Law and policy perspectives of seafarers' claims

Lunecito U. Delos Santos

World Maritime University

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LAW AND POLICY PERSPECTIVES OF SEAFARERS’ CLAIMS

By

LUNECITO UBIAS DELOS SANTOS
Philippines

A dissertation submitted to the World Maritime University in partial fulfilment of the requirements for the award of the degree of

MASTER OF SCIENCE
In
MARITIME AFFAIRS
(MARITIME LAW AND POLICY)

2008
DECLARATION

I certify that all the materials in this dissertation that are not my own work have been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

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ABSTRACT

Title : Law and Policy Perspectives of Seafarers’ Claims

Degree : Master of Science (MSc)

The seafaring profession is as old as human history. It’s over-all contribution to the continued growth and expansion of the global economy is enormous considering that more than 90% of the total volume of global trade is moved by sea transport. This phenomenon is attributed to the concerted efforts of maritime states to ensure safety of navigation of ships flying their flags and the dedication, commitment and competence of seafarers involved in the ocean trade.

Over the years, shipping industry witnessed the increasing influence of harmonized international standards such as the technical, navigational and operational requirements for ships and the training and competency of seafarers through the adoption of internationally and legally binding agreements. However, seafarers’ social and economic security concerns have not been the subject of the same detailed international agreements. In an era where the global advocacy for human rights has reached its peak, many seafarers are still abused, exploited, abandoned, and live in sub-human conditions.

There is no single and comprehensive international legal regime that is in force at the moment to protect and promote the rights and welfare of seafarers, especially the security of their claims.

This study therefore attempts to analyze the international legal framework of seafarers’ claims from the public, regulatory and private law perspectives. Discussions of contemporary policy issues which are related to seafarers’ claims are likewise done from the point of view of seafarers. This study also attempts to provide a platform for policy debate among maritime states particularly to shipowning states, open registry states and maritime labor supplying states of the need to address seriously all issues relevant to seafarers’ claims.

Keywords: seafarers’ claims, flags of convenience
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICONS</td>
<td>International Commission on Shipping</td>
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<td>ILO</td>
<td>International Labor Organization</td>
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<td>ITF</td>
<td>International Transport Workers Federation</td>
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<td>IMO</td>
<td>International Maritime Organization</td>
</tr>
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<td>ILLC</td>
<td>1966 International Convention on Load Lines</td>
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<td>MARINA</td>
<td>Maritime Industry Authority</td>
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<td>POEA</td>
<td>Philippine Overseas Employment Administration</td>
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<tr>
<td>NLRC</td>
<td>National Labor Relations Commission</td>
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<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<td>UNCESCR</td>
<td>United Nations’ Convention on Economic, Social and Cultural Rights</td>
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<td>UNDHR</td>
<td>United Nations Declaration on Human Rights</td>
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CHAPTER I

INTRODUCTION

1.1 Nature of Seafaring

Seafaring is a vital part of human history and progress.¹ During the early times, it played a key role in the humanity's quest for survival and in the pursuit of wealth, power, knowledge and the mastery of the marine environment. The construction of vessels capable of confronting the “perils of the sea” permitted man to venture even further from land in search of fish and other foodstuffs. From antiquity, ocean shipping fostered trade and travel thereby enriching and diversifying human culture through the exchange of goods and ideas.²

Contributing immensely to the genesis and the development of ancient civilizations in China, India and Iraq which had all their beginnings in river valley civilizations, seafaring afforded a very good opportunity for economic, political and military interactions between and among states.

From the Roman Empire to the Second World War, naval and mercantile fleets made the difference between defeat and victory in war. While performing commercial activities in times of peace, seafaring provided the necessary naval fleet and forces in times of war.

Seafaring’s economic dimension is its role in trade facilitation such as in the movement of people, cargoes and services. Islands of archipelagic states as well as between and among states are inter-connected or are linked together primarily because of shipping activities.

Following the rapid expansion of the global economy which demanded more fleets to meet the growing demands of seaborne trade, seafaring has become and

² William H. Tetley, International Maritime and Admiralty Law, Quebec, Canada: Blais International Shipping Publications, 2002 at p.3.
continues to become one of the major backbones of the national economies of shipowning states and maritime labor supplying countries. At present, 90 per cent of the total volume of global trade is moved by sea.³

The metamorphosis of seafaring has evolved to become the most globalized of all industries. Ships now travel seamlessly from one country to another and are manned by seafarers from different nationalities. Seafaring has emerged, by its own, not just as a way of living but as a profession.

1.2 Seafaring Life

1.2.1 Early Seafarers

Quoting from Fitzpatrick and Anderson, the best way to describe the life of early seafarers is to refer back from the chronicles of Edward Barlow who went to the sea in 1659 which he wrote in 1663, upon his return from a voyage of 20 months on a British ship, Queen Charlotte. Together with his shipmates, they had to pay through their wages for damaged cargo. Barlow wrote that:

After going with many hungry belly and thirsty stomach, and many a stormy and dark nights with cold and wet coats, and hoping to receive what they have worked for with sweat and toil after venturing their lives amongst all manners of dangers, for to enrich others at home in all manners of pleasures and delights, wanting nothing that can please their senses; and in this manner are they recompensed, when the poor seamen are no more in fault than the man that never saw a ship all his lifetime.⁴

Seafarers’ life was considered difficult and harsh in terms of economic, social and legal protection. Borrowing from Fitzpatrick and Anderson:

Seafarers lacked the necessary provision for basic needs such as foods and necessary medical attention, in case of physical injuries. The basic foods they brought along with them were mostly salt dried meat and hard biscuits for long voyages. Scurvy was the killer on long voyages due to deficiency of vitamin C as a result of lack of fresh fruits and vegetables. The health of the seafarers was adversely affected by poor accommodation and bad, inadequate food. Damp, crowded forecastles and lack of vegetables, fruits, milk and decent meat to sustain long hours and hard labor, contributed to tuberculosis and other illnesses. Even fresh waters were rationed on long sea passage and were themselves a source of disease. Ships were known

to take water on board direct from river sources, which was then stored in wooden casks. Nutrition was also reduced by the lack of proficiency of cooks. Moreover, the loss of crew during voyages was not only from desertion, but also from death due to exposure to new, infectious diseases, from crew being washed over the side, and from falls from rigging. As always, deaths are underreported for many reasons, including the deaths of seafarers ashore from illness and accidents.  

Wages were vital issues sometimes argued out before sailing. Their wages were not paid until the end of the voyage. When a man desert, his earned wages forfeited. There is no doubt that some seafarers were driven by unscrupulous Masters to desert. Seafarers were also made accountable for damage to cargo during the voyage and their wages taken.

1.2.2 Present-day Seafarers

The painful epic journey of early seafarers provided some lessons learned. To prevent accidents, shipboard safety regulations were introduced during the later part of the 17th century. This practice was not meant to confer rights on seafarers but as a means to ensure safety of navigation with the main purpose of securing the safety of the ship and the cargoes on board.

With regard to living and working conditions, the Final Report of the International Commission on Shipping (ICONS) says that:

Life at sea for many seafarers involves much abuse. Physical abuses include beatings and sexual assault, inadequate medical treatment, sub-standard accommodation, and inadequate food. Mental abuse arises from isolation, cultural insensitivity and lack of amenities for social interaction.

Non-payment of wages, delays in paying entitlements to families, and even abandonment are additional abuses that contribute to the suffering of a large proportion of seafarers. There are few major ports in the world that have not played hosts to one or more abandoned ships and their crews in recent years. The crews can go for many months, sometimes years, with no pay and little hope of repatriation. Unless, these seafarers receive assistance from unions or special services of seafarers’ missions, they will usually lack the means or ability to seek redress through the flag.

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5 Ibid.
6 Ibid.
States’ courts or administrative systems, and are, therefore, usually totally reliant on charity for their subsistence.⁷

By the nature of their employment, seafarers are regarded as belonging to a "special category of workers because they are always subject to different jurisdictions which they might be brought in contact".⁸ The possibility of abuse then is not remote. Citing Jonathan Kitchen, Prof Li mentions that “of all sections of the community, seafaring men … have been the most ignored and therefore the worst treated”⁹.

Following the growing concern for the increasing number of casualties and missing persons at sea and losses of cargoes, the International Maritime Organization (IMO)¹⁰ was established in 1948 to respond to the issue of sub-standard shipping, pollution of the marine environment, and the training and competency of crews. A number of international regulatory regimes to promote safety of life at sea and the protection of the marine environment have been adopted under the auspices of the IMO such as but not limited to the 1974 International Convention for the Safety of Life at Sea (SOLAS); the 1978 International Convention on Standards of Training, Certification and Watchkeeping (STCW) as amended in 1995; and the 1966 International Convention on Load Lines (LLC) and others. Established in 1919, the International Labor Organization (ILO), on the other hand, proactively developed international instruments that aim at benchmarking minimum working and labor standards for workers. Various ILO Conventions and Recommendations intended for seafarers were adopted but some of them have never entered into force. Others have very low ratification rate. This situation prompted the consolidation of all ILO Conventions relating to seafarers which is now the Maritime Labor Convention of

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¹⁰ The International Maritime Organization (IMO), formerly known as the Inter-Governmental Maritime Consultative Organization (IMCO) was established in 1948 through the United Nations (UN) to coordinate international maritime safety and related practices. However the IMO did not enter into full force until 1958.
2006 which is expected to enter into force in 2010\textsuperscript{11} to provide the framework for seafarers' rights.

The United Nations Conference on Trade and Development (UNCTAD) also adopted international regimes to address the issue of maritime claims and arrest of ships which is supposed to represent the private law aspect of seafarers' claims but these have either never been in force or have very low ratification rates among maritime nations.

Clearly enough, there is no single and comprehensive instrument that is currently in force under international law that deals exclusively with seafarers' claims that arise from loss of life, physical injuries, unpaid wages and abandonment.

In spite of the presence of strong seafarers' unions or associations, efforts to advance seafarers' interests have been unsuccessful as compared to technical regulations adopted for safety of navigation and protection of the marine environment.

Realizing the urgency of addressing the issue of seafarers' claims, the IMO and the ILO adopted the following Resolutions:

- Resolution A. 898 (21) on the Guidelines on Shipowners' Responsibilities in Respect of Contractual Claims for Personal Injury to or Death of Seafarers\textsuperscript{12} which was amended by Resolution A. 931 (22) because the former did not directly address contractual claims for personal injury to or death of seafarers, but was concerned to ensure that shipowners have effective insurance cover or other effective forms of financial security for maritime claims.\textsuperscript{13}

\textsuperscript{11} In order to enter into force, the MLC 2006 has to be ratified by at least 30 members representing 33\% of the world gross tonnage.
\textsuperscript{12} Adopted on 25 November 1999.
\textsuperscript{13} IMO, Guidelines on Shipowners’ Responsibilities in Respect of Contractual Claims for Personal Injury to or Death of Seafarers, Doc. No. A 22/Res.931, 17 December 2001 at p.2.
ii. Resolution No. A.930 (22) on the Guidelines on the Provision on the Financial Security in Case of Abandonment of Seafarers\textsuperscript{14}.

Under international law, these Resolutions are regarded as soft laws and that these do not have binding effects among member States of the IMO.

1.3 Purposes

Against this backdrop, this paper aims to provide a platform for policy debate among policy makers in the maritime manpower industry of the need to look into seriously the problems of seafarers’ claims \textit{i.e} loss of life, personal injury, abandonment, and unpaid wages. It also aims to underscore upon maritime labor supplying states of the pressing need to strengthen their national legal infrastructures on the implementation and enforcement of the rights and welfare of their seafarers who are deployed for overseas employment. This paper likewise attempts to emphasize the need to find a common ground for the continuous discussion and eventual conclusion of all problems associated with open registry systems; development of a mandatory regime for the financial security of seafarers’ claims and ratification of maritime labor related instruments.

1.4 Scope and Delimitation

While there are many dimensions of the issues of seafarers’ claims, this study focuses in its discussions on the international legal framework and policy perspectives of seafarers’ claims mainly from the point of view of seafarers.

1.5 Structure

To attain the objectives set by this study, this paper is divided into the following chapters:

Chapter II discusses various rights of seafarers particularly those that give rise to legal claims or compensation for damages whenever they are violated.

\textsuperscript{14} Adopted on 29 November 2001.
Chapter III examines the nature of seafarers’ claims and attempts to illustrate that seafarers' claims and the relationship of maritime claims and maritime liens.

Chapter IV analyzes the international legal framework for seafarers’ claims from the public, regulatory and private law perspectives.

Chapter V presents the Philippines, being the world’s major supplier of maritime manpower, as a country model. Discussions cover the profile of the country’s maritime manpower industry as well as its legal framework for seafarers’ claims. It likewise discusses briefly some labor regulations of Panama with to view to offering an inference of what Filipino seafarers and other foreign seafarers expect on the world’s largest open registry.

Chapter VI analyzes selected contemporary and multi-jurisdictional issues affecting seafarers claims such as the open-registry systems vis-a-vis genuine link, ratification of maritime labor related conventions, piracy and armed robbery against ships as another source of seafarers’ claims and the development of a long term solution for the financial security of seafarers.

Chapter VII makes some concluding remarks of this study.
CHAPTER II

RIGHTS OF SEAFARERS

Seafarers are like other human beings who possess rights that are inherent, universal and unalienable. These kinds of rights are not granted by the State because they go with their persons upon birth. There are also rights which are granted to them by the State through legislative enactments and examples of these are labor and welfare rights. The former are referred to as human rights which make up the very meaning of human existence where States are imposed with the legal duty and obligation to recognize and protect them. The latter are called statutory rights because they are conferred upon by law.

The essence of rights is that any violation of them gives any injured person a legal right to redress such wrong doing before a court of justice and an entitlement to claim for compensation for damages.

While this paper recognizes that seafarers have plenty of human and statutory rights, discussions will focus on those rights that give rise to compensation for damages whenever they are breached.

2.1 Human Rights

Human rights refers to the “basic rights and freedoms” to which all human are entitled. They include, among others, the right to life and liberty and equality before the law.

2.1.1 Right to Life

Life is regarded as one of the unalienable rights of every human being. As enshrined in article 3 of the United Nations’ Universal Declaration of Human Rights
Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

The above declaration encompasses these important elements: (a) inherence of the right to life and (b) legal protection of such right. This right is one that is not conferred or granted by any law it obliges States to secure this unalienable right of its people.

In giving meaning to man’s right to life, human beings, having been born free and equal in dignity, must be treated without distinction of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Moreover, no human being shall be held in slavery or servitude or be subject to torture or to cruel, inhuman, or degrading treatment or punishment.

2.1.2 Right to Equal Protection of Laws

Seafarers are often times regarded as belonging to a special category of workers because their employment requires them to be subject to multi-legal jurisdictions. In this regard, they have the right to be afforded with necessary legal protection and have to be treated equally before any law. The UNDHR is explicit on this:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

16 The International Covenant on Civil and Political Rights or ICCPR was created in 1966. It entered into force on 23 March 1976.
17 Supra, footnote no.15.
18 Ibid, In Article 2.
21 Ibid, In Article 7.
What is guaranteed on the abovementioned declaration is “legal equality”, or as it is usually put, the equality of all persons before the law. Each individual is dealt with as an equal person in the law, which does not treat the person differently because of who he is or what he possesses.\textsuperscript{22}

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\textbf{Box 1}

\textbf{From Wage Claim to Prison}

In January 2004, the crew of the oil tanker, \textbf{Capbreton 1}, contacted the ITF for help with a wage claim. The vessel had been sold by a French company the previous year to new Nigerian owners and the crew had stayed on board. From May 2003 the crew were not paid and, in July, the vessel was arrested by the maritime police for being in Nigerian waters without the required authorisation.

The owners assured the crew that this would soon be lifted and asked them to stay on board to ensure maintenance of the ship. They soon began to suffer from a lack of regular food, water and fuel supplies, but remained on board hoping to secure their outstanding wages by liaising with their respective embassies and with a local lawyer to try and resolve the situation amicably.

In February 2004 their situation took a turn for the worse. Police inspectors arrived on board and accused them of carrying an illegal cargo of oil extracted from vandalised pipelines. They were promptly transferred to police cells and from there to Ikoyi prison in Lagos. In an appeal to the ITF one seafarer wrote: ‘We have not been paid for eight months and are now under arrest for something our shipowner has done. We believe that it was all mounted by our shipowner who can use us as scapegoats for a crime he has done, and on top not pay the wages that he owes us.’

The unfortunate seafarers from Cote d’Ivoire, Benin, Togo and Burkina Faso were charged at a time when the Nigerian government had decided to publicly crack down on illegal bunkering and was seeking to make examples of the perpetrators. They found themselves in a complex legal situation, with the lawyers of the two owners alternately seeking to make deals to extricate one or the other from blame and place all responsibility on the other party, whilst simultaneously portraying the seafarers as criminals.

Locked up in jail, the seafarers were dependent on the ITF and religious organisations for humanitarian assistance. During this period one of their number became ill with a heart condition and in need of medication. Without any means of subsistence from their employers, the crew had to apply to their embassies for help with medical costs and even for transportation between the prison and the court. Their hopes were endlessly raised and dashed by a seesaw of hearings and adjournments in the Nigerian courts. After an excruciating 21 months in prison they were finally released on 30 November 2005 and were repatriated with some of their wage arrears. They have received no compensation for the mental and physical distress caused by their unjust internment.

\textit{Source: ITF Actions Department}

2.2. Labour and Welfare Rights

Labour rights are synonymous with workers' rights. They are a group of legal rights and claimed human rights which have to do with labor relations between workers and employers. They also encompass everything about workers’ pay, benefits and safe living and working conditions.

Box 2

CREW RUTHLESSLY EXPLOITED

Ten Indonesian fishers scaled the Port Company security fence in Port Nelson, New Zealand, seeking protection from the abuse and inhumane conditions on board the Sky 75, a Korean registered fishing vessel over 30 years old. The crew complained of constant verbal and physical abuse and excessively long working hours. They were fed bad food, with rotten meat and vegetables and products past their sell-by date. They were expected to sleep 12 to a cabin, with no blankets and for washing they were told to stand on deck and “shower” in the waves. There was no medical provision on board, or protective clothing, and the crew gave the example of one of their number who crushed his arm in some machinery and was told to carry on working, without treatment. In addition to the indignity and discomfort of their working and living conditions, the crew had not been paid since joining the vessel. Each had paid over US$600 to a Jakarta manning agent to secure their jobs.


2.2.1 Right to Wages

Wages are indispensable component of employment. Because employment is regarded as a property right, any person is entitled to demand payment of his exertions or anything that is due to him. The term wages also includes payment for services made in excess of the seafarer’s regular working hours as well as allowances and related monetary benefits.
Box 3
In explaining before the French public why the seafarers were taking action against the owners of the OBO Basak which was arrested by its creditors, they have written the following:

1. From a motorman

I haven’t received any wages for the past six months. My wife and children at home are suffering. They are being looked after by neighbors and relatives. I haven’t even got enough money in my pocket to buy a razor to shave. I don’t know what to do. Please help us.

2. From a Bosun

In the past ten months I have only received $100. I live in a rented house and my wife receives expensive medical treatment; my son is doing his unpaid compulsory military service and I am the only breadwinner. My neighbors cannot support my family anymore…. We have been completely abandoned.

Source: The Global Seafarer, p.76

2.2.2 Right to Reasonable Working Hours and Holidays

The United Nations’ Convention on Economic, Social and Cultural Rights (UNCESCR)\(^\text{23}\) obliges State Parties in Article 7 to recognize the right of everyone for the enjoyment of just and favorable conditions of work which ensure renumeration\(^\text{24}\), safe and healthy working conditions\(^\text{25}\), rest, leisure and reasonable limitations of working hours and periodic holidays with pay, as well as renumeration for public holidays.\(^\text{26}\)

The ILO likewise provides a standard forty-hour working week for all workers\(^\text{27}\). Any service that is rendered beyond forty hours should be limited and voluntary. Persons working beyond the standard time must be compensated with an overtime pay which shall be computed on the basis of existing labour regulations. To respond to the issue of fatigue, the ILO in Convention No. 180, “Seafarers’ Hours of Work and

\(^{23}\) United Nations’ Convention on Economic, Social and Cultural Rights or UNCESCR. It was adopted and opened for signature, ratification and accession by the UN General Assembly Resolution 2200A (XXI) of 16 December 1966. It entered into force on 03 January 1976.

\(^{24}\) Ibid. In Article 7(a).

\(^{25}\) Ibid. In Article 7(b).

\(^{26}\) Ibid. In Article 7(d).

\(^{27}\) ILO Convention 47, “Forty-Hour Week Convention, 1935 “. It entered into force on 23 June 1957.
the Manning of Ships Convention, 1996 provides limits on hours of work and rest for seafarers on board a vessel. In particular, the maximum hours of work shall not exceed: 14 hours in any 24-hour period and 72 hours in any seven-day period. The minimum hours of rest shall not be less than: ten hours in any 24-hour period and 77 hours in any seven-day period.

Under ILO Convention No. 146, “Seafarers’ Annual Leave with Pay Convention, 1976”, seafarers are entitled to an annual leave which shall be with pay of at least 30 calendar days for one year of service. Any seafarer whose length of service is less than one year is also entitled to a leave and also with pay which shall be prorated in accordance with his length of service.

Furthermore, seafarers are also entitled to an annual leave with pay for at least 30 calendar days per year. For seafarers, this leave is called “shore leave”.

The STCW Convention likewise provides for a 10-hour rest in a 24-hour period of work.

2.2.3 Right to Receive Medical Treatment for Sickness and Injury

Seafarers are entitled to receive medical treatment for sickness and injury while on active service. ILO Convention 164, “Health Protection and Medical Care (Seafarers) Convention, 1987”, obliges State Parties to ensure that measures providing for health protection and medical care for seafarers on board ship are adopted which guarantee seafarers the right of seafarers the right to visit a doctor without delay in ports of call where practicable and medical services shall be provided free of charge to seafarers.

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29 Ibid. In Article 5 (1)(a.i) and (a.ii).
30 Ibid. In Article 5 (2).
31 Ibid. In Article 5 (2).
32 In Paragraph A-VIII/a, STCW Code.
33 In Article 4 (c), ILO Convention No. 164, “Health Protection and Medical Care (Seafarers’ Convention)”
34 Ibid. In Article 4(d).
Medical advice by radio or satellite communication at sea is also made available for seafarers, including onward transmission of medical messages between ships and those ashore.\textsuperscript{35}

### 2.2.4 Right to Social Security and Welfare

Like all other workers, seafarers are entitled to right to social security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.\textsuperscript{36} ILO Convention No. 165, "Revised Social Security (Seafarers) Convention, 1978"\textsuperscript{37} binds State Parties to provide at least three (3) of these branches of social security: medical care, sickness benefit, unemployment benefit, old age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit, survivors' benefits.\textsuperscript{38} Seafarers are also required to be insured under a compulsory sickness insurance scheme.\textsuperscript{39}

In cases where a vessel is lost or foundered, seafarers shall be entitled to receive payment of wages against unemployment resulting from such loss or foundering.\textsuperscript{40} However, the maximum allowed payment of unemployment is limited to two (2) months of wages.\textsuperscript{41}

### 2.2.5 Right to Repatriation

A seafarer who is landed during the term of his engagement or on its expiration shall be entitled to be taken back to his own country, or to the port at which he was engaged.\textsuperscript{42} He has been deemed repatriated if he has been landed in the country to which he belongs, or at the port at which he was engaged, or at a neighbouring port, or at which the voyage commenced.

\textsuperscript{35}\textit{Ibid.} In Article 7(2).
\textsuperscript{36}\textit{Supra,} footnote no. 15 in Article 25.
\textsuperscript{37}ILO Convention No. 165 was adopted on 10 September 1987.
\textsuperscript{38}\textit{Ibid.} In Article 3, C 165.
\textsuperscript{39}ILO Convention No. 56, “Sickness Insurance (Sea) Convention, 1936”, in Article 1 (1), C56.
\textsuperscript{40}ILO Convention No. 8 “Convention Concerning Unemployment Indemnity in Case of Loss or Foundering of the Ship” in Article 1(1). It was adopted in Genoa, Italy on 09 July 1920.
\textsuperscript{41}\textit{Ibid.} In Article 1(2).
\textsuperscript{42}ILO Convention No. 166. “Repatriation of Seamen Convention”, adopted on 09 October 1987. This Convention Revised Convention No. 23.
The expenses of repatriation shall not be a charge on the seafarer if he has been left behind by reason of injury sustained in the service of the ship, shipwreck, illness not due to his own wilful act or default, or discharge for any cause for which he cannot be held responsible.\textsuperscript{43} ILO Convention 166 expanded the entitlements by a seafarer repatriation such as if an engagement for a specific period or for a specific voyage expires abroad; when the shipowner is no longer able to fulfil his or her legal or contractual obligations as an employer of the seafarer by reason of bankruptcy, sale of ship, change of ship’s registration or any other similar reason or regulations or collective agreement, to which the seafarer does not consent to go;\textsuperscript{44} in the event of termination or interruption of employment with an industrial award or collective agreement.\textsuperscript{45} The shipowner shall bear the cost for repatriation\textsuperscript{46} which shall be through expeditious means and the mode transportation shall be by air.\textsuperscript{47}

In case that the shipowner is unable to repatriate any of its seafarers, duties are imposed on the flag state on where the ship is registered, and its default, the Port State.

Box 5

\textbf{Intersea – Leaving Crews by themselves}

The ship arrived in Bulgaria with a crew who had been unpaid for months in 1994. Three returned home without wages and three remained in Bulgaria for more than two years pending resolution of their claim. The shipowner disappeared when he realized the crew were taking steps to recover their outstanding wages and the value of the ship would not even cover court expenses and port dues (priority claims) in full. After two years in Bulgaria, displaced from their homes, two of the crew had apparently settled there permanently and the third decided to go home. He was repatriated to Pakistan in 1996 by the Red Cross.

\textit{Source: IMO, Doc. No. IMO/IL/98/WGLCCS 1/6/2 at p.2}

\textbf{2.2.6 Right to Join Seafarers’ Associations}

While this is not a compensable right, the right to join seafarers association is indispensable in the seafaring profession. This right aims to promote and protect

\textsuperscript{43} Ibid. For specific reference please see Article 4 Convention No. 23.
\textsuperscript{44} Ibid. In Article 2 (1) (e), Convention No. 166.
\textsuperscript{45} Ibid. In Article 2 (1) (g).
\textsuperscript{46} Ibid. In Article 4 (1).
\textsuperscript{47} Ibid. In Article 4 (2).
seafarers’ interests especially those respecting to wages, improvement of workers benefits and working conditions, seafarers have the right to join, assist or form seafarers organizations, provided that it is not contrary to established law, morals and public policy. The right to join seafarers associations goes with it the right to collective bargaining. As a declared policy, Article 23 (4) of the UNDHR states that, “Everyone has the right to form and to join trade unions for the protection of his interests”.

Corollary to the right to join seafarers associations or organizations is the right to strike, right to employment agreement, and right to free employment services and continuity of employment.\textsuperscript{48}

CHAPTER III

SEAFARERS’ CLAIMS

3.1 Nature of Seafarers’ Claims

Based on Convention laws, seafarers’ claims may be categorized either as maritime claims secured by a lien on the ship or as ordinary claims. The former takes priority in ranking over the latter.

Seafarers claims which are considered maritime claims are those that refer to (a) loss of life or personal injury and, (b) wages and other sums due to masters, officers, officers or crew. All other seafarers’ claims fall under the category of ordinary claims.

3.1.1 Maritime Claims

a. Loss of Life

The peculiar nature of the seafaring profession indicates a very high risk of death among seafarers. When it happens, legal beneficiaries of the decedent are entitled to claim compensation for loss of life provided that the cause of death is work related as this is the prevailing practice in the seaborne trade. These deaths must be accidental and in the words of Prof K. X. Li:

Accidental deaths may result either from casualties to vessels, such as foundering, strandings, collisions, capsizing, fires and explosions, ship missing and other casualties to vessels or from personal accidents on board, such as embarking/disembarking ship, slipping/falling overboard, exposure to noxious substance, manual handling, and homicide.

Deaths occurring on any of these circumstances above are compensable. However, the determination of the amount of compensation for loss of life largely depends on the life insurance coverage secured by the shipowner for their seafarers; on the

49 IMO, Diplomatic Conference on Arrest of Ships, Doc. No. A/Conf. 188/6, 19 March 1999 at p.8.
seafarer himself; or those provided by national legislations through their social security systems, if there is any.

In the United States of America, death cases including personal injuries are governed by special laws such as its Jones Act for negligence and unseaworthiness, its Longshore and Harbor Workers’ Compensation Act for other maritime claims of seafarers, its Death on the High Seas Act and its judicially created Moragne for the conferment of special rights and remedies in cases of deaths that occur in certain maritime environments and its application is not only limited to deaths involving seamen but also includes other maritime workers.  

In the case of China, as in many other countries, there is no separate body or special rules to apply in “maritime” personal injury and death cases. The rules that apply to injured seamen and maritime workers are generally the same rules that apply to all persons, especially working persons, who have been injured in any manner.

In actions for loss of life or personal injuries, there are generally two remedial options available. These are claims for compensation and a tort suit for damages.

Seafaring remains the most dangerous of occupations. The data below shows the different causes of death of seafarers over an average of five years or from 1990-1994. The data is based on surveys undertaken mainly on OECD ships.

<table>
<thead>
<tr>
<th>Causes</th>
<th>Seafarers’ Death</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maritime Disasters</td>
<td>1,102</td>
</tr>
<tr>
<td>Occupational Accidents</td>
<td>419</td>
</tr>
<tr>
<td>Illness</td>
<td>521</td>
</tr>
<tr>
<td>Homicides/Suicides</td>
<td>91</td>
</tr>
<tr>
<td>Missing at Sea</td>
<td>74</td>
</tr>
</tbody>
</table>

Source: SIRC

52 Ibid.
53 Supra, footnote no. 4 at p. 32.
As shown in Table 1, maritime disasters such as collisions and grounding are the primary causes of seafarers’ death, followed by occupational accidents, illness, homicides/suicides and missing at sea.

From 2003-2007, it was reported that a total number of 73 deaths were caused by pirate/terroristic attacks.

Like in the past, there are still cases of deaths of seafarers ashore from illness and accidents that were either not reported or underreported. The Fairplay in its 13 July 2002 issue criticized Panama for its failure to conduct casualty investigations on its ships:

Panama has long ignored its international obligation to carry out casualty investigations, and the Panama Maritime Authority’s excuse that it does not have the resources.

Three high profile casualties of Panamanian bulk carriers in 2001 have not been investigated: Leader L (March); Treasure (June) and Kamikawa Maru (September). Panama was reported by the International Underwriting Association in 2000 to have lost 87 ships over the previous five years; an average of about one ship lost in every three weeks.56

b. Personal Injuries

Based on the report of the International Maritime Bureau, there a total of 137 seafarers who were injured from 1991 to 2001 as illustrated in the figure below.

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Figure 1 indicates that year 2000 recorded the highest number of injured seafarers at 99, followed by 39 in 2001, 37 in 1998, and 31 in 1997. While the figure is considered negligible when compared to the total number of seafarers deployed worldwide during this period, the fact remains that these occurred because of unsafe ships or poor implementation of safety management systems. The IMB-ICC also reports that there were 221 cases of physical injuries committed on seafarers from 2003-2007.

In a shipboard accident, if a seafarer misses death, certainly he may suffer personal injury which is either work-related or non-work related. As a consequence, any disability that arises from an injury may either result in partial or total disability.

Under Philippine jurisdiction, to be entitled to compensation benefits, seafarers are required to prove that the injury they sustained is work-related or that such injury is not caused by their own negligent acts. The burden of proof is on the seafarer. This makes the concept of “work-related injury” a litigious one. In this kind of situation, seafarers have been, more often than not, at a disadvantage simply because they do not have access to documents to prove their claims as records are, in most cases, in the hands of shipowners. However, in the case of seafarers employed under Danish flags, they do not need to prove that the cause of injury or death is work-related in order to be entitled to compensation benefits. Danish regulations do not distinguish whether the cause is work-related or not.

In the United States of America (USA), greater amount may be recovered by litigation if the claimant can prove fault or negligence on the part of the shipowner. This clearly illustrates that the US still relies heavily on litigation to provide remedies for such losses.

Moreover, maritime personal injury litigation in the US accounts for an estimated 50% to 60% of the business of the American maritime bar. Such litigation frequently invokes rights and remedies provided by the general maritime law, notably actions

57 Supra, footnote no. 7 at p.18.
59 Lauritzen s Larsen, 345 US 571.
based on the “unseaworthiness” of the ship and/or on the seaman’s rights to “maintenance and cure” as well as to statutory recourses.60

Proving by litigation that an injury is work-related is both litigious and costly. But how is a personal injury suffered by a seafarer who works in an engine room be proved?

The Research Unit of Maritime Medicine in Denmark says that the risk of cancer is high among those working in the engine room. The hazards include the presence of asbestos, mineral oils, polyaromatic hydrocarbons, organic solvents and exhaust gases. Crews on tankers are also exposed to airborne carcinogens like benzene and organic solvents that affect the nervous system. Other researches also suggest an increased risk of cardiovascular diseases among seafarers.61

Ms. Doris Magsaysay-Ho, Chief Executive Officer of the Magsaysay Maritime Corporation, one of Philippines’ largest manning agencies says that:

> Any death, any injury is unfortunate. Yet what we have is a lot of deaths that comes from sickness. So how can you now be sure that a case is an accident-related or a health-related injury or death if somebody died of heart attack?62

While many flag states define compensation benefits of seafarers who suffer partial disability which must arise from a work-related injury which include costs of hospitalization and wages while recuperating from sickness and while their employment contract is subsisting, this is not always the case for seafarers who suffer permanent and total disability. These seafarers are sent home and their employment contracts terminated.

**c. Unpaid Wages Due to Abandonment**

Cases of abandonment still persist today. Seafarers are abandoned because a ship has been arrested by the creditors. Other reasons include ship being detained by port authorities by reason of safety deficiencies, shipwreck, non-payment of wages,

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61 Supra, Footnote No. 58.
foods, bunkers and company has been dissolved or declared bankrupt.\textsuperscript{63} In short, when abandoned, a seafarer, more often than not, has outstanding claims for unpaid wages, cost for repatriation and other legal claims.

For a period of five years or from 1995-1999, vessels registered from the Americas had the highest number of ships abandoned followed by those in Europe, Asia and Africa, with 49.05\%, 34.90\%, 10.37\% and 5.6\%, respectively. This involves 212 ships from 32 flag states. It is interesting to note that most of these vessels are registered under the so-called FOCs such as Panama and Malta. Table 2 and figure 2 reflect the distribution.

\begin{table}
\centering
\begin{tabular}{|l|c|c|l|c|c|c|}
\hline
\textbf{AMERICAS} & \textbf{No.} & \textbf{ASIA & The PACIFIC} & \textbf{No.} & \textbf{EUROPE} & \textbf{No.} & \textbf{AFRICA} & \textbf{No.} \\
\hline
Panama & 72 & Singapore & 10 & Malta & 21 & Liberia & 5 \\
Belize & 12 & Pakistan & 5 & Ukraine & 18 & Nigeria & 3 \\
Honduras & 9 & Malaysia & 2 & Russian Federation & 9 & Angola & 1 \\
St. Vincent and Grenadines & 6 & Marshall Islands & 2 & Romania & 9 & Egypt & 1 \\
Netherlands Antilles & 2 & Bangladesh & 1 & Cyprus & 8 & Equatorial Guinea & 1 \\
Antigua and Barbuda & 1 & Thailand & 1 & Greece & 2 & Ghana & 1 \\
Sao Tome & Principe & 1 & United Arab Emirates & 1 & Turkey & 2 \\
Bahamas & 1 & & & UK & 2 & & \\
& & & & Estonia & 1 & & \\
& & & & Lithuania & 1 & & \\
& & & & Portugal & 1 & & \\
\hline
\textbf{TOTAL} & \textbf{104} & \textbf{22} & \textbf{74} & \textbf{12} & \\
\hline
\end{tabular}
\caption{Distribution of Number of Vessels on which Seafarers were abandoned vis-à-vis number of Flag States and by Geographical Location from 1995-1999}
\end{table}

\textsuperscript{63} IMO, "Assessment of theExtent of the Problem", Doc. No. IMO/IL0/WGLCS 1/6/2, 23 September 1999 at p8.
According to the ITF:

Abandoned seafarers are subject to cruel, inhuman and degrading treatment, at worst, they find themselves in life-threatening working conditions with no means of subsistence. In most cases of abandonment, crew members have not received wages for months sometimes years and are effectively subject to forced labor. They suffer the indignity of relying on the charity of local people and welfare organizations. At home, their families go hungry, and their children’s school fees remain unpaid. Without a wage being remitted, some resort to money lenders and find themselves doubly under pressure from spiraling debts.  

Furthermore, certain shipowners find it more cost effective to abandon one set of crew and engage another, leaving a trail of unpaid wages from port to port. Those criminally responsible owners are able to escape their liabilities because of the corporate veil afforded to them by the FOC system.

Associated to the issue of abandonment is unpaid wages. On the basis of the data gathered by the ITF, there are a total of 3,799 cases of unpaid wages for a period of 5 years or from 2001-2005.

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65 Ibid.
Based on inspections undertaken by the ITF, figure 3 above shows a graphical representation of unpaid wages over the period of five years or from 2001-2005. According to the data, in 2001 there were 763 cases, in 2002, 772, in 2003, 811, in 2004, 751, and in 2005, 702.

d. Wages

In interpreting what constitutes wages, courts have given a broad and liberal meaning. It consists of everything that the seaman is due in the course of his employment. In the case of *The Arosa Star case*\(^{66}\), Chief Justice Worley held that:

> Wages include the following: bonus; victualling allowance; master’s national insurance contributions where these have been agreed to be paid by the owner; subsistence money; and viaticum.

Furthermore, in *The Asora Kulm case*\(^{67}\), the court said that deductions from seaman’s wages for social benefits, health insurance have been included in the definition of wages. It was likewise held in *The Westport case*\(^{68}\) that cost for repatriation and union dues fall within the concept of wages.


3.1.2 Ordinary Seafarers’ Claims

a. Severance Pay

However, in *The Tacoma City case*\(^69\), the court held that “severance pay” is not a maritime claim for the simple reason that it is a compensation given to a seaman as a result of the termination of his employment contract. The payment is no longer connected to current services under a contract of employment.

3.2 Maritime Liens

3.2.1 Concept of Maritime Liens

Maritime lien, a species of maritime claims, is a charge or encumbrance against a maritime property and in that sense it is a proprietary interest similar to a maritime mortgages or hypothéque which is also a charge against the *res*. Maritime property has been jurisprudentially defined as basically comprising the ship, cargo and freight. Generally speaking, only the particular *res* can be encumbered, and the property represents a security for the claim.\(^70\)

A maritime lien is a lien on a vessel, given to secure the claim of a creditor who provided maritime services to the vessel or who suffered an injury from the vessel’s use. As it constitutes a security interest upon ships, it arises purely by operation of law and exists as a claim upon the property concerned, often given priority by statute over other forms of registered security interest. Although its characteristics vary under the laws of different countries, a maritime lien can be described as a privileged claim, upon a maritime property, for service to it or damage done by it, accruing from the moment that the claim attaches, travelling with the property unconditionally. Under common law jurisdictions, it is enforced by an action *in rem*\(^71\).

In considering seafarers’ claims *i.e.* for loss of life or personal injury and wages due to the masters, officers or crew, Professor William H. Tetley states that:


The key factor is service to the ship; the lien is not dependent on who hired the seaman, be it the owner or the charterer. Thus seamen were granted a lien even if they were employed by a person who had stolen the ship, there being no complicity on their part. Similarly, a master had a lien despite having been hired by a fraudulent possessor.\(^{72}\)

Interestingly, the lien for wages is on all parts of the ship and even against parts of the ship after a shipwreck, including its masts, spars, rigging and sails. The lien is also on freight and sub-freights, but it is on freight which is in the course of earning.\(^{73}\)

As discussed above, there are seafarers claims which are in their nature maritime claims but there are also claims which are simply regarded as ordinary seafarers’ claims such as “severance pay” or separation pay. The former enjoys preference over an ordinary seafarers’ claims.

### 3.2.2 Consequences of Maritime Liens

It must be clear that some, but not all, consequences are uniform to all claims attracting a maritime lien. These consequences as flowing from a maritime lien are:

i. The lien confers a right and a remedy in addition to any available against a defendant liable “in personam” ( "liability in personam" meaning simply liability of the defendant for the claim);

ii. The lien is enforceable through an action in rem and inherent in that action the ship, cargo or freight subject to it is liable to arrest prior to hearing on the merits; jurisdiction on the merits is founded on service of an in rem claim form, arrest or permitted substitute;\(^{74}\)

iii. The lien arises on the event creating it;

iv. In respect of the ship, cargo or freight the target for the action, the "lien" is enforceable against other creditors (whether secured or unsecured) and, subject to existing possessory liens, takes priority

\(^{72}\) Ibid, at pp. 59-60.

\(^{73}\) Ibid, at p. 276.

\(^{74}\) The concept of in rem is only applicable in common law jurisdictions. This particular consequence of maritime liens does not apply to civil law jurisdictions.
over all other creditors whether the claims of those creditors arose before or after the creation of the lien;
v. Once created, the “lien” is enforceable even though the ship is sold whether or not the purchaser has notice of it;
vi. Where the person liable in personam is a charterer of the ship in respect of which lien arises in certain circumstances the “lien” may be enforced against the ship;
vii. Judicial sale as a step in enforcement of the lien extinguishes it and transfers the liens to the proceeds;
viii. The lien is extinguished by the destruction of the ship, cargo or freight to which it attaches;
ix. The lien is extinguished by laches, waiver or satisfaction of the debt and possibly, by lodging of bail, or provision of a guarantee and the claims attracting the lien may be extinguished by rules relating to effluxion of time. 75

CHAPTER IV

ANALYSIS OF THE INTERNATIONAL LEGAL FRAMEWORK FOR SEAFARERS’ CLAIMS

There is no convention law that addresses directly and comprehensively the issue of seafarers’ claims from the point of view of public, regulatory, and private law. The current international legal framework for seafarers’ claims is derived incidentally from various international regimes that do not have seafarers’ claims as their main object, but rather safety of navigation and protection of marine environment.

The principle of seafarers’ claims arises whenever the shipowner or charterer is negligent to make his ship seaworthy which is a probable cause for loss of life or personal injuries or if he fails to comply the terms and conditions of the employment contract with the seafarers such as violation of the terms and conditions of the employment contract.

The UNCLOS is regarded as the “constitution of oceans”. It allows the enactment of regulatory laws through the various bodies of the UN on a wide range of maritime issues. On the part of the IMO, it has adopted convention laws within the ambit of safety of navigation and the protection of the marine environment. The ILO promulgated and adopted various maritime labor related Conventions to provide the framework for minimum working and living standards for seafarers in the overseas trade but some of these Conventions have never been in force or have very low ratification rate. This is also the case of the various arrest and maritime liens and mortgages conventions which were promulgated by the UNCTAD.

By way of illustration, this paper will endeavor to use the figure in the next page to show the international legal framework for seafarers’ claims from the public, regulatory and private law perspectives.
Under international law, the public law aspect involves the relationship between and among States; the regulatory law aspect between the State and its citizens; and, the private law aspect between and among private persons.

Figure 4
International Legal Framework for Seafarers’ Claims

- Public Law
  - 1982 UNCLOS

- Regulatory Law
  - 2006 Maritime Labor Convention
  - 1974 SOLAS Convention
  - 1995 STCW Convention
  - 1966 Load Line Convention

- Private Law
  - 1999 Arrest Convention
  - 1993 Maritime Liens & Mortgages Convention
  - 1976 Limitation of Liability Convention

4.1 Public International Law Framework

4.1.1 1982 UN Convention on the Law of the Sea (UNCLOS)\(^{76}\)

The UNCLOS provides the public international law basis of seafarers’ claims, particularly Article 94 which defines the duties of flag states.

The real object of Article 94 is to ensure safety of navigation of all ships involved in the ocean trade which means that every ship must meet the requirements of seaworthiness and manning/crewing standards for ship operations.

In relation to Figure 4 above, the public international law framework as contemplated in Article 94 is illustrated in Figure 5 which is found in the succeeding page.

a. Duties of Flag States

Article 94 enumerates the duties of flag states whose ships fly their flags. It can be summarized as follows.

i. Jurisdiction on Administrative, Technical and Social Matters.

Article 94 (1) mandates every flag state to assume jurisdiction under its internal law in respect of administrative, technical and social matters over each ship flying its flag as well as its master, officer and crew. The exercise of exclusive jurisdiction is in all parts of the ocean within the flag state’s national jurisdiction and elsewhere in all parts of the sea which are beyond the jurisdiction of any state. The phrase “in respect of administrative, technical and social matters concerning the ship” refers to all “activities on the ship, or more accurately everyone else on board the ship”.

ii. Maintenance of a Register of Shipping.

Paragraph 2(a) is the principal statement regarding the duty of the flag State to maintain a register of ships. Beyond the requirement that the register should contain the names of ships and “particulars”, no further requirements are laid down in this provision. However, by Article 91 which provides that each State is free to fix the conditions for the grant of its nationality as long as it adheres to minimum accepted international standards, it follows that each State is free to establish laws and regulations concerning registration of ships and the manner of registration.
iii. Measures to ensure safety at sea

Article 94 (3) requires flag States to take such measures for ships flying its flag as are necessary to ensure safety of navigation at sea with regard to construction, equipment and seaworthiness of ships, manning of ships and qualification of master, officers and crew.

The reference to the seaworthiness of ships is supplemented by Article 21977 of UNCLOS particularly on measures relating to seaworthiness of vessels to avoid pollution of the marine environment. The basic meaning of “seaworthiness is “a fit condition to undergo voyage, and to encounter stormy weather” Taken in its context and in the light of Article 21(2)79, “seaworthiness” is assumed to embrace the design, construction, manning and equipment as well as the standards of maintenance of the ship or vessel. Indeed, the term has been defined as meaning “that reasonably safe and proper condition in which a vessel's hull and equipment, her cargo and storage thereof, machinery and complement of crew, are deemed adequate to undertake a specific sea voyage or to be employed in a particular trade”.

By Article 94 (4), flag States must ensure that each of their ships is “in the charge of a master and officers who possess appropriate qualifications...and that the crew is appropriate in qualification and in numbers for the type, size, machinery and equipment of the ship.”80

iv. Marine Casualty Investigation

Another flag state duty is the conduct of an inquiry which must be held before a suitably qualified person or persons into “every marine casualty or incident of navigation on the high seas” involving a ship flying its flag. This applies to incidents which cause loss of life or serious injury to nationals of another State, or serious

77 Ibid, in Article 219. States which, upon request or on their own initiative, have ascertained that a vessel within one of their ports or at one of their off-shore terminals is in violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment shall, as far as practicable, take administrative measures to prevent the vessel from sailing.

78 Oxford Dictionary, 2nd Ed. p 820

79 Supra, footnote no. 76. In Article 21 (2). Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.

damage to ships or installations of another State or to the marine environment. The flag State and the other State concerned are to cooperate in the conduct of any such inquiry. 81

An “incident of navigation” is a form of “maritime casualty”, and article 94 indicates that it may be anything that causes “loss of life or serious injury to nationals of another State or serious damage to ships or installations or another State or to the marine environment.

The importance of marine casualty investigation is to determine, among others, the nationalities of the crew in order to identify the liabilities of the shipowner, the insurance provider and for the flag state concerned to be informed of its nationals who may figure out in a maritime accident. This solves the traditional problem of having deaths and personal injuries unreported to relevant authorities.

b. UNCLOS as Umbrella Convention

UNCLOS is acknowledged as an “umbrella convention”. Most of its provisions, being of a general kind, can be implemented only through specific operative regulations in other international agreements. 82 These operative regulations are regarded as regulatory laws which are promulgated by relevant UN bodies.

The context above is supported by relevant provisions of the said Convention. The most pertinent provisions for this paper are Article 94 (3) (b) which makes reference to “applicable international instruments” in relation to manning of ships and Article 94 (5) to “generally accepted international regulations, procedures and practices” vis-à-vis technical qualifications and qualifications in maritime law of the master, officers, and crew.

The ILO, which accepts that it has a role in setting standards for labor and occupational standards in relation to article 94, paragraph 3(b), has adopted a number of ILO Conventions and Resolutions which are now consolidated through


the Maritime Labor Convention, 2006. The IMO, on the other hand, has adopted the SOLAS Convention, MARPOL Convention, STCW Convention, Load Lines Convention and others.

A careful study of UNCLOS provision on Article 94 indicates that the following issues have been responded through the enactment of regulatory instruments.

<table>
<thead>
<tr>
<th>Subject Matter</th>
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<tr>
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<td>SOLAS, Load Lines, COLREG, MARPOL, STCW</td>
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<tr>
<td></td>
<td>Paragraph 3: Measures to ensure safety at sea on the following matters:</td>
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</tr>
<tr>
<td>(a) Construction, equipment and seaworthiness of ships</td>
<td>As above</td>
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<tr>
<td>(b) Manning of ships</td>
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<td></td>
</tr>
<tr>
<td>Paragraph 4:</td>
<td>The above measures shall include the following:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(b) Technical qualification of the master, officers, and crew</td>
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<tr>
<td>Paragraph 7:</td>
<td>Duty of the Flag State to conduct an investigation of any casualty occurring to its ships.</td>
<td>IMO’s field of competence</td>
<td>SOLAS (regulations I/21) Load Lines (Art.23) MARPOL art. 6(4) and art.12</td>
</tr>
</tbody>
</table>

Source: IMO

84 To complete the framework, this paper has included the MLC, 2006 in view of the fact that the ILO has standard setting function for international occupational living and working conditions of workers.
4.2 Regulatory International Law Framework

4.2.1 International Convention on Safety of Life at Sea (SOLAS), 1974

The main regulatory convention that deals with the seaworthiness of ships is the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention), as amended by the Protocols of 1978 and 1988. It contains a large number of complex regulations which lay down standards relating, but not limited, to the construction of ships, fire safety measures, life-saving appliances, the carriage of navigational equipment and other aspects of the safety of navigation, and special measures to enhance maritime safety.

State Parties to the SOLAS Convention are obliged to impose, through their own legislation, the standards laid down in the Convention upon the vessel sailing under their flags. They are likewise entitled to see that ships flying the flag of other contracting parties which are present in their ports have on board valid certificates as required by the SOLAS Convention. 85

Where “there are clear grounds for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of any of the certificates, or where a certificate has expired or where the ship and its equipment do not comply with the provisions of Regulation 11 Chapter I of the Convention, the authorities of the port state “shall take steps to ensure that the ship shall not sail until it can proceed to sea or leave the port for the purpose of proceeding to the appropriate repair yard without danger to the ship or persons on board” (Chapter I, Regulation 19, as amended). In 1994, the Convention was amended to extend Port State Control to the checking of operational requirements “when there are clear grounds for believing that the master or crew are not familiar with essential shipboard procedures relating to the safety of ships (Chapter XI, Regulation 4) 86

From the point of view of safe manning of ships, Regulation V/14 of the SOLAS Convention requires State Parties to ensure that the ships flying their flags comply with the minimum manning requirements set by their national regulations.

85 Supra, footnote no. 80 at p. 265.
86 Ibid.
To assist maritime administrations in this regard, the IMO adopted on 25 November 1995 Resolution No. A.890(21) on the principles of Safe Manning. To incorporate recent developments with respect to the coming of entry into force of the 1995 amendments to the STCW Convention and the Code and the International Port Facility and Security (ISPS) Code, Resolution A. 890 (21) was amended by IMO Resolution A.955 (23) and adopted on 05 November 2003.

The Resolution notes that safe manning is a function of the number of qualified and experienced seafarers necessary for the safety and security of the ship, crew, passengers, cargo and property and for the protection of the marine environment.\(^{87}\)

The Resolution endorses the principle that in determining the minimum safe manning levels of ships, the following factors should be taken into consideration: size and type of ship, number, size and type of main propulsion units and auxiliaries, construction and equipment of the ship, method of maintenance used, cargo to be carried, and others.\(^{88}\)

The determination of the safe manning level of a ship should be based on performance of the functions at the appropriate level(s) of responsibility as specified in the STCW Code which includes navigation, cargo handling and stowage, operation of the ship and care for person on board, marine engineering, electrical, electronic and control engineering, radiocommunication, and maintenance and repair.\(^{89}\)

4.2.2 Load Lines Convention, 1966

Another international instrument that deals with seaworthiness of ships is the International Convention on Load Lines of 1966\(^{90}\). It seeks to address the issue of overloading which is often the cause of shipping casualties. The Convention prescribes the minimum freeboard (or the minimum draught to which the ship is

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\(^{88}\) Ibid.

\(^{89}\) Ibid.

\(^{90}\) International Convention on Load Lines Convention, 1966. It was adopted by the IMO on 05 April 1966 and entered into force on 21 July 1968.
permitted to be loaded. Enforcement of this Convention is very similar to that of the SOLAS Convention, including the power of port States to detain ships which lack appropriate and valid certificate.

4.2.3 1978 STCW Convention and Watchkeeping Standards as amended in 1995

The STCW Convention is regarded as one of the most important regulatory regimes concluded in ensuring safety at sea because the object it aims to achieve is the establishment of global minimum professional standards for seafarers. The first STCW Convention was adopted in 1978, and its amendments in 1995.

Of particular interest of this paper is that the very first version of the STCW Convention had set a standard aptitude for the watch. Paragraph 5 of Regulation II/1 of the 1978 Convention states that the “watch system shall be such that the efficiency of watchkeeping officers and watchkeeping ratings is not impaired by fatigue. Duties shall be so organized that the first watch at the commencement of a voyage and the subsequent relieving watches are sufficiently rested and otherwise fit for duty”\(^91\)

This general principle has been repeated in detail in the STCW Convention of 1995.

In Regulation VIII/1 of the Annex of the Convention, States Parties are required to take measures to prevent fatigue among watchkeepers and attend to their application. In particular, each Administration shall “establish and enforce rest periods for watchkeeping personnel and require that watch systems are so arranged that the efficiency of all watchkeeping personnel is not impaired by fatigue.”\(^92\)

Under Section VIII/1 part A of the Code, it provides several regulations relating to aptitude for watchkeeping such as the provision for a minimum of 10 hours’ time off duty which should be provided in every 24 hours. It requires observance for rest

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\(^{92}\) Ibid.
periods which should not be divided into more than two periods, one of which must be at least 6 hours. 93

Section VIII/1 of part B of the Code lays down guidelines for the prevention of fatigue and details certain provisions of part A. There is also a reference to IMO Resolution A.772, enumerating the fatigue factors that have to be taken into account by those involved in shipping operations. It requires Administrations to provide regulations on the maintenance of records of working hours and rest periods for seafarers, and their inspection, and to amend regulations on prevention of fatigue on the basis of the findings of accident investigations. 94

4.2.4 Maritime Labor Convention, 2006

Adopted by the International Labor Conference of the ILO in Geneva on February 2006, the Maritime Labor Convention of 2006, sets out seafarers’ rights to decent conditions of work and helps to create conditions for fair competition for shipowners. It contains a comprehensive set of global standards, based on those that are already found in 68 maritime labor instruments that were adopted by the ILO since 1920.95

The consolidation of existing ILO instruments was a result of the concern raised by ILO member states on the numerous number of ILO Conventions, many of which are very detailed, made it difficult for governments to ratify and enforce all of the standards. Many of the standards were out of date and did not reflect contemporary working and living conditions on board ships. Another reason is that there is a need to develop a more effective enforcement and compliance system that would help eliminate substandard ships. 96

The MLC is made up of articles, regulations, standards and guidelines. Articles, regulations and guidelines are all legally binding, whereas guidelines are not97. A

93 Ibid.
94 Ibid.
96 Ibid.
97 Ibid.
review of the structure of the MLC shows that it is separated into five titles which contain provisions that relate to the following subject matter:

Title I- “Minimum Requirements for Seafarers to Work on Ships”. It sets forth the requirements regarding age, medical fitness, training and qualifications, and recruitment and placement.

Title II- “Conditions of Employment”. It defines those conditions that are related to seafaring employment. It determines the requirements for employment agreements, payment of wages, hours of work and rest, leave, repatriation in the event of a ship’s loss or foundering, manning levels, career and skill development, and employment opportunities for seafarers.

Title III- “Accommodation, Recreational Facilities, Food and Clothing”. It mandates shipowners to provide seafarers with safe and decent accommodations and recreational facilities, and hospital accommodation. It also requires shipowners to ensure that food and drinking water be appropriate in quality, nutritional value, and quantity which must be given free of charge to seafarers. Ship cooks must possess the necessary training and qualification.

Title IV-“Health Protection, Medical Care, Welfare and Social Security Protection”. It sets forth the requirements that relate to medical care on-board ships and ashore, shipowner’s liability, health and safety protection, accident prevention, access to shore-based facilities, and social security.

Title V- “Compliance and Enforcement”. It also sets out for an inspection regime for ships that are subject to the Convention. Further to Flag and Port State inspection requirements, Labor Supplying states must ensure that they comply with the requirements that are found outside this title with respect to recruitment, placement, and social security.

The existing ILO maritime labour conventions will be gradually phased out as ILO member States that have ratified those Conventions ratify the new Convention. Countries that ratify the MLC 2006 will no longer be bound by existing Conventions when the new Convention comes into force for them. Countries that do not ratify the
MLC 2006 will remain bound by the existing Conventions they have ratified but those Conventions will be closed for further ratification.\textsuperscript{98}

Along this line, for those countries that will eventually become State Parties to the MLC 2006, titles 3 and 4 are the most relevant provisions vis-à-vis the subject of this paper.

Under Title II, it entitles seafarers to a written employment contract whose terms and conditions must be enforceable and consistent with the standards set out by the Convention.

Regulation 2.2 which speaks about wages ensures that seafarers are paid for their services in accordance with their employment agreements. A monthly account of payments due and the amounts paid shall be made available to the seafarer. A seafarer is likewise entitled to payment of his overtime services, the computation of which is laid down in Guideline B2.2.2, “Calculation and Payment”.

In Regulation 2.3, “Hours of Work and Hours of Rest”, the Convention provides express provisions for maximum hours of work which should not exceed 14 hours in any 24-hour period and 72 hours in any seven-day period; and, minimum hours of rest shall not be less than 10 hours in any 24-hour period, and 77 hours in any seven-day period. For young seafarers, or those under the age of 18, express provisions for the maximum hours of work and minimum hours of rest have also been mentioned. The intention of this regulation is to ensure that seafarers will not suffer fatigue or to catch sickness because of overwork on board.

In Regulation 2.4, “Entitlement to Leave”, it sets out the principle that seafarers are entitled to paid annual leave or a shore-leave for the benefit of their health and well-being.

In Regulation 2.5, “Repatriation”, it speaks about the conditions and procedures for the repatriation of seafarers which shall be undertaken on the following circumstances:

\textsuperscript{98} \textit{Ibid.}
i. If the seafarers’ employment agreement expires while they are abroad;
ii. When the seafarers’ employment agreement is terminated:
   a. By the shipowner; or
   b. By the seafarer for justified reasons; and also
iii. When the seafarers are no longer able to carry out their duties under
     their employment agreement or cannot be expected to carry them out in
     the specific circumstances.

Seafarers are also entitled to repatriation on the following instances:

i. Upon the expiry of the period of notice given in accordance with the
   provisions of the seafarers’ employment agreement;
ii. In the event of illness or injury or other medical condition which requires
    their repatriation when found medically fit to travel;
iii. In the event of shipwreck;
iv. In the event of the shipowner not being able to continue to fulfill their
    legal or contractual obligations as an employer of the seafarers by
    reason of insolvency, sale of ship, change of ship's registration or any
    other similar reason;
v. In the event of a ship being bound for a war zone, as defined by national
    laws or regulations or seafarers' employment agreements, to which the
    seafarer does not consent to go; and
vi. In the event of termination or interruption of employment in accordance
    with an industrial award or collective agreement, or termination of
    employment for any other similar reason.

In these instances, the shipowner shall bear the cost of repatriating his seafarers. In
his default, the Flag State shall arrange for the repatriation of the seafarer
concerned. If it fails to do so, the State from which a seafarer is to be repatriated or
the State of which he is a national may arrange for his repatriation and recover the
cost from the Flag State of the ship that employed the seafarer.
The costs to be borne by the shipowner for repatriation should include at least the following:

i. in the event of termination or interruption of employment in accordance with an industrial award or collective agreement, or termination of employment for any other similar reason.

ii. passage to the destination selected for repatriation;

iii. accommodation and food from the moment the seafarers leave the ship until they reach the repatriation destination;

iv. pay and allowances from the moment the seafarers leave the ship until they reach the repatriation destination;

v. transportation of 30 kg of the seafarers' personal luggage to the repatriation destination; and

vi. medical treatment when necessary until the seafarers are medically fit to travel to the repatriation destination.

Time spent awaiting repatriation and repatriation travel time should not be deducted from paid leave accrued to the seafarers.

In Regulation 2.6 which subject is “Seafarer Compensation for the Ship’s Loss or Foundering”, the Convention entitles seafarers to adequate compensation in case of injury, loss or unemployment arising from the ship’s loss or foundering.

With regard to Accommodation and Recreational Facilities, the Convention mandates States Parties to ensure that seafarers have decent accommodation and recreational facilities on board to promote seafarers' health and well-being.

In Regulation 3.2, “Food and catering”, State Parties mandates to ensure that seafarers have access to good quality food and drinking water provided under regulated hygienic conditions.

With respect to Health Protection, Medical Care, Welfare and Social Security Protection which is the subject of Title 4, the Convention requires that States Parties shall ensure that all seafarers on ships that fly their flags are covered by adequate measures for the protection of their health and that they have access to prompt and
adequate medical care while working on board. Seafarers should be given the right to revisit a qualified medical doctor or dentist without delay in ports of call, where applicable.

Every seafarer on board shall be afforded with free medical care and health protection services which shall not be limited to treatment of sick or injured seafarers but include measures of a preventive character such as health promotion and health education programmes.

The purpose of Regulation 4.2, “Shipowners' Liability” is to ensure that seafarers are protected from the financial consequences of sickness, injury or death occurring in connection with their employment. State Parties have to ensure that shipowners of ships that fly their flags are responsible for the health protection and medical care of all seafarers working on board their ships. These are the minimum standards.

i. Treatment when necessary until the seafarers are medically fit to travel to the repatriation destination.

ii. Shipowners shall be liable to bear the costs for seafarers working on their ships in respect of sickness and injury of the seafarers occurring between the date commencing the duty and the date upon which they are deemed duly repatriated, or arising from their employment between those dates;

iii. Shipowners shall provide financial security to assure compensation in the event of the death or long-term disability of seafarers due to an occupational injury, illness or hazard, as set out in national law, the seafarers' employment agreement or collective agreement;

iv. Shipowners shall be liable to defray the expense of medical care, including medical treatment and the supply of the necessary medicines and therapeutic appliances, and board and lodging away from home until the sick or injured seafarer has recovered, or until the sickness or incapacity has been declared of a permanent character; and

v. Shipowners shall be liable to pay the cost of burial expenses in the case of death occurring on board or ashore during the period of engagement.
Where the sickness or injury results in incapacity for work the shipowner shall be liable:

i. To pay the cost of burial expenses in the case of death occurring on board or ashore during the period of engagement.

ii. To pay full wages as long as the sick or injured seafarers remain on board or until the seafarers have been repatriated;

iii. To pay wages in whole or in part as prescribed by national laws or regulations or as provided for in collective agreements from the time when the seafarers are repatriated or landed until their recovery or, if earlier, until they are entitled to cash benefits under the legislation of the Member concerned.

Social Security provisions under Regulation 4.5 have the purpose of ensuring that measures are taken with a view to providing seafarers with access to social security protection. Every seafarer shall be provided with at least three (3) of any of these branches of social security schemes: medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors' benefit.

4.3 Private International Law Framework

The expansion of the shipping industry required the employment of mixed crews in the overseas trade. Until recently, more and more crews have been recruited from developing countries particularly from the Philippines, China, and India.

This situation clearly indicates that seafarers, by the nature of their employment, are subject to the national laws of different jurisdictions. This scenario makes it difficult for them to enforce their legal claims primarily because domestic laws differ from one country to another.

At the international level, the need to have uniformity in regulating the relationship between shipowners and seafarers who come in contact with different jurisdictions has become a serious concern for the maritime community. Among other issues, attempts have been made to promote uniformity in the treatment of maritime claims
and maritime liens through the various arrest and maritime liens and mortgages conventions, but as previously mentioned, these efforts have been unsuccessful.

At any rate, the following initiatives have been launched with the view to responding this important concern in the private law perspective.

4.3.1 Arrest Conventions

Arrest of a ship is a very powerful weapon to ensure the security of a maritime claim. In international maritime law, it is a form of an interim remedy. In common law jurisdictions, it may operate as a ground for jurisdiction on the merit as well as a primary method of ensuring the availability of judicial sale, itself the means of implementing the interest conferred through the action in rem.99

As a general rule, arrest may be prevented or ended by the provision of alternative security through bail, payment into court, where liability may be limited through the setting up of a limitation fund, or the provision of a guarantee or undertaking. Bail or payment into court provides a fund (notional or actual) representing the ship for the claimant and proceedings continue on that basis. A limitation fund provides adequate security for all claimants under the control of the court. A guarantee or undertaking, however, is contractual, and does not provide any fund for claim, but simply and agreement enforceable on the conditions specified in it. Whether or not the agreement is in addition to or replaces any lien will depend on its terms. Its replacement of arrest will not itself affect the existence of any lien – the lien not being dependent on arrest. The “security” is therefore contractual in nature.100

a. 1952 International Convention on the Arrest of Ships

The 1952 Arrest Convention is concerned with arrest as a provisional remedy and a ground for jurisdiction on the merits. It defines arrest for its purposes as the “detention of a ship by judicial process to secure a maritime claim”- it does not include the seizure of a ship in execution or satisfaction of a judgment. 101

99 Supra, footnote no. 75 at p367.
100 Ibid, at p368
101 Ibid at p369.
The Convention explicitly provides that a ship may only be arrested if the claim against it is in the nature of a maritime claim. The list of maritime claims is found in Article 1 which are all closely and directly connected with the operations of the ship. Further in Article 7, it lays down the circumstances on which an arresting state can effect arrest and that it requires that courts trying the case must adjudicate the issue on the merit. It is also clear under Article 3 (3) that a ship may not be arrested or that a bail or other security be given more than once in any of the jurisdictions of any of the Contracting States by the same claimant for the same claim.

The Convention is applicable to any vessel flying the flag of a contracting State in the jurisdiction of a Contracting State. It means that arrest can only be possible if the ship enters within the territorial jurisdiction of an arresting State. It cannot be done in the high seas. In addition, the Convention also provides that ships of non-contracting States may be arrested in the jurisdiction of a contracting State for any of the maritime claims determined by the Convention and other claims permitted under the national law of a contracting state. In the case of a non-contracting State, the Convention endorses the principle that it cannot arrest a ship flying the flag of a non-contracting state.

The Convention introduces the concept of and allows “sister ship arrest”. It means that a claimant can arrest of the ship in respect of which the claim arose or another ship owned by the owner of the ship in respect of which the claim arose. In order for the ship arrest be released, the shipowner needs to lodge the necessary security for the claims. In case the court finds that it lacks jurisdiction on the merit to try and hear the case, the defendant is required to furnish the court with sufficient security before the ship is released.

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102 For purposes of this paper, Article 1 of the 1952 Arrest Convention provides, among others, that loss of life, personal injuries sustained by seafarers in connected to a duty on board, and wages are considered maritime claims.


b. 1999 International Convention on the Arrest of Ships

In comparison, the 1999 Convention follows the format of the 1952 Convention, but the drafting was done in a more precise way. According to Jackson, the uncertainty of substantive rights in an arrested ship is removed and the power of arrest is dependent more closely on the person liable on the claim being linked with the ship at the time of the arrest. Jurisdiction on the merits becomes a Convention concept with qualifications for national laws.\textsuperscript{105}

In terms of the definition of “arrest”, the Convention extends to include “restriction on removal” as well as detention of a ship. It still excludes arrest in “execution or satisfaction of a judgment”.\textsuperscript{106}

The Convention applies to any ship within the jurisdiction of any State Party, whether or not that ship is flying the flag of a State Party.\textsuperscript{107} Exempted are warships, naval auxiliary or other ships owned or operated by a State and used only on government non-commercial service.\textsuperscript{108}

In respect to ships not owned by the person liable of the claim, the following are the grounds by which arrest of the ship in respect of which the claim has arisen as provided under Article 3(1) of the Convention:

i. The person owning or demise chartering the ship is liable for the claim and was owner or demise charterer of the ship when the claim arose and at the time of arrest was the owner or in case of demise, charterer;

ii. It is based on ownership, possession or mortgage;

iii. The claim attracts a maritime lien and is against the owner, demise charterer or manager or operator of the ship.

\textsuperscript{105} \textit{Supra}, footnote no. 75 at p. 370.
\textsuperscript{106} \textit{Supra}, footnote no. 49, in Article 1 (2).
\textsuperscript{107} \textit{Ibid}, in Article 8 (1).
\textsuperscript{108} \textit{Ibid}, in Article 8(2).
4.3.2 Maritime Liens and Mortgages Conventions

As treatment of the legal concept, nature and consequences of maritime claims and maritime liens varies from one jurisdiction to another which has become a very good source of conflict issues between and among jurisdictions, the UNCTAD attempted to bring uniformity in the treatment of these matters under international law. This resulted in the adoption of three (3) international instruments. These are the International Conventions for the Unification of Certain Rules Relating to Maritime Liens and Mortgages of 1926, 1967 and 1993.

The 1967 Convention which was intended to replace the 1926 Convention is not yet in force. The 1993 Convention, while in force has very low ratification rate. A good number of traditional maritime states as well as labor supplying countries have not yet ratified or acceded to this Convention.

This paper is of the view that the cold acceptance of these conventions clearly reflects the high degree of differences among national laws on the issue of maritime claims and maritime liens, particularly on the priority ranking of claims.

It is apparent that the three Conventions have very much limited in scope because they encompass only subjects on registration, priority, transfer of ownership and rules relating to forced sale. As regards liens the Conventions provide for maritime liens and but recognition of these liens rests under national law.109

a. 1926 Maritime Liens and Mortgages Convention

Article 7 of the 1926 Convention recognizes five categories of claims attracting maritime liens and one among them are claims for personal injuries.

Like in many other international instruments, the Convention does not apply to government controlled and operated ships provided they are not performing commercial activities. Articles 8 and 13 provide that maritime liens within the meaning of the Convention are enforceable against a ship into whatever hands it

109 Supra, footnote no. 75 at p. 481.
may pass and even against a chartered ship. With regard to the prescriptive period to bring action, claims must be instituted within one year from the time the incident took place.

b. 1967 Maritime Liens and Mortgages Convention

In the 1967 Convention, it still provides five categories of claims attracting maritime liens but this time, claim for loss of life has been included.

c. 1993 Maritime Liens and Mortgages Convention

The 1993 Convention had more relevance to registration of ships. It also provides for five categories of claims which take priority over all other interests including mortgages and for the recognition of other liens created by national laws.\textsuperscript{110}

\textbf{4.3.3 Convention on Limitation of Liability for Maritime Claims}

Limitation of liability is an accepted concept generally in the use of corporate personality to limit individual liability. In shipping, it has long been accepted that in addition, a shipowner or operator may directly limit his liability for compensation for damage, loss or injury caused through his acts.\textsuperscript{111} In fact, the limitation of liability in respect to claims arising from a maritime incident has long been recognized by many states.

Justification for limitation has economic significance. It would serve as an encouragement for more investments in shipping trade as well as in insurance business for the simple reason that the risks in shipping business have become insurable. The balancing factor for claimants for the limit on compensation is the lessening of the possibility of non-recovery.

The ability to limit does not necessarily affect the principle of liability. Limitation of liability operates through a limit on compensation not linked to any principle of liability without fault or without any regard to the conduct of the limitation claimant.

\textsuperscript{110} Supra, footnote no. 71.
\textsuperscript{111} For more discussion on limitation of liability, please see Steel [1995] LMCLQ 71
The claiming of limitation is not exclusively linked to the provision of any security for the claim. However, the setting up of a “limitation fund” and the claiming of global limitation may in respect of claims within a particular regime relieve the person claiming limitation from provision of further security and also channel claims against him to the fund.\textsuperscript{112}

In discussing the connection between liability and limitation, Brandon J\textsuperscript{113} had the view that the “right of recovery declared in liability proceedings was not “res judicata” in respect of limitation proceedings”.

By the nature of seafarers’ claims, if proceedings for the limitation of liability is held in a court of a single state, the possibility of a binding effect of the judgment is higher than remote. Because of the different foreign elements involved in the litigation for limitation for liability, the risks of irreconcilable judgments are high simply because of the application of different legal systems.

\textbf{a. 1976 Convention on Limitation of Liability for Maritime Claims}

It is clear that the intention of the 1976 Limitation Convention is to set up a framework for the limitation of liability for shipowners, ship operators as well as salvors\textsuperscript{114}.

The Convention replaces the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships, which was signed in Brussels in 1957, and came into force in 1968. Under the 1976 Convention, the limit of liability for claims covered is raised considerably, in some cases up to 250-300 per cent. Limits are specified for two types of claims - claims for loss of life or personal injury, and property claims (such as damage to other ships, property or harbour works).\textsuperscript{115}

\textsuperscript{112} Supra, footnote no. 75 at pp. 577-578.
\textsuperscript{113} The Wladyslaw Lokietek, [1978] 2 Lloyd’s Rep. 520
\textsuperscript{114} Article 1, 1976 Limitation of Liability for Maritime Claims.
\textsuperscript{115} Please see: http://www.imo.org/Conventions/contents.asp?doc_id=664&topic_id=256
In the Convention, the limitation amounts are expressed in terms of units of account. Each unit of account is equivalent in value to the Special Drawing Right (SDR) as defined by the International Monetary Fund (IMF), although States which are not members of the IMF and whose law does not allow the use of SDR may continue to use the old gold franc (referred to as "monetary unit" in the Convention).

The limits under the 1976 Convention were set at 333,000 SDR (US$499,500) for personal claims for ships not exceeding 500 tons plus an additional amount based on tonnage: 116

i. For each ton from 501 to 3,000 tons, 500 SDR (US$750);
ii. For each ton from 3,001 to 30,000 tons, 333 SDR (US$500);
iii. For each ton from 30,001 to 70,000 tons, 250 SDR (US$375);
iv. For each ton in excess of 70,000 tons, 167 SDR (US$251).

For other claims, the limit of liability was fixed under the 1976 Convention at 167,000 SDR (US$250,500) for ships not exceeding 500 tons. For larger ships the additional amounts were: 117

i. For each ton in excess of 70,000 tons, 167 SDR (US$251);
ii. For each ton from 501 to 30,000 tons, 167 (US$251);
iii. For each ton from 30,001 to 70,000 tons, 125 SDR (US$180);
iv. For each ton in excess of 70,000 tons, 83 SDR (US$125);

The Convention provides for a virtually unbreakable system of limiting liability. It declares that a person will not be able to limit liability only if "it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such a loss, or recklessly and with knowledge that such loss would probably result". 118

116 Ibid.
117 Ibid.
118 Ibid.
b. 1996 Protocol

Under the 1996 MLMC Protocol, which entered into force in 2004, the amount of compensation payable in the event of an incident being substantially increased and also introduces a "tacit acceptance" procedure for updating these amounts. 119

The limit of liability for claims for loss of life or personal injury for ships not exceeding 2,000 gross tonnage is 2 million SDR (US$3.17 million). 120

For larger ships, the following additional amounts are used in calculating the limitation amount: 121

i. For each ton from 2,001 to 30,000 tons, 800 SDR (US$1,269);
ii. For each ton from 30,001 to 70,000 tons, 600 SDR (US$952);
iii. For each ton in excess of 70,000, 400 SDR (US$634).

Under the 1996 LLMC Protocol, the limit of liability for property claims for ships not exceeding 2,000 gross tonnage is 1 million SDR (US$1.586 million). For larger ships, the following additional amounts are used in calculating the limitation amount: 122

i. For each ton from 2,001 to 30,000 tons, 400 SDR (US$634);
ii. For each ton from 30,001 to 70,000 tons, 300 SDR (US$476);
iii. For each ton in excess of 70,000, 200 SDR (US$317).

120 Ibid.
121 Ibid.
122 Ibid.
CHAPTER V

FILIPINO SEAFARERS AND THE PANAMANIAN REGISTRY

The Philippines, an archipelago of 7,100 islands, is situated in the South East Asian region, bordering the countries of Indonesia and Malaysia in the South, Taiwan in the North, and Viet Nam and Hong Kong in the West. In 2007, it had a total population of 88,574,614 million making it the 12th most populous country in the world. As the 37th largest economy, the country’s GDP for 2007 reached US$ 117.562 billion which translated to a total growth rate of 7.3%. The country’s economy is highly dependent on agriculture, manufacturing, mining, remittances of overseas Filipino workers, service industry and business process outsourcing. Total remittance from overseas workers is US $ 14.3 billion and it accounts to about 10 per cent of the country’s GDP.

5.1 The Philippine Seafaring Industry

Seafaring industry continues to remain as one of the major components of overseas employment for Filipinos. It is said that there is a great probability that a Filipino crew is on board every ship in the overseas trade. For 2007, Filipino seafarers are responsible for remitting to the government coffers in the total amount of US$ 2,236,363.00 in hard currency representing 15.275% of total remittances of Filipino overseas workers in the amount of US$ 12,761,308.00 in the same period.

In a paper which was submitted by the Philippines to the IMO, in describing the economic contributions of Filipino seafarers, it said that:

124 Ibid.
125 Ibid.
126 Ibid.
128 Ibid. Please see also supra. footnote 123.
Filipino seafarers, together with other land-based overseas workers have been considered as the country's *Bagong Bayani* (new heroes) as they prop the economy through the foreign exchange they continuously bring into the country. There is a grateful recognition of the sacrifices the Filipino seafarer has to endure for the sake of uplifting the circumstances of his family and at the same time contribute to the improvement of the quality of life of the Filipino in general. Indeed, there is a supposition that in some parts of the country, it is the seafarer who introduces the social and economic transformation of the rural community. To a certain extent, this fact is manifested by the clustering of seafarers in some municipalities and provinces which somehow shows that the economic gains of seafaring stimulates enthusiasm for people in the local communities to pursue a career in seafaring.\(^{129}\)

The paper further stated that:

“While the steady disposable income from the practice of their profession, seafarers are able to derive a wide range of socio-economic benefits and initiate the “multiplier process”. They are able to afford better nutrition, health care, clothing and decent living facilities. Many of them buy houses of better quality or undertake improvements in their existing one. The higher the seafarers’ income, the better educational facilities they are able to procure for their children. They can also afford to spend for recreation, leisure and entertainment and the convenience which automation can offer.”\(^{130}\)

In a study conducted by the Seafarers’ International Research Center (SIRC) at the Cardiff University in the United Kingdom, it found out that Filipino seafarers typically come from large families, with an average of 6 siblings\(^ {131}\). Most Filipino seafarers are married with more or less 4 children. The paper reveals that:

Filipino seafarers are recruited from among families of lower social status. Most of seafarers’ fathers were either engaged in fishing and farming, while most mothers were fulltime housewives and some were self-employed market vendors.\(^ {132}\)

By reason of the economic background they come from, Filipino seafarers make it an obligation for them to support their family in terms of financing the education not only of their children but also of their brothers and sisters as well as for the medical expenses of their ageing parents or grandparents.

\(^{129}\) *Supra*. Footnote no. 127.

\(^{130}\) *Ibid.*

\(^{131}\) Minghua Zhao & Maragtas S.V. Amante, *Chinese and Filipino Seafarers: A Race to the Top or to the Bottom?*” This paper was presented during the 2003 Seafarers’ International Research Centre’s (SIRC) Symposium at the Cardiff University, United Kingdom.

5.2 Profile of Philippine Shipboard Labor

More than 11 percent of the total population of the country are employed overseas. This figure places the Philippines as the largest producer of migrant labor worldwide. For 2007, the country deployed a total of 1,077,623\(^{133}\) workers for overseas employment. Seabased and landbased employment totaled to 266,553\(^{134}\) or 24.74\% and 811,070\(^{135}\) or 75.26\%, respectively. This figure does not take into account undocumented Filipino workers who managed to slipped out from the country as tourists and later were able to find employment. This breaking record is translated to an average of 2,952 workers departing the country daily.

Today, most of Filipino seafarers are working on board vessels of the following flag states.

<table>
<thead>
<tr>
<th>Flag of Registry</th>
<th>No. of Seafarers</th>
<th>% share</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Panama</td>
<td>51,619</td>
<td>19.37%</td>
</tr>
<tr>
<td>2. Bahamas</td>
<td>29,681</td>
<td>11.14%</td>
</tr>
<tr>
<td>3. Liberia</td>
<td>21,966</td>
<td>8.24%</td>
</tr>
<tr>
<td>4. Singapore</td>
<td>10,308</td>
<td>3.87%</td>
</tr>
<tr>
<td>5. Marshall Islands</td>
<td>9,772</td>
<td>3.67%</td>
</tr>
<tr>
<td>6. United Kingdom</td>
<td>8,172</td>
<td>3.07%</td>
</tr>
<tr>
<td>7. Malta</td>
<td>7,513</td>
<td>2.82%</td>
</tr>
<tr>
<td>8. Cyprus</td>
<td>7,052</td>
<td>2.65%</td>
</tr>
<tr>
<td>9. Netherlands</td>
<td>7,017</td>
<td>2.63%</td>
</tr>
<tr>
<td>10. Norway</td>
<td>6,975</td>
<td>2.62%</td>
</tr>
<tr>
<td>11. Other Flags of Registry</td>
<td>106,478</td>
<td>39.95%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>266,553</strong></td>
<td><strong>100.00%</strong></td>
</tr>
</tbody>
</table>

Source: POEA

The table above shows that Panama, Bahamas and Liberia are the top three single employers of Filipino seafarers with 51,619 (19.37\%), 29,681 (11.14\%) and 21,966 (8.24\%).

\(^{133}\) Supra. footnote 123.  
\(^{134}\) Ibid.  
\(^{135}\) Ibid.
### Table 5
**Deployment of Seafarers by Ship Type for 2007**

<table>
<thead>
<tr>
<th>Top 10 Vessel Type</th>
<th>No. of Seafarers</th>
<th>% share</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Passenger</td>
<td>47,782</td>
<td>17.93</td>
</tr>
<tr>
<td>2. Bulk Carrier</td>
<td>42,357</td>
<td>15.89</td>
</tr>
<tr>
<td>3. Container</td>
<td>31,983</td>
<td>12.00</td>
</tr>
<tr>
<td>4. Tanker</td>
<td>25,011</td>
<td>9.38</td>
</tr>
<tr>
<td>5. Oil/Product Tanker</td>
<td>14,462</td>
<td>5.43</td>
</tr>
<tr>
<td>6. General Cargo</td>
<td>10,754</td>
<td>4.03</td>
</tr>
<tr>
<td>7. Chemical Tanker</td>
<td>7,902</td>
<td>2.96</td>
</tr>
<tr>
<td>8. Tugboat</td>
<td>6,610</td>
<td>2.48</td>
</tr>
<tr>
<td>9. Pure Car Carrier</td>
<td>5,743</td>
<td>2.15</td>
</tr>
<tr>
<td>10. Others/Not specified</td>
<td>73,949</td>
<td>27.74</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>266,553</strong></td>
<td><strong>100.00</strong></td>
</tr>
</tbody>
</table>

Source: POEA

For the year, most Filipino seafarers were employed in passenger ships at 47,782, followed by Bulk Carriers at 42,347, Container ships at 31,983, and Tanker ships at 25,011. Table 5 likewise shows the number of Filipino seafarers on board other types of ships.

### Table 6
**Top 10 Skills of Deployed Seafarers for 2007**

<table>
<thead>
<tr>
<th>Position</th>
<th>No. of Seafarers</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Able Seaman</td>
<td>31,818</td>
</tr>
<tr>
<td>2. Oiler</td>
<td>19,491</td>
</tr>
<tr>
<td>3. Ordinary Seaman</td>
<td>17,355</td>
</tr>
<tr>
<td>4. Second Mates</td>
<td>7,873</td>
</tr>
<tr>
<td>5. Messman</td>
<td>7,810</td>
</tr>
<tr>
<td>6. Chief Cook</td>
<td>7,778</td>
</tr>
<tr>
<td>7. Bosun</td>
<td>7,737</td>
</tr>
<tr>
<td>8. Third Engineer Officer</td>
<td>7,056</td>
</tr>
<tr>
<td>9. Third Mate</td>
<td>6,559</td>
</tr>
<tr>
<td>10. Waiter/Waitress</td>
<td>6,388</td>
</tr>
</tbody>
</table>

Source: POEA

Profiling was made on the skills of 226,900 seafarers that were deployed in 2007. The data shows that about 14% or 31,818 are able seamen, 8.6% or 19,491 were oilers, 7.6% or 17,355 were ordinary seamen, 3.5% or 7,873 were second mates, and 3.4% or 7,810 were messmen.
The remaining top five skills are chief cook (7,778), bosun (7,737), third engineer officer (7,056), third mate (6,559) and waiter/waitress (6,388).

5.3 Legal Framework for Seafarers’ Claims

5.3.1 Public Law

Seafarers’ claims in the Philippines find their legal basis from the country’s constitution.

The 1987 Constitution declares it as a state policy to affirm labor as a primary economic force and to protect the rights of the workers and promote their welfare. Particularly, under its Article XIII, section 3, it provides that:

The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all. They shall be entitled to security of tenure, humane conditions of work, and a living wage.

5.3.2 Regulatory Law

Consistent with the legal framework of seafarers’ claims which was discussed in Chapter IV of this paper, the mandate to ensure safety of navigation of ships flying the Philippine flag within and outside the country’s territorial waters belongs to the Maritime Industry Authority (MARINA). In 1997, the Authority issued the Philippine Merchant Marine Rules and Regulations (PMMRR) to ensure that all ships of Philippine ownership and/or registry are so designed, constructed, maintained, operated, and inspected in accordance with the standards necessary to enhance the safety of life and property at sea and the protection of the marine environment. The PMMRR sets out the minimum crewing levels on Philippine flag vessels, and also stipulates that crew members must hold appropriate certificates.136

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136 Chapter XVIII: Minimum Safe Manning determines the safe manning requirements of Philippine registered ships. It also defines the duties and responsibilities of officers and ratings in compliance with the provisions of the STCW Convention and relevant international regulations.
Employment of overseas Filipino seafarers is primarily governed by the Standard Employment Contract (SEC)\textsuperscript{137} which is under the auspices of the Philippine Overseas Employment Agency (POEA). The SEC prescribes the minimum terms and conditions of employment of Filipino seafarers. Labour unions may submit a collective bargaining agreement with the POEA and, if approved, to be incorporated in the SEC."\textsuperscript{138}

To understand better the nature of employment of Filipino seafarers employed in the overseas trade, the country’s Supreme Court in \textit{The Petroleum Shipping Limited Case}\textsuperscript{139} ruled that “seafarers are contractual employees”. In explaining its decision, the court said that:

They cannot be considered as regular employees under Article 280 of the Labor Code. Their employment is governed by the contracts they sign every time they are rehired and their employment is terminated when the contract expires. Their employment is contractually fixed for a certain period of time. They fall under the exception of Article 280 whose employment has been fixed for a specific project or undertaking the completion of which has been determined at the time of engagement of the employee or where the work or services to be performed is seasonal in nature and the employment is for the duration of the season.

However, in the case of Filipino seafarers on board national flags operating within the territorial waters of the country, they are considered as local employees of shipping companies. They would either be considered regular or contractual employees and the terms and conditions of their employment is governed by the provisions of the Labor Code and the provisions of collective bargaining agreement, if approved.

In the case of foreign seafarers employed on Philippine bareboat chartered vessels, terms and conditions of their employment shall be governed by the labor laws of their country of origin. The Labor Code of the Philippines is also applicable because they bind their employers.

\textsuperscript{137} Full text of the POEA Standard Employment Contract can be accessed at www.poea.gov.ph.

\textsuperscript{138} Supra, footnote no. 4 at p 417.

\textsuperscript{139} \textit{Petroleum Shipping Limited (formerly Esso International Shipping (Bahamas) Vo., Ltd and Trans-GLOBAL Maritime Agency, Inc v National Labor Relations Commission, GR. No. 148130, 16 June 2006.}
Like many other workers, Filipino seafarers are entitled to employment benefits ranging from compensation, medical, disability to death, if they are qualified. A state compensation and insurance fund, which is administered by the Social Security System (SSS) has been established to fund employees’ benefits. This is not available to non-Filipino seafarers.

5.3.3 Sources of Seafarers’ Claims

Sources of seafarers’ claims for Filipino seafarers employed by foreign principals are those that arise from the POEA Standard Employment Contract; the Labor Code for Filipino seafarers on board national flags; and, the Civil Code, for tort and damages, whenever applicable.

Based on the SEC, the following are sources of seafarers’ claims.

i. Wages

Section 7, “Wages” of the Standard Contract provides that:

The seafarer shall be paid his monthly wages not later than 15 days of the succeeding month from the date commencement (sic) of the contract until the date of arrival at the point of hire upon termination of his employment.

However, the contract does not specify the minimum wage due to Filipino seafarers. The determination is left between the shipowner or through the manning agent and the seafarer.

ii. Overtime Pay

Any work in excess of eight hours per day is considered as overtime work. The SEC also provides for overtime pay which shall be compensated with not less than 125 per cent of basic hourly rate based on 208 regular working hours per month. Guaranteed or fixed overtime shall be compensated with not less than 30 per cent of the monthly salary of the seafarer but this should not exceed 105 hours a month. Hours in excess shall be further compensated on an open over time rate. However, there is no overtime pay in cases of emergency.

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140 The Fund is administered by the Social Security System. An employee’s share is 1% of his monthly gross earning.
iii. Death Benefits

The standard terms and conditions provides in Section 20 the following provisions:

In case of work-related death of the seafarers, during the term of his contract the employer shall pay his beneficiaries the Philippine currency equivalent to the amount of Fifty Thousand US dollars (US$ 50,000.00) and an additional amount of Seven Thousand US dollars (US$ 7,000.00) to each child under the age of (21) but not exceeding four (4) children, at the exchange rate prevailing during the time of payment.

These benefits are separate and distinct from any other benefits due under the Social Security System (SSS), the Overseas Workers’ Welfare Administration (OWWA), Employees’ Compensation Commission (ESC), Philippine Health Insurance Corporation (Philhealth) and the Home Development Mutual Fund (HDMF), if applicable. Compensation is doubled if death is caused by warlike activities while sailing within a declared war zone or war risk area. The employer is also responsible for transporting the remains and personal effects to the Philippines in appropriate circumstances and for burial expenses of US$ 1,000.00.

iv. Injury or Illness Benefits

For work-related injury or illness during the term of the contract, the seafarer is entitled to continuous payment of wages onboard, and the full cost of medical or dental treatment, surgical and hospital treatment, as well as board and lodging until he becomes fit enough to work or is repatriated. The employer bears the full cost of repatriation. If after repatriation, the seafarer requires medical attention arising from the injury or illness, this must be provided at cost to the employer until the seafarer is declared fit to work or the degree of disability has been established by the company-designated physician.

Upon sign-off the vessel for medical treatment, the seafarer is entitled to sickness allowance equivalent to his basic wage until he is declared fit to work or the degree of permanent disability has been assessed by the company-designated physician but in no case shall this period exceed one hundred twenty (120) days, or until he becomes fit to work, or the disability is established by a company-designated physician. The seafarer must present himself within three working days upon his return. If the doctor appointed by the seafarer disagrees with the assessment, a
third doctor may be agreed jointly between the employer and the seafarer. The
decision of this doctor shall be final and binding on both parties.

Compensation is excluded if the injury, incapacity, disability or death resulted from
the seafarer’s willful or criminal act or intentional breach of his duties. Further, a
seafarer is disqualified from compensation if he knowingly conceals a medical
complaint at the pre-employment medical examination.

In a position paper submitted by the United Filipino Marine Radio Officers to the
International Commission on Shipping (ICONS) criticized the provision
compensation and Benefits for Injuries, Illness or Deaths of Seafarers on the SEC
and it said that:

The provision in the standard contract repeatedly state (sic) that
Compensation and Benefits from Injuries, illness or death of seafarers must
be WORK RELATED to make sure that the nail is well driven-in favor of the
employers, it is no longer sufficient that he submits himself to a thorough
medical examination, as it has always been the case. Now, the (sic)
seafarers must make a (sic) full disclosure of his medical history. The
disclosure will not bar him from being employed but will prevent the (sic)
Seafarers from health benefits. The new standard contract transferred the
“burden of proof” to the seafarers. 141

This position is also supported by the Seafarers’ Mission Center in the Philippines
which says that:

Some of the worst changes are limitation on seafarers’ centuries old rights
to medical care for all injuries and illness incurred while employed on the
ship (maintenance and cure). Under the new agreement, employers are
responsible for paying only for seafarers’ occupational injuries and diseases
that were job related. Compensation for injuries, illnesses and disability is
limited by the agreement. It further stated that seafarers must disclose their
past medical conditions, disabilities and medical histories. If they do not,
they risk disqualification from compensation and benefits, termination from
employment and punitive sanctions.

In protecting the lives of its seafarers and in preventing injuries, the contract
specifically requires employers to provide seaworthy ships and take reasonable
measures to prevent accidents and provide safety equipment, but the Seafarers
Mission Center of the Philippines sees it no longer necessary to be included in the

141 Position paper submitted by the United Filipino Radio Officers The document can be
July 2008
contrast because “these obligations are already required by general maritime law and international conventions”

5.3.4 Jurisdictional and Enforcement Issues

The terms and conditions of the SEC provide a procedure to address a seafarer complaint. On issues arising from money claim from employee-employer relationship or by virtue of any contract including claims for actual, moral, exemplary and other forms of damages, involving Filipino overseas seafarers, the NLRC has exclusive jurisdiction. In acquiring the person of the defendant, the seafarer may have the option of suing the principal or the local manning agent, and any claim must be filed within three (3) years from the date when the cause of action arose.

The procedure under the NLRC can be summarized as follows:

Once the NLRC acquires jurisdiction, the case is assigned to the Labor Arbiter who, as a general rule, tries to undertake amicable settlement between the parties through mediation. However, if the parties would not be able to come into a compromise agreement, the Labor Arbiter shall require the submission of position papers including scheduling for hearings, before a decision, adjudicating the dispute, is rendered. The decision of the Labor Arbiter may be appealed within 10 days from receipt of decision, to the Court of Appeals within 60 days, then to the Supreme Court within 15 days from receipt of the decision of the Court of Appeals.

It must be clear that in an action for torts and damages, jurisdiction belongs to the province of regular courts and not the NLRC.

Whenever he is successful in his suit for money claims, the seafarers may file before the NLRC for execution of judgment by garnishing the security posted by the concerned manning agency with the POEA, and by attaching other properties of the agency of the principal. The amount of bond filed before the POEA is very minimal and the assets of local manning agencies are limited such that when the agency becomes insolvent due to substantial money claims, there is no other recourse of the seafarer in the Philippines.

Arrest of ships is allowed under Philippine jurisdiction as provided by the Code of Commerce of 1885. A vessel might be sued in action in rem for the enforcement of a
maritime lien, attached by the court and then sold. According to the Code of Commerce, there is a lien on the vessel for the salaries due to the captain and crew during its last voyage.

A writ of attachment is not necessary for the court to acquire jurisdiction over the res when the property is burdened by a maritime lien. The court may then order the judicial sale of the vessel once the right to the lien is established.

Another for procedure for attachment is provided in the Civil Procedure. Rule 57 provides that at the start of the legal case, or at any time before the entry of judgment, a claimant may have the property of the adverse party attached as a security for the satisfaction of any judgment. However, the claimant is required to post a bond as a security for all possible damages that the defendant may sustain if the attachment fails.

The ancillary remedy of a writ of attachment is available in Philippine lower courts such as the Municipal Trial Court and Regional Trial Court. It is likewise available to all creditors of the vessel or shipowners, including the preferred and other maritime lienholders. Under the doctrine of “piercing the veil of corporate entity”, sister ship arrest is possible where the vessels owned by the creditor through a corporation may be attached if it is shown that the corporate personality is being used as a shield to further an end subversive justice or as an alter ego, adjunct or business conduit for the sole benefit of the stockholder. What is required is that the vessel seized is alleged to be owned by the shipowner.

The Philippines is not a signatory to the International Convention to the Arrest of Sea-Going Ships of 1952 or 1999, nor to the 1993 International Convention on Maritime Liens and Mortgages. However, under section 2 of the Constitution, it provides that the Philippines adopts generally accepted principle of international law as part of the law of the land. As such, in the absence of any domestic law, these conventions may be used in evidence.

142 Palay, Incorporated v Clave, 124 SCRA 638
143 McConnel v Court of Appeals, 15 SCRA 722
Presidential Decree No. 1521, “The Ship Mortgage Decree of 1978” introduces the common law procedure in admiralty for the arrest of ships in an action in rem where the vessel is made a defendant.

In terms of priorities of liens, Section 17 of PD 21 provides that:

The preferred mortgage lien shall have priority over all claims against the vessel, except the following claims in the order stated: 1) expenses and fees allowed and costs taxed by the court and taxes due to the Government; 2) crew wages; 3) general average; 4) salvage, including contract salvage; 5) maritime liens arising prior in time to the recording of the preferred mortgage; 6) damages arising out of tort; and, 7) preferred mortgage registered prior in time. (*underscoring supplied*)

PD 1521 does not expressly state whether loss of life or injury caused on seafarers could be treated as maritime liens; however, they could be deduced under item 6 above as damages arising from tort. Crew wages take preference over damages arising from tort.

Considering that the Philippines is not a party to international instruments such as the MLC 2006, the 1993 MLMC and the 1999 Arrest Convention, it would be difficult to enforce the claims of seafarers against foreign principals. Within the domestic sphere, the available structures and the principal judicial process can be long, tedious and expensive. The process may take almost 10 years in some cases that is when shipowners or manning agents opt to avail themselves of all legal remedies.

Attachment of properties of the employer is one way to ensure the sufficiency of funds to satisfy the claims of seafarers. But this process is governed by the rules on attachment and that the seafarers is required to post a bond. Arrest of ships is only possible when the vessel enters the Philippine territory. Manning agents who assume joint and solidary liability with the employer for claims arising out of employee-employer relationship, the bonds posted by these manning agents are grossly insufficient to cover potential claims of seafarers, and the assets of crewing agencies are also limited.
To understand the position of Filipino seafarers and other seafarers on board Panamanian flag vessels is to review the country’s relevant laws and its practices as an Open Registry State.

5.4 The Panamanian Registry

5.4.1 Nationality of Ships Registered

Panama, located in Central America, is the leading country providing an open registry for ships. According to the Lloyd’s Register, Panama has a total number of 7,518 registered ships with a total gross tonnage of 164,834,459 as of 31 October 2007. New ships registered for 2007 totaled to 1,511 with an aggregate gross tonnage of 26,404,685.

Table 7
Top Nationalities of New Registered Ships
(January-December 2007)

<table>
<thead>
<tr>
<th>NATIONALITY</th>
<th>NO. OF SHIPS</th>
<th>GT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Japan</td>
<td>264</td>
<td>8,921,312</td>
</tr>
<tr>
<td>2. Singapore</td>
<td>104</td>
<td>2,818,685</td>
</tr>
<tr>
<td>3. Korea</td>
<td>75</td>
<td>2,018,020</td>
</tr>
<tr>
<td>4. Hong Kong</td>
<td>70</td>
<td>1,367,840</td>
</tr>
<tr>
<td>5. Switzerland</td>
<td>29</td>
<td>1,217,671</td>
</tr>
<tr>
<td>6. Greece</td>
<td>80</td>
<td>1,126,670</td>
</tr>
<tr>
<td>7. Panama</td>
<td>186</td>
<td>971,576</td>
</tr>
<tr>
<td>8. China</td>
<td>28</td>
<td>895,988</td>
</tr>
<tr>
<td>10. Marshall Islands</td>
<td>32</td>
<td>531,096</td>
</tr>
</tbody>
</table>

Source: Panama Maritime Authority

It can be gleaned from the table that in terms of gross tonnage registration, nationals from Japan, Singapore, Korea, Hong Kong and Switzerland topped the registration of new ships for 2007.

Panama’s open registry system dates back in 1928 when a law was enacted removing the requirement of Panamanian citizenship and residency as pre-

144 Discussions on the Panamanian Registry were substantially lifted from Fitzpatrick and Andersons’ Seafarers Rights, pp 381-406. Please see supra footnote no. 4.
requisites for the registration of vessels. Thus, any person or company, regardless of nationality and corporate domicile can register ships. In fact, establishing a company or a corporation in Panama is relatively easy and straight forward.

Ownership of shares can be issued to bearers and there is no obligation to disclose the shareholders’ identity in any public record. Moreover, non-resident shipping companies are not subject to income or withholding taxes. Instead, Panamanian ships are subject to moderate annual fee calculated on the amount of tonnage. Significant discounts of the annual tonnage are available in the event an owner registers three or more vessels or even a single vessel of substantial tonnage.

5.4.2 Labor Law

Panama’s Labor Code regulates the relationship between labor and capital. Unlike land based workers, seafarers working in international vessels have been excluded from several of its provisions such as the 13th month wage provision.

Under Panamanian regulation, the legal regime that is most applicable to all seafarers, both national and international, working on-board Panamanian ships is Decree Law No. 8 (DL 8/98) which was enacted on 26 February 1998. Article 1 of the said Decree provides that:

This law Decree relates to the public order and regulates in its entirely the relations between capital and labor onboard Panamanian registered vessels.

In Article 2, it says that:

Situations or events not foreseen in this Law Decree, nor in international conventions ratified by the Republic of Panama, nor in complementary legal provisions shall be resolved according to the generally accepted norms, uses, and practices of the shipping and the maritime trade.

The implementation of DL 8/98 was surrounded by many controversies because it failed to re-enact many provisions that were promulgated in the Labor Code such as those relating to the right to strike, the right to collective bargaining, minimum wage, internal working conditions, suspension of the contract and compensation schemes for injuries and sickness. It now appears that this Decree has not amply protected the seafarers.
Criticisms lodged on DL 8/98 include the following:

i. It does not address the right to freedom of association, collective bargaining or the right to strike. The decree simply states that the shipowners’ and the seamens’ organization may sign collective agreements.

ii. It does not expressly grant seafarers the right to organize. Panama is a signatory to the ILO Convention No. 98 which subject is the right to organize and to collective bargaining. The Decree now appears to be in contradiction with Panama’s obligation under Convention No. 98.

iii. There is no provision in DL 8/98 for collective bargaining, although there is only a passing comment that employers and trade unions may enter into collective agreements.

iv. The Decree is silent on the right of seafarers to go on strike. In practice any strike action on board Panamanian vessels would be subject case by case interpretation by the Courts.

v. Article 26 of the DL 8/98 insists on the guarantee for equal treatment between nationalities and prohibition on discrimination on the basis of union affiliation, religion, race or politics. However, it does create any sanction for the violation of this provision.

5.4.3 Sources of Seafarers’ Claims

Minimum Terms and Conditions of Employment Contracts

It would be interesting to note that, unlike in the Philippines, there is no standard employment contracts for seafarers in Panama. However, the Article 35 of DL 8/98 requires that the terms and conditions of the contract should include, among others, the following: the duration of the contract, food and accommodation on board; the amount of the salary, currency and method and place of payment; details regarding termination of contract; annual leave granted to the seafarer; the shipowner’s obligations in case of accidents, sickness and/or death of the seafarer and the
name and address of the P & I club or insurance company which provides professional risk insurance coverage for the crew together with any limitation on the insurance coverage applicable in the port where the shipowner or operator contracted to the insurance.

i. Wages and Over Time Pay

Executive Decree (ED) No. 4 of 1994 fixes the minimum wage for seafarers working on Panamanian vessels sailing in international waters at US$200 per month, although the shipowner and the seafarer are free to negotiate the rate of pay including overtime pay. ED 4/94 has not been repealed by DL 8/98. For purposes of computing the overtime rate, it should not be less than the basic hourly wage plus 25 per cent.\(^\text{146}\)

It should be noted that Panamanian law guarantees the principle of equal pay for equal work. It means that a seafarer is entitled to the same salary as any other employee if he performs the same tasks, for the same employer, under similar conditions, and with equal time of service on the same ship.\(^\text{147}\)

Wages are to be paid from the date the seafarer starts working on board the ship. If the seafarer has to travel from the place of engagement to the ship, wages are payable from the beginning of the journey or as provided in the contract.\(^\text{148}\)

Thereafter, the salary shall be paid in accordance with the terms of the contract. If in case the seafarer is not paid of his salary in the manner prescribed by the contract, he can terminate the contract and will be paid indemnity.

DL 8/98 provides that wages cannot be reduced unilaterally and its reduction during the course of the contract constitutes a violation of the contract and give right to the seafarer to resign and to receive an indemnity.

ii. Holidays and Leave

The Shipowner and the seafarer are free to agree on holidays and shore leave and the agreement should be made part of the terms of the contract. Panama has not

\(^{146}\) In Article 68, DL 8/98
\(^{147}\) In Article 5, DL 8/98
\(^{148}\) In Article 39, DL 8/98
ratified the ILO Seafarers’ Annual Leave with Pay Convention 1976 (ILO C146), although it is now a Party to the ILO MLC 2006.

iii. Sickness, Injury and Death

In Article 351 of DL 8/98, it requires that the employment contract should identify the insurance company that covers the professional risks. In case the seafarer is sick, it obliges the shipowner to be responsible in covering hospital expenses of the seafarer including expenses for medication, food and accommodation, full salary until the seafarer is fully recovered from such illness or when the employment contract expires.

Article 90 of DL 8/98 also mandates the shipowner to pay the usual burial expenses in the event the seafarer dies after disembarking, or if at the time of the death, the seafarer was still receiving assistance from the shipowner.

iv. Repatriation

Article 36 of DL 8/98 provides that it is the obligation of the employer to repatriate the seafarer where the seafarer was hired, or to the port of boarding, as the seafarer may choose, or where the contract is terminated unilaterally by the employer. In Article 37, if the contract was terminated by mutual agreement, each will be responsible for 50 per cent of repatriation expenses. In case the ship was wrecked, or in case the employment was terminated without just cause, or if the employment contract has been suspended due to an accident which occurred while the seafarer was in service or due to the sickness that has not been caused by the seafarer, the same article also requires the employer to fund the repatriation of the seafarer. In Article 38, repatriation costs include transportation, accommodation, salary and food during the return voyage to the place of engagement or boarding port.

v. Termination of Employment

DL 8/98 also provides instances by which an employment contract may be terminated. Some of the reasons are deception by the seafarer by the presentation of false certificates, unprovoked violence, endangering the safety of the ship and refusing to obey orders without just cause. In Article 52, whenever the seafarer is
dismissed, he will only be paid wages earned up to the dismissal date, proportional paid leave and repatriation expenses.

In Article 48, a seafarer’s employment contract is deemed terminated on his death; loss of unseaworthiness of the ship; suspension of the ship’s service due to lay-up for more than 90 days; disembarkation of the seafarer due to sickness or injury; change of ship registry, among others.

5.4.4 Enforcement of Claims

Like in many other jurisdictions, Panama has laws to enforce claims of seafarers on board Panamanian vessel.

However, this paper will no longer endeavor to discuss the relevant legal procedures as it is of the honest view that it would be difficult for any foreign seafarer to enforce his claim under Panamanian laws considering that most of the ships flying its flags are owned by nationals from other countries who do not have residence in that country and many of its registered ships do not call the ports of Panama. Another reason is that Panamanian laws allow the non public disclosure the real owners of the vessels registered in its registry. While it has laws concerning wages and compensation for sickness, injury, death and termination of employment, and other claims which by their nature are compensable, questions arise on how the country would be able to enforce these laws against shipowners considering that most of its shipowners do not hold office or reside in that country. As a matter of legal procedure, before a court of could acquire the jurisdiction on the person of the defendant, the real identity of the defendant must be made certain, otherwise, the case would be dismissed.

Interestingly, data from the IMO reveals that from 01 July 1995 to 32 June 1999, there were 72 Panamanian registered vessels that were abandoned, leaving the crew unpaid of their salaries aside from working under sub-human conditions.\footnote{Supra, footnote no. 63.}

With this number of abandoned ships, this paper likewise doubts if unpaid claims by seafarers have been resolved by relevant Panamanian authorities.
At present and based from its February 2008 records, the Paris MOU has blacklisted 10 vessels over multiple violations of international safety and labor regulations.  

5.4.5 Filipino seafarers under Panamanian Registry

As of 2007, there are more of less 51,610 Filipino seafarers on board Panamanian registered vessels. The employment contract of these seafarers have been processed by the POEA where the terms and conditions of employment are defined by the SEC. One among the provisions of the SEC is designating the Philippines as one of the venues for the institution of any legal action arising from the violation of the SEC. This is one way for the Philippine government to ensure that its seafarers get at least the minimum terms and conditions for shipboard employment of foreign registered vessels.

<table>
<thead>
<tr>
<th>Box 6</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>The Alexandra Case, A Panamanian registered vessel</strong></td>
</tr>
</tbody>
</table>

The crew of 10 Filipinos and 5 Romanians was left stranded on Mongla River, Bangladesh, after an explosion killed 5 crewmen in November 1996. At this stage the crew were owed about US$ 100,000 in unpaid wages. The ship had been arrested by a bunker supplier. A local lawyer represented the crew who were finally repatriated with part of the wages that they were due in mid 1997.

*Source: IMO, Doc. No. IMO/IL/IL/WGLCCS 1/6/2 at p.2*

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In its desire to present matters that have direct relation to seafarers claims, this paper shall embark a discussion on the following contemporary policy issues with the view to providing useful inputs for continuing debate among policy makers in the maritime manpower industry.

6.1 Flagging-Out

With the adoption and strict implementation of international standards for safety of navigation and the protection of the marine environment by the IMO and the desire to maximize profits as well as to reduce ship operating costs, shipowners from traditional maritime states have opted to register their ships in the so-called “open registry systems” or simply “flags of convenience systems”.

Under an open-registry system, shipowners benefit from the low taxation levels for profits and incomes and the reduced operating costs due to lower crew wages. Shipowners do not need to invest so much capital for labor and safety standards.\(^{151}\)

Under current situations, FOCs are steadily becoming more important within the global maritime community.\(^{152}\) In a study conducted by the SIRC, flagging out is primarily caused by the desire to minimize costs.\(^{153}\) The ITF has been very explicit on its position on this issue by saying that:

FOCs enable shipowners to minimize their operational costs by, inter alia, transfer pricing, trade union avoidance, recruitment of non-domiciled seafarers and passport holders on a very low wage rates, non-payment

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\(^{153}\) S.A. Bergantino and P.B. Marlow: An econometric analysis of the decision to flag out, (Cardiff, SIRC, 1997).
of welfare and social security contributions for their crews and avoidance of strictly applied safety and environmental standards\textsuperscript{154}

More and more ships are now registered under the so-called “FOCs systems” where nationals of these countries have less or no capital participation at all. Below is table 8 which illustrates the top ten FOCs whose nationals have less than 30% or no participation share at all.

<table>
<thead>
<tr>
<th>Flags of Registration</th>
<th>Number of Vessels</th>
<th>Share of world Total (Vessels)</th>
<th>DW tonnage, 1,000 dwt</th>
<th>Share of World Total, dwt</th>
<th>Average Vessel Size</th>
<th>% Share of Nationals of Country of Registry</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Panama</td>
<td>7,199</td>
<td>7.58</td>
<td>232,148</td>
<td>22.27</td>
<td>32,247</td>
<td>0</td>
</tr>
<tr>
<td>2. Liberia</td>
<td>1,908</td>
<td>2.01</td>
<td>105,227</td>
<td>10.10</td>
<td>55,150</td>
<td>0</td>
</tr>
<tr>
<td>3. Bahamas</td>
<td>1,394</td>
<td>1.47</td>
<td>55,238</td>
<td>5.30</td>
<td>39,625</td>
<td>0</td>
</tr>
<tr>
<td>4. Malta</td>
<td>1287</td>
<td>1.36</td>
<td>40,201</td>
<td>3.86</td>
<td>31,236</td>
<td>0</td>
</tr>
<tr>
<td>5. Antigua and Barbuda</td>
<td>1,081</td>
<td>1.14</td>
<td>10,400</td>
<td>1.00</td>
<td>9621</td>
<td>0</td>
</tr>
<tr>
<td>6. Saint Vincent and Grenadines</td>
<td>1,063</td>
<td>1.12</td>
<td>8,552</td>
<td>0.82</td>
<td>8,045</td>
<td>0</td>
</tr>
<tr>
<td>7. Bermuda</td>
<td>149</td>
<td>0.16</td>
<td>9,361</td>
<td>0.90</td>
<td>62,829</td>
<td>6</td>
</tr>
<tr>
<td>8. Cayman Islands</td>
<td>157</td>
<td>0.17</td>
<td>4,637</td>
<td>0.44</td>
<td>29,538</td>
<td>7</td>
</tr>
<tr>
<td>9. Cyprus</td>
<td>966</td>
<td>1.02</td>
<td>29,627</td>
<td>2.84</td>
<td>30,670</td>
<td>8</td>
</tr>
<tr>
<td>10. Marshall Islands</td>
<td>963</td>
<td>1.01</td>
<td>54,644</td>
<td>5.24</td>
<td>56,744</td>
<td>26</td>
</tr>
</tbody>
</table>

Source: UNCTAD

It is noticeable on nationals of Panama, Liberia, Bahamas, Malta, Antigua and Barbuda, and Saint Vincent and Grenadines do not have any equity participation in the vessels registered in these their flags. Nationals from Bermuda, Cayman Islands and Cyprus have less than 10% equity participation.

According to the UNCTAD in its 2007 Review of Maritime Transport:

The flag of the world’s largest registry, Panama, is predominantly used by vessel owners of Japan, Greece, China, Taiwan and Switzerland. Japanese owners alone account for about half of the Panama registered dwt. From the perspective of the country of domicile, owners from Japan and Switzerland rely most heavily on Panama to provide the flags of their

ships, each having more than 75% of their nationally controlled fleet registered in Panama.\textsuperscript{155}

In the case of Liberia, the world’s second largest registry, the UNCTAD also reports that:

Liberia is predominantly used by owners from Germany (for containerships) as well as from Greece, the Russian Federation and Saudi Arabia (for oil tankers). Saudi Arabia relies on Liberia to provide the flag for more than half of its nationally controlled fleet. Liberia supplies the flag for more than 10% of the world’s dwt, albeit for just 2% of the number of ships, this being due to the large vessel size of Liberian-registered ships.\textsuperscript{156}

In the case of Malta, three quarters of its registered ships are owned by Greeks, more than 90% of the fleet of Antigua and Barbuda is owned by Germans, and about 60% of the dwt of Saint Vincent and Grenadines originates from Greece and China.\textsuperscript{157}

### Table 9

<table>
<thead>
<tr>
<th>Country or Territory of Domicile</th>
<th>Panama</th>
<th>Liberia</th>
<th>Bahamas</th>
<th>Marshall Is</th>
<th>Malta</th>
<th>Isle of Man</th>
<th>Antigua &amp; Barbuda</th>
<th>St. Vincent &amp; Grenadines</th>
<th>Bermuda</th>
<th>Cyprus</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Greece</td>
<td>546</td>
<td>288</td>
<td>228</td>
<td>190</td>
<td>473</td>
<td>46</td>
<td>3</td>
<td>85</td>
<td>2</td>
<td>313</td>
</tr>
<tr>
<td>2. Japan</td>
<td>2,082</td>
<td>102</td>
<td>59</td>
<td>5</td>
<td>1</td>
<td>4</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>19</td>
</tr>
<tr>
<td>3. Germany</td>
<td>34</td>
<td>659</td>
<td>39</td>
<td>190</td>
<td>59</td>
<td>55</td>
<td>869</td>
<td>4</td>
<td>21</td>
<td>185</td>
</tr>
<tr>
<td>4. China</td>
<td>460</td>
<td>51</td>
<td>5</td>
<td>2</td>
<td>13</td>
<td>0</td>
<td>0</td>
<td>111</td>
<td>0</td>
<td>10</td>
</tr>
<tr>
<td>5. Norway</td>
<td>68</td>
<td>40</td>
<td>268</td>
<td>66</td>
<td>62</td>
<td>52</td>
<td>11</td>
<td>27</td>
<td>0</td>
<td>17</td>
</tr>
<tr>
<td>6. United States</td>
<td>145</td>
<td>105</td>
<td>166</td>
<td>191</td>
<td>8</td>
<td>5</td>
<td>7</td>
<td>27</td>
<td>5</td>
<td>7</td>
</tr>
<tr>
<td>7. Hong Kong</td>
<td>159</td>
<td>23</td>
<td>7</td>
<td>9</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>6</td>
<td>29</td>
<td>1</td>
</tr>
<tr>
<td>8. Korea</td>
<td>297</td>
<td>4</td>
<td>0</td>
<td>2</td>
<td>5</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>15</td>
<td>3</td>
</tr>
<tr>
<td>9. United Kingdom</td>
<td>43</td>
<td>34</td>
<td>86</td>
<td>10</td>
<td>8</td>
<td>90</td>
<td>5</td>
<td>12</td>
<td>0</td>
<td>25</td>
</tr>
<tr>
<td>10. Singapore</td>
<td>78</td>
<td>42</td>
<td>11</td>
<td>6</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>5</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>11. Taiwan</td>
<td>306</td>
<td>76</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>12. Denmark</td>
<td>31</td>
<td>8</td>
<td>71</td>
<td>4</td>
<td>7</td>
<td>67</td>
<td>17</td>
<td>15</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>13. Russian Federation</td>
<td>12</td>
<td>86</td>
<td>6</td>
<td>4</td>
<td>69</td>
<td>0</td>
<td>5</td>
<td>25</td>
<td>0</td>
<td>51</td>
</tr>
<tr>
<td>14. Italy</td>
<td>10</td>
<td>19</td>
<td>8</td>
<td>2</td>
<td>39</td>
<td>2</td>
<td>0</td>
<td>19</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>15. India</td>
<td>26</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>8</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Source: UNCTAD


\textsuperscript{156} Ibid.

\textsuperscript{157} Ibid.
The ITF believes that these ships registered under the FOC system do not have “genuine link” between the real owner of the vessel and the flag the vessel flies in accordance article 91 of the UNCLOS.\textsuperscript{158}

Thus, in cases where claims against the vessels registered under an FOC system, seafarers are, as a rule, should file their claims against the shipowner and must be lodged on the country of registration of the vessel, except when the contract of employment with the foreign seafarer provides otherwise. The problem is that more often than not shipowners from these Registries do not reside in the country where their vessels are registered. There had been many instances that shipowners were able to escape liability because they could not be prosecuted in the country where they registered their ship because of the corporate veil afforded to them.

The primary issue arising from FOCs vis-à-vis seafarers’ claims is the difficulty to identify the potential defendants. This is because this shipping practice has developed so that there is often a web of corporate identities involving the ship.\textsuperscript{159} According to Fitzpatrick and Anderson:

\begin{quote}
The ship’s registry may disclose the name of a company as the registered owner but it may be very difficult to obtain any real information about this company, its shareholders or assets. In practice, the registered owner maybe a single ship which is run by a management company in another State. Ownership structures may be changed after a claim arises and the actual corporate defendant may cease.\textsuperscript{160}
\end{quote}

Associated with the desire of shipowners to reduce costs on manpower, recruitment of officers and crew and other service providers such as cooks, entertainers, and others has been shifted to developing countries where wages are considered relatively. Today, majority of seafarers, both officers and ratings, now come from the Asian region, with the Philippines topping the list. The table below shows the countries that are currently supplying the needed manpower requirements of the overseas shipping trade.

\textsuperscript{158} Please see the ITF website for more discussions at \url{www.itfglobal.com}, Accessed on 30 July 2008.
\textsuperscript{159} \textit{Supra}, footnote no. 4 at p.171.
\textsuperscript{160} \textit{Ibid}, at p.172.
Table 10
Top 5 Major Maritime Labor Supplying Countries161
(BIMCO/ISF Manpower 2005 Update)

<table>
<thead>
<tr>
<th>Nationality of Seafarers</th>
<th>Officers</th>
<th>Ratings</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Philippines</td>
<td>46,359</td>
<td>74,040</td>
<td>120,399</td>
</tr>
<tr>
<td>2. China</td>
<td>42,704</td>
<td>79,504</td>
<td>122,208</td>
</tr>
<tr>
<td>3. Turkey</td>
<td>22,091</td>
<td>60,328</td>
<td>82,419</td>
</tr>
<tr>
<td>4. Indonesia</td>
<td>7,750</td>
<td>34,000</td>
<td>41,750</td>
</tr>
<tr>
<td>5. Greece</td>
<td>17,000</td>
<td>15,000</td>
<td>32,000</td>
</tr>
</tbody>
</table>

Source: BIMCO/ISF

Wage rates of seafarers from developing countries (i.e. Philippines, China and Indonesia) in the table are cheaper as compared to their counterparts in Europe, North America, Japan and Korea. According to the ISF which conducts regular surveys of wage rates among seafarers, it found out that there is indeed large variations between the average monthly earnings of ABs of various nationalities.162

The 1992 survey revealed that the average monthly earnings of a German AB (US$ 5,758) were 19 times higher than the earnings of a Bangladeshi AB (US$ 305).163

Three years after, the ISF’s 1995 survey showed that the nationalities earnings above average wages were more or less the same as in 1992, except that Sri Lankan and Taiwanese seafarers had joined those earning more than the international average. The gap between the lowest and highest average earning countries remained, with the average earnings of Japanese ABs (US$ 9,349) being 41 times higher than the lowest paid- Bangladeshi seafarers (US$227). The Figure in the succeeding page illustrates this case.

162 Supra, footnote note 152 at p.109.
163 Ibid.
With the low wages that these seafarers receive which is barely enough to support their personal and family needs would normally be hesitant to lodge a complaint against his employer in a foreign country not only that it is litigious but it is also expensive plus the uncertainty of winning the case.

Another way for the shipowner to reduce on cost is to refuse employing seafarers who have lodged complaints against them through the ITF. In this way, they would be able to avoid future legal complaints which will cost them tremendous amount of money. In the maritime community, this practice is termed as “blacklisting” which is a very common practice in the Philippines and in India.

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*Ibid* at p.110.
Box 7

A Case of Blacklisting

The Greek owned, Maltese-flagged, 16,320 ton cargo ship Katerina arrived at the Port of Long Beach on 10 September 2004. After four seafarers blew the whistle on the captain and senior officers of the vessel for falsifying pollution prevention records, all 13 Filipino crew members were designated material witnesses in the case. In spite of agreeing to assist the US in its strict approach to pollution control, the innocent seafarers were brought in to court in handcuffs, connected in single file by ankle chains. Because they were required to stay in the US for the duration of the criminal investigations, neither the shipowner nor the Government was prepared to pay the seafarers any wages, maintenance or provide them with housing.

Fortunately, a combination of Filipino community groups, seafarers’ welfare organizations and unions was able to provide the men with material support for the duration of their enforced stay. However, at the end of the trial, their ordeal was not over.

On returning to the Philippines, those seafarers that did not benefit from the financial rewards of whistle blowing found themselves unable to get work. To quote from a letter written to the ITF from one of the men’s daughters: “They would like to work again in the ship but the problem is, all the company here in the Philippines will not accept them because of the incident that happen which involves them. They are being blacklisted in all the companies that they have applied in” -

Jeff Engels, ITF Coordinator, USA

6.2 Genuine Link

Over the years, the issue of genuine link has remained a contentious issue not only in the IMO but also in other international bodies. In view of the avalanche of ship registrations in the so-called FOCs system, the link between the shipowner and the flag state is absent which makes it impossible or extremely difficult for the flag State to exercise any jurisdiction over a company with no assets or personnel in its territory- no property to seize and no people to arrest. ¹⁶⁵

¹⁶⁵ Supra, footnote no. 152.
There have been considerable debates over what should constitute a “genuine link”, but equally there is a strong resistance from those that benefit from the FOC system to formulate a concrete definition.  

The IMO, nevertheless, is of the view that questions relating to ownership of vessels should be considered as subject matters of an economic corporate nature that clearly fall beyond the purview of the law of the sea and the mandate of relevant international organizations as defined in the Convention of the Law of the Sea. What is important for purposes of establishing a genuine link is to identify who assumes the responsibility for the operation and control of the vessel.

6.3 Piracy and Armed Robbery Against Ships

Another potential source for seafarers’ claims for loss of lives and physical injuries are those that arise from piracy and armed robbery against ships. The ILO and IMO Resolutions that were adopted to deal with issues related to seafarers’ claims for loss of life, personal injury and abandonment do not clearly indicate whether seafarers could use these Resolutions as bases for them to pursue these claims in cases of piracy and armed robbery against ships.

Based on the data from the International Maritime Bureau (IMB) a total of 2,304 cases of violence have been committed against seafarers from 2003-2007 as shown in the table below.

<table>
<thead>
<tr>
<th>Types of Violence</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Taken Hostage</td>
<td>359</td>
<td>148</td>
<td>440</td>
<td>188</td>
<td>292</td>
<td>1,427</td>
</tr>
<tr>
<td>2. Kidnap/Ransom</td>
<td>86</td>
<td>13</td>
<td>77</td>
<td>63</td>
<td>239</td>
<td></td>
</tr>
<tr>
<td>3. Crew Threatened</td>
<td>65</td>
<td>34</td>
<td>14</td>
<td>17</td>
<td>6</td>
<td>136</td>
</tr>
<tr>
<td>4. Crew Assailed</td>
<td>40</td>
<td>12</td>
<td>6</td>
<td>2</td>
<td>29</td>
<td>89</td>
</tr>
<tr>
<td>5. Crew Injured</td>
<td>88</td>
<td>59</td>
<td>24</td>
<td>15</td>
<td>35</td>
<td>221</td>
</tr>
<tr>
<td>6. Crew Killed</td>
<td>21</td>
<td>32</td>
<td>-</td>
<td>15</td>
<td>5</td>
<td>73</td>
</tr>
<tr>
<td>7. Missing</td>
<td>71</td>
<td>30</td>
<td>12</td>
<td>3</td>
<td>3</td>
<td>119</td>
</tr>
<tr>
<td>Total</td>
<td>644</td>
<td>401</td>
<td>509</td>
<td>317</td>
<td>433</td>
<td>2,304</td>
</tr>
</tbody>
</table>

Source: IMB-ICC

166 Ibid.
Pirate attacks continue to be a source of major concern in the shipping community. 1,552\textsuperscript{168} ships figured out from pirate attacks from 2003-2007, and the following flag states top the list.

<table>
<thead>
<tr>
<th>Flag States</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Panama</td>
<td>62</td>
<td>64</td>
<td>50</td>
<td>42</td>
<td>42</td>
<td>260</td>
</tr>
<tr>
<td>2. Liberia</td>
<td>27</td>
<td>34</td>
<td>18</td>
<td>24</td>
<td>28</td>
<td>161</td>
</tr>
<tr>
<td>3. Singapore</td>
<td>41</td>
<td>31</td>
<td>24</td>
<td>20</td>
<td>23</td>
<td>139</td>
</tr>
<tr>
<td>4. Malaysia</td>
<td>27</td>
<td>17</td>
<td>13</td>
<td>11</td>
<td>5</td>
<td>73</td>
</tr>
<tr>
<td>5. Cyprus</td>
<td>24</td>
<td>14</td>
<td>13</td>
<td>5</td>
<td>10</td>
<td>66</td>
</tr>
<tr>
<td>6. Malta</td>
<td>17</td>
<td>13</td>
<td>11</td>
<td>14</td>
<td>6</td>
<td>61</td>
</tr>
<tr>
<td>7. Hong Kong</td>
<td>20</td>
<td>6</td>
<td>12</td>
<td>10</td>
<td>7</td>
<td>55</td>
</tr>
<tr>
<td>8. India</td>
<td>17</td>
<td>9</td>
<td>10</td>
<td>7</td>
<td>6</td>
<td>49</td>
</tr>
<tr>
<td>9. Bahamas</td>
<td>17</td>
<td>8</td>
<td>9</td>
<td>5</td>
<td>7</td>
<td>46</td>
</tr>
<tr>
<td>10. Marshall Islands</td>
<td>6</td>
<td>6</td>
<td>9</td>
<td>7</td>
<td>16</td>
<td>44</td>
</tr>
</tbody>
</table>

Source: IMB-ICC

Panama and Liberia, which are regarded as FOC states, occupy the top 2 position in terms of the number of ships that were attacked by pirates. In view of the nature of pirate or terroristic attacks, it is assumed that there is a great possibility of death or physical injury committed against seafarers as well as for the shipowner to abandon his ship after determining the cost involve if it were to be rescued.

When seafarers die or suffer physical injuries on the occasion of pirate or terroristic attack by reason of defense of their lives and those of others and defense of properties on board ship or other related instances, the legal regime, under international law, by which they can base their claim remains unclear. In fact, many jurisdictions do not provide compensation or benefits for the victims arising from pirate/terroristic acts.

6.4 Ratification of Relevant Conventions

Considering the international nature of shipping, the best way for maritime administrations to protect and enforce the rights of their seafarers especially those pertaining to matters involving financial claims is the ratification of international

\textsuperscript{168} Supra, footnote no. 55 at p.18.
conventions because it would require State Parties to comply with their obligations with these international agreements.

As a way of illustration, the figure below indicates that there are still many states that have not yet ratified the MLC of 2006, the 1993 MLM Convention, and the 1999 Arrest Convention.

Figure 7
Rate of Ratification of the International Conventions Covering Seafarers' Claims

Source: IMO, UNCTAD, ILO

Figure above illustrates the fact that international regimes that promote safety of navigation have the highest number of ratification rate, while those involving seafarers rights and claims are either not in force or whenever in force it has few ratifications except for the 1976 Limitation of Liability Convention, the reason for its high ratification rate is obvious.

It must be noted that ratification of conventions laws particularly those relating to arrest of ships and maritime liens will certainly enhance uniformity in the application of international private maritime law.

However, even if a country has ratified a particular convention, the problem of compliance with its obligation sometimes becomes a concern in the shipping community. As Fitzpatrick and Anderson say:
It is well known that for a variety of reasons, many of the States which engage in shipping activities are either unwilling or unable to take effective measures to regulate the operations of ships and shipowners under their jurisdiction. In some cases, this is because the State lacks the necessary requisite capacity to enforce national and international standards against all its ships, but in other cases, it appears that the failure to act results from the desire of its ships, but in other cases, it appears that the failure to act results from the desire of the State to offer a competitive advantage to its operators. In some cases, shipowners cut corners as a means of counteracting strong market forces against which they have to operate. Indeed, in many cases, these market forces themselves can provide the flag State with the incentive to tolerance or even encourage abuses of seafarers’ rights by its shipowners’ and operators.\(^{169}\)

It must be highlighted that the benefit of ratification of these conventions belonging within the sphere of international private maritime law would provide both the seafarer and the shipowner with legal certainty in reducing delay and expense of litigation.

### 6.5 Financial Security for Seafarers’ Claims

The MLC 2006, while intended to provide the regulatory framework for the adoption of minimum labor and occupational standards for seafarers employed in ocean-going ships, has failed to address some issues that are related to the security of the financial claim of seafarers. It has not yet in force but there are already proposals to amend some of its provisions.

According to the Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation Regarding Claims for Death, Personal Injury and Abandonment of Seafarers, the text of the newly adopted Maritime Labour Convention, 2006, did not address many of the provisions set out in the Guidelines on Shipowners’ Responsibilities in respect to Contractual Claims for Personal Injury to or Death of Seafarers, which were earlier adopted by both the Assembly of the IMO and the Governing Body of the ILO.\(^{170}\) As a result, the Conference believed that the Working Group should continue its work, and recommended to both Organizations, to

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\(^{169}\) Supra, footnote no. 4 at p. 545.

develop a standard accompanied by guidelines, which could be included in the Maritime Labour Convention or in another existing instrument.\footnote{171}

The Working Group has identified Regulation 2.5, paragraph 2 of the MLC which states that “Each Member shall require ships that fly its flag to provide financial security to ensure that seafarers are duly repatriated in accordance with the Code”\footnote{172} could be used as basis for developing a standard.

Accordingly, some parts of IMO Resolution A. 930 (22), which deals with the Guidelines on Provision of Financial Security in Case of Abandonment of Seafarers could be used in the elaboration of a future instrument which are: Scope of Financial Security Systems, Forms of Financial Security Systems and Certificates.\footnote{173}

As expected, seafarers and shipowners continue have conflicting positions on how the issue of financial security in cases of abandonment which the MLC 2006 has failed to take into consideration. It is the view of shipowners that it is government responsibility since the financial security system can be delivered by a variety of means, some of which are beyond the control of the shipowner, such as social welfare fund or other similar State-administered system. Further, since there is a variety of different systems possible, it is the Governments’ responsibility to have in place necessary laws and procedures to identify and control the applicable system. However, on the part of seafarers, this matter should be the responsibility of the shipowner.\footnote{174}

In support of the shipowners’ position, Mrs. Cleopatra Doumbia-Henry, Director, ILO International Labor Standards, said that payments to the seafarer are covered by other parts of the MLC. The Shipowners point out that the only possible gap

\footnotesize{\textsuperscript{171} Ib}d.\textsuperscript{\textsuperscript{172} Ib}d.\textsuperscript{\textsuperscript{173} Ib}d.\textsuperscript{\textsuperscript{174} IMO/ILO, “ Provision of Financial Security for Abandonment of Seafarers”, Doc. No. IMO/ILO/WGLCCS 8/2/3, 01 July 2008 at p.3. For further discussion of the text of the proposal of the ITF on the proposed instrument, please see, “ Examination of the Issue of Financial Security for Crew Members/Seafarers and their Dependents with Regard to Compensation in Cases of Personal Injury and Death”, Doc. No. IMO/ILO/WGLCCS 8/2/6, 08 July 2008}
between IMO Resolution No. 930 (22) and the MLC is the financial security for travelling expenses.  

While shipowners agree that there were indeed gaps on the matter of financial security for seafarers’ claims in case of abandonment, they are of the view that in developing a new instrument to include ceiling of liability but this concept is not supported by seafarers. The reason for the shipowners’ position is to ensure that where the system of financial security is arranged through insurance, that the instrument enables the insurers to provide it. It is known that insurance providers do not accept an unlimited liability.

In order ensure that seafarers are protected from the financial consequences of sickness, injury or death occurring in connection with their employment, the Shipowners’ Group, in its proposal to amend the MLC 2006 assumes this but proposes from national laws or regulations exemptions from liability in respect of the following:

6. **National laws or regulations** may exclude the shipowner from liability in respect of: *(Underscoring supplied)*
   (a) injury incurred otherwise than in the service of the ship;
   (b) injury or sickness due to the willful misconduct of the sick, injured or deceased seafarer;
   (c) sickness or infirmity intentionally concealed when the engagement is entered into; and,
   (d) injury, sickness or death due to war, terrorism, cyber, biochemical and nuclear risks or due to an exceptional natural phenomena or act wholly caused by the intentional act of a third party. *(Underscoring supplied)*

7. National laws or regulations may exempt the shipowner from liability to defray the expense of medical care on board and lodging and burial expenses in so far as such liability is assumed by public authorities.

Such position endorses the notion of the half-hearted desire of shipowners to assume full responsibility in providing their seafarers’ with a comprehensive financial coverage for their claims.

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175 *Ibid* at p.3.
176 *Ibid*.
177 IMO/ILO, “Crew Claims (Death and Personal Injuries)”, Doc. No. IMO/ILO/WGLCCS 8/2/4, 1 July 2008
There are likewise proposals in the course of addressing the issue of financial security such as the development of a long term-solution on this issue. Within the perspective of the IMO, there are two options possible: the adoption of a self-standing treaty and the adoption of an amendment to an existing treaty.\textsuperscript{178}

Under the first option, drafting and adoption of a new convention in IMO can take several years to complete although in some cases, where quick response has been required to deal with an emergency situation, Governments have been willing to accelerate this process considerably.\textsuperscript{179}

Under the second option, the IMO Conventions that are closely related to the issue of liability and compensation regarding claims for death, personal injury and abandonment of seafarers are the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974\textsuperscript{180} and the Protocol of 2002 to the Athens Convention\textsuperscript{181} which is not yet in force and the International Convention for the Safety of Life at Sea, 1974\textsuperscript{182}


\textsuperscript{179} Ibid.

\textsuperscript{180} The 1974 Athens Convention establishes a regime of liability for damage suffered by passengers carried on sea-going vessel. It declares the carrier or the performing carrier liable for damage, including personal injury and death, or loss suffered by a passenger if the incident causing the damage occurred in the course of the carriage and was due to the fault or neglect of the carrier or the performing carrier. There is no compulsory insurance under this Convention. In relation to the subject of this study, the introduction of provisions on financial security in cases of abandonment of seafarers would require the adoption of a protocol within its own entry into force provisions by a conference of the parties.

\textsuperscript{181} The Protocol of 2002 to the Athens Convention introduces compulsory insurance to cover passengers on ships and raises the limits of liability. It also introduces other mechanism to assist passengers in obtaining compensation, based on well-accepted principles applied in existing liability and compensation regimes dealing with oil pollution. These include replacing fault-based liability system with a strict liability system for shipping related incidents, backed by the requirement that the carrier take out compulsory insurance to cover these potential claims.

\textsuperscript{182} The 1974 SOLAS Convention is a technical treaty dealing with maritime safety. It contains tacit amendment provisions for the acceptance and entry into force of amendments. However, since the provisions on financial security in cases of abandonment of seafarers cover a totally different subject, their introduction in the Convention would require the adoption of a protocol by a conference of the States Parties, with specific entry into force provisions.
A proposal to develop a new mandatory instrument, or to amend an existing treaty, would be a new work item in the IMO\textsuperscript{183}, particularly the Legal Committee, and such proposal will take several more meetings before the same are considered. Should either of these be considered, discussions in greater detail will commence and a new draft instrument be prepared. However, it should be noted that in the development of treaty instruments, the seafarers group and the shipowners group do not stand in equal footing because the two former groups merely hold the status as observers in IMO.

The two options are not the most viable solutions at the moment because neither are quick and straightforward to negotiate.\textsuperscript{184}

Therefore, what is clear at the moment is that it will take several more years, and even a decade, before a real solution of all issues surrounding seafarers' claims will be resolved. The contrasting scenario about the economic progress brought about by the seaborne trade and the vulnerability of seafarers from various forms of abuses including the violations of their rights remains a reality and a comedy of errors in the world stage.

\textsuperscript{183} Supra, footnote no. 170 at p2.
\textsuperscript{184} Ibid.
CHAPTER VII

CONCLUSIONS

1. Many seafarers still continue to be subject to different forms of physical and mental abuse. Physical abuse comes in the form of beatings, sexual assault, inadequate medical treatment, sub-standard accommodation as well as inadequate food; mental abuse in the form of isolation, cultural insensitivity and lack of amenities for social interaction. Delayed or unpaid wages and abandonment remain a common experience of some seafarers.

2. The problem of abandonment is real and a serious one because there are human and social dimensions involved. It likewise involves matters of repatriation, immigration status, support for the crew/seafarers and unpaid wages which makes abandonment a rather complex issue. When abandoned in a foreign land, seafarers are regarded as unemployed or illegal aliens and eventually face trials for deportation or imprisonment.

Maintenance and support of abandoned crew members/seafarers as well as their repatriation are humanitarian issues. Non-government organizations or charitable institutions, in some instances, have been bearing the responsibility in assisting and providing the costs for food, accommodation and repatriation of seafarers which should not be the case.

3. There is no international regime that is in force, at this point in time, to ensure the financial security of seafarers' claims that arise from loss of life, physical injuries, unpaid wages and abandonment. Interestingly, MLC is not yet in force but there are already proposals to amend some of its provisions. With some proposals expected to be coming underway, this paper doubts whether the MLC 2006 will come into force in 2010 as it was envisioned to be.
4. Ratification rate of international conventions that represent the private law aspect of seafarers’ claims is very low. This suggests that seafarers and their claims continue to be subject to various jurisdictions and seafarers remain at the mercy of domestic legislations.

5. The legal position of seafarers is generally uncertain and vulnerable. This is because there is an absence of universally applied international standards. By the nature of their employment, they will continually be under the subject of different jurisdictions and their legal position depends on which national legal standards apply to a particular case, which court has jurisdiction over the subject matter and whether a judgment in one jurisdiction can be enforced in another State.

6. The Resolutions adopted by the IMO and the ILO on the Guidelines on Shipowners’ Responsibilities in Respect of Contractual Claims for Personal Injury to Death of Seafarers and the Guidelines on the Provision on the Financial Security in Case of Abandonment of Seafarers are viewed to be applicable only during the ordinary course of doing shipping business. They are not contemplated to apply on the occasion of terroristic/pirate attacks or wars.

7. The problem of sub-standard shipping and ill-treatment of seafarers is traced from the failure of a number of Flag States to fulfill their responsibilities under the provisions of Articles 91 and 94 of the UNCLOS. It must be stressed that ships have the nationality of the State whose flag they fly. Flag States are responsible in ensuring that their vessels act in conformity with applicable rules of international law wherever their vessels may be located.

8. International law requires that a genuine link exist between the ship and the State whose flag it flies. Flag States are required to exercise effective jurisdiction over administrative, technical and social matters concerned with the ship’s operation. However, the exact requirements for a genuine link are not clarified
in any convention. The interpretation of genuine link requirement varies between States, as does the extent of actual jurisdiction over ships under their flags.\textsuperscript{185}

9. Substandard shipping continues to remain to be a serious concern until the definition and parameters of “genuine link” are fully clarified and accepted by the global maritime community. For a flag state to be considered a FOC is not the problem but the question is anchored on whether or not the flag State is conducting its activities in accordance with its obligations under international law.

10. In some FOC states that protect the non-disclosure of information with respect to ship ownership, seafarers will continue to be in quagmire in pursuing their legal cases against erring shipowners. As such, rights of seafarers to have decent and safe working conditions remain an aspiration for the future.

\textsuperscript{185} Supra, footnote no. 7 at p.92.
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