solely, in the context of the definition of seafarer during the negotiation of the MLC, 2006. However, ultimately, the above noted approach emerged, although, as discussed in section 4.2 below, it has proved to pose some challenges for national

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72) See also the discussion below in section 4.2. In principle, this could allow an outside employer to sign the SEA as a representative of the shipowner, if legally authorized by the shipowner to do so on its behalf – that is - not in their own capacity. However, it seems unlikely that shipowners would consider it advisable to give carte blanche to outside employers to represent them in this way. Equally it seems unlikely that an employer would be viewed as the «shipowner» as it would mean assuming the responsibilities for operating the ship as indicated under the definition of shipowner. In practice the master, although also a seafarer and also required to have a SEA, is understood to be the representative of the shipowner for this purpose.

73) Standard A2.1 paragraph 1. The wording of Standard A2.1, paragraph 1, was drafted to avoid a possible problem of contracting out of the MLC, 2006. Where a seafarer is self-employed, his or her legal arrangements/contract would still need to provide for the same matters.

legal implementation.

From<sup>74</sup> a practical perspective this means that under the approach adopted by the MLC, 2006 the shipowner has overall responsibility for all aspects of working and living conditions on board: seafarers should not have to deal with more than one person with respect to their working and living conditions, and that one person should be the shipowner, who should take responsibility for ensuring that those conditions conform to the requirements of the MLC, 2006, and are respected. This is not simply question of jurisdiction and applicable law but also relates at a practical level to the nature of working life on board ship.

From a purely legal perspective this contractual approach may, at first, seem problematic in that a seafarer may already have an employment contract with his/her employer, who will already be responsible for honouring the obligations in that agreement, in particular those relating to the payment of wages and allowances and social protection obligations, matters that must be included in the SEA. On the other hand it is equally clear that there are certain important elements in the SEA contractual relationship that are of concern to the shipowner rather than to the outside or third party employer (e.g., relating to policies regarding behaviour on board, the authority of the master, and safety at sea, hour or of rest or work, complaints onboard)<sup>75</sup>.

However, this does not mean that the shipowner has to renegotiate an existing agreement between the seafarer and the outside employer. There are potentially a number of solutions, some of which as discussed in the next section have been adopted to implement the MLC, 2006.

For example, although perhaps unusual in principle, there is no reason why a seafarer cannot have two legally enforceable agreements one with the outside third party employer and one with the shipowner. Obviously a seafarer could not expect to obtain double compensation, however the right to seek a remedy or even bring an action against either party should not be an issue. In that case it seems obvious a shipowner, as a contractual party, in cases where there may be an outside employer involved who would be held responsible for the obligations of the other would want to obtain some sort of guarantee or a hold harmless clause in the shipowner's contractual arrangements with the other employer. As noted early this is already referred to in Standard A2.5, paragraph 4, in the case of repatriation costs.

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74) The following discussion draws upon aspects of the discussion in McConnell et al, (2011) *ibid*, note 18, pp. 289-291.

75) In view of their personal nature, it seems understandable that the related obligations should be entered into by the seafarers themselves (as required by Standard A2.1) rather than by their outside employer acting as their representative.

Similarly a SEA with, for example, a signature by both the shipowner and an outside employer would be viable if it is clear in the SEA that the shipowner is directly responsible to the seafarer for all matters as a matter of joint and several liability or as a guarantor of the outside or third party employer.

Alternatively a SEA with a shipowner could, for example, set out the ship-related conditions of employment and then provide, much like the incorporation by reference of a collective bargaining agreement as envisaged in the paragraph 2 of Regulation 2.1, that all other terms and conditions are contained in the employment agreement concluded between the seafarer and the outside employer. That agreement would be annexed as a schedule to the SEA (and would be subject to flag and port State inspection). The shipowner would, however, have to make sure that the employment terms in the annexed agreement are consistent with the flag State's national requirements implementing the MLC, 2006 and that there are no gaps in coverage<sup>76</sup>

All of these solutions essentially relate to an evaluation of relative negotiating power. They reflect the view that shipowners are in the best position in terms of negotiating arrangements with any other entities involved, for example concessionaires, that may have employer responsibilities for seafarers on the ship, to ensure that the shipowners are reimbursed in the event they have to pay wages or other matters that are, by agreement, the primary responsibility of the outside employer. The industry has in fact clearly responded to this approach, not only through development of insurance to cover a number of matters, but also through the adoption of standard clauses for industry contracts such those developed through the Baltic and International Maritime Council (BIMCO).<sup>77</sup>

As explained in section 2, the role of the SEA under the system of the MLC, 2006 recognizes the increasing role and responsibilities of private seafarer recruitment and placement services, most of which are located outside the jurisdiction of the flag State. The Convention includes the innovative, albeit viewed by some countries<sup>78</sup> as

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76) In this case it would also be advisable for the shipowner to conclude a 'hold harmless' agreement with the outside employer.

77) This appears to be the response of the industry to potentially complex contractual questions. See e.g., BIMCO «Recommended Additional MLC 2006 Clauses for BIMCO Contracts», Special Circular No. 2 (11 June 2013), «[t]o address the issue of shipboard personnel not directly employed by the owners, BIMCO has developed a suite of Recommended Additional MLC Clauses for BIMCO Contracts. The Clauses are designed to be added to specific BIMCO contracts as a supplementary clause. The specific BIMCO contracts are SUPPLYTIME, SHIPMAN and CREWMAN», online: BIMCO <[www.bimco.org/-/media/Chartering/Special\\_Circulars/SC2013\\_02\\_R030713.ashx](http://www.bimco.org/-/media/Chartering/Special_Circulars/SC2013_02_R030713.ashx)>

78) This was raised by the United Kingdom during the first meeting of the Special Tripartite Committee (STC) established under Article XIII of the MLC, 2006, 7-11 April 2014 : See *Report of the meeting*, ILO Doc. GB322./LILS/3 <[http://www.ilo.org/gb/GBSessions/GB322/lils/WCMS\\_315447/lang-en/index.htm](http://www.ilo.org/gb/GBSessions/GB322/lils/WCMS_315447/lang-en/index.htm)>

409. The representative of the Government of the United Kingdom indicated that his Government

legally difficult to implement, requirement that the service in question has a system of protection such as insurance or an equivalent measure to compensate seafarers for monetary loss that may incur as result of a failure of the service or a shipowner under the SEA. As noted in section 2 above, this provides the logical counter balance to the system of holding the shipowner also responsible for employment rights under the SEA even if the seafarer has an outside or third party employer. In other words

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had some concerns with regard to the system of protection of seafarers. Standard A1.4, paragraph 5(c)(vi), of the Convention established a system to compensate seafarers for monetary loss that they may incur as a result of the failure of a recruitment and placement service or the relevant shipowner under the seafarers' employment agreement (SEA) to meet its obligations to them. While the MLC, 2006, aimed to create decent conditions and a level playing field for shipowners, that provision was open to wide interpretation. He expressed the hope that through the present discussions, guidance or proposals for amendments for future meetings could be developed. Specific issues included, inter alia, the nature of the losses to be covered; the nature of the organizations to be covered and whether the recruiter and shipowner might be expected to cover the same obligations; the legal feasibility of a legal entity obtaining insurance in respect of seafarers for whom that entity no longer had a contractual relationship; the commercial viability of such insurance for small businesses and possible equivalent appropriate measures.

410. The Seafarer spokesperson raised the question of whether employment agencies were covered under the Convention, because, unlike employment and recruitment services, the Convention was silent with regard to the former. The Private Employment Agencies Convention, 1997 (No. 181), would cover employment agencies, but since the Convention was relatively recent, he asked the Office for clarification on this issue

411. The Chairperson of the Government group, indicated that while there were a lot of similarities between national systems, not all governments had experience with private recruitment services. In the event governments had a legal issue, they could refer to the comments of the CEACR and advice provided by the Office. The representative of the Government of the Philippines indicated that, in his country, employment agencies could directly hire seafarers, were considered as direct employers under the law and were covered by the national Labour Code. Otherwise, the seafarer was hired by an agency, which fell under the national recruitment and placement laws. Those laws went beyond the requirements of Standard A1.4 by instituting a licensing system for recruitment and/or manning agencies with requirements as regards capitalization and an escrow of 1 million pesos for claims. In addition, there was joint and several liability on the part of recruitment and/or manning agencies and shipowners in relation to seafarers' money claims, as well as joint and several liability for officers and employees of such agencies, who could be personally liable. The representative of the Government of Norway considered that the points raised by the United Kingdom pointed to a legal ambiguity in Standard A1.4, paragraph 5(c)(vi), which could result in difficulties to obtain insurance for relevant businesses. This problem had been examined when the principles of the Recruitment and Placement of Seafarers Convention, 1996 (No. 179), had been incorporated in the MLC, 2006, and they might wish to deal with the issue in the future. The representative of the Government of China stated that, even though China had not ratified the Convention, the arrangements in place with regard to Standard A1.4 were in line with the requirements of the MLC, 2006, as laws and regulations required a licencing system for recruitment agencies. It was hoped that the ILO would give further guidance on this item in the future. The representative of the Government of Singapore explained that, in Singapore, there were three situations of recruitment of seafarers: recruitment by recruitment and placement agencies; recruitment by shipowner subsidiary companies; and recruitment by the shipping companies. Licences were only required in the first two cases. However, all three cases had to comply with the requirements of Standard A1.4. Recruitment and placement services could opt to use insurance or a bank guarantee, among other options, to provide seafarers with a system of protection under MLC, 2006, Standard A1.4, paragraph 5(c)(vi).

just as a shipowner is expected to pay for repatriation costs (and must have financial security in place) in the event the responsible employer does not do so, in the event a shipowner does not live up to its obligations then any private service that may have been involved in the recruiting the seafarer can also be held responsible and a system of protection such as insurance must be in place. As with the shipowners presumably these services would or should also require indemnification or hold harmless clauses in arrangements with shipowners. In either case the central point is that the seafarer is to be protected with issues relating to ultimate liability under the various corporate arrangements, left as matter to be addressed by the shipowner and other actors concerned.

However the underlying legal questions of contract formation and party autonomy cannot be ignored and, as discussed below, has given rise to some uncertainty and questions where a SEA (including collective bargaining agreements that provide the content of a SEA), contain a choice of law and/ or forum clause. The MLC, 2006 does not contain a provision expressly addressing this issue although, as explained in section 4.2 below, the issue was discussed and was considered resolved during the negotiation of the Convention. The predecessor Convention No. 22 contains a provision regarding jurisdiction but it refers only to the «ordinary rules as to jurisdiction».<sup>79</sup> However Convention No. 22 dates from a period before the rise of international registers and the transnational maritime work force and there was less likelihood of question of multiple jurisdictions. As discussed below the related requirement that the shipowner be a signatory/party to the SEA has also presented some difficulties.

## 4.2 The SEA and national implementation

The following discussion of national implementation must be understood in context: it relates to emerging understanding and practices since the MLC, 2006 became operative in August 2013 with the first examination by the ILO supervisory system occurring only in November 2014. It is likely that with more experience in the sector over the next few years common approaches will surface. In connection with national implementation issues it is of interest to note that, aside from the debates discussed above regarding the definition of shipowner, the requirements regarding the SEA in Regulation 2.1 and the Code were adopted with almost no discussion at the 94<sup>th</sup>

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<sup>79</sup>) Convention No. 22, (1926) [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C022](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C022)

### Article 4

1. Adequate measures shall be taken in accordance with national law for ensuring that the agreement shall not contain any stipulation by which the parties purport to contract in advance to depart from the ordinary rules as to jurisdiction over the agreement.
2. This Article shall not be interpreted as excluding a reference to arbitration.

ILC.<sup>80</sup> This might suggest, therefore, that there was a high degree of international consensus and that implementation would not be present difficulties.

Although there have been some interesting questions on the application of various requirements<sup>81</sup> related to the SEA, this section of the Chapter specifically considers

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80) ILO, *Report of the Committee of the Whole*, 94<sup>th</sup> Session ILC, 2006, PR7 (Part I) paragraphs 393 to 417.

The two issues that arose related to Standard A2.1 paragraph 1(c) regarding copies vs originals of the SEA and in paragraph 4 (a) the reference, which was deleted, to the seafarer's «family» name <<http://www.ilo.org/public/english/standards/relm/ilc/ilc94/pr-7-i.pdf>>

81) For example interesting and important SEA related issues have arisen with respect to the interaction between the requirements for repatriation and the requirement for paid annual leave in connection with the question of length of service on board ship and renewal or extension of a SEA. Another interesting issue, which relates to changing industry contracting practices, is the question of whether seafarers' paid annual leave must also include all benefits such as those set out under shipowners' liability for sickness so that the seafarer remains under the SEA until the end of the paid annual leave entitlement. The ILO 2015 FAQ provides some information on the first of the issues. <[http://www.ilo.org/wcmsp5/groups/public/-ed\\_norm/-normes/documents/publication/wcms\\_237451.pdf#page=1](http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-normes/documents/publication/wcms_237451.pdf#page=1)>

**C2.1.j. Does the MLC, 2006 set a maximum limit on the length of an employment agreement? Can I have an SEA for a period longer than 12 months?**

The MLC, 2006 does not set a maximum period for a contract of employment. In fact Standard A2.1 envisages SEAs of an indefinite period. However, the interaction between the right of a seafarer to be repatriated after a maximum period of service on board (a period less than 12 months) under Standard A2.5 [see C2.5.g. Can a seafarer decide not to exercise a right to be repatriated when that entitlement arises?] and the obligation of the flag State under Regulation 2.4 and the Code to require that seafarers be given the minimum paid annual leave [see C2.4.a. What is a seafarer's minimum entitlement to paid leave?] establishes some limitations on the period of continuous service on board a ship or ships. The specific limits will include questions such as whether the competent authority has decided in some cases to permit seafarers to forgo their minimum paid annual leave [see C2.4.b. Can a seafarer agree to be paid instead of actually taking paid leave?] or to whether a seafarer has chosen not to exercise her or his right to be repatriated [see C2.5.g. Can a seafarer decide not to exercise the right to be repatriated when the entitlement arises?] are matters for national law and practice, including applicable collective agreements.

**C2.1.k. Can I sign consecutive SEAs that cover a period longer than 12 months?**

Yes. However, the period of continuous service on board a ship or ships would still be subject to the applicable national requirements that seafarers be given minimum paid annual leave under Regulation 2.4 and the Code [see C2.4.a. What is a seafarer's minimum entitlement to paid leave?] and the right of a seafarer to be repatriated after a maximum period of service on board (a period less than 12 months) under Standard A2.5 [see C2.5.a. What is the entitlement to repatriation?]. These are matters for national law and practice, including applicable collective agreements. [see C2.1.j. Does the MLC, 2006 set a maximum limit on the length of an employment agreement? Can I have an SEA for a period longer than 12 months?].

The second issue may well arise in the future meetings at the ILO as it relates to the underlying question of shorter term or voyage contracts which terminate the relationship with the particular shipowner once the seafarer is repatriated (usually without having exercised any or all of her or his paid leave entitlement) versus indefinite or longer term contracts and the nature of paid annual leave in the first context vs lump sum leave or holiday pay entitlements upon termination of the employment relationship. The historical reasons for this are of some interest but are outside the scope of this chapter; See: New Zealand, House of Representatives, *Report of the New Zealand Delegation on the Twenty-Eighth (Maritime)*

two issues that have been raised by governments in international meetings. The two issues are jurisdiction with respect the SEA and the applicable national law and the related question of the shipowner signature requirement even in cases where a third party or outside employer also has responsibilities.

In terms of constraints on national implementation, although the MLC, 2006 establishes requirements as to the process for signature by seafarer and for the form and content of the SEA, it does not contain a mandatory model form for the SEA. This is because there was an intention to allow for a variety of national legal practices, as indicated in the inclusive definition in Article II, paragraph 1 (g) «*seafarers employment agreement* includes both a contract of employment and articles of agreement». However the SEA must be in a «clear, written legal enforceable agreement» that is «consistent with the standards set out in the Code.»<sup>82</sup> As mentioned earlier, Standard A2.1, includes requirements regarding signatures by the shipowner and the seafarer, copies of the agreement, the process related protections for seafarers, and, importantly, the list of the 10 matters which, as a minimum, must be included in the SEA. In addition, as explained in sections 1 and 2 and 4.1 above, importantly the SEA is a matter to be inspected by flag States and is subject to inspection during PSC, however it does not provide the substantive content of the various terms of employment referred to in the SEA.<sup>83</sup> These are found elsewhere in the other Regulations and the related Code provisions in the MLC, 2006, many of which, while subject to flag State inspection and verification, are not on the list of areas to be certified and, other than through the seafarer complaint system<sup>84</sup> established under the MLC, 2006, are areas that «in principle»<sup>85</sup> are not subject to PSC inspection. However the fact that these are all areas that require the flag State to ensure compliance with the MLC, 2006 as implemented nationally before issuing an MLC to a ship means that the flag State has a legal responsibility to verify compliance with its national laws or regulations on at least the ten matters in the

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*Session of the International Labour Conference, Seattle, Washington . 1946*, AJHR, 1946, I, A-07a.pdf, Report of the Government Delegation. <ajs.natlib.govt.nz/cgi-bin/atojs?a=d&cl=search&d=AJHR1946-I.2.1.2.9&srpos=9&e=——10—1—bySH—0-AJHR\_1946\_I\_AZz-B->

82) Regulation 2.1 paragraph 1.

83) A point that has been misunderstood by some authors.

84) See Standard A5.2.1, paragraphs 1 (d) and 3 and Regulation 5.2.2. See also ILO *Guidelines for port State control officers carrying out inspections under the Maritime Labour Convention, 2006* <[http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—normes/documents/publication/wcms\\_101787.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—normes/documents/publication/wcms_101787.pdf)>

85) The on-board documents provide *prima facie* evidence of compliance. However in cases where a more detailed inspection is carried out by a PSCO then, in accordance with paragraph 2 of Standard A5.2.1, that inspection shall in principle cover the matters listed in Appendix A5-III. For the list see *ibid*, note 37. See also ILO *Guidelines for port State control officers carrying out inspections under the Maritime Labour Convention, 2006* <[http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—normes/documents/publication/wcms\\_101787.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—normes/documents/publication/wcms_101787.pdf)>

SEA as well as any other topics in the list of 14 areas to be dealt with in the DMLC Parts I and II and certified.<sup>86</sup> Regulation 5.1.3 paragraph 3 provides (emphasis added)

3. Each Member shall require ships that fly its flag to carry and maintain a maritime labour certificate certifying that the working and living conditions of seafarers on the ship, including measures for ongoing compliance to be included in the declaration of maritime labour compliance referred to in paragraph 4 of this Regulation, have been inspected and meet the requirements of national laws or regulations or other measures implementing this Convention.

The mandatory wording of the forms for the MLC and the DMLC is legally significant in this respect.<sup>87</sup> The form for the MLC, which is contained in Appendix A5-II of the Convention, certifies that (emphasis added):

1. That this ship has been inspected and verified to be in compliance with the requirements of the Convention, and the provisions of the attached Declaration of Maritime Labour Compliance.

2. That the seafarers' working and living conditions specified<sup>37</sup> in Appendix A5-I of the Convention were found to correspond to the above mentioned country's national requirements implementing the Convention. These national requirements are summarized in the Declaration of Maritime Labour Compliance, Part I.

The form for the DMLC, which is also contained in Appendix A5-II, requires that the flag State set out information regarding its national requirements for the 14 areas including information with respect to any exemptions that have been granted under Title 3 or the use of substantial equivalencies under Article VI paragraphs 3 and 4<sup>88</sup> in the national implementation of the Code of the MLC, 2006.

The foregoing extracts all serve to illustrate the emphasis in MLC, 2006 on the role of the flag State and its central interest, indeed obligation, to ensure that on ships

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86) Although the wording in the Convention is not entirely clear on this point, this is the understanding with respect to Regulation 5.1.1 paragraph 4 and is reflected the approach taken in the ILO *Guidelines for flag State inspections under the Maritime Labour Convention, 2006* that were adopted in 2008 by an international tripartite meeting of experts:  
<[http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—normes/documents/publication/wcms\\_101788.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—normes/documents/publication/wcms_101788.pdf)>

87) Regulation.5.1.3 paragraphs 4 and 5 provide:

4. Each Member shall require ships that fly its flag to carry and maintain a declaration of maritime labour compliance stating the national requirements implementing this Convention for the working and living conditions for seafarers and setting out the measures adopted by the shipowner to ensure compliance with the requirements on the ship or ships concerned.

5. The maritime labour certificate and the declaration of maritime labour compliance shall conform to the model prescribed by the Code.

88) See discussion *ibid.*, note 29.

under its flag, and the SEAs and their content are consistent with the its national requirements implementing the MLC, 2006.

Despite this apparent clarity the question of the primacy of the flag State role in the context of the LOSC and the SEA have arisen. It was formally raised in a written document and in a statement by the representative of one of the largest flag States (based on GT of ships under its flag) at an international meeting at the ILO in April 2014<sup>89</sup>:

413. The representative of the Government of the Marshall Islands recalled that Article 94 of the United Nations Convention on the Law of the Sea (UNCLOS) required «every State to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag». It also required every State to take such measures for ships flying its flag «as are necessary to ensure the safety at sea with regard, inter alia, to: «... the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments». The MLC, 2006, also recognized the jurisdiction of a flag State over its vessels. However, a problem had arisen with respect to the MLC, 2006, and the incorporation of CBAs into SEAs. Some CBAs required the resolution of disputes involving contracts for seafaring labour to be resolved under the laws in the seafarer's country of residence rather than those of the flag State. This had caused a major conflict and an over-abundance of cases of non-conformity issued by inspectors to Marshall Islands-flagged vessels. Unilateral action had to be taken to accept dispute resolution under other member States' laws, where those were substantially equivalent or not of a lesser standard, following a review of the laws and regulations of other member States. From a practical standpoint, that placed a significant administrative burden upon member States. Noting that Article I, paragraph 2, of the MLC, 2006, required that «Members shall cooperate with each other for the purpose of ensuring the effective implementation and enforcement of this Convention.», the Marshall Islands had sought to discuss this issue on a bilateral basis with other member States confronted with similar problems. He requested the Office to provide legal guidance in this respect and would welcome discussion with other member States that were labour supplying States.

414. The Seafarer spokesperson indicated that the concern raised by the representative of the Government of the Marshall Islands had been discussed at

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89) The written document is longer but was informally circulated and is not part of the official records. *Report of the first meeting of the Special Tripartite Committee established under Article XIII of the Maritime Labour Convention, 2006 (Geneva, 7–11 April 2014) Report of the Chairperson to the Governing Body, in accordance with Article 16 of the Standing Orders of the Special Tripartite Committee.* ILO Doc.No. GB.322/LILS/  
<[http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—relconf/documents/meetingdocument/wcms\\_315447.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_315447.pdf)>

considerable length in 2006, when the Convention had been adopted and referred in that respect to paragraphs 903–906 of the report of the Committee of the Whole of the 94<sup>th</sup> Session of the International Labour Conference. He recalled that in previous meetings, the right of redress had been discussed, a right enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. During the process of negotiation of the text of the MLC, 2006, a compromise had been reached and it was therefore unnecessary to further discuss this issue.

415. The representative of the Government of the Philippines, referring to the MLC, 2006, indicated that member States had responsibilities, which included regulating the recruitment and placement services and the social security coverage of seafarers. His Government would gladly accept bilateral negotiations with the Marshall Islands and other member States based on Article I, paragraph 2, of the MLC, 2006.

The Seafarer spokesperson's comments appear to relate to a different issue in the context of PSCO and access to courts or procedures to investigate complaints in port States, however the concern for the Marshall Islands<sup>90</sup> is as indicated in the statement different matter and is not only confined to SEAs incorporating CBAs. In addition to the administrative issues raised, Marshall Island law provides that it applies to SEAs.<sup>91</sup> However, as reflected in the response by the representative of the Philippines, the Philippines is the country of residence to a significant number –approximately one third– of the world's seafaring workforce and, as such, has a long standing institutional practice<sup>92</sup> with respect to the regulation of the terms of

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90) Although only raised in the meeting by the Marshall Islands, concerns about the POEA mandatory agreement which potentially conflicts with the flag State laws and may cause uncertainty during PSC have also been raised less formally by ROs and also some shipowners.

91) Republic of the Marshall Islands Maritime Act, 1990 (MI-107).

**§ 853. Contracts for seafaring labor.**

1. The following clause shall appear, or be by force of law included, in all contracts for seafaring labor on board vessels of the Republic:

«The parties to this contract hereby stipulate that the terms and conditions laid down herein shall be subject to the applicable provisions of the Maritime Law and Regulations of the Republic of the Marshall Islands. Any dispute as to the terms and conditions of this contract shall be resolved in accordance with the Maritime Law and Regulations of the Republic of the Marshall Islands.»

2. All contracts relating to service aboard a vessel registered under this Title shall be governed in interpretation and application by the Laws of the Republic, including this Chapter and any Regulations thereunder. [P.L. 1990-92, § 193.]

For more information on the regulatory situation see also Direct Request (comments) of the ILO Committee of Experts in 2014 (published 104<sup>th</sup> session of the ILC 2015) after examination of the national report by the Republic of the Marshall Islands:

<[http://www.ilo.org/dyn/normlex/en/f?p=1000:80031:0::NO:80031:P80031\\_COMMENT\\_ID:3186229](http://www.ilo.org/dyn/normlex/en/f?p=1000:80031:0::NO:80031:P80031_COMMENT_ID:3186229)>

92) The Department of Labour, through the Philippines Overseas Employment Agency (POEA) regulates

employment for Filipino seafarers working internationally. This includes a mandatory standard form POEA agreement<sup>93</sup> which includes *inter alia* clauses on choice of law and choice of forum both of which designate the Philippines as the location of choice. The POEA agreements are of interest in that they appear to serve a dual purpose. They protect the seafarer in question with minimum standards including social protection etc in the event the flag State does not do so.<sup>94</sup>

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recruitment and placement of seafarers and other workers internationally. <<http://www.poea.gov.ph/>> See for example rules regarding oversea employment of seafarers «Standard Terms and Conditions Governing the Overseas Employment of Filipino Seafarers On-board Ocean-Going Ships» (Memorandum Circular of the Philippine Overseas Employment Administration (POEA) No. 10 of 2010 (legislation under revision to implement the MLC, 2006). <<http://www.poea.gov.ph/MCs/MC%202010/MC-10-2010.pdf>> . See also Memorandum Circular of the Philippine Overseas Employment Administration (POEA) No. 04 of 2013 regarding «Revision of the One-Page Covering Employment Contract» to include information required under Standard A2.1 of the MLC, 2006 on the seafarer's date of birth and place of birth, shipowner's address and reference to any collective bargaining agreement, if applicable. <http://www.poea.gov.ph/MCs/MC%202013/MC-04-2013.pdf>> the standard form cover page incorporates by reference the standard term of employment in POEA Memorandum No.10 of 2010.

For more information on the regulatory situation see also Direct Request (comments) of the ILO Committee of Experts in 2014 (published 104<sup>th</sup> session of the ILC 2015) after examination of the national report by the Philippines, refers to other regulatory provisions:

<[http://www.ilo.org/dyn/normlex/en/f?p=1000:80031:0::NO:80031:P80031\\_COMMENT\\_ID:3190199?93](http://www.ilo.org/dyn/normlex/en/f?p=1000:80031:0::NO:80031:P80031_COMMENT_ID:3190199?93)> <<http://www.poea.gov.ph/MCs/MC%202010/MC-10-2010.pdf>> see sections 29-31.

94) It is perhaps surprising, therefore, that it does not appear that shipowners seek to avoid these choice of law and forum clauses but rather the cases (often involving tort based claims), are brought by Filipino seafarers who do not wish to be bound by these clauses, presumably because their remedies may be better under other legal systems.

As noted by US District Court, in *Ernany De Joseph v Odffell Tankers (USA), Inc* 196 F Supp 2d 476 <<http://law.justia.com/cases/federal/district-courts/FSupp2/196/476/2517879/>> in connection with forum clause in the POEA contract:

[...] Although the Court admittedly sympathizes with Plaintiff's plight, as it does in any and every case involving an injured seaman, it also realizes that the POEA forum selection clause was designed to protect Filipino seamen working aboard international vessels. That vessel owners, who are also obliged to accept the POEA terms, rather than Filipino seamen, have thus far been the parties seeking to enforce these clauses, does not in any way diminish the beneficent and liberal purposes behind the enactment.

In general Courts have upheld the choice of law and or forum clauses in the seafarer employment contracts: See for e.g., *The «Rainbow Joy»*[2005] 3 SLR 719; [2005] SGCA 36, <<http://www.singaporelaw.sg/rss/judg/48879.html>> where the court noted the following with respect to the POEA agreement clause regarding the application of Philippines law (emphasis added):

30 The appellant submitted that the governing law relating to his contract of employment was the law of the flag of the vessel, namely, Hong Kong law. Moreover, the instant claim could be framed either in contract or in tort and the tort having been committed on board the vessel, Hong Kong law should apply.

31 As a general proposition, it is probably correct to say that the law of the flag country should apply in relation to a tort committed on board a vessel which is then on the high seas. However, where in the contract of employment the parties have specified the governing law, the contract term should prevail. *Dacey and Morris on The Conflict of Laws* (Sweet & Maxwell, 13<sup>th</sup> Ed, 2000) («*Dacey and Morris*») states at para 32-005:

At common law, the starting point was that every contract was governed at its outset by its

However, at the same time they are clearly designed to ensure that the work force also serves the wider public interest of supporting the Philippines economy and ensuring that its seafarers remain competitive in a sector, that is increasingly competitive with seafarers resident in other countries, particularly emerging economies, also seeking to enter the international workforce.

The wider issue of party autonomy in the context of the emphasis in the MLC, 2006 on the flag State's role and responsibilities and public policy as reflected by the adoption of the MLC, 2006 is to ensure a high degree of uniformity in seafarers' employment at least with respect to the respect for minimum standards. In addition to the concerns raised by the Marshall Islands, the underlying concern is to ensure

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«proper law», a term coined by Westlake. When the parties had expressed their intention as to the law governing the contract, their expressed intention, in general, determined the proper law of the contract, at any rate if the application of foreign law was not contrary to public policy and the choice was «bona fide and legal». Where there was no express selection of the governing law, an intention with regard to the law to govern the contract could be inferred from the terms and nature of the contract and from the general circumstances of the case. When the intention of the parties to a contract with regard to the law governing it was not expressed and could not be inferred from the circumstances, the contract was governed by the system of law with which the transaction had its closest and most real connection.

32 Notwithstanding this clear statement of principle in *Dacey and Morris* that where the contract provides for the governing law, that should be the applicable law, the appellant relied on the Canadian Federal Court of Appeal's decision in *The Ship «Mercury Bell» v Amosin* (1986) 27 DLR (4<sup>th</sup>) 641 («*Mercury Bell*») to contend that the proper law of this contract of employment between the appellant and the respondent was the law of the flag. However, we do not understand *Mercury Bell* as having held that the flag state law should apply in any event, even in the face of an express governing law provision. This can be seen from the main judgment in the case delivered by Marceau J (at 644):

There is no doubt that to determine the rights of seamen against the owners of the ship on which they are serving, which is the subject-matter of the action, the law of the ship's port of registry is to be looked at. This is required by «the well-established rule of international law that the law of the flag state ordinarily governs the international affairs of a ship» (*McCulloch v. Sociedad Nacional de Marineros de Honduras* (1962), 372 U.S. 10 at p. 21 (U.S. Sup. Ct., 1963)), a rule formally confirmed in s 274 of the *Canada Shipping Act*, R.S.C., 1970 c. S-9, as amended, which reads as follows:

274. Where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, then, if there is in this Part any provision on the subject that is hereby expressly made to extend to that ship, the case shall be governed by that provision; but if there is no such provision, the case shall be governed by the law of the port at which the ship is registered.

That this action must be disposed of on the basis of the law of Liberia is therefore without question.

It did not appear to us that Marceau J was there considering a case where the contract had a forum selection clause.

It is noted that the *Canada Shipping Act* provision referred to in the «*Mercury Bell*» is not included in the current text of the *Canada Shipping Act*. In addition where the claim is based on a tort occurring in the State's territorial water, in the absence of choice of law and or forum clauses, courts have also chosen to apply the law of the littoral State, for a lengthy review of cases law on this issue and choice of law and forum in this context, see for e.g., *Union Shipping New Zealand Ltd v Morgan* [2002] NSWCA 124 <<http://www.austlii.edu.au/au/cases/nsw/NSWCA/2002/124.html>>

that SEAs and these clauses are not used to contract out of the MLC, 2006 requirements as implemented by the flag State.

Although, as noted earlier, the MLC, 2006 does not explicitly address the question of jurisdiction, the question of the SEA and the relationship between the role of flag States and the labour supplying States (usually the seafarer's country of residence) was discussed and thought to be settled during the development of the MLC, 2006 text.<sup>95</sup>

In the context of Regulation 2.1 and the Code regarding the SEA, the question of whether this provision is also directed to States with labour-supplying interests was discussed at the fourth meeting of the High Level Tripartite Working Group on Maritime Labour Standards in January 2004. It was decided to remove text in the Regulation that would have also established labour-supplying obligations. The Report<sup>96</sup> of the meeting states:

124. There was an extended debate relating to the phrase «in their territory» and whether Standard A2.1 should cover both flag state obligations and labour-supply obligations to regulate the content of seafarers' employment agreements. Several Government representatives were opposed to legislating for other than their flagships in this matter. This resulted in the deletion of the phrase «in its territory» and the inclusion in the chapeau of a phrase limiting the provision to seafarer contracts on the Members' flagships. It also resulted in the consequential deletion of paragraph 3. The Seafarers' group strongly supported the idea of highlighting the flag state responsibility under paragraph 1(a) in the chapeau and of the deletion of paragraph 3. However, in their view, although their primary concern is directed to ensuring flag state responsibility, the need to also put in place an equally strong system of labour-supply responsibility is also required. There is a need to require that labour-supply governments also legislate in the same way as flag state governments to ensure that the coverage is comprehensive. For this reason

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95) The most recent edition (2015) of the ILO *Frequently Asked Questions* includes this following information: <[http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—normes/documents/publication/wcms\\_237451.pdf#page=10](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—normes/documents/publication/wcms_237451.pdf#page=10)>

**C2.1.I. Which national law should be reflected in the terms of an SEA, the law of the flag State or the law of the country where the SEA was signed or the law of a country identified in the SEA?**

This is a complex question of international law and the legal practice of courts. The MLC, 2006 does not specifically address this issue; however, a flag State has international legal responsibility and also specific responsibility under the MLC, 2006 for the working and living conditions for seafarers on board its ship. This means that no matter where the SEA is signed or which laws are identified in the SEA as applicable, the flag State would still have a responsibility to ensure that the SEA meets its standards implementing the MLC, 2006.

96) *Final Report*. Working Party D, ILO Doc. No.TWGMLS/2004/19, 19-23 Jan.2004, Nantes. <<http://ilo-mirror.library.cornell.edu/public/english/dialogue/sector/techmeet/twgmls04/twgmls-r-19.pdf>>

the Seafarers' group did not want to delete the provision on this matter in Regulation 5.3, paragraph 3.

This followed an earlier discussion at a meeting in June 2003 which considered *inter alia* the differing responsibilities of labour-supplying States and, emphasized the flag State responsibility for employment contracts.<sup>97</sup> The preliminary draft of Article V, paragraph 6 (now paragraph 5), had read (deleted text show in italics):

6. Each Member shall exercise effective jurisdiction and control over seafarer recruitment and placement services in its territory, *as well as effective jurisdiction over seafarers' employment agreements that are concluded in its territory.*

It is clear, therefore, that with respect to the SEA requirement of the MLC, 2006 the intention behind the MLC, 2006 is that the flag State has the responsibility to ensure compliance with its national law implementing the SEA and the terms of employment. This means that even if choice of law or forum clauses designating the laws or tribunals of another country are permitted by the flag State, as a minimum it must also require that the terms of the SEA comply with flag State law implementing the MLC, 2006. In effect this approach simply avoids the jurisdictional problems by requiring that certain standards be met or the SEA is not acceptable for purposes for flag State ship inspection and certification. This appears to be the approach adopted by some countries<sup>98</sup> for example, the United Kingdom of Great Britain, provides in Marine Guidance Note<sup>99</sup> (explaining the relevant MLC, 2006 implementation regulation<sup>100</sup>) with standard requirements pertaining to the shipowner's signature and guarantee to the seafarer for coverage of the terms even if another employer is involved and well as basic minimum terms as well as indicating clauses that cannot be contained in a SEA<sup>101</sup>. The Marine Guidance Note addresses the question of

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97) *Final report, Third Meeting*. ILO Doc. No. TWGMLS/ 2003/10 at paragraphs 131-142. 30 June – 4 July 2003, Geneva.

<<http://ilo-mirror.library.cornell.edu/public/english/dialogue/sector/techmeet/twgmls03/twgmls-r-10.pdf>>

98) See for example *Executive Decree 86* of 2013 adopted by Panama to implement the MLC, 2006. It does not address the issue of choice of law or forum.

<<http://www.segumar.com/wp-content/uploads/2013/03/Executive-Decree-No.-86-of-February-2013.pdf>>

99) UK, Maritime & Coastguard Agency, *Maritime Labour Convention, 2006- Seafarers Employment Agreements*. MGN 477 (M) . <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/441086/MGN\\_477\\_SEA.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/441086/MGN_477_SEA.pdf)>

100) Statutory Instruments 2014 No. 1613 MERCHANT SHIPPING, The Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc.) Regulations 2014. <<http://www.legislation.gov.uk/uksi/2014/1613/introduction/made>>

101) *Ibid*, note 99 at note 15. For example, clauses with respecting joining or not joining a union or disclosure of medical or other sensitive data or paying for repatriation or other charges deducted from wages contrary to UK law.

choice of law or forum obliquely<sup>102</sup> by envisaging SEAs that are in not written in the English language and also providing with respect to law and forum matters the following with in connection with dealing with seafarer complaints:

16.3 [...] It should be noted that whilst UK ships are subject to UK law, powers to determine matters are not restricted to UK courts. A seafarer or shipowner may undertake proceedings in a court of another country, although such proceedings should normally take account of relevant UK law.

The situation is less clear in other countries. For example, as discussed below, in connection with shipowner's signature the Netherlands instead provides for substantial equivalence<sup>103</sup>, with respect to the requirement for a shipowner signature based on complex combination of Civil Code provisions which appear to envisage litigation under Netherlands law to recover against a shipowner in the event the seafarer's employer fails to meet responsibilities.<sup>104</sup> This would appear to envisage the national law as *de facto* applicable to SEAs on Netherlands ships.<sup>105</sup> It is also of some interest to note that Swedish law provides, in the relevant MLC, 2006 related legislation a provision which came into force in January 2015 that a dispute concerning a seafarer employment relationship may not be brought before a foreign authority<sup>106</sup>. This provision is, however, not applicable if EU legislation provides otherwise.

These are only a few examples of responses. Although, as noted above, still at an

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102) *Ibid*, note 99, sections 8 and 16.

103) Under Article VI paragraph 3 and 4 of the MLC, 2006. See discussion *supra* in section 2, at footnote 29.

104) The English language webpage for the MLC, 2006 implementation including the three DMLC Part I (for differing categories of ships) and other instructions are found on or linked to the following webpage. <[http://www.ilent.nl/english/merchant\\_shipping/ship\\_owners\\_dutch\\_flag/legislation/mlc\\_maritime\\_labour\\_convention/](http://www.ilent.nl/english/merchant_shipping/ship_owners_dutch_flag/legislation/mlc_maritime_labour_convention/)>

Inspection instructions for Flag State inspections under the MLC, 2006 are set in «Instruction to RO» No. 22, 11 October 2012 <[http://www.ilent.nl/english/Images/Instruction%20to%20RO%20No.%2022%20Maritime%20Labour%20Convention\\_tcm343-363404.pdf](http://www.ilent.nl/english/Images/Instruction%20to%20RO%20No.%2022%20Maritime%20Labour%20Convention_tcm343-363404.pdf)>

Each of the three national DMLC Part I contains a lengthy annex setting out, in English, the relevant provisions and notes and interpretations of the Dutch Civil Code. For example, the Annex dated Version1 valid from 1 February 2013 for ships built after 20 August 2013 is found at: <[http://www.ilent.nl/english/Images/DMLC%20part%20I%2C%20Annex%20ships%20built%20from%20August%2020th\\_tcm343-363420.pdf](http://www.ilent.nl/english/Images/DMLC%20part%20I%2C%20Annex%20ships%20built%20from%20August%2020th_tcm343-363420.pdf)>

105) For example, the Annex dated Version1 valid from 1 February 2013 for ships built after 20 August 2013

<[http://www.ilent.nl/english/Images/DMLC%20part%20I%2C%20Annex%20ships%20built%20from%20August%2020th\\_tcm343-363420.pdf](http://www.ilent.nl/english/Images/DMLC%20part%20I%2C%20Annex%20ships%20built%20from%20August%2020th_tcm343-363420.pdf)> provides *inter alia* that:

**Art. 1a. Extension applicability**

This act and its underlying decrees and regulations are equally applicable to work performed fully or partially outside of the Netherlands by persons, working on board seagoing vessels which on the basis of Netherlands legal rules are entitled to fly the Netherlands flag.

106) Merchant Seamen's Act (1973:282) SFS No.1973:282 as amended, section 14.

early stage, with increasingly active PSC on MLC, 2006 issues, it seems clear that flag States will now begin to exert more control over SEAs and will increasingly review and enforce national requirements for the SEAs and their content irrespective any choice of law or forum clauses. If the SEAs does not comply with flag State laws then it will not be accepted. This should, over time and through the interaction with ROs inspecting ships on behalf of differing flags, produce a high level of uniformity in national laws implementing the MLC, 2006, although of course, procedural matters that may make a jurisdiction more or less attractive, e.g., time bars or heads of damage etc. for some claims would not be affected.

As noted at the beginning of this section (4.2), the second issue considered is the question of the requirement for a shipowner signature to the SEA, is interwoven with the question of jurisdiction and is already referred to above.

Section 4.1 above discussed, in connection with the definition of a shipowner, the strategic and pragmatic approach adopted in the Convention, which is to focus on the «shipowner» as defined in the MLC, 2006 as the single entity that seafarers can look to fulfill employment related responsibilities, irrespective of any other arrangements or third party employer. Equally, this provides the link also for the flag State which has jurisdiction over, and international responsibility for, ships/shipowners under its flag. As also explained the clear legal identification including signature of the entity the «shipowner» as required under paragraph 1 of Standard A2.1 is an important aspect of this approach.

The ILO's CEACR commented on this issue after its examination of the first national implementation reports on the MLC, 2006<sup>107</sup>:

... In connection with seafarers' employment agreements, the Committee stresses the importance of the basic legal relationship that the MLC, 2006 establishes between the seafarer and the person defined as «shipowner» under Article II. In accordance with paragraph 1 of Standard A2.1, every seafarer must have an original agreement that is signed by the seafarer and the shipowner or a representative of the latter (whether or not the shipowner is considered to be the employer of the seafarer).

Section 4.1 noted potential legal/contractual issues this might pose and several possible solutions to provide for cases where an outside or third party employer or others might also be involved in the employment of seafarers. Nevertheless questions

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<sup>107</sup> See: *Report of the Committee of Experts on the Application of Conventions and Recommendations* (Report III (Part 1A) (2015) at page 479 < [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100\\_COMMENT\\_ID,P13100\\_LANG\\_CODE:3236210,en](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:3236210,en) > . The CEACR also commented o specific national implementation practices on this matter. These are also available on the ILO MLC, 2006 website and MLC database of national information.

have arisen when putting this into operation and some uncertainty exists, particularly in connection with the question of the possibility of signature by «a representative of the shipowner». In the first meeting of the Special Tripartite Committee under Article XIII of the MLC, 2006<sup>108</sup>, there was the following exchange of views on the SEA and this issue (emphasis added).

416. The representative of the Government of the Marshall Islands further wished to exchange information on the implementation of Standard A2.1, paragraph 1(a), of the MLC, 2006, which required that the SEA be signed by both the seafarer and the shipowner or a representative of the shipowner. It was explained that, with respect to «representative of the shipowner», some registered shipowners required the ship's master to sign the employment agreement as a representative of the company while others provided separate crewing agencies with the authority to implement and sign the employment agreements and others vested their ship management companies with such authority. This was causing a problem in practice, as port State control was citing ship deficiencies because the SEA had not been signed by the same company that had signed Part II of the DMLC and had been named on the Maritime Labour Certificate. Importantly, there needed to be transparency – the entity signing the SEA needed to be vested with the authority to do so via contractual arrangements which were clearly articulated in Part II of the DMLC. He therefore requested clarification from the Office on that issue, more specifically for inspection personnel, and suggested that it could possibly be addressed in courses and activities on the MLC, 2006, offered by the ILO and the International Training Centre in Turin.

417. The Shipowner spokesperson, referring to Parts I and II of the DMLC, indicated that it was a port State control issue and that similar issues would be raised until all parties got used to the implementation of the Convention.

418. The representative of the Government of Greece stated that this issue had already been dealt with and referred to page 33 of the 2012 edition of the ILO FAQ. She believed that the SEA could be signed by a representative of the shipowner, accompanied by appropriate documentary evidence.

419. The representative of the Government of Australia shared the view that this issue was related to port State control, indicating that his Government had also been having implementation issues in that respect. Referring to Standard A2.1, paragraph 1(a), stating that «where they are not employees, evidence of

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108) Report of the first meeting of the Special Tripartite Committee established under Article XIII of the Maritime Labour Convention, 2006 (Geneva, 7–11 April 2014) Report of the Chairperson to the Governing Body, in accordance with Article 16 of the Standing Orders of the Special Tripartite Committee. ILO Doc.No. GB.322/LILS/  
<[http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—relconf/documents/meetingdocument/wcms\\_315447.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_315447.pdf)>

contractual or similar arrangements», he questioned whether all seafarers on board would necessarily need to have an SEA. He supported the request for clarification from the Office made by the representative of the Marshall Islands in this regard. The representatives of the Governments of the Bahamas and Denmark also supported the request for clarification. The representative of the Government of Greece indicated that, based on her understanding, the provision referred to self-employed persons.

[ ... ]

423. The representative of the Government of the Bahamas stated that his country had issued 14,000 Maritime Labour Certificates and that documentation had been one of the principal areas identified in the inspection findings, particularly concerning elements discussed by the Government representative of the United Kingdom, such as contractual agreements and SEAs. In relation to the current definition of the term «shipowner», he noted that the reference to the «assumption of responsibility for the operation of the ship» had various requirements for documentation to clearly demonstrate that assumption as well as the acceptance of such responsibility. He further recalled the statements by the Government representative of the United Kingdom concerning contractual agreements as they related to persons employed on ships that were not directly employed by the shipowner, per se, or the companies which had assumed the responsibility. His Government was of the view that this question had to be clarified in the FAQs.

[ ... ]

The most recent edition (2015) of the ILO's *Frequently Asked Questions*<sup>109</sup>, although not authoritative as legal opinion, sets out questions that have been raised and provides some information as to practice. It provides the following general information on these points:

**C1.4.p. When I was recruited to work on a ship, my employer was a manning agency and they signed my employment contract. Is that acceptable under the MLC, 2006?**

The answer would depend on whether the seafarer has a seafarers' employment agreement (SEA) that clearly identifies the shipowner as a responsible party under the agreement even if others, such as a manning agency, may also have employment-related responsibilities [see C2.1.e. Can the employer of a seafarer supplying a seafarer to the ship sign the seafarers' employment agreement (SEA) as the shipowner?]. Some countries have developed standard forms for the SEA that allow a shipowner and any other employer to sign as jointly responsible or as guarantor.

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109) <[http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—normes/documents/publication/wcms\\_237451.pdf#page=10](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—normes/documents/publication/wcms_237451.pdf#page=10)>

**C2.1.d. Who must sign a seafarers' employment agreement (SEA)?**

In accordance with Standard A2.1, paragraph 1(a), of the MLC, 2006 the SEA must be signed by both the seafarer and the shipowner or a representative of the shipowner. Except in cases where the applicable national law considers that a particular person, such as the ship's master, has apparent authority to act on behalf of the shipowner, any signatory other than a shipowner should produce a signed «power of attorney» or other document showing that he/she is authorized to represent the shipowner [see B14. Who is the shipowner under the MLC, 2006?][see C2.1.e. Can the employer of a seafarer supplying a seafarer to the ship sign the seafarers' employment agreement (SEA) as the shipowner?].

**C2.1.e. Can the employer of a seafarer supplying a seafarer to the ship sign the seafarers' employment agreement (SEA) as the shipowner?**

The term «shipowner» is defined comprehensively in Article II, paragraph 1(j), of the MLC, 2006 as «... the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities imposed on shipowners in accordance with this Convention, regardless of whether any other organizations or persons fulfil certain of the duties or responsibilities on behalf of the shipowner» [see B14. Who is the shipowner under the MLC, 2006?].

The intention of the drafters of the MLC, 2006 was that there could only be one person – namely, «the shipowner» – who assumes, vis-à-vis each seafarer, all the duties and responsibilities imposed by the Convention on the shipowner. While another person supplying a seafarer to the ship may have concluded an employment contract with that seafarer and be responsible for implementing that contract, including payment of wages, for example, the shipowner will still have the overall responsibility vis-à-vis the seafarer. Such an employer could therefore only sign the SEA as a representative of the shipowner (assuming that the employer has a signed power of attorney from the shipowner).

**C2.1.i. My employment agreement has a space for two signatures, one for the shipowner and one for an employer. Is this acceptable under the MLC, 2006?**

The MLC, 2006 does not prohibit this practice and it is a matter for the flag State to consider. The answer would depend on whether the seafarer has a seafarers' employment agreement (SEA) that clearly identifies the shipowner as a responsible party under the agreement even if others, such as a manning agency or other employer, may also have employment-related responsibilities. [See C2.1.e. Can the employer of a seafarer supplying a seafarer to the ship sign the seafarers' employment agreement (SEA) as the shipowner?]. Some countries have developed model forms for the SEA that allow a shipowner and any other employer to sign as jointly responsible or as guarantor.

As the extracts indicate there are various national approaches to implementation and the question of shipowner signature and the question of potential contractual responsibility of third party employers. Some of these responses have generated uncertainty. For example, some countries, such as Denmark, provide as a «tool» an example of a standard form cover page for seafarers on its ships.<sup>110</sup> This SEA has basic information complying with the MLC, 2006 However it appears to envisage signature by either a shipowner or an employer. While there is no legal reason that a country cannot use the term employer to refer to the «shipowner» entity (see for example the Philippines POEA) as long as it is clear which entity is referred to, two alternative categories potentially creates uncertainty, even if national law would allow the seafarer to bring a legal claim against a shipowner in the event of an employer failure.

This approach was the subject of observations by the relevant workers' organization (LO) in response to the Government's national report on the MLC, 2006 and was the subject of the following comment by CEACR<sup>111</sup> in 2014 on the Danish flag State practice this matter:

*Regulation 2.1 and the Code. Seafarers' employment agreements.* The Committee notes the observations made by the LO that the employment agreement presented by the DMA is not in line with the Convention since it distinguishes between the shipowner and the employer. The Committee notes the Government's reply that in their view «it is not a requirement under the MLC or in Danish laws and regulations, that the shipowner must be the employer. If the shipowner or the employer does not fulfil the obligations mentioned above, the shipowner in many cases, for example, on the protection of the seafarer on board the shipowner may be sanctioned according to section 65 of the Consolidated act on seafarers' conditions of employment, etc.»

The Committee recalls that Regulation 2.1 and the Code do not require that the shipowner must also be the employer, however it does require that every seafarer has an original agreement that is signed in accordance with paragraph 1 of Standard A2.1, which provides that a seafarer's employment agreement must be signed by the seafarer and the shipowner, or a representative of the shipowner. It appears under section 1(a) of the Consolidated act on seafarers' conditions of employment, etc. and other instruments a shipowner may remain responsible for all matters under a seafarers' employment agreement, even if a seafarer has a different employer. However, this is not clear in the legislation. The Committee also notes the standard form agreement provided by the Government which

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110) Denmark has a very useful national MLC, 2006 website <<http://www.dma.dk/Ships/MLC/Sider/default.aspx>> on the SEA see: <<http://dma.dk/Ships/MLC/Sider/SeafarersEmploymentAgreements.aspx>>

111) *Direct Request* (2014)- published ILC 2015.

<[http://www.ilo.org/dyn/normlex/en/f?p=1000:80031:0::NO:80031:P80031\\_COMMENT\\_ID:3189953?](http://www.ilo.org/dyn/normlex/en/f?p=1000:80031:0::NO:80031:P80031_COMMENT_ID:3189953?)>

provides alternatively that the agreement can be between the seafarer and a shipowner or a master or an employer. The Committee notes that this agreement creates uncertainty as to who is the responsible party. The Committee recalls that, irrespective of the employment arrangements involved, the seafarer is required to have an agreement signed by both the seafarer and the shipowner or a representative of the shipowner. ***The Committee requests the Government to clarify who are the parties under the Danish law on the seafarers' employment agreement and to consider amending the standard form agreement to ensure that seafarers have an original agreement signed by both the seafarer and shipowner or a shipowner's representative, as required under paragraph 1 of Standard A2.1.***

The national implementation of the UK on this matter was examined by the CEACR in December 2015 however as of February 2016 no comments have been published. Its practice, as reflected in the sample model for an SEA set out in the Marine Guidance Note discussed above<sup>112</sup> appears to follow the approach noted by CEACR in that, although it envisages signature by a third party employer this must be combined with a signature by the shipowner as «guarantor» for all the obligations, this creating the contractual link and providing clear information that the shipowner is also fully responsible.

Also examined by CEACR in December 2015 ( but as of February 2016 no comments have been published), the practice of the Netherlands, as mentioned above in connection with jurisdiction, and its decision to claim substantial equivalence on this matter appears more complicated. Leaving aside the question of application of substantial equivalence on this requirement the situation referred to in the Annex to the Dutch DMLC Part I seems to present some problems in terms of the goals of certainty and clarity for seafarer and identifying a single immediately responsible party.

The explanatory notes (extracted) to the Annex to the DMLC Part 1 for new ships states that:<sup>113</sup>

**Note:**

In derogation of Standard A2.1, paragraph 1 (a), of the Convention, the Netherlands allows seafarers' employment agreements to be signed not only by the shipowner or a representative of the shipowner, but also by an employer other than the shipowner or his representative.

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112) *Ibid.*, note 98

113) For example, the Annex dated Version1 valid from 1 February 2013 for ships built after 20 August 2013 is found at: <[http://www.ilent.nl/english/Images/DMLC%20part%20I%2C%20Annex%20ships%20built%20from%20August%2020th\\_tcm343-363420.pdf](http://www.ilent.nl/english/Images/DMLC%20part%20I%2C%20Annex%20ships%20built%20from%20August%2020th_tcm343-363420.pdf)>

Three specific groups of other employers may be identified:

- 1) Temporary employment agencies.
- 2) An employer that has employees work on a part of the ship, that is rented by this employer from the shipowner.
- 3) An employer that has employees work on a ship that has been chartered by the employer for specified work.

**Note to «an employer other than the shipowner or his representative»:**

If the shipowners states his use of this substantial equivalency or the employer on the seafarers' employment agreement is not the shipowner, the substantial equivalency is in place.

The Recognized Organization will then act on the assumption that the other employer is a temporary employment agency and the additional requirements must be followed.

A temporary employment agency is approved if;

- 1) it is located in a country, it has been approved by that country , and that country is a Member to the Maritime Labour Convention, 2006; or
- 2) it has been audited by one of the seven RO's approved by the Dutch authorities:
  1. American Bureau of Shipping
  2. Bureau Veritas
  3. ClassNK (Nippon Kaiji Kyokai)
  4. Det Norske Veritas
  5. Germanischer Lloyd
  6. Lloyd's Register
  7. Registro Italiano Navale
- 3) the shipowner shows proof that the temporary employment agency performs in accordance with the stipulated regulations.

**Interpretation to The Act on Allocation of Workers by Intermediaries, Art. 1 (3a):**

It must be clear from a contract that the work performed is in connection with delivered goods or an accomplished activity. This may be a specific work, related to the maintenance of the ship or it may be the work related to fulfilling a guarantee.

**Interpretation to The Act on Allocation of Workers by Intermediaries, Art. 1 (3b):**

It must be clear from a contract between the shipowner and a different shipowner that this assistance is rendered without financial profit. The seafarers must be employed by the different shipowner. The different shipowner must be clearly identified as a shipowner.

**Interpretation to The Act on Allocation of Workers by Intermediaries, Art. 1**

**(3c):** Enterprises sometimes allocate the work related to manning to a specific entity in the enterprise. This is allowed under this paragraph. The shipowner must show that the Manning Department forms a full part of the enterprise.

If the shipowner is of the opinion that **one of the other options** applies, he will contact the ILT for further guidance.

The shipowner shall provide the ILT with documentary evidence that the other employer is not a temporary employment agency through:

1. A contract between the shipowner and the other employer specifying the kind of work concerned, and stipulating the duration of the contract.

The DMLC Part I Annex also contains the following the following extract from the Dutch Civil Code:

Art. 738

The shipowner is accountable for fulfilling the obligations arising from articles 706-709, 717-720, 734 and 734a-734l, in case the employer is irrevocably sentenced to fulfillment but fails to comply.

The above extracts are from the DMLC Part I, which must be carried on board ship. It appears that it would be difficult for a seafarer to ascertain who the responsible «shipowner» entity is under this approach, particularly in cases where a temporary employment agency appears to be acceptable to sign the SEA as the employer instead of the shipowner.

However as noted above this is matter to be considered by the ILO CEACR when it examines the national report.

These are but a few illustrative examples. The central point that emerges is that although there are clearly some uncertainty implementing aspects of the SEA, especially with respect to the shipowner signature and the direct contractual liability) requirements, in all cases it is clear that flag State law and practice are now the focus of legal interest and concern.

## 5. Conclusion

This Chapter has explored the uneasy relationship between public and private international law in the context of the SEA requirement under MLC, 2006. It has argued that the MLC, 2006 requirement for the SEA signed by the shipowner and based on flag State responsibility provides a strategic pragmatic solution proposed by the industry. While there is the possibility for party autonomy on matters of choice of law and forum if flag State law permits, in fact ultimately flag State law will need to



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be applied and as matter of policy and practice the flag State has the overriding legal interest.