

# Jurisdiction and Applicable law in individual Employment Contract at sea under European Law from Norwegian perspective

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## **Abstract**

The primary purpose of this study is to identify the jurisdiction and applicable law over individual employment contracts at sea in Europe Union and Norway and provide guidance for seafarers on obtaining better protections.

Accordingly, chapter 2 of this study is divided into two parts. The first part sets out the rules of jurisdiction regarding individual employment contracts on regulations interpretation contained in United Nations Convention on the Law of the Sea and Brussels I Regulation (recast) as well as looking into the way these rules are interpreted by the ECJ. It should be noted that although Brussels Convention and Lugano Convention have been replaced by Brussels I Regulation (recast), the decisions of old cases based on these conventions consist of the decisive grounds for the courts to make the decisions in the future cases. Another part attempts to interpret the way to decide the jurisdiction concerning maritime employment contracts in Norwegian court and the alternative way for seafarers to claim in Norway.

Then chapter 3 of this study examines case law in Europe Union and Norway respectively to illustrate the way to decide the applicable law concerning maritime employment contracts. It is worth noting that the determination of applicable law in Europe Union is mainly based on Rome I which is not ratified by Norway. There is a divergence of opinion between Europe Union and Norway when determining the applicable law. It is argued that whether the rule of flag State is appropriate for deciding applicable law when the ship is registered under flag of convenience. The conclusion will be that, for the sake of foreseeability of employment contractual parties, it is advisable for Norwegian legislation to harmonise the conflict rules with European legislation.

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## **LIST OF ABBREVIATIONS**

CBA: Collective Bargaining Agreement

MLC: Maritime Labour Convention 2006

IMO: the International Maritime Organization

UNCLOS: United Nations Convention on the Law of the Sea 1982

EU: European Union

ECJ: the European Court of Justice

FOC: the flags of convenience

EEZ: the Exclusive Economic Zone

NMC: the Norwegian Maritime Code

CBA: collective labour agreement

EEA: the European Economic Area

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# 1 Chapter 1 Introduction

## 1.1 Background

Every type of contract may produce disputes from time to time. Dispute resolution clauses are inserted in the contract to settle potential disputes on the jurisdiction and the applicable law. Normally, the clauses include two parts, one is jurisdiction clause, and the other is choice-of-law clause. The courts or arbitration tribunals named by the jurisdiction clause will hear any claims that may arise. In choice-of-law clause, contractual parties can select which domestic law will be used to interpret the provisions of the agreement. The settlement clauses, on the one hand, provide the foreseeability to contractual parties on the place where he/she can bring the claim to and the set of law that will govern, especially in relation to the cross border contracts. On the other hand, from the economic perspective, they keep the contractual parties from wasting time and money. The freedom for contractual parties to choose the competent court and the applicable law is the essence character of the party autonomy.

The party autonomy is an extremely significant issue in international contracts. For example, contractual parties may discharge the obligations in several countries. In such case, it's typical that two or more relevant courts or legal systems are applicable to the international contractual relationship due to different places of performance of the contract. As with governing law, there is otherwise a risk of costly, time-consuming and wasteful preliminary battles about whether disputes should be handled in the courts of country A or country B, and also a risk of multiple claims proceeding in parallel in several different jurisdictions simultaneously.<sup>1</sup> Therefore, party autonomy could reduce the risks mentioned above.

In practice, however, it is hard for the seafarers to decide the jurisdiction and applicable law in the individual employment contract. Because of the complicated territorial situation,

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<sup>1</sup> "Governing law" and "jurisdiction" clauses, Herbert Smith Freehills LLP, June 30 2008.  
<http://www.lexology.com/library/detail.aspx?g=469b7d6f-4f8c-44cb-9f10-dcdd1edf20bf>.

seafarers may join the trade union or seafarers' organization to enjoy more protection and to get better legal suggestions from the union or organization. Generally, only the members of the trade union or organization that is a party to a collective agreement are covered. The representatives of the seafarers in the union or organization will negotiate the employment terms (for example, working condition or salary) with employers or shipowners and conclude a collective agreement instead of individual employment contracts. The negotiation process between union or organization and employers is called collective bargaining. The goal of collective bargaining is to reach a collective agreement that stipulates the terms and conditions of employment relationships and helps to build trust and mutual respect between the parties and enhance the quality of labour relations.<sup>2</sup> Collective agreements can reinforce compliance with statutory provisions, enable parties to improve on them, and provide a mechanism for addressing issues specific to certain enterprises or economic sectors. This can benefit both parties, ensuring that workers get a fair share of productivity gains while not impairing the capacity of employers to operate profitably<sup>3</sup>. Additionally, the most important thing is that jurisdiction and choice-of-law clause are usually negotiated and regulated in the collective agreement. Hence, the dispute between seaman and his/her employer is resolved more easily and faster due to the predictability and clarity of collective agreement.

In some cases, collective agreements may be incorporated into individual employment contracts if suitable or apt for incorporation, either by an express agreement or by an inference from the conduct of the parties<sup>4</sup>. Unfortunately, not every seaman joins the trade union or organization and the terms of collective agreements are not suitable for every type of individual employment contract.

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<sup>2</sup> Collective bargaining - a policy guide, International Labour Office, Governance and Tripartism Department (GOVERNANCE), Conditions of Work and Equality Department (WORKQUALITY) - Geneva: ILO, 2015. 978-92-2-129232-6[ISBN]. [http://www.ilo.org/travail/whatwedo/instructionmaterials/WCMS\\_425004/lang-en/index.htm](http://www.ilo.org/travail/whatwedo/instructionmaterials/WCMS_425004/lang-en/index.htm).

<sup>3</sup> Ibid.

<sup>4</sup> Uglješa Grušić, *The European Private International Law of Employment* (Cambridge University Press, 2015), P148.



## 1.2 Limitations

As a matter of fact, seafarers who work on board vessels travelling on the international routes usually work in various waters and perform the job on foreign vessels. On the one hand, individual employment contracts, sometimes including the clause of choice of law or forum, are standard-form contracts which are lengthy and complex, and may thus pass unnoticed by employees. Moreover, a seafarer usually does not sign any contract at all; instead, he fills in his name and address in a registry book on board the ship. Another common practice is the signing of two contracts with different terms of employment.<sup>5</sup> On the other hand, the typical features of (individual) employment contracts were not freedom and equality, but submission, subordination and inequality of bargaining power<sup>6</sup>. As a weak party to an individual contract, an employee may not know as much information as his/her employer about the available alternatives and possible risks. Furthermore, employees do not have enough understanding and knowledge of the legal terms and definitions used in the contract. This will lead to misunderstanding of the details in the employment contract and limitations on the exertion of employee's rights. In addition, as an employee, even with awareness of the available alternatives and possible risks, he/she will still sign the contract to please their employers for fear of losing the job.

What is worse, for example, some judgments put employees in an unfavourable position, since they enabled employers to (ab)use their typically superior position and impose the jurisdiction of the courts favourable for them on their employees. It also enabled employers to confer jurisdiction on the courts of the country not sufficiently closely connected with, or legitimately interested in regulating, the employment relationship in question and disputes arising out of it.<sup>7</sup> Therefore, employees would not know whether the courts guarantee adequate protection for them.

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<sup>5</sup> Desislava Nikolaeva Dimitrova, Roger Blanpain, *Seafarers' Rights in the Globalized Maritime Industry* (Kluwer Law International, 2010), P49.

<sup>6</sup> Uglješa Grušić, *The European Private International Law of Employment* (Cambridge University Press, 2015), P22.

<sup>7</sup> Uglješa Grušić, *The European Private International Law of Employment* (Cambridge University Press, 2015), P96.

Furthermore, seafarer may sue the employer in the forum for each place which is closely connected with the dispute if there is no habitual place of performance the contract. However, only one national law is applicable to the case in question. Identifying jurisdiction and applicable law by discordant ways in different countries will lead to inconsistent results in the same case. Especially when the ship is registered under flag of convenience (FOC) by employer. That's because the law of FOC cannot provide adequate protection for seafarers. Even though seafarers can choose the court which is convenient for him, it is not easy for seafarers to know whether the court uses the law of FOC or other rules to decide the applicable law so that he can obtain a high degree of protection.

### **1.3 Legal sources**

#### **1.3.1 Private international law**

In general, the relevant sources of international law which apply to the jurisdiction and applicable law over the employment contracts at sea are Maritime Labour Convention<sup>8</sup> (MLC) and United Nations Convention on the Law of the Sea<sup>9</sup> (UNCLOS). The Article II of MLC defines 'seafarer' as "any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies". The definition of 'seafarer' in MLC can be used to determine 'crew' as employees in UNCLOS. Under the UNCLOS, ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. Article 94 in UNCLOS also require every State to "effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag". In other words, any disputes occur on the ship on the high seas will be subject to the jurisdiction and laws of the state in accordance with the flag flown by the ship. Additionally, UNCLOS allows the coastal States to extend their jurisdiction and hear disputes regard-

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<sup>8</sup> Maritime Labour Convention 2006, entry into force: 20 Aug 2013.

<sup>9</sup> United Nations Convention on the Law of the Sea of 10 December 1982. The Convention entered into force in accordance with its article 308 on 16 November 1994, 12 months after the date of deposit of the sixtieth instrument of ratification or accession. Today, it is the globally recognized regime dealing with all matters relating to the law of the sea.

ing exploitation of marine resources, conduct of marine scientific research and protection of the environment from 12 to 200 nautical miles from their baselines. All in all, when dealing with the matters of jurisdiction and applicable law regarding maritime disputes, including employment relationships at sea, the courts of the flag State of vessels or the coastal State may have the right to hear any claims in light of their domestic law respectively when the ship sails on the high seas or in the territorial waters.

When dealing with the jurisdiction and applicable law regarding maritime disputes, the obligations under the MLC and UNCLOS rest with the flag State. However, in some countries, both of them are not applicable to the cases related to the jurisdiction and applicable law over the individual employment contracts. For example, in European Union (EU), in the case of *Intertanko*<sup>10</sup>, the European Court of Justice (ECJ) had stated that the UNCLOS was not meant as a directly applicable statute between private persons and cannot be directly applied as conflict of laws provisions.<sup>11</sup>

### 1.3.2 European Union

Consequently, within the EU and Norway, the legal sources concerning jurisdiction over individual employment contracts are Brussels Convention of 1968<sup>12</sup>, as amended, together with Lugano Convention of 1988<sup>13</sup>. Decisions based on Brussels Convention and Lugano Convention largely shaped Brussels I Regulation<sup>14</sup> amendment currently. After that, Brussels I Regulation was replaced by Brussels I Regulation (recast)<sup>15</sup> in 2015. The Brussels I

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<sup>10</sup> C-308/06 - *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*.

<sup>11</sup> Helsinki Court of Appeal decision, No. 1282 & No.S14/2378-2415, awarded on 14 September 2015.

<sup>12</sup> Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, hereinafter 'Brussels Convention'.

<sup>13</sup> Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters, hereinafter 'Lugano Convention'.

<sup>14</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, hereinafter 'Brussels I Regulation'.

<sup>15</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, hereinafter 'Brussels I Regulation (recast)'.

Regulation (recast) applies to proceedings commenced on or after 10 January 2015. Brussels I Regulation continues applying to the proceedings initiated before that date.

From Brussels Convention to Brussels I Regulation (recast), the rules are more concentrated on the objective of employee protection. Firstly, the rules of jurisdiction in employment matters are regulated in a separate, self-contained section. Secondly, in Article 21, the rule of the engaging place of business could be invoked only by employees instead of being available to both employers and employees. Thirdly, in Article 21(1) (b), employers may be sued in the courts in places where the business engaging the employee situated at the moment of engagement, or when the proceeding starts. Fourthly, in Article 23(2), the jurisdiction agreement was effective in an employment dispute, not only if it was entered into after the dispute had arisen, but also if it was invoked by the employee to seize courts other than those specified in non-consensual jurisdictional bases.<sup>16</sup> In other words, the effectiveness of the jurisdiction agreement takes employee benefits into consideration rather than denies them in all events as before. Furthermore, in Article 20(2) of Brussels I Regulation (recast), states that,

“Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State”.

Additionally, new provision of Article 21(2) in the Brussels I Regulation (recast), states that,

“An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1”.

In other words, it vests employees with the rights to sue a non-EU employer in certain places within the EU.

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<sup>16</sup> Uglješa Grušić, *The European Private International Law of Employment* (Cambridge University Press, 2015), p98.

Currently, when determining the applicable law regarding individual employment contracts in EU, Rome I<sup>17</sup> and Rome II<sup>18</sup>, which focus on governing law of contractual and non-contractual obligations respectively, will be applicable to the relevant cases. However, the difference among the legal sources of jurisdiction and applicable law is that Rome Regulations (Rome Regulation<sup>19</sup>, Rome I and Rome II) are not applied in the courts of Norway or any Member State of the European Free Trade Association.

In the matter of applicable law concerning individual employment disputes, this article will mainly discuss Rome I. Rome I, which largely follows the rules of the Rome Convention regards to employment, was adopted in 2009. As the Rome I cannot be applied retroactively, employment contracts concluded before that date are still governed by the rules of the Rome Convention. Therefore, in the absent of choice-of-law clause or the clause is deemed to be void, the primary factors of determination of applicable law in Rome I are the rule of habitual place of work and engaging place of work (Article 8(2) (3)), escape clause (Article 8(4)), overriding mandatory rule (Article 9) and Ordre public (public policy) (Article 21).

It is worth noting that, recently, the rule of close connection which is regulated in escape clause has great effect on deciding the applicable law. In 3.2.10 of the Green Paper, it pointed out that certain Member States have special rules, sometimes unilateral, that are detrimental to uniformity of solutions (for example, a conflict rule designating the law of the flag for sailors on board ship)<sup>20</sup>. The escape clause of Article 6 (2) [Rome Convention] in fine allows, if necessary, the application of the objectively closer connected law which might by chance be the more protective law.<sup>21</sup>

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<sup>17</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, hereinafter 'Rome I'.

<sup>18</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, hereinafter 'Rome II'.

<sup>19</sup> Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (80/934/EEC), hereinafter 'Rome Convention'.

<sup>20</sup> Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, Brussels, 14.1.2003 COM (2002) 654 final, P37, hereafter 'Green Paper'. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0654&from=EN>.

<sup>21</sup> Ulrich Magnus and Peter Mankowski, Joint response to the Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a community instrument and its

### 1.3.3 Norway

In Norway, on the one hand, several domestic laws are applied to the issues of determination of jurisdiction and applicable law for labour relationships at sea. Firstly, as mentioned before, the Lugano Convention on jurisdiction and the recognition and enforcement of judgements was ratified by Norway in 2009. It has been incorporated into Section 4-5 (4) of Norwegian Dispute Act<sup>22</sup>. Secondly, Section 1-2 and 6-5 of the Ship Labour Act established the exclusive jurisdiction in regard to the ship which is registered in the Norwegian Ship Register. Additionally, individual contracts of engagement for service on ships in the Norwegian International Ship Register are subject to Norwegian courts and Norwegian law which was laid down in the Section 6 of Norwegian International Ship Register<sup>23</sup> (NIS). However, Norway does not have a general codification comparable to the Rome Convention or Rome I, nor does it have the case law or the literature that might arise out of such a systematic form of codification.<sup>24</sup>

On the other hand, the case law can be utilized to solve the case as regards to the matters of jurisdiction and applicable law. For example, the decision of the “Irma-Mignon” case in 1923, which has set the standard for choice of law in Norway by introducing the so-called individualising method.<sup>25</sup> The details of the law will be discussed in the following chapters.

## 1.4 Methodology

This article is divided into two parts and introduces the places where seamen can sue their employers and the laws which govern the dispute. Chapter 2 is mainly about the choice of forum regarding individual employment contracts at sea. Lugano Convention are applied in

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modernisation com (2002) 654 final, Para 7.6.

[http://ec.europa.eu/justice/news/consulting\\_public/rome\\_i/contributions/university\\_hamburg\\_en.pdf](http://ec.europa.eu/justice/news/consulting_public/rome_i/contributions/university_hamburg_en.pdf).

<sup>22</sup> Act of 17 June 2005 no. 90 relating to mediation and procedure in civil disputes.

<sup>23</sup> Act of 12 June 1987 No.48 relating to a Norwegian International Ship Register, as subsequently amended, last by Act of 9 May 2014 No.16 (in force on 9 May 2014 pursuant to decree of 9 May 2014 No.625).

<sup>24</sup> Giuditta Cordero-Moss, *New Trends in the Norwegian Practice on the Choice of Law Applicable to Contracts*, P46. <http://www.scandinavianlaw.se/pdf/57-2.pdf>.

<sup>25</sup> Giuditta Cordero Moss, “Recent private international law codifications National report for Norway”, *International Academy of Comparative Law 18th International Congress of Comparative Law Washington, July 25 to August 1, 2010 Topic II B. Private International Law*. [http://folk.uio.no/giudittm/IACL\\_10\\_PIL\\_Norway.pdf](http://folk.uio.no/giudittm/IACL_10_PIL_Norway.pdf).

EU and Norway, therefore, the principle rule of identifying the court to hear the claim is almost the same in EU and Norway. This part will analyze in detail the written law and case law and summarize the factors which are favorable to the seafarers when determining the forum in EU and Norway. Finally, it will discuss whether the domestic law provides more protection to the seafarers when the infringement of their rights.

Chapter 3 will introduce the applicable law as regards to labour relationships at sea in EU and Norway. The conflict of laws rule may be different in EU and Norway because Rome Regulations are not applied in the courts of Norway. Hence, this chapter will discuss whether there are differences between EU and Norway when dealing with the issues of applicable law through case law. It will also discuss whether application of foreign law will be conflict with the public policy of the forum.

## **2 Chapter 2 Jurisdiction for maritime employment contracts**

### **2.1 European Union**

#### **2.1.1 Introduction**

In this article, ‘jurisdiction’ means the power, which stems directly from sovereignty, to create, apply and enforce rules.<sup>26</sup> The cases regarding jurisdiction will be more complicated if seafarers carry out their work in different countries or in non-sovereignty areas. For example, a Chinese seafarer works on a Norwegian ship, which is operated by an Italian company. The employer is domiciled in France. The ship usually sails from Singapore to Russia or Germany. In this case, the contract can be deemed as an international employment contract at sea. When the Chinese seafarer proceeds against his employer, issues arise on which court is favourable to the employee to sue and what measures to protect the seaman when deciding jurisdiction.

There are many factors to be considered when determining jurisdiction, such as the flag state of the ship, the nationality of the contracted parties, the usual workplace of the em-

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<sup>26</sup> Jürgen Basedow, Ulrich Magnus, Rüdiger Wolfrum, *The Hamburg Lectures on Maritime Affairs 2011-2013*, (Springer, 2014), P149.

ployee, the duration of the employment contracts, and the type of the employment claim. The court should ensure “existence of a particularly close relationship between a dispute and the court best placed, in order to ensure the proper administration of justice and effective organisation of the proceedings”.<sup>27</sup> As a consequence, it is important to understand how to properly protect seaman as a weaker party in the contract by utilizing the basic principle in the Brussels I Regulation (recast).

### 2.1.2 The flag State rule

Base on Article 23 of Brussels I Regulation (recast), the choice-of-forum agreement decided by the contractual parties will be valid after a dispute arises. In the absence of the choice-of-forum clause or when the clause is deemed as invalid, traditionally, the flag State of ship is a widely used criterion as determining jurisdiction over seamen. In the scope of private international law, as mentioned before, the flag State rule as legal basis to solve maritime disputes is regulated in UNCLOS. Under Article 92, it states that,

“Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.”

Additionally, in case law, in the *M/V Saiga (No.2)*, ITLOS held that UNCLOS considers a ship as a unit, as regards the obligations of the flag State with respect to the ship, [...] thus the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.<sup>28</sup> Ships have the nationality of the State whose flag they are entitled to fly. The jurisdiction of the flag State is general in its content and, as far as legislation and adjudication are concerned, in its territorial extension.<sup>29</sup> With the transparency of the flag which flies on the vessel, the contractual parties, particularly for an employee, can reasonably foresee the

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<sup>27</sup> Michael Bogdan, *Concise Introduction to EU Private International Law*, (Sussex Academic Press, 2012), P228.

<sup>28</sup> Yvonne Baatz, *Maritime Law* (CRC Press, 2014), P316.

<sup>29</sup> Irini Papanicolopulu, “Jurisdiction of States over Persons at Sea: Principles, Issues, Consequences”, *The Hamburg Lectures on Maritime Affairs 2011-2013*, 21 August 2014, DOI 10.1007/978-3-642-55104-8\_6.



country in which the vessel is registered or licensed. The flag State rule enhances predictability and possibility to apply the same law to everyone working on board the vessel.

However, the use of FOC and the establishment of new registers by States with no pre-existing maritime infrastructure is growing.<sup>30</sup> Ship registered under the maritime laws of a country (such as Liberia or Panama) which is not the home country of the ship's owners, because the country of registry offers low tax rates and/or leniency in crew and safety requirements.<sup>31</sup> Seafarers working under ships with FOC may bear the risks that the flag State cannot provide better protection to them. The flag State rule gives the answer that only courts in the country whose flag the ship flies can hear the claim irrespective of disadvantages of FOC. In such a case, the rule of flag State may ignore considerations which are favourable for seaman when determining the jurisdiction, for example, the domicile of employer, the habitual workplace of employee, the resident place of employee, etc. In the system of EU law, therefore, these conditions will be also considered in order to effectively protect the weaker party to the individual employment contracts when selecting the competent court instead of the flag State rule.

### 2.1.3 Decision from the European Court of Justice

#### 2.1.3.1 Introduction

Currently, Brussels I Regulation (recast) is the main legal source to handle the issue of jurisdiction over individual employment contracts. In the absence of choice-of-court provision in the individual employment contract, Article 20-23 of the Brussels I Regulation (recast) are applicable. According to these articles, seafarers may select the court in the place where employer is domiciled, or the place where or from where the seaman habitually carries out his work or in the courts for the last place where he did so, or the place where the business which engaged the seaman is or was situated. The employee can invoke the protective jurisdictional rules against an employer domiciled outside the EU and sue several

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<sup>30</sup> Matthew Gianni, "Real and Present Danger Flag State Failure and Maritime Security and Safety", <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=348A185887B58353940D0EDF86AC66DA?doi=10.1.1.553.703&rep=rep1&type=pdf>.

<sup>31</sup> Business dictionary, <http://www.businessdictionary.com/definition/flag-of-convenience.html>.

employers as co-defendants before the courts of Member States where one of them is domiciled. It depends entirely on the will of the plaintiff (seafarers) whether or not to have resort to these special jurisdictions and he shall decide in accordance with his interests and the particular circumstances of the case.<sup>32</sup> Albeit the decisions of the case law that mentioned below were based on Brussels Convention, Lugano Convention or Brussels Regulation respectively, the terms in the Conventions will be treated as the same rule because there are only minor differences which have no impact on employment contractual disputes.

#### 2.1.3.2 Working on the Continental shelf or the Exclusive Economic Zone (EEZ)

If a dispute arises when the crew member work on the Continental shelf or EEZ, Brussels I Regulation (recast) does not expressively deal with the jurisdiction issue. Whereas, in EU case law, the judge invoked the legal provision in Continental Shelf Convention<sup>33</sup> and UNCLOS to solve the matter of jurisdiction in relation to employment relationship at sea.

On the one hand, according to Article 5 of Continental Shelf Convention,

“Such installations and devices, though under the jurisdiction of the coastal State,”

In other words, the coastal State is entitled to construct and maintain or operate on the continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources. On the other hand, in the light of Article 56, 60, 76 and 80 of UNCLOS, the continental shelf and EEZ cover essentially the part of the ocean adjacent to the territorial sea of the coastal State up to 200 nautical miles into the ocean. Therefore, fixed installations and structures located on the continental shelf or in EEZ of the ocean, are subject to the exclusive jurisdiction of the coastal State.

In the case of Weber<sup>34</sup>, Mr Weber was on board vessels or carried out installations on several platforms located within the Netherlands continental shelf area from July 1987 to 21 September 1993. From 21 September to 30 December 1993 he was employed on a floating crane operating in Danish territorial waters. One of the concerns in this case is how to find

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<sup>32</sup> Ulrich Magnus, Peter Mankowski, Alfonso-Luis Calvo Caravaca, Brussels I Regulation, (sellier. european law publ., 2007), P333.

<sup>33</sup> Convention on the continental shelf done at Geneva, on 29 April 1958. Entry into force: 10 June 1964.

<sup>34</sup> C-37/00, Herbert Weber v Universal Ogden Services Ltd.

out the competent court if the place of performance of contract was located on “floating installations” above the continental shelf or EEZ.

The ECJ explained that on the basis of Continental Shelf Convention and UNCLOS, those fixed or floating installations positioned on or above the continental shelf are under the jurisdiction of the coastal State. The coastal State enjoys certain “sovereign rights” over these areas of the ocean.<sup>35</sup> Furthermore, when the vessel is navigating in the EEZ, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State. In other words, the working place on the continental shelf or in EEZ are deemed to have performed the work in the territorial waters of that State. The rule of flag State cannot be exercised to determine the jurisdiction and the court in the coastal state will be substituted to hear the claim. Hence, the ECJ ruled that Mr Weber’s work on board vessels or installations on the Netherlands continental shelf is to be regarded as performing the obligation in the Netherlands. The courts of Netherlands and Danish may have jurisdiction on this case.

All in all, employees, including seafarers who perform their job on the continental shelf or in the EEZ area of the State, can be regarded as working in the coastal State and they can commence the proceeding against their employers in the court of the coastal State. Another complex question arises in this case is how to identify the jurisdiction if the employee worked in several places during the performance of the employment contract.

#### 2.1.3.3 The performance of work in several countries

The ships sail on the international routes and go through different territorial waters and high seas. The seaman usually performs his employment contract in a number of different countries. Consequently, there are many choices for seafarer to bring the action, for example, the court in the port State or in the coastal State or any State that the vessel passed by. It is problematic to commence a claim in different courts when the work is performed in more than one place, particularly for urgent matters. In EU, the solution concerning the

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<sup>35</sup> Jürgen Basedow, Ulrich Magnus, Rudiger Wolfrum, *The Hamburg Lectures on Maritime Affairs 2009 & 2010*, (Springer Science & Business Media, 2012), P124.

matter of jurisdiction is mainly laid down in the Article 21 of Brussels I Regulation (recast), stating that,

“1. An employer domiciled in a Member State may be sued: (a) in the courts of the Member State in which he is domiciled; or (b) in another Member State: (i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or (ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1.”

However, Brussel Regulation I (recast) did not give the direct answer that how to define the habitual place if the performance the job in many places. Hence, the ECJ explained the rule of habitual place of work through different old case law.

### **Case Mulox<sup>36</sup>**

In the case of Mulox, Mr Geels, a Dutchman, whose office was at his home in France, initially performed his work of selling products in Germany, Belgium and the Netherlands, and also the Scandinavian countries, to which he made frequent trips. Then he brought the claim against his English employer in France regarding to the dismissal of the employment contract.

At that time, the Brussels Convention<sup>37</sup> did not have specific provisions in relation to employment contracts. Employee cannot be explicitly guided to select the court by the simple terms in Brussels Convention. The explanations of the term in the case law had great effect for the employee to determine the court before which he may bring an action and the employer reasonably to foresee the court before which he may be sued. In the case at hand, the court gave the interpretation of the habitual place of performance it means:

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<sup>36</sup> Case C-125/92, Mulox IBC Ltd. v. Hendrick Geels, (1993) ECR I-4075.

<sup>37</sup> Article 5 of the Brussels Convention, a person domiciled in a Contracting State may, in another Contracting State, be sued: (1) in matters relating to a contract, in the courts for the place of performance of the obligation in question.

“The work which entrusted to the employee was carried out from an office in a Contracting State, where the employee had established his residence, from which he performed his work and to which he returned after each business trip. Furthermore, it is open to the national court to take account of the fact that, when the dispute before it arose, the employee was carrying out his work solely in the territory of that Contracting State.”<sup>38</sup>

In other words, the habitual workplace was defined by the Court as 'the place where or from which the employee principally discharges his obligations towards his employer'.<sup>39</sup>

### **Case Rutten<sup>40</sup>**

In the case of Rutten, Mr Rutten was a Dutch and served for an English company. He set his office and kept all relevant documentation at his home in Netherlands. He also prepared and began his trips and returned back after his trips in Netherlands. In other words. Mr Rutten carried out some two-thirds of his work in the Netherlands, the remaining appeared to have been performed in several other countries. In this case, the employment contract contained neither the clause of a choice-of-court nor a choice-of-law. Hence, Mr Rutten sought payment of arrears of salary and interest before the court in Netherlands.

The decision of the court is based on Lugano Convention<sup>41</sup> when special provisions related to employment contracts was updated in Lugano Convention. In the case, circumstances concerned with habitual workplace should be considered such as whether or not the worker carried out his work from one particular office, whether he organised his professional activities from that office, whether he had his residence in that place, how long he stayed there, whether he went back there after every business trip...make it possible to verify the location of the effective centre of the employee's working activities.<sup>42</sup> The judge ruled that,

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<sup>38</sup> Case C-125/92, *Mulox IBC Ltd v Hendrick Geels*, Judgment of the Court of 13 July 1993, para 25.

<sup>39</sup> Opinion of Mr Jacobs, CASE C-37/00 Opinion of advocate general Jacobs delivered on 18 October 2001, P37.

<sup>40</sup> Case C-383/95, *Petrus Wilhelmus Rutten v. Cross Medical Ltd.*, (1997) ECR I-57, I-77.

<sup>41</sup> Article 5 of Lugano Convention 1989, a person domiciled in a Contracting State may, in another Contracting State, be sued: in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, this place shall be the place of business through which he was engaged.

<sup>42</sup> Jürgen Basedow, Ulrich Magnus, Rüdiger Wolfrum, *The Hamburg Lectures on Maritime Affairs 2011-2013*, (Springer, 2014), P403.

“Accordingly, Article 5(1) of the Convention, as amended by the San Sebastian Convention, must be interpreted as meaning that where, in the performance of a contract of employment an employee carries out his work in several Contracting States, the place where he habitually carries out his work, within the meaning of that provision, is the place where he has established the effective centre of his working activities. When identifying that place, it is necessary to take into account the fact that the employee spends most of his working time in one of the Contracting States in which he has an office where he organizes his work for his employer and to which he returns after each business trip abroad.”<sup>43</sup>

In this case, the ECJ ruled that Mr Rutten carried out almost two-thirds of the activity in one contracting State. He had his office in Netherlands where he organized his work for his employer and to which he returned after each business trip abroad. His home can be considered the place of effective centre of his working activities. All of these factor should be given prominence when making decision by the national court.

#### **Case Voogsgeerd<sup>44</sup>**

In the case of Voogsgeerd, Mr Voogsgeerd worked as a chief engineer on the ships. He always boarded and received the instructions for each of his missions in Belgium. In the case, when identifying the jurisdiction and applicable law, the court considered the habitual place where employee performed his work instead of the flag State of the ships he worked on. In the judgement of this case, the court ruled that,

“If it is apparent from these findings that the place from which the employee carries out his transport tasks and also receives the instructions concerning his tasks is always the same, that place must be considered to be the place where he habitually carries out his work, [...] the factor of the place where the employee habitually carries out his work is applied in priority.”<sup>45</sup>

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<sup>43</sup> Case C-383/95, Petrus Wilhelmus Rutten vs Cross Medical Ltd, Judgement of the court (Sixth Chamber) 9 January 1997, Para.27.

<sup>44</sup> Case C-384/10, Jan Voogsgeerd v Navimer SA.

<sup>45</sup> Case C-384/10, Jan Voogsgeerd v Navimer SA, Judgment of the Court (Fourth Chamber) of 15 December 2011. Para. 39.

In this case, in deciding whether the employee can be regarded as having carried out his work "habitually", the factor can be taken into account that whether an employee carries out his tasks and receives the instructions concerning his tasks in the same place.

### **Case Weber<sup>46</sup>**

In the case of Weber, Mr Weber was a German and resided in Germany. His employer was established in United Kingdom. As mentioned before, Mr Weber worked on the continental shelf in Netherlands as well as in the Danish waters, he could claim for the compensation for the dismissal of employment contract in the courts of Netherlands or Denmark.

This case is different from the cases mentioned before because Mr Weber did not have an office in one of the contracting States constituting the actual centre of his professional activities and from which he carried out the essential part of his duties vis-à-vis his employer. Moreover, Mr Weber carried out less than half of his work, in terms of duration, within a single jurisdiction, but the remainder, the majority, was of a totally fragmented and dispersed nature, in terms of both duration and place of employment. Thus there might be a significant proportion of his work within one area, far outstripping any work he did in any other area but accounting none the less for under half his time.<sup>47</sup> The question is how to define the habitual place of work and find out the competent court to hear the dispute in the case at hand.

Regarding Article 5(1) of Brussels Convention<sup>48</sup>, when determining the habitual workplace, the whole of the duration of the work periods should be taken into account when employment contract is performed by the employee in many different Contracting States, irrespectively of what was established in the individual employment contract, or the place where the employer commenced his working activity. Failing other criteria, that will be the place

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<sup>46</sup> C-37/00, Herbert Weber v Universal Ogden Services Ltd.

<sup>47</sup> CASE C-37/00, Herbert Weber and Universal Ogden Services Ltd, Opinion of advocate general Jacobs delivered on 18 October 2001, P52.

<sup>48</sup> Article 5(1) of the Brussels Convention "in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated"

where the employee has worked the longest.<sup>49</sup> In summary, the employee will have the choices to sue his employer either in the courts for the place where the business which engaged him is situated, or in the courts of the Contracting State in whose territory the employer is domiciled.<sup>50</sup>

If one follows this reasoning, when identifying the habitual place of performance in relation to individual employment contracts at sea, all the factors should be considered such as, characterise the activity of the employee, [...] the place from which the employee carries out his transport tasks, receives instructions concerning those tasks and organises his work, and at which the tools of his trade are situated. [...] The deciding factor, ultimately, is where the employee performs the greater part of his obligations towards his employer.<sup>51</sup>

#### 2.1.4 Conclusion

Although the cases we mentioned above are the very old cases, they play a vital role in shaping the new legal principles and concepts regarding individual employment contracts in Brussels I Regulation (recast). In these case law, the significance of the expression «place of work» to include the place starting from which the work is carried out, and the concept of «habitually» to coincide with that of performing the essential part of the worker's obligations, which can be deduced, depending on the sector of activity, from factually different circumstances, such as the opening of an office in a member State where the worker returns after each business trip (Mulox and Rutten), or a predominant quantity of work time spent in the same State (Weber)<sup>52</sup>, or the place from which the employee carries out his transport tasks and receives the instructions (Voogsgeerd).

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<sup>49</sup> Case C-37/00 Herbert Weber v Universal Ogden Services Ltd, Judgement of the court (Sixth Chamber) 27 February 2002.

<sup>50</sup> Ibid, Para 58.

<sup>51</sup> Case C-384/10, Jan Voogsgeerd v Navimer SA (Reference for a preliminary ruling from the Hof van Cassatie (Belgium)), Para 59.

<sup>52</sup> Carla Gulotta, The first two decisions of the European Court of Justice on the law applicable to employment contracts, Recibido: 15.07.2013 / Aceptado: 24.07.2013.



The decisions given in these cases are of practical importance on guiding different cases until now, especially in area of the maritime employment contracts. In other word, the flag State rule is not the only one way to identify the jurisdiction in EU.

Nonetheless, the rule that the court having the closest connection to a case in question is not incorporated into the field of jurisdiction. Seafarers always work on the ships which are the extension of the territory of the State, hence, the result of applicable to the rule of habitual place may be the same as the rule of flag State. It is less practical and minor influence when determining the jurisdiction over maritime employment contract under FOC. In addition, in cases where an employer may be sued are decided on the fall-back clause of engaging place of business if there is no habitual place of work. The fall-back rule does not meet the objectives of proximity and jurisdictionally preferring claimant employees (seafarers) and is, furthermore, deprived of almost any practical importance.<sup>53</sup> Therefore, European Parliament proposed the fall-back clause which applies where there is no habitual place of work should be reworded so as to refer to the place of business from which the employee receives or received day-to-day instructions rather than to the engaging place of business.<sup>54</sup>

As to their scope of application, neither Brussels I Regulation nor Lugano Convention aims to provide a fixed set of rules on international jurisdiction for all international cases, but only those in which the defendant is domiciled in a member state; otherwise, the system refers international jurisdiction issues to the relevant national law.<sup>55</sup> The next chapter will look into the national law regarding jurisdiction over employment relationships in Norway and set out the way to protect seafarers under national law framework.

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<sup>53</sup> Uglješa Grušić, *The European Private International Law of Employment* (Cambridge University Press, 2015), P129.

<sup>54</sup> Private international law and employment, European Parliament resolution of 8 October 2013 on improving private international law: jurisdiction rules applicable to employment (2013/2023(INI)) (2016/C 181/03) <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1472410422410&uri=CELEX:52013IP0396#document1>.

<sup>55</sup> Laura Carballo Piñeiro, *International Maritime Labour Law* (Springer, 2015), P77.

## 2.2 Jurisdiction issues for maritime employment contracts subject to Norwegian law

### 2.2.1 Introduction

In general, when an employee works on board a Norwegian ship, the individual employment contract is subject to Norwegian law in Norwegian courts. Section 6 of NIS<sup>56</sup> regulates that

“cases concerning the employee’s service on the ship may be brought against the owner before a Norwegian court or before a court in the employee’s country of residence. A contract of engagement as referred to in the first sentence is not a hindrance to a case being brought before a court in another country when such action is permitted under the Lugano Convention 2007”.

Moreover, Section 4-5 (4) of the Norwegian Dispute Act<sup>57</sup> which has been modelled on the Lugano Convention stipulates that

“an action by an employee against his employer for claims arising out of an individual employment relationship may be brought at the place of work or at the place where the employee normally performs his work. If there is no such place, the action may be brought at the place where employer who hired employee are located”.

That is to say, the principle to determine the jurisdiction regarding individual employment contracts at sea in Norway is the same as in EU.

In Section 1-2 of Ship Labour Act<sup>58</sup>, it is stated that,

“This Act shall apply to any employee working on board Norwegian ships”.

In Section 6-5 of Ship Labour Act, stating that,

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<sup>56</sup> Lov om norsk internasjonalt skipsregister [NIS-loven], Act of 12 June 1987 No.48 relating to a Norwegian International Ship Register (hereafter ‘NIS’)

<sup>57</sup> Lov om mekling og rettergang i sivile tvister (tvisteloven), Act of 17 June 2005 no. 90 relating to mediation and procedure in civil disputes.

<sup>58</sup> Lov om stillingsvern mv. for arbeidstakere på skip (skipsarbeidsloven), Act of 21 June 2013 No. 102 relating to employment protection etc. for employees on board ships, in force on 9 May 2014 pursuant to decree of 9 May 2014 No. 625).(hereafter ‘Ship Labour Act’).

“Disputes concerning the employment relationship between the employee and the employer or between the employee and the company while the ship is abroad shall not be brought before foreign authorities. Disputes pursuant to the first paragraph may be submitted before a Norwegian foreign service official. The foreign service official shall render his or her decision in the case after hearing the statements of the parties. The decision may within six months be brought before the courts in Norway”.

In other words, if the ship relevant to the dispute is registered in the Norwegian Ship Registry, for example, both the Norwegian International Ship Register and the Norwegian Ship Register, then, Norwegian court can exercise the jurisdiction.

Furthermore, as regards ships flying flags of convenience, there are strong reasons for a case to be rejected by Norwegian courts based on rules or signing-on contracts which state that the country of registration shall have exclusive jurisdiction<sup>59</sup>. However, in the situation of FOC, if the court of the flag State cannot effectively preserve seafarers’ rights, Norwegian seafarers can select Norwegian courts due to his resident or the domicile of employer in Norway based on Section 6 of NIS. If Norwegian courts accord with the rule of habitual workplace or the rule of engaging place of business based on Section 4-5 (4) of the Norwegian Dispute Act, employer can also be sued in Norway.

In Norway, unwritten law also have a great influence on future cases. When determining the jurisdiction, the explanation of the basic principle in the case law by Norwegian court is the same as the explanation of Section 5 in the Lugano Convention by the ECJ.

### 2.2.2 Case Ryanair<sup>60</sup>

#### **The facts of the case**

Cocca is an Italian who concluded an employment contract with Irish airline Ryanair Limited (hereafter Ryanair). She worked as a Cabin Services Agent and had obligation to live no further than a one-hour journey from the airport in Norway. The contract included the explicit jurisdiction clause that any disputes is solved in Irish forum. Cocca was dismissed

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<sup>59</sup> Henning Jakhell, The rights of seafarers seamen collective labour law, strikes, boycotting - flags of convenience, June 28th, 2001.

<sup>60</sup> Case no.13-202882ASK-BORG/04, Ryanair Limited vs Alessandra Cocca.

when she was stationed at Moss Airport Rygge in Norway. Hence, Cocca brought the claim against Ryanair before Moss District Court due to the alleged illegal dismissal of the contract.

Ryanair argued that, firstly, the parties had agreed that only Irish law was applicable to the employment relationships; secondly, Cocca's salaries were paid into an account in an Irish bank so that she paid tax to Ireland; thirdly, she was a member of the Irish National Insurance Scheme. Moreover, Ryanair did not have any branches in Norway or other countries and it organised the work including emanating instructions from Ireland.

Cocca argued that, firstly, she was stationed at Rygge where all standby duties were performed there. During standby duties, she had specific tasks at the airport. Secondly, Rygge was not just a mustering place, but the place where she showed up 45 minutes before departure time in order to receive instructions and information and ended each working day. She stayed at Rygge every night for service and maintenance. Thirdly, she received a separate "Norway Supplement" in salary. In addition, she was required to live less than one hour from Rygge.

At first, Moss district concluded that the dispute did not have sufficient link to Norway, cf. Section 4-3 of the Norwegian Dispute Act "Disputes in international matters may only be brought before the Norwegian courts if the facts of the case have a sufficiently strong connection to Norway.", cf., Section 4-5 (4) and Article 19 of the Lugano Convention.<sup>61</sup> However, the final conclusion from the Supreme Court of Norway is that Norwegian court is competent and the question of choice of law has been addressed in another case which will be mentioned below.

### **The decision of the Norwegian Supreme Court**

First, Article 21 (1) of the Lugano Convention provides that "the provisions of this Section may be departed from only by an agreement on jurisdiction which is entered into after the dispute has arisen", accordingly, the choice of court clause was concluded before Cocca commenced the proceeding, hence, the Irish court did not have jurisdiction in this case.

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<sup>61</sup> Case no.: 13-202882ASK-BORG/04, Alessandra Cocca vs Ryanair Limited, Borgarting Court of Appeal, Pronounced: 5 March 2014.

Second, in the view of Supreme Court, Ryanair's argument was irrelevant to the decision on jurisdiction. If the proper venue was Irish court as claimed by Ryanair, then a more general situation can be implied in which employees have very limited influence on the choice of jurisdiction.

Third, except the conditions that Ryanair mentioned before, for example, the system of insurance that employee joined or the currency that the employee get, other factors should be given the significant consideration as well. That means the relevant factors such as the place where Cocca worked and lived, which country is more close connection with the performance of the contract should be taken into account.

The court of Appeal ruled that,

“The residence duty meant that she lived close to the airport as long as the employment relationship there lasted. This represents an actual connection that must be given substantial weight. This meant that Rygge and the area where she lived, was her natural social connection point in connection with both work and leisure. In the Court of Appeal's opinion this actual connection weighs very heavily, even though a number of other factors must be taken into account.”<sup>62</sup>

Therefore, the court in Norway adopt the rule of close connection to determine the issue of jurisdiction. By analogy, disputes concerning maritime individual employment contracts, the following factors shall also be considered when determining which state the employment has the closest connection with: Where the employee pays taxes, where the employee is a member of National Insurance, pension scheme, where she has medical insurance and disability insurance, as well as matters related to salary provisions and other working conditions. <sup>63</sup>

### 2.2.3 Exclusive jurisdiction at sea

However, the situation concerning judicial jurisdiction would be changed while the ship is registered in a foreign country. The question is whether Norwegian courts are competent to

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<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

consider a claim against the foreign owners. It is conceivable that the law of the country of registration lays down that legal actions against the owner may only be brought in the country of registration, and it is also conceivable that pursuant to the crew's signing-on contract the courts of the country of registration – or possibly of another country – shall have exclusive jurisdiction.

According to Section 6-5 of the Ship Labour Act, Norwegian courts shall have exclusive jurisdiction if ships are registered in the Norwegian Ship Register. However, Lugano Convention was ratified by Norway and incorporated into Section 4-5(4) of the Norwegian Dispute Act. In other words, seafarers who work on Norwegian ships can sue their employer in several places, not only in Norway. For example, the court in the place where employer domiciled, the habitual workplace or the place of engaging business. For example, the decision of the Industrial Court in Hamburg in the case Heimthaler<sup>64</sup> is illustrative. The court did not find that Article 50 of the Norwegian Seamen's Act<sup>65</sup> in any way prevented the German seaman, who signed on in Germany for service on board a Norwegian ship, from bringing an action in Germany for various claims in connection with the employment relationship, especially the employment settlement.<sup>66</sup>

#### 2.2.4 The alternative way for seafarer to claim in Norway

A further complication is that many seafarers are employed by manning agencies acting as 'agents for' or 'on behalf of' another company, which means that the actual employer is an independent entity, often situated in a foreign country. That is not an accidental choice, and it is often used to cover the identity of the real employer and conceal his tracks.<sup>67</sup> Hence, a

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<sup>64</sup> Case Urteil Dec. 9., 1983 Heimthaler vs. Westfal-Larsen & Co. a/s

<sup>65</sup> Seamen's Act of 30 May 1975 no. 18 § 50: "If, while the ship is in a foreign country, a dispute arises between the master and the crew regarding the settlement of wages, the ship service or the employment relationship in general, the case shall be referred to a Norwegian foreign service station. The dispute shall not be brought before foreign authorities."

<sup>66</sup> Henning Jakhell, "The rights of seafarers seamen collective labour law, strikes, boycotting - flags of convenience", June 28th, 2001.  
<http://folk.uio.no/hejakhel/documents/Seamen%20collective%20labour%20law,%20strikes,%20boycotting%20-%20flags.pdf>

<sup>67</sup> Desislava Nikolaeva Dimitrova, Roger Blanpain, *Seafarers' Rights in the Globalized Maritime Industry* (Kluwer Law International, 2010), P50.

seafarer may have two contracts from time to time, one with the manning agency and one with the shipowner. It is difficult to know the real liability subject and the legal effect of the contracts.

Due to uncertainties of legal responsibility attached with individual employment contract, an alternative way for a seafarer to protect himself is applying for a ship arrest. The Arrest Convention<sup>68</sup> came into force on 14 September 2011. In Article 2 of Arrest Convention, “Subject to the provisions of this Convention, the procedure relating to the arrest of a ship or its release shall be governed by the law of the State in which the arrest was effected or applied for.”

Arrest Convention has been incorporated into the Norwegian Maritime Code<sup>69</sup> (NMC), and is mainly found in chapter 4 Arrest of Ships of the NMC.

What’s more, Section 4-5(5) of Norwegian Dispute Act governs maritime relations, reads as follows,

“Actions arising out of maritime relations may be brought in the judicial district where the vessel's port of registry is situated. If the vessel has been arrested, an action relating to the claim for the payment of money secured by such arrest may be brought at the place where such arrest took place. This same applies if the vessel has been released or arrest has been avoided by the provision of security.”

In Section 51 of NMC

“Claims against a reder are secured by maritime liens against the ship, in so far as they relate to wages and other sums due to the master and other persons employed on board in respect of their employment on the vessel”.

In Section 14-1 of Enforcement Act<sup>70</sup>

“the creditor having a secured claim on the ship can request an arrest order issued for the ship”.

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<sup>68</sup> International Convention on the Arrest of Ships (Geneva, March 12, 1999) (hereafter Arrest Convention)

<sup>69</sup> The Norwegian Maritime Code, 24 June 1994 no. 39 with amendments including Act 7 June 2013 no. 30, Marlus nr. 435.

<sup>70</sup> Lov 1992-06-26 nr 86: Lov om tvangfullbyrdelse og midlertidig sikring (tvangfullbyrdelsesloven), Enforcement of Claims Act, hereafter ‘Enforcement Act’.

This means that there is an automatic securing of the wage claim without the need for registration or other activity by the seafarer.<sup>71</sup> Moreover, in Section 31 of Enforcement Act, “When an arrest order is issued for the ship, an action can be brought in the judicial district in which the arrest is made – this also concerns legal actions against those who have stood bail or surety for the claim”.

If an arrest order is issued for the ship when it is within a Norwegian port, seafarers may commence the arrest application by themselves without any help of attorney in the Norwegian court. There are no substantial fees payable to the court in connection with an arrest, only a minor fee in the region of NOK 2,000 – 3,000 (approx. EUR 250-350).<sup>72</sup>

In order to lift an arrest as soon as possible, International Group of P&I Clubs have worked out similar documents which are commonly known as Club letters of undertaking (LOUs). Due to the [P&I] Clubs' long tradition as indemnity insurers within the shipping community, their financial status and the back-up of the International Group, these important documents are accepted as security by claimants in most jurisdictions.<sup>73</sup> If the vessel has been arrested in Norway, the security must cover the port dues for a period of minimum fourteen days and should, in accordance with the Enforcement of Claims Act, be established either by way of a cash deposit or bank guarantee from a Norwegian bank.<sup>74</sup> In Norway, for seafarers, ship arrest is a relative easy, safe, inexpensive and quick solution.

## 2.2.5 Conclusion

For seaman, the ship can only be arrested when the disputes are related to wages and other sums in Norway. The legal permissibility of arrest a ship is limited. Thus, the usual way to solve the disputes is that bringing the claim in the court. When deciding the jurisdiction, Norwegian seafarers can sue in Norwegian court regardless of the nationality of vessels. If

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<sup>71</sup> Maritime lien for seafarers' wages in Norway, [http://seafarersrights.org/wp/wp-content/uploads/2014/11/NORWAY.SUBJECTGUIDE.MARITIMELIENSFORSEAFARERSWAGES\\_2013\\_ENG.pdf](http://seafarersrights.org/wp/wp-content/uploads/2014/11/NORWAY.SUBJECTGUIDE.MARITIMELIENSFORSEAFARERSWAGES_2013_ENG.pdf).

<sup>72</sup> Ingar Fuglevåg, Simonsen Vogt Wiig, “Ship arrest in Norway”, [http://svw.no/contentassets/fac6fec5349d441c9bd31790bd1ab3247d70c3738e91a32c62ff6b56dbb99874\\_1368442355.pdf](http://svw.no/contentassets/fac6fec5349d441c9bd31790bd1ab3247d70c3738e91a32c62ff6b56dbb99874_1368442355.pdf).

<sup>73</sup> “A P&I Club's view on arrest of ships”, INSIGHT 162, 01 MAY 2001, <http://www.gard.no/web/updates/content/52637/a-pi-clubs-view-on-arrest-of-ships>.

<sup>74</sup> Ibid.



seafarers are not resident in Norway, but he usually works on Norwegian ship or his habitual workplace is in Norwegian water or the performance of employment contract is more closely connected in Norway, seafarer can also bring the claim in Norwegian court.

### **2.3 Conclusion**

Protection is best assured if disputes fall within the jurisdiction of the courts of the place where he (a seafarer) discharges his obligations, where it is (likely to be) least expensive for him to commence or defend himself in court proceedings.<sup>75</sup> However, the current international legal framework for seafarers' claims is derived incidentally from various international regimes that do not have seafarers' claims as their main subject, but safety of navigation and protection of marine environment.<sup>76</sup>

The Lugano Convention has been translated and incorporated into Norwegian domestic legislation (Section 4-8 of Disputes Act), and supersedes any conflicting national rules. In EU and Norway, the desired harmonisation has been achieved in the field of jurisdiction for employment contracts through Brussels I Regulation (recast). Hence, seafarers as employees are applicable to the same rule – the rule of habitual workplace and engaging place of business when identifying the court both in EU and Norway. Moreover, the case law mentioned in this chapter appear to give employees obliged to perform in several Contracting States a full range of options of jurisdictions in which he or she could sue the employer.

## **3 Chapter 3 Applicable law**

### **3.1 Introduction**

In practice, no state has sovereignty on the high seas, hence, it is the law of flag State that is expected to handle the case in relation to the employment contracts that seafarers carry out

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<sup>75</sup> CASE C-37/00, Opinion of advocate general Jacobs delivered on 18 October 2001, P44.

<sup>76</sup> Lunecito U. Delos Santos, "Law and policy perspectives of seafarers' claims" The Maritime Commons: Digital Repository of the World Maritime University, 2008.

the job on the international routes. In Article 5 of the Convention on the High Seas<sup>77</sup>, states that,

“Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”

Also, UNCLOS following centuries of tradition, assigns this role to the flag state.<sup>78</sup> Article 91 of UNCLOS provides as follows,

“Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.”

To defined the genuine link, in the report of International Maritime Organization (IMO), it states that,

“The organisations considered that the question of the role of the “genuine link” under UNCLOS [...] is directly related to the issue of the effective exercise of flag State obligations”.<sup>79</sup>

That means, there must be actual effective exercise of flag State obligations over a particular vessel. If in practice the exercise of flag State obligation was not effective, the genuine link between the flag and the vessel would be absent. Hence, a flag State must be able to show that the necessary mechanisms for effective exercise of jurisdiction and control are in place at the time when the ship is granted its nationality. Such mechanisms could include sufficient and suitably qualified personnel for carrying out the necessary surveys of the ship, checking the certification of the crew, etc. It may also be necessary for the flag State to lay down conditions which will ensure that in practice it can enforce applicable international safety, labour and pollution standards against the owners and operators of its ships, by requiring the owner and/or operator to have a significant presence in its territory, such as a

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<sup>77</sup> Convention on the High Seas, done at Geneva on 29 April 1958. Entered into force on 30 September 1962.

<sup>78</sup> Bevan Marten, Port State Jurisdiction and the Regulation of International Merchant Shipping (Springer, 2013), P15.

<sup>79</sup> IMO Council 96th Session Agenda item 14 (a) C96/14(a)/1/Add.1, 24th March 2006.

registered office or agent, through which any liability resting on the owner or operator of the ship (such as a fine or order to carry out repairs) may effectively be discharged.<sup>80</sup>

In EU, besides the Convention on the High Seas and UNCLOS, Rome I is the legal source to handle the applicable law matter over individual employment contracts. That means, in the absent of the choice of law, the flag State rule is not the only rule to determine the applicable law concerning maritime employment contracts. The rule of habitual workplace and the engaging place of business, the rule of close connection in Rome I are applicable to the issues of governing law as well.

Rome Regulations are not enforced in Norway. When deciding on the applicable law for private employment contracts at sea, the court mainly depends on Section 1-2 of Ship Labour Act and Section 6 of NIS, as well as the formula of “Irma-Mignon” which was set in the decision of Norwegian court in 1923.

The following chapter will discuss several case law to illustrate the methods of identifying applicable law concerning individual employment contract which are laid down in Rome I, UNCLOS and the Convention on the High Seas.

## **3.2 European Union**

### **3.2.1 The rule of habitual workplace and engaging place of business**

In the absent of choice of law, the rule of habitual workplace and engaging place of business regarding applicable law are regulated in Article 8 (2) (3) of Rome I and read as follows,

“To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country. Where the law applicable cannot

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<sup>80</sup> Robin R Churchill, with the assistance of Christopher Hedley, *The meaning of the “Genuine link” requirement in relation to the nationality of ships*, October 2000, ISBN:0901969508. P71.

be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.” The ECJ has dealt with two cases which have some relevance to the question of the rule of habitual workplace and engaging place of business. They are the Koelzsch and Voogsgeerd cases. Albeit the decisions of these cases were based on Article 6 of the Rome Convention – currently Article 8 of Rome I, these typical case law still have decisive effect on the future case when deciding the applicable law.

### 3.2.1.1 Case Koelzsch<sup>81</sup>

In the case of Koelzsch, Mr Koelzsch was employed as a driver by a Danish company whose office was in Luxembourg. Mr Koelzsch domiciled in Germany and his work was transporting flowers from Denmark to various places in Germany and occasionally to other European states. The lorries were registered in Luxembourg and Mr Koelzsch was covered by Luxembourg social security. The jurisdiction clause and choice-of-law clause in the employment contract stated that any disputes must be resolved in the Luxembourg court and by its law. Koelzsch sued his employer for compensation of alleged the unlawful termination of employment contracts. The question arose when deciding the habitual workplace because the employee worked in more than one country, and returns systematically to one of them.

Koelzsch argued that the country/place where the employee ‘habitually carries out his work’ in the Rome Convention must be interpreted in the same way as the Court defined the habitual work place as the place where or from which the employee principally discharges his obligations towards his employer or the place where employee carries out his tasks and receives the instructions concerning his tasks in Article 5(1) of the Brussels Convention in its case law. From the opinion of Advocate General Trstenjak, he supported the argument of Mr Koelzsch and concluded that,

“In a situation where an employee works in more than one Contracting State, the country in which he habitually carries out his work in performance of the contract within the meaning

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<sup>81</sup> Case C-29/10, Heiko Koelzsch v État du Grand-Duché de Luxembourg.

of that article is the country in or from which, taking account of all the circumstances of the case at issue, the employee in fact performs the essential part of his duties vis-à-vis his employer. The national court must carry out that assessment, taking into account all the facts of the case.”<sup>82</sup>

Therefore, by analogy, when deciding the applicable concerning maritime employment contracts, the national court must consider the following factors such as, in which or from which countries the seafarers carry out their principle transport work, from which place seafarers organise their work and how it is organised, where seafarers receive instructions, and whether the final destination is in one country or in many different countries to find out the place in which seafarer habitually carries out his work.

### 3.2.1.2 Case Voogsgeerd<sup>83</sup>

In the case of Voogsgeerd, Mr Voogsgeerd entered into an employment contract with Navimer – a Luxembourg company, and signed a contract in Naviglobe – a Belgian subsidiary. He worked on a seagoing ships belonging to Navimer and received his salary from Navimer as well. But he was obliged to report to, and received briefings and instructions from Belgium where all of his voyages commenced and terminated. The contract was expressly subject to the law of Luxembourg. Mr Voogsgeerd brought the claim against Navimer and Naviglobe in Belgium almost a year after his dismissal. He argued that Belgian law was the otherwise applicable law under the choice-of-law rule of the habitual place of work. Contrary to this, the defendants argued that Luxembourg law was only applicable, since Mr Voogsgeerd had had no habitual place of work and the engaging place of business. Moreover, the ship belonged to Navimer which had been situated in Luxembourg. In the case, Article 80(2) of the Luxembourg Law, legal proceedings for compensation in respect to wrongful termination of a seaman’s contract of employment shall be brought before the competent court within three months of notification of dismissal or communication of the reasons, or else be time-barred. In this case, the employee commenced the claim

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<sup>82</sup> Case C-29/10, Heiko Koelzsch v Grand Duchy of Luxembourg, Opinion of Advocate General Trstenjak, delivered on 16 December 2010, para 101.

<sup>83</sup> Case C-384/10, Jan Voogsgeerd v Navimer SA.

almost a year after his dismissal. Based on Article 6(1) of the Rome Convention, currently Article 8 (1) states that,

“Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.”

Obviously, the law chosen by the parties and the law of flag State – Luxembourg law is not favourable for the employee, thus, the clause of choice-of-law should not apply.

Another question is whether the place of business was where an employee was engaged or with which the employee was connected for his actual employment, even though the employee did not habitually carry out his work in any one country.

The ECJ ruled that,

“The place of business is not only the subsidiaries and branches but also other units, such as the offices of an undertaking, could constitute places of business within the meaning of Article 6(2) (b) of the Rome Convention, even though they do not have legal personality.”<sup>84</sup>, “the place of business of another company with which the company employing the worker is connected can also serve as the place of business within the meaning of Article 6(2)(b) of the Convention, even if the employer’s authority to issue instructions has not been delegated to that other company.”<sup>85</sup>

In this case, first, the director in the Naviglobe and Navimer are the same, it is for the court to assess whether two companies have connections and whether Naviglobe is the employer of the personnel engaged by Navimer. Second, the employee always received instructions in Belgium. The court may classify Naviglobe in Belgium as a ‘place of business’ if objective factors make it possible to establish that there exists a real situation different from that which appears from the terms of the contract, even though the authority of the employer

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<sup>84</sup> Judgment of the court (Fourth Chamber) 15 December 2011, In Case C-384/10, Jan Voogsgeerd v Navimer SA, Paragraph 54.

<sup>85</sup> Ibid, para.91

has not been formally transferred to that other undertaking.<sup>86</sup> Hence, the Belgian law is applicable law in the case instead of the law of the flag which flying on the ship.

### 3.2.2 Escape clause – the closet connection rule

In the case of Voogsgeerd, the court ruled that it follows from the wording of Article 6(2) of the Rome Convention that it was the legislator's intention to establish a hierarchy of the factors to be taken into account in order to determine the law applicable to the contract of employment.<sup>87</sup> In other words, the rule of habitual workplace is the fundamental principle. If there is no habitual workplace, the law of the country in which the employer's place of business is situated applies. If both of rules fail, the fall-back rule applies.

The fall-back rule which is regulated in Article 8 (4) of Rome I provides another way to deal with the matters of governing law and reads as follows,

“Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply”.

In the case of Superfast<sup>88</sup>, all the appellants jointly lodged an appeal against that judgment of District court of Helsinki before Helsinki Court of Appeal. They argued that according to Articles 91 and 94 of UNCLOS, regarding international employment contracts at sea, the flag State rule was applied to a ship and people who work on it, hence, the law of the flag State of the vessels, i.e. Greek law, should be applicable. Moreover, the mandatory provisions of the law of the flag State were more favourable to the seafarers and should be applicable irrespective of Finish law which was appointed in the collective labour agreement (CBA).

Whereas, seamen who joint in the action claimed that German law should be applied to this case. They claimed that the case should be based on the Rome Convention, and the mandatory provisions of German law offered better protection to the seamen than Finnish law.

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<sup>86</sup> Ibid, Para 65.

<sup>87</sup> Ibid, para 34.

<sup>88</sup>Case No.1282 (Case S 14/2378-2415 have been heard together), Helsinki Court of Appeal, Superfast EPTA Maritime Company, Superfast OKTO Maritime Company, Superfast ENNEA Maritime Company, Superfast Ferries S.A., Baltic SF VII, VIII and IX Limited vs Uwe Haselbach and the other seamen.

Moreover, the dispute in the case was on the termination of individual employment contracts, not the collective labour agreement, thus, Finnish law is not applicable. Furthermore, based on the rule of flag State in Article 94 of the UNCLOS, each state had an obligation to assume jurisdiction under its internal law over the crew of the vessel flying its flag. However, it did not mean the law of the flag State was applicable to the individual employment contracts and the flag State principle would determine the habitual workplace. Finally, seamen engaged and finished the work in Germany. In any case, the performance of employment contract by seamen had the closest connection to Germany. Hence, German law is applicable to the case.

### **The decision from Helsinki Court of Appeal**

The controversial point in the case is which law offer better protection for the seafarers. Whether UNCLOS regarding the law of flag State (Greek law) or Finnish law in the CBA is applicable in the case or in the absence of choice of law, whether the rule of close connection (German law) should be applied to the employment contract on the basis of Article 6 of Rome Convention.

The first question is whether UNCLOS is applicable in the private relationship. First, the vessels have not been sailing on the high seas. The condition of Article 94 of UNCLOS regarding the high seas are not filled. Second, UNCLOS cannot be directly applied as conflict of law in the field of individual employment relationships. Moreover, the flag State principle has no significance in the conflict of law in the EU. Hence, the court of appeal has concluded that UNCLOS cannot be directly applied in the case.

The second question is whether CBA was suitable for the case. The Court of Appeal states that the issue of weighting importance of the collective labour agreement indicated by the choice of law clause is to be assessed later on in the process, when applying the mandatory provisions of German law.

Finally, which factors are determinant in the escape clause of Rome Convention? In the case, the court found that the employment contract was closely connected to Germany. The rationale is that the seamen lived and resided in Germany (all but one of them were all German citizens) so they started the work and ended it in Germany. If the work shift ended somewhere outside Germany, the seamen were always arranged to go to Germany without



any charge. Moreover, the administrative management and the human resource management of the vessels, the office which seafarers signed their contracts were located in Germany, that's why seamen carried out their transportation assignments and received their instructions from Germany. Furthermore, their salaries were paid to German bank accounts and their health care services were organized by their employer in Germany. Additionally, the seamen were covered in the scope of social security and pension scheme, level of both were the same as those ensured in German legislation. All in all, the seamen fulfilled most of their contractual obligations in Germany, in the light of all the factors which characterize the employees' activities. On the contrary, Greece has nothing to do with the performance the contract, even though the registration and the flag State of the ship, the domicile of the ship company is connected with Greece. Therefore, the ECJ ruled that German law is applicable in this case instead of Greek law.

#### **The fall-back rule of close connection in Rome I**

In the case of *Voogsgeerd*, in the view of Advocate General, the employment contract must have a close connection with that other country. The following criteria may be indicative of a closer connection with a specific country: the language of the contract, the use of legal concepts from a specific legal system, the currency used, the duration of the employment contract, its entry in the staff register, the nationality of the contracting parties, the normal place of residence, the place where the employer supervises his staff and the place where the contract is concluded.<sup>89</sup>

In the case of *Superfast*, in order to find out which country is closely connected with the employment contract, many significant factors can be noticed, such as, the location where the seamen have primarily worked, the place of conclusion of the contract, domicile and residence of the contractual parties, the country where employees pay taxes and the affiliation to social security, pension, sickness insurance and invalidity benefit.

Such factors mentioned in the *Voogsgeerd* and *Superfast* cases reveal a closer connection with a country other than the flag State. Both of the decisions from the courts ignored the

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<sup>89</sup> Case C-384/10, *Jan Voogsgeerd v Navimer SA*, Opinion of Advocate General Trstenjak, delivered on 8 September 2011, para 74.

flag as a relevant criterion to the procedure in these two cases. The flags of the ship which seamen worked on board were not the connection to the habitual place of work when deciding the applicable law in employment contracts at sea. Hence, the next section will discuss whether the flag State rule is applicable and provides adequate protection for seafarers when determining the applicable law in EU.

### 3.2.3 The law of flag State rule in EU

In the *Voogsgeerd* and *Superfast* cases, seafarers worked on board ship in EU waters and received instructions from EU, therefore, the rule of close connection was applicable instead of the flag State rule. If the ship sails on the international routes, seafarers usually work on high seas. In such situation, how to identify applicable law when dispute concerning individual employment contract arises?

As mentioned before, no state has sovereignty on the high seas, Convention on the High Seas and UNCLOS which had been ratified by EU provide that ship sailing on high seas is subject only to the jurisdiction and law of its flag State. The precondition to allow the flag State to exercise its jurisdiction and control, there must be a genuine link between the ship and its flag State.

Admittedly, when the ship is sailing on international routes, it is convenient and predictable for seafarers to know the nationality of the ship and require protections from the law of the country whose flag they are flying in disregard of the nationality of seafarers and the location of the ship. However, such situation exists if there is real connection between the flag State and the crew and ownership of the vessel. In the meantime, the law of flag State provides adequate regulatory measures and is favourable for seafarers. Thus, according to Article 5 of Convention on the High Seas and Article 91 of UNCLOS respectively, when seafarers working on board ships which usually sail on high seas, the law of flag State can be considered to be applicable law by the courts in EU.

Nonetheless, registries such as that of Liberia, Panama, Malta are amongst those which are said to be open registries<sup>90</sup> or FOC. In order to reduce economic cost or to benefit from tax

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<sup>90</sup> Nivedita M. Hosanee, "A critical analysis of flag state duties as laid down under article 94 of the 1982 Unit-

policy, more and more vessels are registered under FOC. The general aim of employers is to gain profits regardless of disadvantages to employees. There is no real link between the ship and its flag State. Furthermore, ship owners can easily and quickly change the flag of their ship and the practice of recurrently changing the flag of a ship to reduce costs and avoid laws is also referred to as “flag hopping”.<sup>91</sup> It means that disputes regarding employment contracts at sea cannot be simply addressed by the law of flags of convenience.

In the IMCO Case<sup>92</sup>, the court ruled that,

“there was no genuine link between Liberia and Panama and the ships registered by them because the legislation of those countries had no provisions on incorporation of ship-owning companies or the nationality of the management, which were common connecting factors in other States.”<sup>93</sup>

In addition, seafarers usually work on different ship that flying different flags. In these saturation, the unpredictability of flag State increases the difficulties to decide the applicable law concerning the employment contracts.

As stated under Article 11 of the Coordination of social security systems,<sup>94</sup>

“For the purposes of this Title, an activity as an employed or self-employed person normally pursued on board a vessel at sea flying the flag of a Member State shall be deemed to be an activity pursued in the said Member State. However, a person employed on board a vessel flying the flag of a Member State and remunerated for such activity by an undertaking or a person whose registered office or place of business is in another Member State shall be subject to the legislation of the latter Member State if he/she resides in that State. The un-

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ed Nations Convention on the law of the sea”, Division for ocean affairs and the law of the sea office of legal affairs, the United Nations New York 2009. P94.

<sup>91</sup> Patrizia Heidegger, Ingvild Jenssen, Delphine Reuter, Nicola Mulinaris and Francesca Carlsson, What a difference a flag makes-Why ship owners’ responsibility to ensure sustainable ship recycling needs to go beyond flag state jurisdiction. Briefing Paper April 2015. <http://www.shipbreakingplatform.org/>

<sup>92</sup> Advisory Opinion on the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation [1960].

<sup>93</sup> ICJ, Advisory Opinion on the Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organisation, Pleadings, Oral Arguments and Documents, pp. 251-2 and 357.

<sup>94</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

dertaking or person paying the remuneration shall be considered as the employer for the purposes of the said legislation.”

By analogy, when determining the governing law concerning employment contracts at sea, the law of flag State can be considered as a criterion for assessing whether the law is favourable to seafarers at first. It will be easy and immediate to determine the applicable law in accord with the expectation of contractual parties. If the law of the flag State is less favourable to the seafarers and offers less protection, the rule of habitual workplace and engaging place of business or the close connection rule can be applied in the light of Rome I.

### 3.2.4 Overriding mandatory rule and Ordre public (public policy)

As stated under Article 9,

“Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation”.

Furthermore, based on Article 21,

“The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum”.

If the private interests violate the public interests in the State, the law of that State may intervene in the private relationship by overriding mandatory rule or by the ordre public rule. Protection of weak parties to the employment contract is the primary objective of these rules. On the one hand, the mandatory provisions of the governing law should apply if they are more favourable for the employee than the provisions of the chosen law. An example may be that rules on protection of employees lead to unlawful or unjustified performance of the employment contract. In such situation, overriding mandatory provisions of the forum are domestic peremptory rules to solve the dispute in question irrespective of the chosen law.

On the other hand, the ordre public rule, for example, if a contract is made under circumstances that would make it void under Norwegian law pursuant to the rules on fraud or de-

gency, the contract may be deemed void even though it would be valid pursuant to the *lex causae*. In such case, it would not be necessary to fill in any rule: the contract in question is either valid or void<sup>95</sup>.

In the case of Duarte<sup>96</sup>, Duarte quitted his job in Black & Decker and accepted an offer from another a competitor of B&D. B&D prevented Duarte from taking up the new job due to the restrictive covenants in the Long-Term Incentive Plan agreement (LTIP). LTIP clearly stated that Duarte cannot accept employment by, or otherwise assist, any of the companies included in the substantial list within two years after the termination from Black & Decker. Maryland law was chosen as applicable law in LTIP. Under Maryland law, the restrictive covenants could be justifiable. On the contrary, it could be invalid under English law.

The main disputes were on which law governed the case and whether the restrictive agreement in LTIP was void and unenforceable under Article 16 of the Rome Convention. The High Court upheld Duarte and held that,

“When Mr Duarte entered into the covenants, he was working in England under a contract of employment which, pursuant to Article 6.2 (a) of the Convention, was governed by English law. [...] The public policy of this country as expressed by Lord Macnaghten is therefore directly engaged if the covenants are enforced by an English court applying Maryland law when they would be unenforceable under English law. In other words, the result of the application of the specified law would be ‘manifestly’ incompatible with the public policy of the forum.<sup>97</sup>”

That’s to say, the parts of LTIP restricted employees’ right and breached the public policy of the English court. The employee was entitled to a declaration that the restrictive covenants in LTIP were unenforceable against him independently of the recognition of legiti-

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<sup>95</sup> Linn Hoel Ringvoll. Limitations on the applicability of the parties' choice of law under Norwegian conflict-of-laws rules,

<http://www.mondaq.com/x/121800/Contract+Law/Choice+Of+Law+When+Norwegian+Law+Prevails>.

<sup>96</sup> Neutral Citation Number: [2007] EWHC 2720 (QB), Case No: HQ07XO24O1, Alexandre Miguel Braz Duarte vs the Black and Decker Corporation and Black and Decker Europe.

<sup>97</sup> Judgement in the High Court of Justice Queen’s Bench Division, Case No: HQ07XO24O1, Date: 23/11/2007. Paragraph 61.

mate agreement under the chosen law. All in all, its (public policy) effect is to ensure that private international law does not undermine rights established at the European level; instead it ensures that those rights are protected in national courts.<sup>98</sup> If the interest of employee or public interest are unreasonably damaged by the private employment contracts, the contracts might be deemed as unenforceable. The national court may redress the wrongs of the contract and provide protection to the employee through the rule of overriding mandatory and public policy of the forum under Rome I.

In order to prevent the application of national rules not be detrimental to the primacy and uniform application of EU law and the effect of freedom of choice of law, the application of overriding mandatory and public policy rule should be restrict. Hence, more evidences should be provided by employees to prove that the application of foreign law obviously conflicts with national law or domestic public policy. For employees, it is not an easy and proper way to use the rule to reject the applicable law or protect their rights.

### 3.2.5 Conclusion

The law of flag State can be looked into by court whether it is favourable to the interest of seafarers. Whereas, proper and fair protections for seafarers cannot be provided by the law of FOC. In such situation, it is unfair for seamen to deal with disputes regarding employment relationships based of the flag State rule, thus, the rule of habitual place and engaging place of business, the rule of close connection can be taken into consideration when determining the applicable law in employment contracts at sea. In addition, the rule of overriding mandatory and public policy can be applied under the limited situation as mentioned before.

All these cases as old cases are indispensable to understand the provisions in Article 8, 9 and 21 of Rome I in use, namely Article 6, 7 and 16 of Rome Convention. In the case of Koelzsch, the law of the country in which the employee carries out his working activities is applicable, rather than the law of the country in which the employer is established. In the

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<sup>98</sup> Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press, 2009), P192

Case Voogsgeerd, the claim was time-barred under the choice-of-law, but admissible under Belgian law. Moreover, Belgian law was more closely connected with the case, hence, Belgian law would be applied in the case because it is more favourable to employee. In the case of Duarte, the overriding mandatory rule provides another way for the national court to protect the employee. All in all, employee as a weaker party to the contract, there is no reason why the employee, just because he is engaged in international employment, should enjoy double protection. If the employee were entitled to benefits under both laws, he or she would receive better protection than either law envisages.<sup>99</sup>

### **3.3 Norway**

#### **3.3.1 Introduction**

Norwegian domestic law as well as case law have main effect on determining the applicable law over maritime employment contracts because Norway did not ratify the Rome Regulations.

On the one hand, in Section 1-2 of Ship Labour Act, the object of the law is employees working on board Norwegian vessels. In Section 6 of NIS, it is clearly stated that individual contracts of engagement for service on ships in this register shall expressly state that the contract is subject to Norwegian laws. On the other hand, in the case of “Irma-Mignon”, the claim was based on tort, where two Norwegian ships (Irma and Mignon) that collided in a British river. Compensation issue was settled under Norwegian law rather than British law. The Supreme Court ruled that the common nationality of the vessels rendered the association with Norway stronger than the association with the law of the country where the accident took place. Therefore, the Supreme Court in Norway established the rule of closest connection when deciding the applicable law. In other words, a legal issue related to several States shall be governed by the law of the country with which the case has the strongest association.

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<sup>99</sup> Uglješa Grušić, *The European Private International Law of Employment* (Cambridge University Press, 2015), p149

### 3.3.2 Case Ryanair<sup>100</sup>

In this case mentioned above, the argument on the jurisdiction was resolved, based on the closest connection rule and the Norwegian court had the right to hear the dispute at last. The argument concerning the applicable law was also decided on the account of the closest connection rule by the Norwegian High Court.

Whether Norwegian law or Irish law was applicable in the employment contract, first, the assessment of the Norwegian court is basis of the Norwegian non-statutory choice of law rules, so-called “Irma-Mignon” formula. That is to say, the court took into consideration which country the case has the strongest association with when identifying the governing law. In the case, Cocca was obligated to live in the place which was near the Rygge in Norway and the relevant factors such as the working place of Cocca, the place where she got the beneficial from the tax insurance, the place where she was included in the social security system, the currency the employer paid, are related to Norway. All of them reveal that the claimant is closely connected with Norwegian law.

Second, the rules regarding evaluation of compensation for economic and non-economic losses in Norway and Ireland are significantly different. In the opinion of European legal unity, in the light of Article 8 (1) of Rome I, the choice of law cannot deprive the employee of the protection afforded to her by provisions that cannot be derogated from by agreement under the law. In the case, Norwegian law is the more favourable rule of the objectively applicable law govern the contract and not the rules of the chosen law. Although Rome I is not a part of the EEA agreement, for the purposes of the overall assessment as specified in Article 8 (4), in the absent of choice of law, the court had no reasons to give decisive weight to the employer's headquarters which is located in Ireland or because of all instructions being sent from Ireland.

Furthermore, when handling the case, Norwegian Court also utilized the case law, for example, Case Koelzsch and Voogsgeerd mentioned above, to illustrate why this case is governed by Norwegian law in the terms of Article 8 (2) (3) of Rome I.

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<sup>100</sup> Case MOSS tingrett TMOSS-2013-58182-Borgarting lagmannsrett LB-2015-51137 (15-051137ASD-BORG/03), Ryanair Limited vs Alessandra Cocca.



All in all, the court made the decision that Norwegian law is more closely connected with the case and provides more protection to the employee. Hence, the case was discussed and resolved under Norwegian law.

### 3.3.3 Case Eimskip<sup>101</sup>

Mr Fredheim was a Norwegian citizen and resided in Norway. He worked on board ships for a subsidiary of Norwegian company, Eimskip Norway AS (Eimskip). He mainly transported goods in Norwegian water. The ships were registered under FOC in Antigua and Barbuda. The employment contract contained a clause of choice of forum, but no clause of choice of law. Employee commenced the proceeding against Eimskip due to the alleged illegal termination of the employment contract in Vesterålen district court in 2015.

Hypothetically, following the way of decision of Case Ryanair and the norms of Rome I, firstly, Norwegian law provides more protection than the law of FOC in Antigua and Barbuda, based on Article 8 (1) of Rome I, Norwegian law is more favourable for employee and thus Norwegian law is applicable in this case. Secondly, Mr Fredheim signed the employment contract in Norway and he habitually carried out his duties in the Norwegian waters. In light of Article 8(2) (3) and the case law mentioned above, the employee performed a greater part of his obligations towards his employer in Norway, so Norwegian law was the law of habitual workplace. Moreover, according to Article 8 (4) and case law mentioned above, relevant factors, such as, both employer and employee are domicile in Norway, Norwegian seaman worked in the Norwegian waters, gave justifiable reasons that the applicable law in this case is associated with Norwegian law rather than the law of flag State. In addition, ships are registered in Antigua and Barbuda due to the lower tax. There is no genuine link between the performance of employment contract by seaman and the flag State of Antigua and Barbuda. Based on the decision of Norwegian court in “Irma-Mignon” case, the law of the flag that flying on the vessels is not closely connected with

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<sup>101</sup> Case HR-2016-01251-A, (sak nr. 2015/2368), sivil sak, anke over dom. Kjell-Atle Fredheim mot Eimskip Norway AS.

the employment contract, hence, the law in Norway is applicable in the case instead of the law of Antigua or Barbuda.

Adversely, the decision of the court is that Norwegian law is not applicable to the case at hand.

The main argument is whether there is a legal conflict rule applies to the matter of the case. First, the court ruled that the Irma-Mignon formula is applicable if there is no law, custom or other firmer rules governing the issue. In the case, Ship Labour Act is applicable to the case instead of the Irma-Mignon formula. Moreover, Section 1-2 of Ship Labour Act specified that the law applies to employees who work on board Norwegian ships. In other words, Ships Labour Act applies to Norwegian ships and it could not apply to employees on ships with another flag. Furthermore, the provision on skipsarbeidslovens virkeområde must be understood as a conflict rule, jf. Ot.prp. nr. 13 (1999–2000) page 15 of the corresponding provision in sjømannsloven § 1. As stated in Prop. 115 L (2012–2013) page 66, employees of foreign-registered ships as a rule "be subject sailor laws of that country"<sup>102</sup>. In other words, employment relationships at sea are applicable to the law of flag State in Norway. Hence, the case cannot be subject to Norwegian law because Mr Fredheim worked on board ships that flying the flags of Antigua and Barbuda.

Second, on the one hand, Rome I is not part of the EEA Agreement, and there is no basis for applying EU law by analogy to the detriment of Norwegian law. On the other hand, the principle of the flag State is codified in UNCLOS which is applicable from 1994. Both Norway and Antigua have ratified UNCLOS.

In conclusion, the Norwegian Court ruled that the law of flag State is applicable to the case at hand. The case is not subject to Norwegian law.

### 3.3.4 Conclusion

Although in the Case Eimskip and Ryanair, employee worked on different transportations, the similar argument is how to determine the applicable law in individual employment con-

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<sup>102</sup> Kjell-Atle Fredheim mot Eimskip Norway AS. NORGES HØYESTERETT Den 14. juni 2016 avsa Høyesterett dom i HR-2016-01251-A, (sak nr. 2015/2368), sivil sak, anke over dom, para 30.

tracts when the employment relationships possess cross border factors. In the Case Eimskip, even though the law of the county in which the ship flies FOC is not favourable to the interest of seafarer, Norwegian court indicated that the law of flag State was the only connection with the case without using special maritime connecting factors, for example, the rule of close connection as mentioned in Case Ryanair. By contrast, in the Case Ryanair, Norwegian court utilized the same rule – the close connection rule to determine the jurisdiction and the applicable law. The main reason is that the employment contract has a closer connection with Norway. Moreover, Norwegian law is more favourable to the employee.

It is worth noting that different ways will be used to decide the applicable law in employment contracts by Norwegian court. Obviously, as employee, the result of Case Ryanair is more beneficial than that in Case Eimskip. Hence, for the purpose of protecting the weaker party, it is better to construe whether there are sufficient conditions to determine the applicable law which is more favourable to seamen, not simply and directly using the law of flag State, especially when the ship is registered under the FOC or shipowner frequently changes the flag flying on the ship. However, the decisions in the case law seem to be more directed towards finding a just solution in the specific case, rather than elaborating a conflict rule that may serve as a guideline for future cases<sup>103</sup> in Norway.

### **3.4 Conclusion**

It is possible for seafarers to sue their employers in more than one court. Each of the court has its own choice-of-law rule to decide which law will govern the claim. If the respective choice-of-law rules are not harmonised, they will determine two different laws as applicable, with the result that the parties will not be able to assess, for example, whether the claim is time-barred or not until a lawsuit is initiated. This affects predictability and is not desirable.<sup>104</sup> The harmonisation of conflict-of-law rules offers the contracting parties foreseeable solutions to numerous problems that affect employment relationships. For example, the

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<sup>103</sup> Giuditta Cordero Moss, "Recent private international law codifications National report for Norway", International Academy of Comparative Law 18th International Congress of Comparative Law Washington, July 25 to August 1, 2010 Topic II B. Private International Law. [http://folk.uio.no/giudittm/IACL\\_10\\_PIL\\_Norway.pdf](http://folk.uio.no/giudittm/IACL_10_PIL_Norway.pdf).

<sup>104</sup> Giuditta Cordero-Moss, New Trends in the Norwegian Practice on the Choice of Law Applicable to Contracts, P46. <http://www.scandinavianlaw.se/pdf/57-2.pdf>.

question of how much compensation is to be paid and whether a dispute-settlement clause is to be regarded as valid. Hence, legal issues concerning individual employment contracts at sea is better to be subject to the same principles, i.e. the rule of habitual place, the rule of engaging business place, and the close connection rule to find out which law is more favourable for seamen and provides better protection to weak party in the employment contract when determining the applicable law.

On the one hand, both in EU and Norway, the rule of flag State is still effective when deciding the applicable law concerning the employment contracts at sea. On the other hand, Rome I is not ratified by Norway, the “Irma-Mignon” formula which established the close connection rule by Norwegian court is the same as the rule in Article 8 (4) of Rome I when identifying the governing law, even though the “Irma-Mignon” formula is not appropriate for every case in Norway. Moreover, the court of Case Ryanair also followed the rule of close connection in Rome I to make a decision. Thus, this does not mean that Norwegian courts should not strive to harmonise choice-of-law rules, and there are indeed signs that Norwegian courts may be abandoning the peculiar approach that they have traditionally followed to embrace the method that underlies European private international law.<sup>105</sup> In order to harmonise the choice-of-law rules between EU and Norway, it is generally suggested that Rome I and the case law of the ECJ relating to determination of applicable law can be deemed as relevant sources of law in Norwegian private international law.

#### **4 Chapter 4 Conclusion**

The matters of jurisdiction and conflict of laws concerning the crew’s individual employment contracts have already been brought forward in the preparation stage of the Brussels I Regulation (recast) and Rome I, the flag State principle has less significant in international maritime transport.

The connections between the Brussels I Regulation (recast) and the Rome I are numerous. The jurisdiction rules in Brussels I Regulation (recast) and the conflict-of-laws rules in Rome I share the same objective of protecting the weaker party to the employment contract.

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<sup>105</sup> Ibid.

For example, in the interests of securing an interpretation of the concepts of private international law which is as uniform as possible, it seems reasonable to transpose that definition of ‘place of business’ established by the Court in relation to Article 5(5) of the Brussels Convention to Article 6(2)(b) of the Rome Convention.<sup>106</sup>

The principle rules such as the rule of habitual workplace and engaging place of business in both of Regulations, have approximate ways to handle the individual employment contracts, including the maritime employment contracts. Therefore, disputes between seafarers and employers are possibly dealt with by the law of the court, instead of the law of flag State. Seafarers and employers will have the advantage of predicting the jurisdiction and applicable law because the court and the applicable law may be at the same country.

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<sup>106</sup> Case C-384/10 Jan Voogsgeerd v Navimer SA, Opinion of Advocate General Trstenjak, delivered on 8 September 2011.

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