Seafarers' access to jurisdictions over labour matters

Article *in* Marine Policy · December 2016

DOI: 10.1016/j.marpol.2016.12.004

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Marine Policy 77 (2017) 1–8

Contents lists available at ScienceDirect

Marine Policy

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ARTICLE INFO

Keywords:
Jurisdiction
Maritime labour matters
Flag state
Port state
Labour Supplying State
State of Shipowners

ABSTRACT

The Maritime Labour Convention, 2006 outlines a framework for states to enforce jurisdiction over maritime labour matters, including the Flag State, Port State and Labour Supplying State. However, the Convention does not provide explicit guidance on jurisdiction determination. This article argues that seafarers should have the right to access the jurisdictions of member states, and that future amendment to the Convention should confirm this right. This paper first analyses current theories of maritime labour jurisdiction. Secondly, it conducts a comparative doctrinal analysis regarding adjudicative jurisdiction principles in common law and civil law systems. Thirdly, in three case studies involving concurrence jurisdictions of member states, this article finds that the authority of any single member state is not reliably accessible to seafarers, in particular when the state has no strong link with the seafarers. This article recommends that seafarers' rights in the Convention to choose one jurisdiction from relevant member states should be confirmed in a future amendment.

1. Introduction

The shipping industry is a highly globalised sector, connecting trade and business all over the world. In this regard, seafarers are one of the most mobile workforces [1–3]. For example, a Filipino seafarer works on board a ship that is registered in Panama and owned or operated by a Greek shipping company that navigates between Asian and American ports. In this scenario, the employment relation in the maritime industry has become fragmented: the beneficial shipowner's domicile, the site of ship operation, and the workplaces and residences of seafarers are subject to different jurisdictions [4–6]. As a consequence, once labour complaints or disputes arise, how to determine jurisdiction and the proper law becomes a complicated problem. The jurisdictional problems and Flag State responsibility have been topics of concern for this sector since the 1950s [7]. Four choices of applicable laws and jurisdictions are relevant with maritime labour disputes, namely the Flag State, Port Sate, Labour Supplying State and the State of Shipowners where the shipowner is domiciled or operates business.

Jurisdiction is the state power to exercise authority over all persons and entities within its territory, of which there are three dimensions: prescriptive, enforcement and adjudicative. The prescriptive jurisdiction (legislative powers) is the power to create, amend and repeal legislation. The enforcement jurisdiction is the power to enforce laws through administrative agencies. Meanwhile, the adjudicative jurisdiction is the supremacy of the courts and arbitration tribunals in hearing and resolving disputes. The 'jurisdiction' in the narrow sense usually refers to the adjudicative jurisdiction. In this paper, both the enforcement and adjudicative jurisdictions are addressed [8,9].

Since the Maritime Labour Convention, 2006 (hereinafter referred to as MLC) came into force in 2013, seafarers' labour disputes have attained a unified international framework to shape the governing laws and jurisdictions. As Chaumette and Charbonneau point out, taking inspiration from the International Maritime Organisation's (IMO) technical standards and control mechanisms, the MLC is an innovative instrument with a cross-national inspection mechanism to ensure its effectiveness [10,11]. The enforcement of the MLC re-emphasizes the necessity to harmonise the international governance framework to avoid conflicts of jurisdictions and legislation. Many studies have focused on the administrative roles of the Flag States and the Port States regarding matters relating to maritime safety and marine pollution prevention as stipulated by the SOLAS, MARPOL, and STCW conventions [11–13]. However, little attention has been paid to the administrative roles of the Labour Supplying States, despite having responsibilities to ensure that the certification of seafarers and the operation of recruitment agencies are complied with in the MLC. In addition, to enforce adjudicative jurisdiction the infringement of seafarers' rights becomes an obligation of the Labour Supplying State. In accordance with international law, each member state shall establish sanctions, which are adequate to discourage violations of seafarers' rights.[1] To protect seafarers' rights, the member states are obliged to enforce adjudicative jurisdiction to investigate the facts and apply sanctions to discourage violations of the MLC.

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[1] Art. 5, Maritime Labour Convention, 2006.

http://dx.doi.org/10.1016/j.marpol.2016.12.004
Received 22 August 2016; Received in revised form 27 November 2016; Accepted 5 December 2016

This paper addresses two questions: what is the potential administrative role of the Labour Supplying State and how can adjudicative authority be ascertained between the Flag State, Port State, Labour Supplying State and the State of Shipowners. The first section examines the concept of maritime labour jurisdiction and identifies the jurisdictions available to seafarers. Secondly, drawing on three typical cases, the current practices of jurisdiction determination are evaluated. Finally, the third section discusses seafarers' entitlement to forum selection once jurisdictions concur over one labour dispute.

2. Maritime labour jurisdiction

Maritime labour matters occur when the working or living conditions of seafarers do not comply with international labour standards and employment agreements. Seafarers are entitled to raise complaints or disputes as per their employment agreements. Maritime labour matters usually involve various jurisdictions of different states due to the mobility of seafarers' working environment on board.

The MLC stipulates that a member state should exercise its jurisdiction over maritime labour matters; however, the MLC does not address matters of maritime labour jurisdiction comprehensively. Rather, the MLC leaves the adjudicative jurisdiction to the discretion of member states: 'the provisions (of Title 5) do not determine legal (adjudicative) jurisdiction or a legal venue (forum)'.

However, in the global governance frameworks, various jurisdictions have connections with disputes arising from seafarers' labour matters. For instance, the Flag State is primarily liable to exercise both enforcement and adjudicative jurisdictions over the ship and seafarers on board. Accordingly, seafarers are entitled to raise complaints or claims to the authorities within the jurisdiction of the Flag State. However, due to the popularity of open registries, it has become difficult for seafarers to access the jurisdictions of Flag States, such as those in Panama, Bahama or Liberia. Taking Chinese seafarers as an example, China has no diplomatic relationship with Panama, which is the Flag State with the largest national fleet size. Taking into account geographical distance and diplomatic barriers, to seek remedies through the jurisdiction of the Flag State is not convenient for Chinese seafarers. When a ship calls at a foreign port, the authority of the Port State is responsible to inspect the labour conditions according to the MLC [14,15]. However, whether the Port State permits foreign seafarers to access its judicial jurisdiction is unclear. As the country of origin, Labour Supplying States have the authority to exercise adjudicative power over the complaints of seafarers, which can make it a convenient jurisdiction for seafarers (see Fig. 1).

The MLC requires each member state to exercise its jurisdiction over seafarer recruitment services within their territory. In the European Union, the inspection and monitoring system of recruitment and placement services are established to protect seafarers' rights [16]. If the agencies infringe seafarers' rights under the MLC or local labour laws, seafarers will have access to the enforcement or adjudicative jurisdiction of the Labour Supplying States. In some major Labour Supplying States, the domicile of recruitment agencies and seafarers are within one state. For example, in the two largest Labour Supplying States, the Philippines and China, only local licensed manning agencies or shipping companies are allowed to recruit and place the local seafarers. Therefore, in cases where seafarers' rights are infringed by manning agencies, it becomes a labour dispute within the maritime Labour Supplying State. The role of manning agencies or the jurisdiction of the state where agencies are domiciled will not be discussed separately in this paper.

In addition to the three relevant states above, the State of Shipowner should be considered as having competent jurisdiction, although the MLC has not stipulated an explicit obligation over these countries. Nevertheless, at the domicile of defendants, that is to say in the States of Shipowners, the adjudicative decision is highly enforceable. Also, subject to the MLC, it is compulsory to conclude a Seafarers' Employment Agreement (hereinafter referred to as SEA) in written form between seafarers and shipowners, which proves that there exists an employment relationship between the seafarer and shipowner. On the grounds of this relationship, a seafarer is entitled to file a lawsuit against the shipowner in a court in the state where the shipowner is domiciled. The employment relationship is a sufficient link to ascertain adjudicative jurisdiction between the State of Shipowner and the seafarer. Therefore, the State of Shipowner is responsible for exercising the jurisdiction over maritime labour matters (see Fig. 1).

Four domains are identified to adjudicate maritime labour matters: the Flag State, the Port State, the Labour Supplying State and the State of Shipowner. Theoretically, these four states are supposed to exercise their jurisdiction to correct violations of seafarers' rights. However, the MLC has failed to create any obligation to adjudicate seafarers' complaints or disputes as a conventional obligation, but rather entitles member state with discretion to decide on whether or not to entertain maritime labour disputes according to domestic laws.

It seems possible for seafarers to choose any connected jurisdiction to file a complaint or dispute. Nonetheless, different states hold different attitudes towards mobile migrant labour matters. For instance, some states are unwilling to address these disputes. To ascertain the jurisdiction over seafarers' labour matters remains a challenging issue following the entry into force of the MLC. As such, this paper will shed light on such issue through comparative legal analysis and case studies.

3. Research methods

Comparative legal doctrinal analysis and case studies are two research methods adopted by this study [17]. Firstly, based on normative sources, such as statutory texts, the current principles and practices of enforcement jurisdiction are evaluated, as are the obliga-

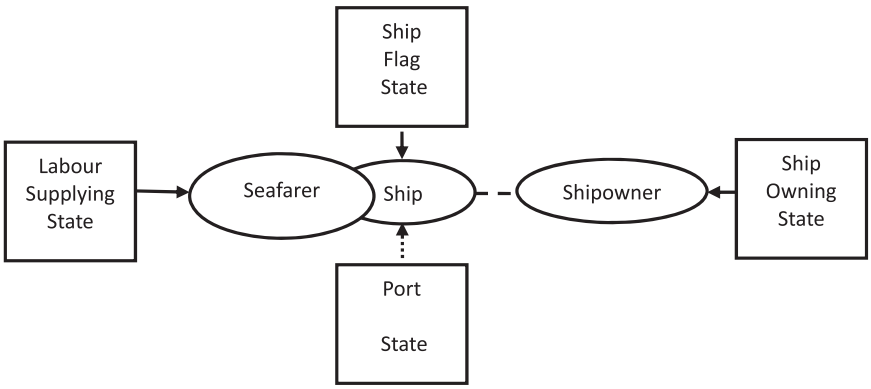

Fig. 1. Maritime labour jurisdiction.

Table 1
Jurisdictions involved in the Selected Cases.

Jurisdiction Ship	Flag State	State of Shipowner	Labour Supply State	Port State
PING DA 7	Kiribati	Hong Kong	China	Micronesia
LEDOR	Sierra Leone	Panama	Syria	China
SS Norway	Norway	Bermuda	The Philippines	USA

tory roles of the Flag State, Port State and Labour Supplying State according to the governance framework established under the MLC. Secondly, drawing on statutory rules and case law, the principles of adjudicative jurisdiction over maritime labour matters are examined and compared in two mainstream legal traditions: European civil law and English and American common law. The analysis aims to shed light on how the roles of different states are integrated into both administrative and adjudicative jurisdictions under different law systems.

To explore the maritime labour jurisdiction in practice, through online search three recent cases of maritime labour disputes following the enforcement of MLC in 2013 are selected (see Table 1). The selection criteria include (1) seafarers' rights were infringed and seafarers attempted to seek remedies or assistance from relevant authorities of different jurisdictions; (2) the Flag States, Port States, Labour Supply States and the States of Shipowners are different jurisdictions; (3) at least one jurisdiction responded to seafarers' complaints or petitions. Through comparing these three cases, the attitudes of different jurisdictions can be identified and compared.

Two cases concern enforcement jurisdiction issues: Case One and Case Three. The reason for choosing these two cases is that the seafarers involved in these two were from China and the Philippines, both of which supply the majority of maritime labour worldwide [18]. Also, Case One and Case Two are concerned with adjudicative jurisdiction. There was a conflict between enforcement and adjudicative jurisdictions in Case Three. In Case Two, the labour dispute occurred in a mixed environment of civil law and common law. In this case, it concerned the Chinese law system based on European civil law, while its maritime law is almost entirely implanted from English maritime law. As a result, China's maritime jurisdiction is mixed with civil law and common law traditions. Case Three occurred in the US and is related to the practices of maritime labour jurisdiction under common law. Therefore, these three cases cover the judicial practices of both civil law and common law systems and involve the two major nationalities of maritime workers, Chinese and Filipino. Accordingly, this analysis can provide representative judicial practices regarding international seafarers' access to both civil and common law jurisdictions, including the enforcement and adjudicative jurisdictions over maritime labour protection matters.

4. Comparative legal doctrinal analysis

4.1. Enforcement jurisdiction

As per Article 94 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), 'every (Flag) State shall effectively exercise its jurisdiction and control in administrative, technical and social **matters** over ships flying its flag'. Nowadays, the scope of 'matters' extends to the public management of maritime safety, pollution prevention, and labour protection [19].

However, some Flag States lack the motivation or capacity to exercise the enforcement jurisdiction. Subject to the principle of *pacta sunt servanda*, all member states should perform their conventional obligations. Nevertheless, some states, in particular, the 'flags of convenience (FOC)' states,[2] may 'market' themselves to shipowners through their lenient regulatory requirements [20,21]. As a result, these ships may 'race to the bottom' regarding ship maintenance and operations, and seafarers' working conditions [22,23]. These substandard vessels threaten maritime safety and seafarers' lives. Although there is an international mechanism to ensure compliance to the Flag State Implementation (FSI), the supervision over sovereignty is restricted, which also explains why the enforcement of previous International Labour Organisation maritime labour standards became fragmented and ineffective. Unlike the open registry practices of FOC, international registry policies are created by northern European shipping states. These traditional shipping states have created more favourable conditions of ownership, manning and taxation than their close registry conditions to attract the re-registration of their national owned or controlled international fleet. Although international registry is not entirely differentiated from open registries in the maritime industry, generally speaking there is a genuine link between the state and the ships. Therefore, the Flag State conducts strict inspections and controls over the ships of international registry, while international navigated ships also enjoy the same rights as those of close registry except cabotage. These states exercise an effective jurisdiction over the ships of international registry, since there are genuine links between them.

Considering the weakness and poor performance of the FSI, Port States were authorised to perform enforcement jurisdiction over foreign ships in their waters in response. Through continuous efforts made by the IMO, the regime of Port State Control has been constructed with Port States that are entitled to exercise their jurisdiction over matters including maritime safety, marine pollution prevention and the living and working conditions of seafarers.

The enforcement jurisdiction exercised by the Port States and the Flag States are consistent. The regime of Port State Control (PSC) was to supplement the roles and duties which should be performed by the Flag States under Article 94 of UNCLOS. Nowadays, international treaties and practices are gradually shifting the burden of and opportunity for enforcement from the Flag States to the Port States. The limitation of Flag State jurisdiction is widely acknowledged, as the international community embraces a new opportunity to enhance maritime safety and maritime environment protection through the Port State Control [22–26] which makes a considerable contribution to safeguarding international maritime safety, the marine environment and human rights at seas.

However, some Port States may also be reluctant to exercise the enforcement jurisdiction over maritime labour matters, and their practices may be confined within certain limits. According to Article 5 of the Convention on the High Seas (1958), the Flag State should 'exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag'. Neither the successive UNCLOS nor the later Convention on Conditions for Registration of Ships (1986) challenged this principle. As a result, the Port State Control cannot have an equivalent status as the Flag State Implementation in international law. Furthermore, influenced by different legal traditions, the jurisdiction scopes of Port States vary over maritime labour disputes. For example, an Anglo-American common law principle supports the notion that the Port State should be entitled to exercise jurisdiction over the internal matters on board foreign vessels. In France, however, it is held that the 'Port State had no jurisdiction over purely internal issues of the foreign vessel because of the rule of comity' [27].

[2] Flag of convenience (FOC) is a shipping practice whereby a ship is registered in a country other than that of the ship owner for flexible crewing requirements and costs, tax incentives and attractive minimal registration and tonnage fees in the FoC country. In 1974 the ITF defined an FOC quite simply as being: 'where beneficial ownership and control of a vessel is found to be elsewhere than in the country of the flag the vessel is flying'

The PSC enforcement jurisdiction has been significantly extended to maritime labour conditions. For instance, PSC officers are competent to conduct inspections and corrections if a vessel violates international social standards. Following ILO Convention No. 147 on Minimum Standards in Merchant Ships 1976 and the 1978 *Amoco Cadiz* disaster, Port States obtained inspection power over foreign vessels. In 1982 the Paris Memorandum of Understanding (Paris MOU) built up the first regional framework to exercise their enforcement jurisdiction over maritime labour conditions on board foreign ships. As the PSC inspection rules regarding maritime labour conditions have mostly been developed by the ILO, from then on the ILO has obtained some hard 'teeth' for the global fulfilment of its labour standards in the maritime industry compared to its previous maritime labour conventions. Later, the MLC succeeded the PSC mechanism [22,27]. Some regional cooperation further strengthened the mechanism. For example, on the basis of European Council Directives within which the MLC is incorporated, the PSC mechanism has worked very effectively within the EU under Paris MOU [28].

Although working conditions on board have improved continuously through regional cooperation particularly in developed regions generally, voluntary Port State jurisdiction may still lead to 'ports of convenience'[3] in developing regions. The availability of both financial and human resources has resulted in the efficacy of PSC to vary from port to port. Some PSC standards are below what is acceptable in some developing regions. For instance, some ports may loosen the need to meet international standards in order to attract more shipping business and gain market advantages. As a result, some ships may only take voyages among those ports, where the Port State Controls operate at sub-standard levels. It is the facultative nature of PSC that contributes to the emergence of ports of convenience [29,30]. Even in developed regions, the Port State enforcement jurisdiction over maritime labour matters is still less attentive than over matters of safety and pollution prevention. Between 1998 and 2009, the deficiencies detected regarding working and living conditions on board accounted for less than 10–15% of the total deficiencies detected under Paris Memorandum PSC inspection, while not a single vessel was detained on breach of labour standards. It should be reasonable to argue that even the developed regional PSC has relatively ignored maritime labour matters. Certainly, the enforcement of MLC since 2013 may change this situation, however greater observations and data need to be collected before such a judgement can be made [19,22].

Some labour supplying states have been criticised for being ineffective in the enforcement jurisdiction over their national seafarers' labour matters. Recent studies suggest that a 'crew of convenience'[4] has arisen out of the practices of FOC and the notion of a port of convenience. Namely, this refers to the pursuit of "cheap" crews for placement on FOC ships has created the market of "crew of convenience" [19,31]. 'Traditional' European Maritime Flag States impose high protective standards regarding labour employment and work conditions; whereas, FOC States provide little protection over seafarers with the crews aboard vessels flagged to these states often known as 'crews of convenience' due to the low wages and inferior working conditions provided. Such seafarers tend to be from less developed states, which may not have appropriate legislation or do not assign proper administrative authorities to protect their overseas labour, despite these seafarers domiciling within the state, which is a strong connecting factor for the choice of conflict law and forum selection [31].

As indicated by the above analysis, current enforcement jurisdiction over maritime labour conditions by the Flag States and the Port States are subject to several structural weaknesses. In addition, it pays more attention to maritime safety, marine pollution prevention and the competency of the crew, compared to maritime labour matters. Also, the role of maritime labour supplying states has been underestimated, with certain enforcement obligations being imposed by the MLC (2006), including the qualification of seafarers, crew agencies' operations, the provision of social security and the promotion of employment opportunities for seafarers who are "ordinarily resident" in the States [32].

4.2. Adjudicative jurisdiction

The Maritime Labour Convention (2006) does not provide an adjudicative jurisdiction rule for member states regarding maritime labour disputes, while entitling member states to act using discretion. In this section, the most influential legal systems in the shipping sector, namely those of the European Union, the United Kingdom and the United States are selected to examine the adjudicative jurisdiction rules.

4.3. EU adjudicative jurisdiction

In the European Union, whether a court of an EU member state has jurisdiction over a dispute between a shipowner and seafarer is decided by the rules of adjudicative jurisdiction. This governs subject matters relating to the contract of employment, which is referred to as the Seafarer Employment Agreement (SEA) [33]. A contract of employment comes into existence if an employment relation can be established by the criteria: 'for a certain period of time a person performs service for and under the direction of another person in return for which he receives remuneration'.

A shipowner, who is domiciled, or deemed to be domiciled in an EU member state under the provisions of Section 5 of the Jurisdiction Regulation, may be sued in various jurisdictions at the choice of the seafarer claimant. This is because the seafarer is regarded as a vulnerable party and, as a result, should have a wider scope to secure an advantageous forum. A shipowner may be sued in an EU member state, where they as the employer are domiciled, even if the state differs from the Flag State of the vessel involved. If the shipowner is not domiciled in an EU state but has a branch or agency therein, the seafarer is still entitled to file a lawsuit in the EU. In addition, a shipowner could be sued in the EU, where the seafarer habitually carries out his work on a vessel flying an EU member state's flag. Otherwise, the proceedings should not be filed in the EU.

However, the state in which a seafarer habitually carries out his work is not necessarily the Flag State if the seafarer carries out his activities in more than one state. Should this be the case, references could be made therefrom:

(1) to the place where, or from which, he or she principally discharged the obligations towards the employer;
(2) to the place in which he or she had established the effective centre of his working activities; and, in the absence of an office, to the place in which he or she carried out the majority of his work. In the latter case, the Court preferred a temporal assessment of the duties,
(3) surmising that, in the absence of other criteria, the place where he had worked the longest.

Accordingly, the EU jurisdiction rule states that firstly the State of Shipowners can exercise the adjudicative jurisdiction over disputes regarding the Seafarer Employment Agreement. Secondly, the Flag State could take the jurisdiction, if the vessel flies an EU member state's flag. Thirdly, when a seafarer works in more than one ship that flies such flags, then the Port State jurisdiction may be applied if they

[3] 'Ports of convenience', much like the pattern of 'flags of convenience', internationally agreed standards are not vigorously enforced, or not enforced at all in a port, so that a port can attract the business of vessels which have violated the applicable standards.

[4] FOC states have few such restrictions and the crews aboard these vessels are termed as 'crew of convenience', since shipowners are able to recruit in the global labour market according to their convenience.

had already discharged the obligations from an EU port.

A jurisdiction clause is allowed to be agreed upon in a Seafarer Employment Agreement. The clause must not reduce the choices of forums available to the seafarer or provide further options to the shipowner. Accordingly, only if the non-exclusive jurisdiction clause is valid, can the seafarer be entitled to more choices of forum in the EU than those available through the Jurisdiction Regulation.

4.4. UK adjudicative jurisdiction

In the English legal system, under Section 20(1) (a) of Senior Courts Act 1981(SCA), the Admiralty Court has jurisdiction over maritime labour claims. A representative labour matter is a claim for loss of life or personal injury sustained in the consequence of defects on board a ship or of the wrongful act, neglect or default of the shipowner. Moreover, a seafarer may claim for sufferings as consequences of personal injury or loss of life from the wrongful act, neglect or default of another ship or even ashore. If the unseaworthiness of the ship is attributed wholly or in part to the negligence of a third party, the negligence thereof being deemed attributable to the shipowner as the seafarer's employer, the shipowner will be liable as well. Accordingly, most claims regarding loss of life or personal injury are connected with a ship and subject to the admiralty jurisdiction.

Wage claims are the most frequent category encountered by seafarers. Under English law, wage claims include repatriation and subsistence expenses, medical expenses, or any sum allotted out of wages or adjudged by a superintendent to be due by way of wages; nevertheless, if such expenses remain unpaid, they may not necessarily be recoverable as wages, with severance pay made payable by contract on dismissal.

Claims for damage or loss of life or personal injury arising out of a collision between ships are subject to the jurisdiction of Admiralty Courts. The International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision limits the exercise of jurisdiction by the contracting states, while a member's court may not exercise jurisdiction in a collision claim *in personam* unless:

(a) the defendant has his habitual residence or place of business within England or Wales; or
(b) the cause of action arose within the inland waters of England and Wales or within the limits of a port of England and Wales; or
(c) an action arising out of the same incident or series of incidents is proceeding in the High Court or has been heard and determined in the High Court;
(d) the defendant has submitted or agreed to submit to the jurisdiction of the High Court Note that there are no such restrictions placed upon the exercise of jurisdiction in a collision claim *in rem*.

An action could also be brought for damage caused by one ship to persons on board through the carrying out of or the omission to perform a manoeuvre or through non-compliance with regulations even when there has been no actual collision.

Where a foreign seafarer is killed on board a foreign-flagged ship as a result of a collision with another foreign ship in international waters, the seafarer's dependents may bring a claim for negligent breach of contract under the Fatal Accidents Act 1976.

As a general rule, both claims for personal damage done by a ship and for seafarers' wages give rise to a maritime lien on both the ship and freight. This lien arises not from the contract, but from the services to the ship. It applies to foreign ships as due to the existence of maritime liens being governed by the maxim *lex fori*, they can thus only be enforced by an admiralty claim *in rem*.

Under English admiralty law, maritime labour claims could be brought in the form *in personam or in rem*. In fact, claims *in rem* could be divided into two categories: one category of claims *in rem* is described as truly *in rem*, while the other has been referred to as "statutory lien" claims and is conveniently called claims *quasi in rem* that depend on a link with liability *in personam*.

The English admiralty jurisdiction exercised *in personam* is not any different from that under Brussels I Regulation since the jurisdiction rules over civil matters in the Regulation between courts of EU Member States are constructed in the nature of the *in personam* claim bearing in mind that the UK is one such member. The claims *quasi in rem* under the Brussels I Regulation are regarded as a form of *in personam*, thus only the part of the claims truly *in rem* is unique under English admiralty law although the Admiralty Court could exercise its jurisdiction in two ways: *in personam or rem*. Among them, the jurisdiction *in rem* could easily be secured through serving the claim *in rem* or arresting the ship, while, as a matter of fact, the actions that could be brought *in rem* under the UK Senior Courts Act 1981 are identical to those under 1952 Arrest Convention [34,35].

4.5. US adjudicative jurisdiction

Unlike English law, no US federal law enumerates the categories of claims that fall within maritime jurisdiction; however, the maritime labour claims arising from injury (or death) and wage issues fall under maritime jurisdiction. For any maritime-related claims, the claimant can choose to file a maritime lawsuit in a federal district court or a non-maritime lawsuit in a state court.

There are also three types of maritime claims in US maritime law: *in personam, in rem,* and *quasi in rem*. The claimant could file a claim *in personam* against the person who is liable for an obligation derived from a tort or breach of contract. The claimant might also lodge an action *in rem* directly against the vessel that relates to the action; only a federal court could exercise the jurisdiction over a claim *in rem*. Meanwhile, a claim *quasi in rem* is lodged to compel the defendant to appeal in court.

For a seafarer who is injured during the service of a vessel, he or she is entitled to file a claim against their employer for compensation under the Jones Act, the compensation from which is based on negligence. However, the seafarer or dependent has to prove the existence of an employment relationship and that the compensation claim is due to injuries or death under the Jones Act. This type of claim cannot be secured by a maritime lien. A foreign seafarer may lodge a claim according to the Jones Act. The court would decide whether the Jones Act is applicable to a foreign seafarer on consideration of the following factors: (1) the place of the wrongful act; (2) the law of the vessel's flag; (3) the allegiance (nationality) or domicile of the injured seaman; (4) the allegiance of the shipowner; (5) the place of the contract; (6) inaccessibility of the foreign forum (jurisdiction); (7) the law of the forum; (8) the vessel owner's base of operations.

As to the wage dispute, a seafarer could apply a maritime lien that would bring a seafarer and vessel to a maritime jurisdiction. However, the claim based on a maritime lien should only be brought *in rem* against the ship itself. A seafarer's wage is listed as the most 'preferred maritime liens' in the Federal Maritime Lien Act [36].

4.6. The current practices of jurisdiction over maritime labour matters

Case One: Seafarers Abandoned on Ship PING DA 7.

On 11 December 2013, the refrigerated cargo ship PING DA 7 flying the Kiribati flag ran aground and damaged coral reef off the Federated States of Micronesia, before the local police detained all 17 Chinese seafarers' certificates. However, the Hong Kong-based registered owner (PING JH) and ship managing company (RUN JIU SHIPPING) had been refusing to supply the seafarers with food and fresh water. The ship managing company was based in Zhejiang, China. When the message was transferred to the Chinese Maritime Safety Administration (the MSA), it coordinated with the local government where the ship managing company was domiciled. Through the

intervention of the local government through China's consular officer in Micronesia, the ship managing company eventually supplied the seafarers with provisions who were then repatriated; however, the captain was jailed for six months.

In this case, the Flag State did nothing, which the seafarers would have expected. The Port State, Micronesia had hoped to criminalise the seafarers and would not protect their labour rights. Eventually, it was the seafarers' Supply State, China who exercised the enforcement jurisdiction to protect them. Another key prerequisite was the ship managing company domiciled in China, which allowed the Chinese local government to control the employment relations. Supposing that the ship managing company was domiciled somewhere other than China, the Chinese local government would have had no access to impose any impact on the company. Had this been the case, the result would have been altogether different. In this case, China played two roles: one as a Labour Supplying State who was obligated to exercise the jurisdiction and the other as a State of Shipowner, who was capable of exercising the jurisdiction.

Case Two: Seafarers Abandoned on Ship LEDOR.

The bulk carrier LEDOR flew the flag of Sierra Leone. The ship registered owner G & B SHIPPING PK was in Panama, while the ship manager/commercial manager KRALI SHPK was in Rruge Skenderbeg Durres, Albania. The ship ran aground and then polluted off Putian water, China in October 2011. Later, the ship was abandoned by the shipowner who had also refused to supply the crew or to pay seafarers' wages. Along with the pollution and abandonment, the Chinese consignee applied to the Xiamen Maritime Court for a writ for cargo discharge, the Albanian captain and 17 Syrian seafarers refused to discharge cargo unless their wages were paid. The Chinese maritime judges had to coordinate with the consignee to make advancement to the seafarers as part of their wages. The seafarers also applied for a maritime lien over the vessel for their wages and filed a lawsuit against the shipowner who even did not appear before the court. The Chinese Maritime Court arrested the vessel upon application and made a decision to auction the vessel to cover the seafarers' wage payment and repatriation.[5]

In this case, the Flag State jurisdiction did not function at all. Moreover, both the Labour Supplying State and the State of Shipowners failed to exercise their authorities to protect seafarers' rights. It was the Port State, China who exercised the adjudicative jurisdiction on the basis of the employment relationship between the seafarers and shipowner. Chinese maritime law transplanted key legal principles from English maritime law into its existing civil law system. There is no action *in rem* in China's maritime law, however Chinese and foreign seafarers could have maritime liens arising from unpaid wages and injury (death) compensations. Through the exercise of the maritime liens against the ship, China's maritime court took action *in personam* and the adjudicative jurisdiction over the overseas shipowner.

Case Three: Bautista v. Star Cruises.[6]

In 2003, vessel SS Norway (dismantled in 2006) of Norwegian Cruise Lines (owned by Star Cruises) suffered a rupture of one boiler while docked at its Miami terminal. In the explosion, eight Filipino seafarers lost their lives, and another 17 were injured, including ten who suffered serious burns. The ship registered owner was Norwegian Cruise Line Ltd in Bermuda, and the ship managing company was Norwegian Cruise Line Holdings in Miami, USA. In 2007, the US National Transportation Safety Board attributed the accident to 'deficient boiler operation, maintenance, and inspection practices of Norwegian Cruise Line, which allowed material deterioration and fatigue cracking to weaken the boiler.' The family members of the deceased seafarers filed lawsuits against the mother company, Star Cruises in a Miami court under the Jones Act. However, the defendant's attorney persuaded the court to uphold the arbitration provision within the Philippine Overseas Employment Administration Standard Employment Contract (POEA SEC) that should have been signed before the Filipino seafarers were placed on board.

The US Federal Eleventh Circuit Court decided that the Filipino seafarers' employment contracts reflected the commercial legal relationships and thus declined to exercise the adjudicative jurisdiction. The Convention Act 1970 of the US for ratification of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 creates a framework for the enforcement of arbitral international commercial contracts. The Federal Arbitration Act 1925 of US stipulates that 'any parties within the US that have agreed by contract to arbitrate commercial disputes are compelled to do so rather than settle their claims in court.' However, the Federal Arbitration Act specifically excluded seafarers' contracts from the definition of commercial contracts that are subject to arbitration. The Federal Circuit Court reviewed that the language of the Convention Act and overrode the exemption of seafarers because the Convention Act applies to all 'commercial legal relationships without exception'.

In this case, the Flag State jurisdiction was invisible as well. The US should have played two roles. The first one was as a Port State, because the ship was docked in Miami when the accident occurred and the US National Transportation Safety Board should have taken on the investigation obligation, according to the requirements of the SOLAS Convention. Secondly, the US could also have been regarded as the State of Shipowners, since the headquarters of the ship managing company was in Miami, USA. However, the Federal Circuit Court declined to exercise the adjudicative jurisdiction. The judge dismissed the motivation of the claim on the grounds of the arbitration clause in the foreign seafarers' employment contract. Some scholars argued that the US courts have lost its openness and have closed its 'doors' to overseas seafarers, which originated from earlier cases such as *Lauritzen v. Larsen* and *Hellenic Lines Ltd. V. Rhoditis* [37].

There could be some other arguments from this case. There are concurrent jurisdictions in this case. On the one hand, the POEA formulated its Seafarer Employment Contract (SEC) and compelled the SEC to be followed by seafarers, the agency and shipowners. According to the SEC, '(a dispute) should be submitted to either the original and exclusive jurisdiction of the National Labour Relations Commission or the original and exclusive jurisdiction of the voluntary arbitrator or panel of arbitrators, and the POEA shall exercise original and exclusive jurisdiction to hear and decide disciplinary action on cases'. Thus, it is the Philippines who acted as the Labour Supplying State and attempted to exercise its enforcement jurisdiction by providing minimum protection for its nationals. On the other hand, the US should have played two roles (the Port State and the State of Shipowners) and exercised its adjudicative jurisdiction. As a result thereof, on the basis of concurrent jurisdictions, the seafarers should have had optional access to jurisdictions for the better protection of their labour rights. Nevertheless, the US court declined the entitlement of seafarers [38].

5. Discussion: the necessity of entitling seafarers to select jurisdictions

Both the enforcement and adjudicative jurisdictions are derived from the sovereignty of a state. Regarding maritime labour matters, the enforcement jurisdictions are strictly and explicitly assigned to the Flag, Port and Labour Supplying states through international law. Among the authorities, the Flag State should have exclusive enforcement jurisdictions over maritime labour matters in principle, while the Port State is responsible for supplementing the implementation if the

[5] Xiamen Maritime Court, Agolli v. G & B SHIPPING PK, Civil Judgment (2012) of Xiamen Maritime Court(Xia - Hai - Fa - Shang - Zi No.364), Available at: < http://xmhsfy.gov.cn/ShowList.aspx?nid=17 & id=422 > (accessed 2016. 04.16), 2012 [in Chinese].

[6] []Bautista v. Star Cruises, 696F. Supp. 2d 1274 (S.D. Fla. 2010), Available at: < https://www.courtlistener.com/opinion/2432189/bautista-v-star-cruises/ > (accessed 2016. 04.16), 2010.

Flag States fail to perform their obligations fully. Due to the practices of the flag of convenience and port of convenience, the current enforcement of maritime labour conditions cannot fully function. As indicated by Case One and Case Two, Labour Supplying States (China and the Philippines in both cases) have to play some active role in order to protect their citizens' rights. These protective measures are based on the fact that the Labour Supplying States are entitled to exercise the enforcement authority on the basis of the seafarer's domicile. Accordingly, it might be worthwhile considering allocating more functional jurisdictional power to those Labour Supplying States in the MLC since some Flag States and Port States do not have such motivation or capability to protect foreign seafarers' labour rights. But it is also noticed that the 'crew of convenience' practice can restrict seafarers' access to the jurisdiction of the state in which they are domiciled. Therefore, more legal instruments are needed to be introduced in the field of enforcement jurisdiction of maritime Labour Supplying States.

The adjudicative jurisdiction should be ascertained according to the principle in order to provide seafarers with utmost labour rights protection, considering some member states to the MLC may fail to exercise the enforcement jurisdiction properly. Unlike the certainty of enforcement jurisdiction, the adjudicative jurisdiction is more flexible and uncertain nowadays. Also, the Flag State, Port State and Labour Supplying States can exercise the adjudicative jurisdiction based on their links with the claim. Furthermore, the shipowner's domicile could also be served as a forum choice in the State of Shipowners. The statutory rules of the EU could be regarded as one such example. The adjudicative jurisdiction of the Port State can be constructed through a jurisdiction clause or a claim *in rem* or application of maritime lien by a seafarer. Accordingly, under English and US common law, maritime adjudicative jurisdiction could be established on seafarers' labour claims. China's Maritime Code and procedural rules are similar to some principles of English maritime law, while the Chinese Maritime Court set such a precedent in Case Two, which provided seafarers with convenient access to Chinese maritime jurisdiction. Therefore, theoretically and practically, seafarers should have the right to choose a proper state for the adjudicative jurisdiction over labour matters. The adjudicative jurisdiction regime should be arranged according to the convenience of seafarers. However, in the real maritime world, some courts construct barriers to block seafarers' access to justice, which results in a 'jurisdiction of inconvenience' for seafarers, with the US Court in Case Three one such example.

Through an evaluation of the current principles and practices of maritime labour jurisdiction, it appears that it is constructed through the connection between the state and the claim that arises from the employment relationship. But not every state would like to open the 'door' of its jurisdiction to foreign seafarers. To change this situation, it is necessary to entitle seafarers to select a jurisdiction on a global basis.

If the maritime employment relationship is formulated, the Flag State jurisdiction should be accessible to seafarers since the contract is performed on the 'floating island' of the Flag State (see Fig. 2). A seafarer should also be entitled to file a complaint to the Port State administrative agency according to the MLC or a claim *in personam* to the court in the Port State where the employment contract is discharged or a claim *in rem* is raised. The Labour Supplying State where the seafarer is domiciled should exercise jurisdiction over the employment relationship to protect her citizens' labour rights. The States of Shipowners should facilitate seafarers' access to their adjudicative jurisdiction on the basis of non-discrimination of foreign workers. Concurrent jurisdictions may occur in theory. However, considering the inaccessibility of some jurisdictions in practice (for example the jurisdicitions of some Flag States) to provide reliable protection to seafarers as vulnerable mobile and migrant workers, seafarers should be entitled to select a forum. This forum can be based in any state which is accessible to seafarers and where there is a reasonable link between the employment relationship and the state.

6. Conclusion

A Seafarer Employment Agreement is required by the MLC to be placed on board a ship indicating the existence of the employment relationship between the seafarer and shipowner. Maritime employment relationships are usually transnational, and concerned with both the maritime jurisdiction and labour jurisdiction. The mixture complicates the enforcement and adjudicative jurisdictions and choice of governing laws. General maritime jurisdiction is flexible. For example, where two cargo vessels collide with each other, the jurisdiction for their dispute settlement could be chosen on the basis of one of the Flag States of the two ships or even a third party agreed by the parties involved since they are equal civil legal subjects. Meanwhile, in the maritime labour relationship, in order to achieve the principle of equity, additional attention needs to be paid to the employee as the weaker party, which is to ensure seafarers' rights. One such effective approach is to entitle seafarers the freedom to choose the forum.

The maritime labour jurisdictions and choice of governing laws should not be convenient only for shipowners, such as taking advantage of the notions of the flag of convenience, port of convenience or crew of convenience. To regulate the negative effects of shipowners' free choice of jurisdiction, additional protections need to be provided to the seafarers. The freedom of seafarers to choose jurisdiction among Flag

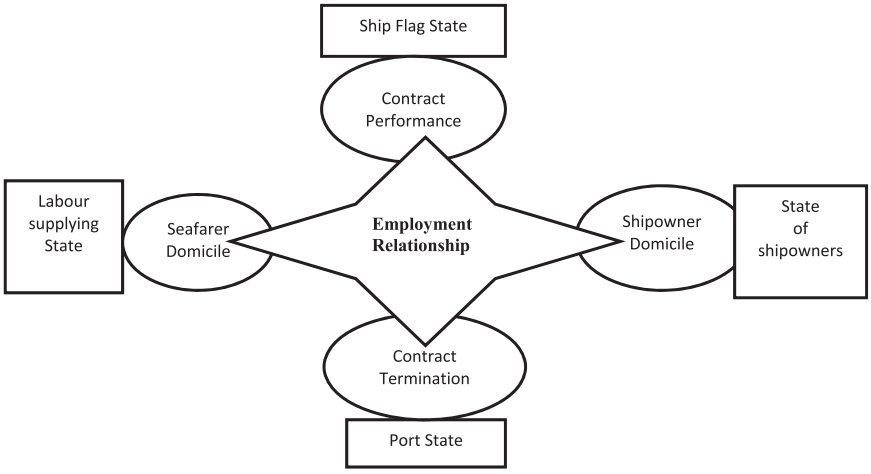

Fig. 2. Maritime employment relationship.

States, Labour Supplying States, the States of Shipowners and Ports States should be confirmed by the international legal instrument. This principle should be applicable to vulnerable workers and in particular to mobile and migrant workers. The Labour Supplying State should exercise protective jurisdiction over their seafarers. In the case of *PING DA 7*, the Chinese MSA's intervention assisted the Chinese seafarers to be repatriated. This case verifies that the Labour Supplying State and the State of Shipowner are capable of addressing seafarers' labour disputes overseas through administrative measures.

It is necessary to provide seafarers with wider access to jurisdiction and to mitigate restrictions on their options of jurisdictions over labour matters. Although the current provisions of the MLC do not provide a principle regarding the determination of jurisdiction or legal forum, we suggest that this issue should be considered and a further amendment is necessary to excplicitly demand member state's obligations to entertain seafarers' complaints or disputes in their jurisdictions, regardless of the Flag States, Port States or Labour Supplying States. In the case of *LEDOR*, Syrian seafarers accessed adjudicative jurisdiction from the Chinese Maritime Court (Port State), which was the key step to solve their problems. However, the Filipino seafarers were unable to seek justice in the US in the case of *SS Norway*, although the accident occurred on US territory. The US federal courts' practice put seafarers in a more vulnerable situation. The practice to reject the petitions of seafarers in the US should not be encouraged while the Chinese state's positive intervention to help both Chinese seafarers and foreign seafarers should be encouraged. Future MLC amendaments should require member states to entertain foreign seafarers' claims wihout dicriminatory treatment. The principle outlines that the member states should ensure foreign seafarers to equal access to jurisdictions on the basis of non-discrimination, if the employment relationship proves to have a reasonable link with the state. Where the 'genuine link' between shipowners and seafarers is likely partitioned by the flag/port/crew of convenience in the maritime sector, the 'genuine link' between the State of Shipowners and seafarers should be reenhanced and reinforced through the disclosure of the employment relationship. The 'genuine link' between seafarers and the State of Shipowners might be the life-saving component because the jurisdictions of some Flag States and even Labour Supplying States may be inaccessible in reality. From this perspective, the 'genuine link' between seafarer and the State of Shipowners must be recognised.

Not only do the merchant seafarers have to confront poor working conditions, the struggles in accessing jurisdiction and making the choice of governing laws, but so do some other transnational migrant workers. For example, fishermen (seafarers on fishing vessels), and in particular, many of those in the Thai seafood supply chain from Southeast Asian states experience similar problems or even worse labour conditions and more uncertain jurisdictions. In this research, a small number of cases have been selected, therefore we cannot over generalise our findings and arguments. However, these three cases reveal the severe and ugent problems faced by seafarers in seeking access to a conveinent jurisdiction for their complaints or claims. For every transnational migrant worker, the access to fair and unrestricted jurisdiction is a crucial component of their labour rights, as well as with regards to human rights protection.

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