The national employment structure of seafarers, built up since the 17th century, is being confronted with the Community structure and, even more, with the internationalisation of maritime labour resulting from the practice of vessels’ being registered in whichever country the shipowner sees fit. This is resulting in a deconstruction, which could give rise to a reconstruction within the framework of the European Union.

The deconstruction has occurred, in particular, through the adaptation of the registration of ships in the member states of the European Union to international competition and the creation of international and offshore registers. The harmonisation of these new registers is conceivable on the grounds of fair competition, maritime safety, and the maintenance of maritime jurisdictions. The regulations on State assistance, the interpretation of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, the determination of the legal status of a ship and its crew, and Community registration of crewing agencies, should make it possible to regulate situations that are currently unregulated. Discussions on the human factor in incidents at sea cannot but have consequences, inasmuch as member states of the European Union are Flag States.

The Port State’s control covers all ships putting in at European Union ports, whatever flag they are sailing under. There appears to be a need to strengthen social controls with respect to manning levels, the skills of the crew, working hours, and rest periods. Community law should give substance to IMO Resolutions A930 and A931 of 29 December 2001, on guaranteeing the payment of seafarers’ wage claims in the event of abandonment and on shipowners’ liability with respect to contractual claims for personal injury. It should also give substance to the IBF (International Bargaining Forum) pay agreement concluded on 13 November 2003 by the ITF, European shipowners in IMEC (International Maritime Employers’ Committee), and Japanese shipowners. This agreement, known as a “green ticket” agreement, should form part of the European social dialogue and give rise to a double extension through a Directive, as happened in 1999 with respect to the agreement on working hours in the merchant navy. Finally, an international public order needs to be constructed that ensures basic rights are respected and decent working conditions guaranteed, and IMO and ITF inspectors need to coordinate their actions, in order to ensure maritime safety, fair competition, environmental safety, and compliance with current international regulations. In the absence of any internationally applicable structure, the primacy of Community law acts as an extremely useful lever.

Maritime employment law has evolved over a long period of time within the national framework of maritime States. To take the example of France, the process began as far back as the royal orders drafted by Colbert under Louis XIV. The maritime employment law of seafarers is older than terrestrial employment law. From the late 17th century the State, protecting its own interests as well as seafarers, has taken on a tutelary role; it registers seafarers—in days gone by, through maritime enrolment, nowadays—through a register; it certifies employment contracts when the crew’s functions are drawn up; it has implemented specific social welfare, which endures in France within the framework of the National Foundation for Disabled Seafarers [Établissement National des Invalides de la Marine—ENIM]. The development of terrestrial employment law did not have any drastic effect on maritime employment law, but they grew closer together. Since 1898, they have developed in tandem, even though the texts remain separate, due to the distinctive characteristics of maritime labour. In 1936, the introduction of paid leave helped to modify the nature of the maritime employment contract; since then, it has covered periods without work, when the seafarer is not on board ship but remains tied to the shipping company. The voyage contract, linked to a specific voyage, is no longer the only reference point. The increase in periods when contracts are suspended and the growth of the collective aspect of industrial relations will lead to an interweaving of maritime and terrestrial regulations that goes beyond parallel development. Maritime employment law loses its autonomy when the seafarer is no longer tied to the Master or the ship, but to the shipping company, over and above any particular voyage. Moreover, ships are getting larger, crews are getting smaller, and the number of French seafarers is dropping. In a maritime world that is shrinking, common employment law cannot but extend to the specificities of maritime labour.
The employment contract has become an individual contract tying the seafarer to the shipping company. The seafarer is now an employee of his company even when not on a voyage. This development seems to have started with the introduction of scheduled services, in particular the first transatlantic liners, even before the First World War. The French legislator has not, however, chosen to draw a clear distinction between the link with the shipping company and the embarkation contract, the industrial relation and the terms of embarkation. The 1926 Maritime Labour Code ignored, and continues to ignore, developments taking place. This has led to confusion over the sources of maritime employment law, and to difficulties in interpreting texts, in all areas—commercial shipping, fishing, and the yachting industry. Over and above the individual industrial relation linking the seafarer to the shipping company, collective industrial relations are beginning to form. National collective employment agreements were concluded in the 1950s, providing the merchant navy with an adaptation of the 1926 Maritime Labour Code. The stabilisation of seafarers and the granting of permanent status to officers have modified professional and contractual relations, but it has subsequently proved impossible to adapt these agreements. Since the 1980s, these collective relations have been forming above all within shipping companies, in the negotiation of leave entitlements, crew numbers and redundancy packages. The law applicable to shipping companies now has almost no distinguishing features: the provisions of the Labour Code relating to professional organisations, staff organisations and collective employment agreements are applicable to shipping companies, with certain adaptations such as the institution of crew delegates. The authorities have proved incapable of modernising these crew delegates, who should be real delegates of the personnel. If a shipowner has several ships each of which is operated by a crew of less than ten, he is under no obligation to have the crew delegates elected, even if those ships are assigned several different crews. Case law has been forced to rebuild the consistency of the legal and regulatory provisions, making French maritime employment law fluid: In the face of silence from the legislator, the new law applies to shipping companies and seafarers. Is it still feasible to concern ourselves only with French law with respect to seafarers at a time when there are only 10,000 seafarers left in the French merchant navy and 20,000 in the fishing fleet?

This old national structure is being shattered by the Community structure, in particular by the principle of equal treatment for all nationals of Community countries. Since 1974, this principle of non-discrimination has called into question seafarers’ nationality privilege; nowadays, it’s the nationality privilege of the Master and First Mate that seems to be on its last legs. The nationality privilege of the Master and First Mate has been defended by the Commission, on the grounds of the prerogatives of the public

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authorities, even with respect to private jobs. This nationality privilege has been declared to be contrary to Community law, inasmuch as these prerogatives of the public authorities seem to be more potential than real. The European Community, in pushing for competition amongst economic operators, has not reconstructed the tutelary role of the State. At the very most, the opening-up of domestic coastal shipping to the whole Community has made it possible to reserve some routes for Community shipowners, and perhaps for Community seafarers. Regulation 3577/92 of the Council of 7 December 1992, on the application of the principle of the free movement of services to maritime transport within member states (coastal shipping), complements Regulation 4055/86 of 22 December 1986. It establishes, from 1 January 1993, the right of Community shipowners operating ships that are registered and sail under the flag of a Community country to provide coastal-shipping services throughout the Community; on 1 January 2004, shipping routes to the Greek islands from the Greek mainland were opened up to all Community shipowners. This Community opening-up, or liberalisation, affects all the national laws, and would appear to have little effect on laws that are widely applied in the international arena, such as Cypriot law. Though Community law has concerned itself with the ship and maritime safety, especially since 1993 and the shipwrecks of the Erika and the Prestige, it does not yet constitute a genuine common policy in this area. The 1996 Commission report “Towards a New Maritime Strategy” sets out options for strengthening safety, fair competition, the opening-up of markets, and a competitiveness policy endowed with incentives. The task, in a nutshell, is to reconcile a common transport policy with the principle of subsidiarity. In 1999, the Economic and Social Council deplored the absence of progress in reducing the tax and welfare burden, and the weakness of Community adaptation to international competition.

Community maritime law has little effect on seafarers, apart from its coordination of

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8Official Journal of the European Communities No 364, 12/12/92.


12Opinion of the Economic and Social Council No C56 of 24 February 1997, p. 9

member states’ social-security systems, which does not affect seafarers from outside the Community. The ease with which Cypriot law has adapted to Community law shows how little impact the latter has had on working conditions on board ship, terms of employment, living conditions, pay, and social welfare. A Community law for seafarers has yet to be constructed.

The old national structure is being shattered even more by the internationalisation of maritime labour, the practice of vessels’ being registered in whichever country the shipowner sees fit. This internationalisation has led to a splitting-in-two of registers in member states of the European Union, through international or offshore registers, repeat or cut-price registers. In order to adapt to international competition, it is necessary to develop labour flexibility. The law of the Flag State has to be reduced to a simple formulation with respect to non-Community seafarers, so as to leave room for a diversity of employment contracts. This trend, which began in 1986, has led to the abandonment of the proposed EUROS register, which was too lax for the unions, too rigid for the shipowners, and insufficiently adapted to international competition and the phenomenon of ships’ being taken off the registers of member states. The practice of vessels’ being registered in whichever country the shipowner sees fit has led to a growth in “controlled” fleets sailing under foreign flags, to the relocation of ships. The expatriation of Community seafarers and officers, under foreign flags, in order to save money on taxes and social-security payments, is affecting both the merchant navy and the yachting industry, especially in the Mediterranean. The flag-of-convenience phenomenon has been accompanied by an increase in instances of the abandonment of ships and seafarers, following the privatisation or bankruptcy of Soviet Bloc state shipping companies, and has led to a glut of “single-ship companies” and unscrupulous commercial operators. In the face of the decay of the law of the Flag State as a result of the flag-of-convenience practices of many Flag States that fail to comply with their international obligations, the reach of port-state control is inevitably being extended in order to ensure maritime safety, environmental protection, fair competition, and respect for basic labour rights. Seafarers are entitled, even in an international business, to decent working conditions and the

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protection of their basic rights. This trend, still in its infancy, could be built on, in particular by adding to Community law.

It should be recalled that member states of the European Union are also Flag States, and define the employment and social-welfare regulations applicable to crews working on board ships sailing under their flag. Limits should therefore be placed on the deconstruction of national labour structures in order to keep maritime jurisdictions within the European Union; there is also an urgent need to force ships putting in at European ports, whatever flag they are sailing under, to comply with national labour regulations, i.e. to strengthen controls on seafarers’ working, living and welfare conditions.

I The Deconstruction of National Labour Structures

The relentless competition generated by the practice of vessels’ being registered in whichever country the shipowner sees fit is affecting all shipowners; to avoid their taking their ships off the registers of member states, we need to diversify the standard national registers and make the national labour structure more flexible, through international and offshore registers. National maritime law is being split in two, at least. The European Union should consider harmonising the repeat, cut-price and international registers of member states.

1. The International and Offshore Registers of Member States

Since 1986, France has been able to use the register of Kerguelen, i.e. the French Southern and Antarctic Territories (FSAT), an overseas territory endowed with legal autonomy but with no regional assembly, since it has no permanent inhabitants. Nearly a hundred ships have a port of registry with the poetic name of “Port aux français”, even though they never go there and would be unable to berth there. Only the Marion Dufresne II, a ship that re-supplies FSAT scientific expeditions, merits its Kerguelen registration. The rest receive special exemption from the Government from the obligation of putting in there once every three months. Kerguelen is thus controlled directly from Paris. The 1952 Overseas Labour Code applicable to the FSAT has never been updated, and has been the subject of only two statutory instruments, in the absence of any permanent inhabitants, employers, businesses or workers.

An action was filed to repeal the decree of 16 June 1986 on the grounds that it constituted an *ultra vires* act; a similar action was filed with respect to the decree of 20 March 1987. However, it took the Council of State nine years to deliver its ruling. On 27

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October 1995, and then again on 16 January 1996, the Assembly of the Council of State voided all the statutory provisions on the registration of ships in the FSAT, on the grounds that the decree was aimed at modifying the respective ambi onal limits of the Maritime Labour Code and the Overseas Labour Code, something that falls within the exclusive remit of the legislature\textsuperscript{21}. Though Article 26 of the law of 26 February 1996 appeared to legalise the registration of ships in the FSAT, this was only an illusion, since it completely failed to specify the labour regulations for seafarers on board such ships, something that, according to the Council of State, falls within the exclusive remit of the legislature\textsuperscript{22}. Since the law authorises the registration of ships in the FSAT, and stipulates that the Master and First Mate must be French nationals, does it allow the industrial relations concerned to be governed by the 1952 Overseas Labour Code? Only following litigation on economic redundancies did the industrial division of the Court of Cassation decide on this matter, ruling that these maritime industrial relations be governed by the Overseas Labour Code, citing the ruling of the Council of State before contradicting it\textsuperscript{23}. The International Labour Organisation regularly notes that the position of foreign seafarers with respect to social welfare is vague, little controlled, and unclear.

Since 1999, France has been developing the registration of passenger ships in Wallis and Fortuna. The international rules ratified by France for passenger ships are not applicable to the FSAT. But Law N\textsuperscript{o} 66-508 of 12 July 1966, which extends the application of the Maritime Labour Code to Wallis and Fortuna, has not yet been the subject of the necessary statutory instrument\textsuperscript{24}. It has therefore become a matter of urgency that this decree not intervene, in order to allow hotel staff to retain their international contracts and enable shipowners to continue applying national collective agreements to French officers, within the framework of a good social policy. These French registers are flexible, but not without their drawbacks. No company is happy with legal uncertainty and a law that is too vague. These registers in overseas territories lie outside Community territory, and are thus unaffected by the opening-up of domestic coastal shipping—a fact of no great significance.

The upshot of all this was the scheme for a French international register, the FIR, prompted by the report from Senator de Richemont and passed by the Senate in December 2003 pending discussion in the National Assembly. Since many European countries—Italy, Germany, Denmark and Norway, for example—have an international register, France should have one, too\textsuperscript{25}. Even Turkey has equipped itself with an


\textsuperscript{22}P. CHAUMETTE: La francisation à l’épreuve du droit communautaire, DMF 1996, pp. 1091–1106.

\textsuperscript{23}Court of Industrial Cassation, 18 July 2000, Sellin et al. v. the company Fish, Droit Social 2000, p. 1043, DMF 2000, p. 891; these economic redundancies are unlawful, Court of Industrial Cassation, 18 December 2001, Droit Social 2002, p. 363, DMF 2002, p. 235, commentary by P. CHAUMETTE, 11 December 2002, ruling N\textsuperscript{o} 3638 F-D, appeal N\textsuperscript{o} R01-12599 and others, 19 March 2003, ruling N\textsuperscript{o} 953 FS-P, appeals N\textsuperscript{o} E01-10.680 and N\textsuperscript{o} F01-10.681.

\textsuperscript{24}Council of State, 9 February 2001, M. Fauvet, the ship Paul Gauguin, DMF 2001, p. 399.

international register, on 12 December 1999\textsuperscript{26}. Whilst social welfare can be connected to the state in which the seafarer and his family reside, as allowed by the conventions of the International Labour Organisation, the same does not apply for the terms of employment on board ship. Seafarers, even officers from France and other Community countries, seem to be excluded from the shipping company, staff representation and stability of industrial relations by precarious embarkation contracts. How can this differential treatment on board with respect to pay and leave be justified? Is the French Constitutional Council, to which the matter could be referred by members of parliament, likely to make as pragmatic an analysis as the German Constitutional Court has done\textsuperscript{27}?

The latter accepted the objectives of the legislator: to adapt to international competition and reserve skilled jobs for German nationals; it ruled that the principle of equality did not apply in this instance, since the seafarers’ situations differed depending on where they lived, which affected the cost of living and, therefore, their spending power. The Constitutional Court held that the German judge was competent to apply to foreign seafarers the law of their contract, i.e. a foreign law, but only in conformity with the basic principles of German labour law; as regards freedom of coalition, the German union must be able to negotiate for all its members, even those who do not reside in Germany\textsuperscript{28}. On this point, the law is in conflict with the Constitution, and had to be amended. The Constitutional Court seems to recognise the right of foreign seafarers working on German-flagged ships to belong to a German union, even if they reside abroad, and the union’s right to negotiate such seafarers’ terms of employment and pay.

In member states of the European Union, could the law of the Flag State shrink to cover only that state’s international and Community commitments, thereby leaving the Flag State at low tide, close to the practices of the international market? Whilst it might be acceptable to give shipowners some latitude in assessing their social policy, with the welfare state giving way to the welfare enterprise, this latitude is pulling both good and bad shipowners down and abandoning maritime jobs and know-how to the international division of labour. The abandonment of the sea will have a harmful effect on land.

\textbf{2. Community Harmonisation of the International Registers}

The failure of the EUROS register scheme was due to member states’ flight to international and offshore registers. This failure makes it both more difficult and more essential to harmonise seafarers’ employment conditions, if only on the grounds of fair competition. The issue has been tackled in terms of State assistance, and referred to the mechanisms of private international law.

\textbf{State Assistance}

\textsuperscript{26}N. ORAL: \textit{The Turkish International Ship Register, Baltic Maritime Law Quarterly}, Tallinn, 2004/1, pp. 1–19.


\textsuperscript{28}Bundesverfassungsgericht, Erster Senat, 10 January 1995, \textnumero 3/95; analysis of this ruling by G. AUCHTER in \textit{Chronique de droit maritime allemande}, DMF 1998, p. 53.
The principle of differential treatment depending on the seafarer’s place of residence has not, as such, been submitted for consideration to the European Court of Justice. The Court, asked to rule on a judgement delivered by Bremen Labour Court, found that the German international register constituted not State assistance, pursuant to Article 92 of the Treaty of Rome, but a mechanism of private international law, designating the law applicable to the maritime industrial relation.

Community guidelines on State assistance allow businesses that are subject to international competition to be exempted from making employers’ welfare contributions with respect to staff sailing on commercial vessels. This mechanism is preferable to the complicated refunding system introduced in France in April 1998. The 2003 Finances Law replaced the refunding of the maritime portion of business tax with the principle of tax relief. These measures were authorised by the Commission. It is proposed that the income of seafarers working more than 183 days a year at sea be exempted from tax, within the framework of a modification to Article 81-a of the General Tax Code. Since France has a PAYE scheme whereby the employer deducts employees’ taxes at source, this exemption from tax acts as an incentive to seafarers rather than to companies.

The composition and cost of the crew should be harmonised within the European Union, as should the terms of employment and pay, and the minimum social-welfare conditions, of non-Community seafarers. There is likewise a need to harmonise the obligations of Flag States in an extremely competitive market where there is a real risk of flag-of-convenience practices. If the authorities and shipowners wish to cut the post of a rating or a lieutenant, both if possible, in order to maintain ships’ registration levels or, even better, make them positively attractive, either controls need to be relaxed and formalities simplified or discount registers, which are more attractive inasmuch as they are more relaxed, need to be sought. The de Richemont report proposes abolishing all quotas of French or Community seafarers within a crew in order to get more French seafarers onto the Kerguelen register than is currently the case (35%), which is to say the least paradoxical. It emphasises several times the larger size of crews on French ships, the flexibility of trade-union negotiations in Italy and Denmark, and the diversity of decisions taken by different national maritime-affairs authorities. There are significant competitive advantages here. It is not clear what conclusion should be drawn: should administrative certification of crewing decisions taken by shipowners be abolished, collective bargaining, either at a national level or within each individual shipping

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company, be facilitated, or crewing decisions be left to the shipowner alone, subject to simple *a posteriori* control by a maritime-labour inspector\(^{33}\)?

The trends with respect to registering ships in the FSAT do not appear likely to shed any light on the debate. On the one hand, the FSAT are an overseas territory that lies outside the jurisdiction of Community law. On the other hand, there are no statutory texts relating to the composition of crews. Order No 2002-357 of 14 March 2002, on the registration of ships in the FSAT, amended Article 26 of Law No 96-151 of 26 February 1996 on transport as follows\(^{34}\):

*The crews of ships registered in the French Southern and Antarctic Territories must have a minimum quotient of French seafarers. This quotient is set by a decree from the Council of State, and depends, in particular, on the technical specifications of the ship in question or its mode of operation. The Master and First Mate must be French nationals.*

However, an agreement between the head of the company and the representative union organisations at the company or, in the absence thereof, the staff delegates, may set a quotient that is different to the one cited above, in accordance with the terms, and within the limits, set by the Council of State’s decree.

Whilst a national agreement has managed to be signed, it has not had a great impact\(^{35}\). The diversity of national [i.e. member states’] international registers raises issues of fair competition, even though it is currently being examined in the light of the provisions of international private law.

**International Private Law**

Traditionally, the crew is subject to the law of the Flag State. But the law of flag-of-convenience States nearly always provides only for individual employment contracts, sometimes supplemented by a company-wide agreement or an ITF agreement. There is unquestionably a need to modernise in the light of the weakening of both the law of the Flag State and the unitary status of the crew. If every seafarer can be subject to the law of his contract, with his personal status determined by his place of residence, would the unity of the crew not then be a matter solely for the company’s internal norms and crew regulations?

German law seems to be part of a wider trend challenging the applicability of the law of the Flag State. In 1989, the Federal Labour Court ruled out the application of the law of the Flag State to a ferry cashier. This ferry was sailing under the German flag, but the [cashier’s] contract contained close links to the United Kingdom, which entailed the application of British law by taking into account the employee’s nationality and place of residence. The contract contained no express or explicit reference to the law selected to govern the contract; the court therefore ruled out the application of the law of the Flag

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\(^{34}\)JORF [Journal officiel de la République Française—“Official Journal of the French Republic”] No 64, 16 March 2002, p. 4788.

State, as well as the connection with the state in which the hiring company was located—in this case, coincidentally, Britain, though there was some uncertainty in this regard\textsuperscript{36}. Since this ruling, the ship has no longer been recognised as a workplace endowed with a nationality. International industrial relations have since then had to be connected, in the absence of the employment contract’s explicitly selecting a law to govern it, to the national law with which the contract is most closely connected. This ruling seemed to anticipate the application of the Rome Convention of 19 June 1980, which came into effect on 1 April 1991, on conflicts of law with respect to contractual obligations. The judge did not seek to invent an implied law selected by the contracting parties on the basis of a joint intention that they had not expressed, but strove to objectivise the contractual relationship, which does not explain the disappearance [sic!] of the ship and its flag.

The Federal Labour Court has continued this trend challenging the applicability of the law of the Flag State to the crew: Indian seafarers were working on a German-flagged ship that was registered on the German international register; the law of the Flag State, as the law of the place where their work was carried out, was ruled out, on the grounds that a ship is not a State, a piece of detached territory; the same went for the law of the place where the employer, i.e. the shipowner commercially operating the ship, was established, i.e. German law. The employment contracts were therefore most closely connected to India, irrespective of whether or not they expressly referred to the seafarers’ nationality or their places of residence\textsuperscript{37}.

The Rome Convention of 19 June 1980 deals only with Community relations, internationalisation within the territory of the Community. Article 2 thereof states that the law designated by this Convention shall be applied even if this is a law of a State that is not a party to the Convention. The Convention has universal applicability; it comes into play as soon as a judge of a member state of the European Union is competent. It is as much international law as Community law. It is leading to uniformity in dispute-resolution for Community countries with respect to international contracts.

The interpretation of the Rome Convention is no longer entrusted to the European Court of Justice, but to judges of the individual member states. Whilst the competent judges in the European Union are obliged to select the applicable law on the basis of the criteria imposed by the Rome Convention, and to investigate the content of the foreign law designated by the rules on conflicts of law, we seem to be a long way from the uniformity of interpretation provided by the European Court of Justice. The two protocols required for this extension of jurisdiction were only signed on 19 December 1988, but they were

\textsuperscript{36}Federal Labour Court, 2\textsuperscript{nd} Division, 24 August 1989, AP \textnumero 30 to Article 30, para. 2, Nos 1 and 2 E GBGB, commentary by A. JUNKER, \textit{Internationales Arbeitsrecht im Konzern}, report by P. LAGARDE, RCDIP 1994, p. 240.

not ratified by enough countries to allow them to come into effect\textsuperscript{38}. Courts of first instance will not be able to refer matters to the ECJ, unlike the appeal for a reinterpretation of Article 177. Only courts whose decisions cannot be appealed against—the Court of Cassation, for example—may refer matters to the ECJ. Draft Regulations are being drawn up aimed at instituting these mechanisms throughout the Community and unifying their interpretation.

Article 6 is especially devoted to the employment contract. A problem with the designation of the employment contract could arise. In all member states, the definition of the employment contract focuses on pay and subordination, but the sphere of employment is not identical. The individual employment contract is governed by the law selected by the parties. This is the general rule stipulated by the Convention with respect to the contract. But the law selected may not deprive the employee of the minimum protection afforded him by the law of the place where he carries out his work. The law selected by the parties may only be applied if it is expressly cited in the contract or is clearly implied by the provisions of the contract or by the circumstances. The judge could no longer simply invent, or guess, the contracting parties' intention; he may only find it and express it. If the law selected by the parties is not expressed, the judge may turn to the law of the place with which the contract is most closely connected\textsuperscript{39}.

The law selected by the parties may not take precedence over the law of the workplace, which intervenes as a regulatory law, beyond the sphere of the administration of labour. The dismemberment of the contract is thus intensified; it follows from the comprehensive combination desired by the Convention, from the object-by-object comparison. The parties may select only the law of the contract, not the contractual provisions. Whichever law they have selected, the employee may not be deprived of the protection afforded him by the law of his customary workplace; the concept of industrial public order is clearly at work here. The nationality of the employee or the employer is irrelevant. The Rome Convention stipulates that the law of the workplace shall apply to any employee working in the Community. The law of the workplace intervenes as the law that is normally applicable (in the absence of any other law's having being selected), and as the regulatory law (despite the selection of another law). What differentiates the Convention from earlier French precedential solutions is the inversion of the order of factors. The law selected by the contracting parties comes first, but the law of the workplace constitutes a minimum. The uncertainty turns on the judge's power to rule out a selected law that is merely implied, and that is not closely connected with the contract, in favour of another law that is more closely connected therewith, complementing the law of the workplace\textsuperscript{40}.

The Convention provided for complementary points of attachment, relating to employees who carry out their activities in several countries. The permanent point of connection will

\textsuperscript{38}P. RODIÈRE: \textit{Droit social de l'Union européenne}, LGDJ, Paris, 2\textsuperscript{nd} Edition, 2002, \textnumero\textsuperscript{536} et seq.


\textsuperscript{40}see the Report by LAGARDE and GIULIANO, Official Journal of the European Communities \textnumero\textsuperscript{C282} of 31/10/80.
be the establishment that hired the employee (which is not necessarily the same thing as
the company’s registered office). This rule holds for sales reps and workers in
international transport. Workers on oil rigs would be connected to the company’s
registered office (see the LAGARDE-GIULIANO report). The determination of the law
of the customary workplace has given rise to debate on mobile workers, seconded
employees, flight personnel, and work carried out on oil rigs. When there is no one
country in which the employee customarily perform his work, the Convention states that
he shall be governed by the law of the place where he was hired. This would seem to
apply to pilots and oil-rig workers. For the seafarer, the law of his customary workplace
is traditionally that of the country under whose flag his ship is sailing, which may leave
room, to a greater or lesser extent, for the employment contract concluded with the
shipowner or a crewing agency, which may be subject to a law other than that of the Flag
State.

For temporary secondment, the law of the country of origin continues to govern the
employment contract. But if the workplace has been permanently transferred abroad the
law of the contract may only be changed by citing, by mutual agreement, the law of the
country of origin, or if the contract is more closely connected to a country other than that
in which the work is performed (Article 6-2-b). This represents a new flexibility, and a
certain strengthening of the judge’s powers. The underlying rationale is that the
applicable law should be the law of proximity. But what is meant by proximity? The law
applicable to the contract governs its interpretation, the discharging of the obligations
contained therein, the consequences of failing to discharge those obligations, the
termination of the obligations, statutes of limitations, the effects of nullity, and the terms
applicable to and consequences of the contract’s being breached.

As regards the form of the employment contract, Article 9 of the Convention provides a
choice: either the law governing the contract’s content or the law of the country where
the contract was concluded. The grounds for voiding the contract flow from this law of
to all contracts that are subject to the law of a member state.

The combinatorial system necessitates identifying both the law selected by the parties and
the law of the customary workplace. In the absence of one of these, the remaining one
must be applied, i.e. either the law selected by the parties or the law of the workplace.\footnote{Paris Court of Appeal, 7 June 1996, 18th Division, in Boikov v. the Black Sea and Baltic General Insurance Company Ltd, RTDE 1996, p. 785, H. GAUDEMET-TALLON, RCDIP 1997, p. 55, M.A. MOREAU; Court of Industrial Cassation, 10 December 1996, Juris-Classeur Périmodique 1997, Ed. E, pan [?] 131.}

In a case in which diving work was carried out abroad and the law selected by the parties
was explicitly cited, viz. the law of Jersey or of the Swiss canton of Fribourg, it was the
law of the customary workplace that was uncertain, due to the variety of locations in
which the divers worked. The applicants argued not that the law selected by the parties
should be complemented by a law of the workplace but that the industrial relation should
be subject to French law, since the registered office of the parent company was in
Marseilles. The Court of Cassation had no means of assessing the impact of the law of

the workplace and could not, therefore, search for that principal place. The work was not performed in France, even though the parent company’s registered office was in Marseilles and the foreign subsidiaries put the divers at the disposal of the parent company. The divers were hired abroad to work abroad; their industrial relation was not most closely connected to French law. In the absence of an adequate territorial law at the place where the work was performed, the industrial relation in question, ruled the Court, should be governed by the law selected by the contracting parties 42.

The situation would be different for seafarers recruited to serve on board a ship, which always sails under the flag of a State. Nevertheless, the shrinking influence of the law of the Flag State is tending to favour the application of the law selected by the shipowner or crewing agency, except with respect to disciplinary matters. The international market tends to “de-territorialize” the ship as much as possible, so that the seafarer works abroad and not on the territory of a member state; it also tends to loosen the ties between the seafarer and the shipping company, and even with the shipowner, in favour of ties to the crewing agency, an intermediary that is also “de-territorialized”. Could the internationalised maritime employment contract end up with no points of connection to any nation state?

Towards Community Registration of Crewing Agencies?
Non-Community seafarers on ships on the international registers of member states are under the authority of the shipowner, but are recruited by crewing agencies, sometimes through public or private employment agencies in their countries of origin. The content of their employment contracts is essentially determined by these crewing agencies, according to their skills and geographical origins. This creates a heterogeneous international market, made up of regional maritime-labour markets. States of which seafarers are nationals sometimes endeavour to protect their nationals, but far more frequently endeavour to keep their market share. Excessive social welfare, diplomatic protection, repatriation in the event of abandonment, and support for union rights and the right to collective bargaining, would increase the cost of the workforce and reduce their market share. At the very most [sic], the quality of maritime training needs to be strengthened pursuant to the requirements of the IMO’s STCW Convention, revised in 1995, and in the light of assessments conducted by both the International Maritime Organisation and the European Union 43.

The parliamentary bill on the French international register (FIR) aims to legalise the current practice, which takes place outside any legal framework and is not controlled. The crewing agency puts seafarers at the disposal of the shipowner, and hires and pays them on the shipowner’s behalf. This bill also makes the crewing agency the seafarers’ employer, within the framework of a maritime-employment concern, a specific form of temporary-employment concern, with the shipowner remaining liable for its crewing

42 Court of Industrial Cassation, 29 April 2003, in Mr X et al. v. the companies Stolt Comex Seaway and Sogexpat Ltd, DMF 2004, p. 429.
agency’s complying with the provisions of the law of the Flag State, i.e. for its complying with France’s international and Community commitments. The crewing agency must be registered by the authorities of the State in which it is established, in accordance with ILO Convention № 179 of 1996, which France has ratified. The seafarer’s employer is the maritime-employment concern, which is only an intermediary, an authorised agent of the shipowner. The maritime-employment concern puts seafarers at the shipowner’s disposal, but does not manage the crew, nor its living and working conditions; it provides workers, not work. The shipowner is therefore liable for any violation of the provisions of Convention № 179: payments demanded from seafarers before they can start work, double contracts, unsigned letters or cheques. Should the maritime-employment concern collapse, the shipowner will have to pay and repatriate the seafarers and finance the insurance contracts. The shipowner will also be liable for any failure to comply with Community directives and with international conventions that have been ratified by France. While the seafarer is at the disposal of the shipowner, the latter is liable for his living and working conditions on board ship. This liability may be both civil and criminal. It is the shipowner who uses the seafarer’s labour, even though the seafarer has a direct contractual relationship only with the maritime-employment concern, which would seem to rule out the application of French law on redundancy.

The contract on putting personnel at the disposal of the shipowner must specify pay, the duration of the contract, and social welfare. The same goes for the employment contract concluded between the seafarer and the crewing agency, which must specify occupational skills. These contracts must be kept on board, and may be examined by the maritime-labour inspector. The absence of a written contract on putting seafarers at the shipowner’s disposal constitutes a criminal offence. Maritime-employment concerns established in France may only operate once they have been registered by the maritime authority. They must demonstrate that they possess a financial guarantee against the risk of insolvency, and that they can thus cover pay, repatriation, and the financing of insurance contracts. The text is obviously inspired by provisions relating to temporary employment, including with respect to criminal liability. It conforms to Resolution A930 (22) of the International Maritime Organisation of 17 December 2001 as regards the furnishing of a financial guarantee against the eventuality of the seafarers’ being abandoned. But these provisions affect only maritime-employment concerns that are established in France. The parliamentary bill obliges the French shipowner to take out insurance against the risk of the crewing agency’s insolvency, with respect to the payment of wages, insurance-contract premiums, and repatriation costs. The shipowner thus has an incentive to work with a good crewing agency, wherever it may be established, since he will be liable for it.

The same requirements to be registered, possess a financial guarantee, comply with Convention 169, respect union rights, and not to use blacklists, should be imposed on every crewing agency, whatever the location of its registered office. This quite obviously is beyond the jurisdiction of an individual member state, but could fall within the remit of Community jurisdiction, through the intermediary of the European Maritime-Safety

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Agency. Council Directive 94/57/CE of 22 November 1994 lays down the common rules and norms on bodies that are authorised to inspect and visit ships, and on the relevant activities of [member states’] maritime authorities. The Commission’s decision of 14 March 2002 takes into account the Commission’s previous decisions of 14 July 2000 and 13 December 2001 on the registration of the Portuguese Rinae-Registro Internacional Naval S.A. and the Hellenic Register of Shipping, and amends the list of registered bodies. A similar procedure is conceivable—indeed, in our opinion is essential—with respect to the registration of crewing agencies. It is not feasible to have more and more debates on and studies of the human factor in maritime safety and not take any requisite measures.

Should we be expecting litigation before the European Court of Human Rights based on the inadequacy of the treatment of non-Community seafarers on board ships sailing under the flags of member states? If so, should it be pleaded that this European Convention on Human Rights does not apply on board ships on member states’ international or offshore registers? The Convention applies to every person who falls within the jurisdiction of members states, and to the maritime zones and locations where such states exercise their jurisdiction.

The status of the ship
The fact that the law of the Flag State no longer reigns supreme on board ship, due to the inroads made by the law selected by the parties to the employment contract, seems to be modifying the status of the ship, which of course remains a workplace for the crew, but also clears the way for connections to various different legal systems. The status of the ship—a thing endowed with a nationality, a name and a port of registry, a registered movable that is often treated as real estate due its value, the collateral of maritime creditors, a centre of competing interests—is therefore directly at stake. The civil, merchant, fishing or cruise ship is not an extension of the territory of the Flag State. Despite the ruling of the Standing Court of International Justice in the Lotus case of 7 September 1927, the theory of territoriality has not flourished, because the ship leaves international waters, the high seas, to enter the territorial waters of a State and put in at a port. In registering a ship, the Flag State thereby confers its nationality on it. This mark of the Flag State’s sovereignty creates a connection, which should be substantial, between

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47Official Journal of the European Communities № L73, 15/03/02, p. 30.
the ship and the Flag State.\(^{51}\) This connection has been exclusive on the high seas since the Brussels Convention of 10 May 1952 on criminal jurisdiction in the event of collisions; this exclusivity was confirmed by the 1958 Geneva High-Seas Convention, and then by the United Nations Convention on the Law of the Sea of 1982. Only limited exceptions to this exclusivity are provided for, by the Montego Bay Convention.\(^{52}\) However, this does not apply in the territorial waters of a State whose flag the ship is not sailing under, all the more so since the inertia of many Flag States is leading to the growth of complementary connections.\(^{53}\) But this is not the place to go into all the civil, commercial and social facets of the status of a ship in a foreign port.

With respect to the international registers, it is widely accepted that the seafarers work abroad, outside the territory of the Flag State. The income of Community officers is thus exempted from taxation, which constitutes a subsidy to the shipping companies. This mechanism does not appear to be limited to taxation, but is implicitly extended to the terms of employment on board, including those of non-Community seafarers. This whole issue requires clarification, at a time when the law of the workplace seems to be disappearing to the benefit of the seafarer’s personal status.\(^{54}\)

II The Reconstruction of International Maritime Employment Law

The same issue of the ship’s current status arises with respect to flagged ships that have put in at French ports. In France, primacy is accorded to the law of the Flag State, which leads to a limitation on the application of the law of the port, whether with respect to the competence of the French judge to consider seafarers’ wage claims (with or without an arrest) or to the intervention of the police or public prosecutor. If the ship has been arrested, the courts of the State of the port of call may have jurisdiction, pursuant to Article 7-1 of the Brussels Convention of 10 May 1952. French judges have tended to limit their international jurisdiction.\(^{55}\) The Court of Cassation eventually condemned this restrictive approach, ruling that the court of the place where the ship was arrested shall be competent to rule on the merits when the maritime debt arose during the voyage in the course of which the arrest was effected.\(^{56}\) It took the ITF’s financing of the CFDT [Confédération française démocratique du travail] Maritime Union’s appeal to the Court of Cassation, on behalf of Turkish seafarers on a Turkish ship, to clarify the situation as

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\(^{56}\) Court of Civil Cassation, 1st Division, 18 July 2000, in the case of the \textit{Obo Basak}, DMF 2000, p. 725, Y. TASSEL.
regards the treatment of the abandonment of seafarers and of unpaid wage debts, on this point at least. The reluctance of French judges to accept the international dimension of their jurisdiction over industrial disputes on board foreign ships that have put in at our ports is the result of an excessive and ancient analysis of the reach of the law of the Flag State and of freedom of navigation: the backdrop to their interpretations seems to be the Opinion of the Council of State of 28 October 1806, which is rarely cited. This opinion regarding the jurisdiction of the Port State is misinterpreted, with the exception becoming the rule. This debate on the nature and reach of the law of the Flag State, and on the legal status of the ship, should be resumed.

The practice of vessels’ being registered in whichever country the shipowner sees fit has led to the phenomenon of fleets controlled under a foreign flag, to the flourishing of “single-ship companies”, and to the expatriation of European officers on foreign-flagged ships, in both the merchant navy and the yachting industry, especially in the Mediterranean. The decay of the law of the Flag State, as a result of the fictitious connections between the ship and its Flag State, has inevitably led to the appearance and expansion of Port State control. The social controls of the Port State need to be strengthened, and Europe-wide international public order created, in order to ensure that decent working conditions and basic rights are adhered to in our ports.

1. Strengthening the Social Controls of the Port State

ILO Convention 147 of 1976 allowed ratifying States to impose compliance with their norms on board ships putting in at their ports, under whatever flag they are sailing. The Paris Memorandum of Understanding (MOU) of 1982 is an agreement between national governments aimed at imposing compliance with IMO conventions on board ship; it refers to ILO Convention 147, but the controls are currently technical rather than social: strengthening maritime safety, preventing pollution, policing the maritime-transport sector. Crews’ skills and pay are increased by controlling the application of STCW Convention, revised by the IMO in 1995, and also of labour regulations, especially those relating to working hours. A new principle of equal treatment is arising, prohibiting discriminatory treatment. Ships sailing under the flag of a State that has not ratified these international conventions may not be given preferential treatment. It would appear to be difficult to insert social clauses into international agreements on the free movement of goods, and trickier still to ensure they are complied with. Port State control seems to be giving rise to international control of the ship and maritime labour. International coordination is essential, since it would make it possible to track a ship under its


successive flags and identities. It is imperative to assess national control practices in order to avoid both controls that exist purely on paper and controls that are too lax. One of the roles of the European Maritime-Safety Agency is to assess national control practices.

Since 1993, the European Union has integrated this maritime-safety measure, in particular through Council directive 95/21 of 19 June 1995 on Port State controls. The international conventions need to be strengthened, and their impact regionalised, but without taking unilateral measures. There are various directives on ship inspections, classification societies, signalling requirements for ships transporting dangerous cargo, and the phased ban on single-hull tankers. Following the shipwreck of the Maltese tanker the *Erika* in December 1999, Directive 2001/106 on the strengthening of Port State control advocated banning ships repeatedly found to be sub-standard. Directive 2002/59 of 27 June 2002 provides for the setting-up of a Community system for tracking shipping and information. Like the Paris Memorandum of Understanding of 1982, directive 95/21 has a social dimension, but one that is extremely limited; both texts refer to ILO Convention 147, which deals with food and lodging on board ship and the existence of written employment contracts. The control of the ship, like all the preventive measures, is essentially technical. They emphasise safety of navigation, the stability of the ship, firefighting measures, communication and rescue facilities, the prevention of pollution, and health-and-safety conditions on board ship. On the social level, a ship may be detained in port if the strength, composition or certification of the crew does not correspond to the document stipulating the crewing requirements, if the crew’s living quarters are not equipped to deal with the low-temperature zones that the ship is operating in, or if there is rubbish, equipment or cargo in the gangways or cabins (ILO conventions). Protocol 196 to Convention 147, recently ratified by France, extends the social controls to ILO Convention 133 on crew accommodation, Convention 180 on working hours and crew numbers, integrated in section A of the appendix, and, if need be, to Conventions 108 on seafarers’ identity papers, 135 on workers’ representatives, 164 on the protection of health and medical care, and 166 on the repatriation of seafarers, integrated in section B of the appendix.

Even before the shipwreck of the *Erika*, both the International Labour Organisation and the European Union had taken steps towards the international regulation of working hours in the merchant navy. On 18 November 1998 the European Commission sent a recommendation to member states asking them to commence procedures for ratifying Convention 180 and the 1996 protocol to Convention 147. Directive 99/63 of 21 June 1999 ratifies the European collective agreement of 30 September 1998 on the organisation of the working hours of seafarers in the merchant navy. This directive

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prescribes either a minimum of 10 hours off and a maximum of 14 hours’ work over a 24-hour period, or 77 hours off and a maximum of 72 hours’ work over a period of 7 days. Every ship must have a crew of sufficient size and quality to guarantee safety. This agreement covers seafarers working on merchant ships sailing under the flag of member states of the Community; it anticipates the ratification of ILO Convention 180 of 1996. Directive 99/95 of 13 December 1999, of the European Parliament and the Council, is concerned with the application of provisions on the working hours of seafarers on board ships putting in at Community ports. The aim of this directive is to apply directive 1999/63 of 21 June 1999, and ILO Convention 180 of 1996, to any ship putting in at a Community port, whatever flag it is sailing under, in order to identify and remedy any situation that poses a clear threat to seafarers’ health or safety. It is a question of maintaining safety and avoiding distortions of competition, even with respect to ships whose Flag State has not ratified Convention 18065.

It would be advisable to integrate into Community law, within the context of social controls over ships by the Port State, compliance with IMO General Assembly Resolutions A930 and A931 of 29 November, and compliance with the so-called “green ticket” pay agreement of 13 November 2003 concluded by the ITF, 75 European shipowners in IMEC, and Japanese shipowners.

The IMO resolutions are concerned with guaranteeing the payment of seafarers’ wage claims in the event of their being abandoned, and with shipowners’ liability with respect to contractual claims for seafarers’ personal injury or death. Since wage claims are connected to subsistence, and since the repatriation of seafarers, along with compensation for work-related personal injury or sickness, is a basic right, compliance with these obligations needs to be imposed on every shipowner, whatever flag his ship is sailing under, who intends trading with the European Union and putting in at a European port. Foreign seafarers working on a foreign ship that is registered in a State that is not a member of the European Union are not covered by the provisions of directive 2002/74 of 23 October 2002, which modified directive 80/987 of 20 October 1980 aimed at protecting workers from the risk of their employer’s insolvency66. A commercial operator, i.e. shipowner, that is not established on Community territory is not covered by Council Regulations № 1346/2000 of 29 May 2000 on insolvency procedures.

These Resolutions of the IMO General Assembly remind member states that as Flag States they are under an obligation to ensure that shipowners comply with directives, that seafarers employed or hired on board ships sailing under their flag are protected, in the event of their being abandoned, by a financial-guarantee system. Shipowners must ensure that there is a certificate on board any ships embarked on international voyages attesting to the existence of a financial guarantee. This certificate must be displayed at a clearly

visible location in the seafarers’ living quarters. A copy of the certificate must be provided, if necessary, to the immigration authorities.

If the shipowner fails to discharge his obligations, the Flag State and, in certain case, the State of which the seafarer is a national or the Port State, may be asked to intervene. When seafarers have been abandoned in a place that falls within the jurisdiction of the Port State, that state must notify the Flag State and the States of which the seafarers are nationals, and must cooperate with them with a view to mutual assistance and a rapid resolution of the situation. If the shipowner does not fulfil his international obligations, if the financial-guarantee system \(sic\) or the Flag State fails to discharge its obligations, the Port State or the States of which the seafarers are nationals may repatriate the seafarers, without prejudice to the recovery of the costs incurred thereby. The Port State communicates to the IMO General Secretary or the ILO Director General the national contact points responsible for handling cases of abandonment, so that the information can be disseminated as widely as possible.\(^{67}\) The issue of the financial guarantee for seafarers’ wage claims could be inserted into the draft single international labour convention for seafarers produced by the high-level ILO group, which is due to be adopted in Geneva in 2005.\(^{68}\) In our opinion, such a guarantee should form part of Community law, thereby internationalising Directive 2002/74 of 23 October 2002. Whatever flag the ship is sailing under, the basic principles of Community labour law must be complied with in European ports.

As regards pay, the ILO’s joint maritime committee recommends a minimum wage for an ordinary rating, currently set at 465 USD, and due to rise to 500 USD on 1 January 2005. But this is a single recommendation, a reference to the basic pay of an ordinary rating, and in no way constitutes a payscale of minimum wages. It is mainly the International Transport Workers’ Federation (ITF) that intervenes in matters of pay and social welfare.\(^{69}\) The ITF endeavours to conclude agreements with shipowners for seafarers working on ships sailing under flags of convenience; the shipowners thereby obtain a “blue ticket”, which facilitates maritime navigation, and contribute to the seafarers’ welfare fund. The ITF is currently revising its strategy through IBF agreements. On 13 November 2003 an agreement was concluded—known as the IBF (International Bargaining Forum) agreement—that constitutes a highly significant shift in the way in which ITF norms are going to be applied on ships. This was an agreement between the ITF and the JNG (Joint Negotiating Group), which represented 75 shipowners from 24 IMEC countries as well as Japanese shipowners, represented by their own association, the IMMAJ (International Mariners Management Committee \(sic\) of Japan.


Henceforth, the terms and conditions of the ITF agreement will be not those unilaterally deemed acceptable by the ITF, but those jointly elaborated by the ITF and shipowners represented in the JNG. The ITF collective agreement traditionally accompanied by the issuing of a “blue ticket”—attesting to the fact that the ship is covered by a standard ITF TCC agreement, with an AB’s wages set at 1400 USD—will remain in effect, but will be replaced as far as possible by the IBF agreement, under which a “green ticket” is issued. This agreement is the fruit of a 12-year process of discussion and negotiation. International union action is an essential component of any social reform, provided the dialogue with the shipowners is constructive. Tripartite cooperation between the State, shipowners and seafarers’ unions to curb human-rights violations and obtain respect for labour rights in the shipping business requires the elaboration of restricting instruments of international labour law. Such instruments are unlikely to result solely from the single seafarers’ convention that the ILO is due to adopt in 2005. Even though ratifying states can impose these provisions on any ship putting in at their ports, this convention will not include a payscale of minimum wages, and is likely to be very disappointing with respect to social welfare. It should therefore be supplemented, in these two essential areas, by international-level collective bargaining. By imposing an ongoing dialogue, the move from the “blue ticket” to the “green ticket” should have positive effects going far beyond compliance with seafarers’ employment terms and conditions, thanks to the institutionalisation of social dialogue.

This international and European social dialogue should be inserted into Community law, as should ILO Convention 180 on working hours. This negotiated payscale should become mandatory on board both ships putting in at European ports and ships registered in member states of the European Union, including ships on the international registers thereof.

2. Constructing International Public Order

Community law alone, in its social dimension, cannot reconstruct maritime employment law; nor can the international law stemming from ILO conventions or the impending single convention for seafarers; the same goes for international union action. It is worth wondering what can be expected from decisions of the International Maritime-Law Court, which sits in Hamburg. Institutional coordination is vital, but will have to define the criteria for reconciling the different interests and values—for example, reconciling the

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shipowner’s freedom to register his ships wherever he sees fit, and freedom of
navigation, with compliance with fishing regulations or respect for seafarers’ basic rights.

National courts, which are competent pursuant to the solutions to conflicts of jurisdiction
provided for by Regulation 44/2001 of 22 December 2000\textsuperscript{72}, can be induced to participate
in the construction of an international public order that ensures seafarers’ basic rights are
protected. Such interventions are highly selective, but can still be viewed as a
contribution to the regulation of maritime industrial relations. Some examples may be
given.

The jurisdiction of a European Union judge sometimes comes as a surprise to the
organisers of these international maritime industrial relations, who have taken care to
register the ship in a State that is flexible with respect to taxation and welfare, to set up an
offshore company supposedly acting as the employer, for example in the Cayman Islands
or the West Indies, to have a commercial operator in a European country whose laws are
applied in the international arena, such as the Netherlands and Luxemburg, to say nothing
of the diversity of the British Isles.

The French Court of Cassation, for example, asserted the international jurisdiction of
French judges with respect to an employee who lived in France who was working for a
foreign employer on board a foreign ship operated from a French port. The Court cited
both the transposition of domestic jurisdictional criteria into the international arena and
Community law on conflicts of jurisdiction. This territorial connection enables an
employee to apply to a local court even though the ship’s offshore registration could
allow connections that are distant and fictitious, deliberately obscuring the employer’s
identify. This connection could lead the judge to apply the foreign law of the employment
contract.

Conflicts of jurisdiction are resolved in different ways depending on whether or not the
respondent is resident on Community territory. The appeal thus emphasised that the
shipowning company was established in the Cayman Islands rather than in the registered
office in the Netherlands of the company that was commercially operating the ship. If the
respondent is not domiciled in the territory of member states of the European Union, the
conflict of jurisdictions is resolved through national precedential mechanisms, by
applying the principle of the transposition of domestic jurisdictional criteria, i.e. Article
R517-1 of the Labour Code, into the international arena\textsuperscript{73}. The Court ruled that in the
case in point the work was performed outside of any establishment, thereby allowing the
jurisdiction of the industrial-tribunal judge of the employee’s place of residence, Le
Cannet. The ship does not appear to constitute an establishment, in particular because it
can sail on the high seas, outside the territory of any specific country.

\textsuperscript{72}Official Journal of the European Communities \# L12, 16 January 2001; H. GAUDEMET-TALLON:

\textsuperscript{73}Court of Civil Cassation, 1\textsuperscript{st} Division, 19 October 1959, Pelassa, D 1960-37, D. HOLLEAUX; J.
If the respondent is domiciled in Community territory, it is vital that the Conventions binding member states of the European Union be applied, to begin with—the Brussels Convention of 27 September 1968. The court of the place where the obligation is discharged is competent even when the Italian employee was hired by a German employer to work as a seafarer on a yacht anchored in a French port, irrespective of what flag the vessel was sailing under. It is of little relevance whether the seafarer is called upon to perform his work in international waters or in foreign waters. The seafarer is less connected to the ship and its Flag State than he is to the ship’s customary port—the actual port of registry, as it were, as opposed to the purely administrative one.

Section 5 of Regulation 44/2001 is concerned with jurisdiction over individual employment contracts. In Articles 18 to 20 of this section, a distinction is made between legal action initiated by the employer and legal action initiated by the employee. On the one hand, the employer is deemed to be domiciled in the European Union if it trades there through an agency, branch, or other establishment. On the other hand, the employer may act only before the court of the worker’s place of residence, in order to comply with the proximity requirements. The employee may choose between the employer’s registered address, the place where he customarily performed or performs his work and, if he does not customarily perform his work in any one country—the place where the company that hired him is established. Whilst the determination of the customary workplace in order to establish jurisdiction is unconnected to the determination of the applicable law, the general method involved is identical, since its starting point is the search for a way to root the international industrial relation. Article 64 contains specific maritime provisions relating solely to ships registered in Greece and Portugal, stipulating the obligation to notify the diplomatic or consular official of the state under whose flag the ship is sailing. Beyond this substantial formality, this article recognises the jurisdiction of the judges of the port of call to rule on a dispute between the ship’s crew or Master and a shipowner who is established within the Regulation’s ambit.

The courts accept, at the seafarer’s request, the jurisdiction of the court of the port where the seafarer works, the ship’s “actual” port of registry, i.e. the seafarer’s place of residence, ignoring the ship’s Flag State, the often illusory administrative port of registry, the place where the seafarer was hired, and the employer’s registered address. It is hardly outrageous that access to the law and justice should lead to favouring a connection of proximity.

Once the national judge is deemed competent, it falls to him to settle the conflict of laws, if the situation has an international dimension, and possibly to apply a foreign law—either the law selected by the parties to govern the contract or the law of the Flag State. The Rome Convention of 19 June 1980 on the law applicable to contractual obligations, which came into effect on 1 April 1991, determines, in the context of Community law,

the law applicable to civil and commercial contracts. With respect to the employment contract, it imposes its combinatory system on all courts of member states, viz. the law selected by the contracting parties, the law of the customary workplace, even in the event of temporary secondment, or the law of the country in which the company that hired the seafarer is located, if there is no one country in which he customarily performs his work (Article 6). The principle is that the contracting parties may select whichever applicable law they choose, but may not evade the protection afforded to the workers by the mandatory provisions of the law that would have been applicable in the absence of such a selection. If no law is expressly cited in the contract, nor clearly implied by the provisions of the contract or by the circumstances, the applicable law must be sought pursuant to the provisions of Article 6-2. The Rome Convention also makes special provision for when the criteria laid out in Article 6-2 do not correspond to the country with which the contract is most closely connected. It was judged that, since the parties had not expressly selected any particular law, a Russian employee seconded by his employer, a Russian company, to the French establishment of the English subsidiary, is subject to French law76.

The judge to whom a case has been submitted may still refuse to apply a foreign law that is incompatible with his country’s legal system. The flag-of-convenience phenomenon makes one question the reliability of connecting the employment contract to both the law of the Flag State and the law selected by the parties, the former imposed by the ship’s operator, and the latter—by the staff-management company. The Italian Court of Cassation invoked the boundaries of international public order as grounds for refusing to apply Liberian law—the law of the Flag State and the law selected by the parties—to an Italian seafarer whose permanent employment contract had been unilaterally rescinded. This Liberian law amounts to revocation ad nutum; the employer is under no obligation to justify its breach of that contract. The Italian judge, competent to settle the dispute, ruled that the need to justify a dismissal constituted a principle of international public order that prohibited him from applying the foreign law on this point. This argument strengthens the seafarer’s protection, but contributes nothing to the international harmonisation of contracts inasmuch as it is dependent on the Italian judge’s jurisdiction77. Whilst this seafarer was Italian, it is desirable that the principle of equal treatment be applied to any Community national, which would help to protect Community officers expatriated under a foreign flag, in particular with respect to “controlled” fleets.

Criminal law also has a part to play in constructing an international public order, as shown by the cases of the Number One and the Edoil. On 11 June 1999, the freighter Number One, sailing under the flag of St Vincent and the Grenadines, was wrecked off Sri Lanka, in the Bay of Bengal, causing the disappearance of ten members of the crew—six Ukrainian and four Senegalese seafarers—and the French Master. The Master’s family instituted legal proceedings in Saint-Nazaire.

76 Paris Court of Appeal, 18th Division, 7 June 1996, in Boikov v. the company Black Sea, RCDIP 1997, p. 55, M.A. MOREAU.
77 Court of Cassation, Industrial Division, 9 March 1998, № 2622, Il Diritto Marittimo 2000, p. 137, commentary by L. RUGGIERO.
At the conclusion of the pre-trial investigation, which brought to light a number of irregularities\textsuperscript{78}, the French shipowners and owners of the cargo, the French manning officer and the classification society—a legal entity set up under Japanese law but having an office in France and represented by the Director thereof—were remanded before the Saint-Nazaire Criminal Court on the charge of manslaughter\textsuperscript{79}. The Criminal Court declared itself competent and, applying French law, accepted the liability of the various defendants\textsuperscript{80}, whilst acknowledging that the mistakes committed by the Master had also contributed to the shipwreck. The court thus seems here to be disregarding the law of the Flag State, which would require that the courts of St Vincent and the Grenadines have jurisdiction, thereby displaying its desire to connect the ship to the legal system of the country where it is actually operated\textsuperscript{81}. If there had been no French victim, would the Flag State have concerned itself with the fate of the families of the Ukrainian and Senegalese victims? Who would be in a position to refer a case to the States of which the victims are nationals, in the unlikely event that their families are listened to and supported by the authorities? It is to be fervently hoped that the States of which the decision-makers are nationals, the States in which the key individuals in the organisation of the transport activity are resident, hold them to account.

The \textit{Edoil}, a Tonga-flagged ship, a chemical tanker in a poor state of repair, has been detained by the Portuguese authorities within the framework of Port State control; the Greek shipowner, Mr Pandermalis, had abandoned the ship and its crew in Sète. The ship was eventually sold and downgraded to a vegetable-oil freighter, thereby allowing it to evade a Community ban, but the buyer is refusing to pay the seafarers, who had the ship arrested in an attempt to obtain the money they are owed. The International Human-Rights Federation filed an action for endangering others; criminal proceedings were initiated in Greece by the unpaid crewmembers. On 2 June 2004, the Athens court sentenced Mr Pandermalis and his wife, representatives of the shipping company \textit{Vermillion Trading Ltd}, to imprisonment, and ordered them to pay the wage arrears. They are probably going to lodge an appeal against the sentence in Greece; but this criminal

\textsuperscript{78}The inquiry revealed a series of shortcomings in the selection of the vessel, the naval consultant and the crew, but also in the area of safety, the procedures for raising the alarm and sending distress signals, and the preparation and running of the ship.

\textsuperscript{79}Under Articles 221-6 paragraph 1, 221-8, 221-10 and, for the classification society—121-3 paragraph 3, 121-2, 131-38 and 131-39, of the Criminal Code, for having through “carelessness, recklessness, inattention, negligence, or failure to discharge an obligation of safety or caution imposed by the law or the regulations, caused the death of some of the crewmembers”.

\textsuperscript{80}The shipowners were sentenced to three years’ imprisonment, two of them suspended, for failing to discharge their legal and statutory obligations; the ship-manager was sentenced to three years’ imprisonment, 18 months of which were suspended, for acts of negligence and recklessness that played a determining role in the occurrence of the injury; and the classification society was fined 225,000 euros for having failed to exercise due diligence. They have all lodged an appeal; the case is to be re-tried before Rennes Court of Appeal in mid-June 2004.

ruling demonstrates that concealing a ship in Tonga does not release the shipowner from his obligations on the territory of the European Union.

Τηε σεα ισ νοτ α τηεατρε τηατ χαν πυτ ον α περφορμανχε οφ Σαμυελ Βεχκεττς
Ωαιτινγ φορ Γοδοτ, ωιτηουτ κνοωινγ ωηετηερ Γοδοτ ωιλλ χομε ορ επεν εξιστς. Ω
ε νεεδ το βε πραγµατιχ: αν ιντερνατιοναλ µαρκετ χαννοτ φυνχτιον ωιτηουτ εφφε
χτισε ιντερνατιοναλ ρυλες, ωηιχη νεεδ το βε προγρεσσισελψ βυιλ υπ.