

Chapter 1

Introduction

Maritime law, including maritime employment, is the testing ground for the globalisation process, which is encouraging the gradual internationalisation of both economies and societies, driven by innovations in technology and communications.¹ This process contrasts with the fact that private international disputes have so far been legally addressed as *rarae aves*, i.e., as exceptions to the domestic situations for which legislative policies are generally conceived. While the latter are characterised by predictable uniformity—although varying to a certain extent in socio-economic terms—the same cannot be said of the former since their contact with different jurisdictions results in different degrees of internationalisation involving different levels of cultural, societal and economic discrepancies.

However, the marginal role played by private international disputes has recently been challenged, with the permeability of borders at the core of the political discussion.² The globalisation process involves the opening up of both societies and economies, as well as an inevitable and inexorable blurring of legislative power, which was almost exclusively in the hands of states until recently. It is becoming increasingly difficult for states to control their societies and economies due in part to the relocation of businesses and migratory movements that lead to a loss of power at the point of policy enforcement. This is the undesired result of regulatory competition and stems from initiatives such as those entitling stakeholders to indirectly select the law applicable to the situation in question by taking

¹ See further Basedow (2013), pp. 82–133.

² Dealing with the transformation of the concept of state resulting from the increasingly blurred concepts of distance and border, which in turn are the consequence of changes in the concepts of time and space due to innovations in technology; see Hinojosa Martínez (2005), p. 5, and more specifically Michaels (2004), pp. 113–115; de Miguel Asensio (2001), pp. 43–44; Pamboukis (2007), p. 87.

advantage of market freedoms. In this context, the absence of clear links to any specific jurisdiction gives prominence to private international law as the best set of rules for dealing with private international situations.³

Nonetheless, private international rules are not enough to avoid a potential race to the bottom in the sector, and it is therefore necessary to take a step further to reduce globalisation's impact on our open societies, particularly through international cooperation and the development of minimum international standards. Against this background it should be noted that in the field of maritime law, private international situations have long been the rule and not the exception, for which reason maritime law is also an excellent example of how innovations have transformed the way private situations are approached legally.

Maritime employment provides an outstanding example of the new course that has been charted: freedom in ship registration—an area with a strong national component until the twentieth century as a result of the tight control exercised by flag states over their vessels—has turned maritime employment into a truly international activity.⁴ Recent developments in technology and communications have enabled operators to choose the law applicable to their businesses through choosing a vessel's flag by registering ships in the country where their interest is based.

Indirect party autonomy allows forum shopping in search of the cheapest law, which is normally the law that reduces both safety on board and labour costs. Healthy competition between legal systems seems unlikely in this context,⁵ and the direct result has in fact been that traditional maritime nations have established international and second registries with a view to competing with 'flags of convenience'—meaning countries that open their registries to any ship—to be able to preserve their merchant and fishing fleets in this way. These registries' main feature is that they allow non-residents in the country where the vessel is registered to be recruited as crew members, meaning that their employment contracts are not necessarily subject to the law of the flag. In addition to freedom in ship registration, this further liberalisation process has led to what is known as 'crews of convenience'.

The inevitable consequence of the internationalisation process of the labour market is the relocation of maritime employment, which is currently dependent on a number of factors, given that the law of the flag state can no longer take all workers aboard under its wing, whether protective or otherwise. Crew members can be recruited anywhere outside the flag state, given that open, second and international registries allow the hiring of staff that are not flag state residents. Shipowners make good use of this freedom of recruitment by using manning agencies based in what are now called 'labour-supplying states'. Needless to say, employers are becoming equally international as well, with the added complication that it is becoming increasingly difficult to locate them under the freedoms of establishment and provision of services.

³ See Mankowski (1995), pp. 1–2; Muir-Watt (2011).

⁴ See Chaumette (2004), pp. 1223–1228.

⁵ See Muir-Watt (2005), pp. 615–633. Further, Muir-Watt (2004).

The end result of these factors is deregulation, which also triggers costs, the most striking of which are derived from gaps in maritime safety, leading to substantial losses as a consequence of catastrophic maritime accidents. There are other costs, however, as the internationalisation processes affecting maritime employment also compromises fair competition in the shipping and fishing sectors. The processes leading to internationalisation and their consequences, as well as the reactions of the international community, are discussed in Chap. 2 of this book.

The first reaction takes the issue of flags of convenience as its starting point. There have been numerous attempts to define flags of convenience, but perhaps the most successful characterises them by their total inhibition of the maritime administration in charge of the vessel in question.⁶ The flag state's lack of control is clearly indicative of the fact that priority is given to the pursuit of economic objectives over other values such as environmental and worker protection, given their low investment in technical measures and labour standards.

The costs of the accidents that inevitably occur as a result of weaker control measures affect not only flag states but also new players in the international arena in maritime issues, i.e., port states⁷: flags of convenience ignore their responsibilities, which in turn undermines flag state authority and legitimises port state intervention to inspect the conditions of the ships docked at its ports. The situation is roughly the following: environmental protection requires stricter shipbuilding standards,⁸ whose implementation should not be avoided by resorting to a flag of convenience. Their enforcement therefore depends on different actors: while there are international agreements on the nature of these standards, whether they are complied with or not falls under the jurisdictions of both the flag state *and* the port state, meaning that port states have become cooperating parties in the control mechanisms, which primarily remain the responsibility of flag states.

Following the trend set in the area of environmental protection issues, the same rationale can be applied to ensuring the protection of workers at sea. At this point,

⁶ The difficulties inherent in providing a definition for the concept of flags of convenience are revealed by discussions during the drafting process of Article 5 of the Geneva Convention on the High Seas of 28 April 1958, whose purpose was to establish what is not a flag of convenience, hence the connecting factors that ships must have with the states that grant them nationality. In the end, there was only agreement on one single undetermined factor: the existence of a genuine link between state and ship, which therefore allows states to exercise their jurisdiction over ships. See Meyers (1967), pp. 218–219; Skourtos (1990), pp. 5–11. In addition to the Convention, it is important to mention the report issued in 1970 by the Committee of Inquiry into Shipping, named after its chairman Lord Rochdale, on the following criteria, which may help identify flags of convenience: non-citizens are allowed to own and control vessels, and manpower may be recruited from among non-nationals; access to the registry is easy, and so is transfer from it; taxes on income from shipping are low or non-existent; the country does not have the power to institute national or international regulations over shipowners and does not need the shipping tonnage for its own purposes but is keen to earn the tonnage fees. More recently, see Alderton and Winchester (2002), pp. 35–43.

⁷ See Chaumette (2001), pp. 70–83.

⁸ See, among many others, Basedow and Wurmnest (2006), pp. 413–434; Basedow and Wurmnest (2008), pp. 278–295; Sobrino Heredia (2005), pp. 1331–1348.

reference must be made to the invaluable work of the two international institutions whose partnership has contributed to laying the foundations of international labour law: the International Maritime Organization (IMO) and the International Labour Organization (ILO). To outline the minimum standards for maritime employment as established by these bodies, the conventions that they have issued that are specifically related to work at sea need to be referred to.

The most important of those conventions are the ILO Maritime Labour Convention 2006 (hereafter MLC, 2006)⁹ and the ILO Working in Fishing Convention 2007 (hereafter WFC 2007).¹⁰ As their names indicate, both deal with living and working conditions on board. However, differences in the kind of economic activity and exploitation of the sea's resources carried out by shipping and fishing fleets have an important bearing on the applicable convention.¹¹ Both seek to institute minimum labour standards, and their compliance needs monitoring not only by the flag state but also by the port state.¹² The 2007 Convention is not as thorough as MLC, 2006, but it also contains provisions on port state control and on the role of labour-supplying countries in establishing and preserving suitable living and working conditions for fishermen.¹³

The background provided by the conventions dealing with international labour law—roughly sketched in the second chapter of this book—is not accepted in all states, nor does it cover all aspects of the employment relationship. It also suffers from serious enforcement problems, making the need to address international jurisdiction and conflict of law issues, the areas to which this book is mainly devoted, even more apparent. The peculiarities of maritime employment have determined the way these issues are approached from a private international law perspective, which is obliged to rely on public international law while tackling situations created and developed at *mare liberum*, namely, in non-sovereignty areas. The 1982 Convention on the Law of the Sea (UNCLOS)¹⁴ was an attempt to reconcile the principle of freedom of the seas with the need for public regulation and private planning involved in every maritime venture by distinguishing among the different maritime areas and submitting whatever happened on the high seas to

⁹ Maritime Labor Convention, 23 February 2006, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:91:0::NO:91:P91_INSTRUMENT_ID:312331:NO.

¹⁰ ILO Convention No. 188, 14 June 2007 concerning work in the fishing sector, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312333:NO.

¹¹ Fish stocks are a limited natural resource, and the planning of their exploitation is the core concept handled by the sector with the participation of the FAO and its Fishing Committee. See Beslier (2010), pp. 47–55.

¹² See Rapport final, Commission paritaire maritime (29e session), Geneva, 22–26 January 2001, JMC/29/2001/14, p. 28. <http://www.ilo.org/public/english/dialogue/sector/techmeet/jmc01/jmcfr.pdf>. Accessed 2 December 2009.

¹³ Port state jurisdiction also plays a key role in the fishing sector with a view to avoiding over-exploitation of migratory species. See further Franckx (2010), pp. 57–79; Gautier (2010), pp. 81–96.

¹⁴ UN Convention on the Law of the Sea, concluded at Montego Bay, 10 December 1982, 1833 UNTS 3.

the flag state's jurisdiction. Accordingly, the flag state could also have a say in living and working conditions aboard.

Nevertheless, the fact that flags of convenience neglect their responsibilities and crews of convenience are not subject to the law of the flag erodes the central role that this connecting factor has traditionally played in resolving key private international law issues. This flag state connection has undeniably lost part of its weight where identifying the closest jurisdiction to a seafarer's employment contract is concerned. In fact, the crisis of the flag as the key connecting factor in these matters affects not only individual employment relationships but also their collective dimension, an issue that is dealt with in the last chapter of the book. Aspects such as determining which state is responsible for social security matters affecting seafarers and deciding on current employment contracts in the event of the employer's insolvency are also covered.

The relative loss of the significance of the vessel's flag as the key connecting factor in maritime employment is less clear when issues of international jurisdiction are addressed. This sector of private international law aims to facilitate access to justice, and in so doing it ought to provide seafarers with several heads of jurisdiction so that they can find a close and thus affordable court. This seems particularly complex because of the high degree of internationalisation in maritime employment, where crew members may have been recruited in different countries, usually through manning agencies, while the shipowner's headquarters may be located in a different country and the work itself may well be carried out on board a ship that is sailing or fishing under a third country's flag.

Chapter 3 tackles international jurisdiction issues in maritime employment by focusing on the rules currently in force in the European Economic Area. Hence, Regulation No. 44/2001, of 22 December 2004 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter Brussels I Regulation),¹⁵ and Regulation (EU) No. 1215/2012 (hereafter Brussels I *bis* Regulation),¹⁶ reviewing Brussels I and which is fully applicable from 10 January 2015, are addressed. Together with the 2007 Lugano Convention,¹⁷ they make up what will be referred to here as the Brussels–Lugano system. Based on the principle of worker protection, Section 5 of Chapter II is specifically devoted to individual employment contracts, including maritime employment.

Until the Brussels I *bis* Regulation has been fully applied, the scope of the Brussels I Regulation only included employers domiciled in a member state or those who have a branch, agency or establishment in a member state, and the same goes for the Lugano Convention in force. Where other cases are concerned, the Regulation and the Lugano Convention refer the issue to the respective national law, a reference that is maintained by the Brussels I *bis* Regulation despite covering

¹⁵ OJ No. L 012, 16.1.2001.

¹⁶ OJ No. L 351, 20.12.2012.

¹⁷ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, held at Lugano on 30 October 2007 (OJ No. 147, 10.6.2009).

cases of employers domiciled in third states. However, national law is not systematically addressed in these pages, although some references will be made to it. Space is also devoted to the essential role played by the 1952 and 1999 Conventions on the arrest of ships,¹⁸ both compatible with the Brussels–Lugano system and establishing a *forum arresti*.

Contrary to international jurisdiction matters, conflict of laws focuses on the establishment of a single applicable law to employment relationships during which attention is specifically paid to factors revealing a close connection between employment contract and a given jurisdiction. Choice of law is also allowed in these matters, but a number of correcting factors have been introduced on the basis that workers, as the weaker party to the contract, are entitled to some kind of protection measures.¹⁹ In the absence of choice of law, the preferred connection is the habitual place of work, as laid down by Article 8 of Regulation (EC) No. 593/2008 of the European Parliament and of the European Council of 17 June 2008 on the law applicable to contractual obligations (hereafter Rome I),²⁰ and in other private international law provisions included in national law systems like those in China,²¹ Japan,²² Panama,²³ Tunisia,²⁴ Turkey,²⁵ South Korea²⁶ and Switzerland.²⁷ This connecting factor refers to the flag state of the vessel when the work is carried

¹⁸ International Convention relating to the arrest of seagoing ships concluded in Brussels on 10 May 1952, 439 UNTS 193, and International Convention relating to the arrest of seagoing ships concluded in Geneva on 12 March 1999, UN/IMO Doc A/CONF.188/6.

¹⁹ In some countries like Tunisia, Ukraine, China and Panama, a choice of law is not allowed on the ground of worker protection. See Articles 67 of the Tunisian Code on Private international law issued by Law 98-97, 27 November 1998; 52 of the Ukrainian Law of 23 June 2005, No. 2709-IV on Private international law; 43 of the Law of the People's Republic of China on the Application of Law for Foreign-related Civil Relationships of 28 October 2010, and 94 of the Panama Private International Law Code, issued by Law of 8 May 2014 (*Gaceta Oficial Digital* No 27530, 8.5.2014). The approach is different in Switzerland, where choice of law is allowed but is limited to the selection of one of the laws indicated by § 121 *Internationales Privatrechtsgesetz*, 18 December 1987 (AS 1988 1776). The EU and other countries mentioned in the text allow the choice of any law provided that it is more favourable to the worker than the law otherwise applicable, as discussed in Chap. 4.

²⁰ OJ No. L 177, 4.7.2008.

²¹ Article 43 of the Law of the People's Republic of China on the Application of Law for Foreign-related Civil Relationships.

²² Article 12 of the Japanese Act on the Application of Laws, enacted by law No. 87, 21 June 2006.

²³ Article 94 of the Panamanian Private International Law Code.

²⁴ Article 67 of the Tunisian Private International Law Code.

²⁵ Article 27 of the Turkish Act on Private international and procedural law No. 5718, 27 November 2007 (as translated by Wilske S and Esin I).

²⁶ Article 28 of the South Korean Act on Private International Law adopted in 2001, enacted by law No. 6465, 7 April 2001.

²⁷ § 121 *Internationales Privatrechtsgesetz*.

out at sea,²⁸ but, as already pointed out, this premise has been challenged by the existence of flags of convenience.

Chapter 4 examines this connecting factor along with others that have been considered more suitable for overcoming the shortfalls of the law of the flag state in an attempt to find the closest law to the maritime employment relationship. Chapter 4 therefore focuses on the Rome I Regulation and on the different paths it offers, in particular the escape clause. Other approaches that aim to abandon the vessel and, with her, the flag state as the habitual workplace often end up pursuing protectionist measures and do not result in the establishing of a closer law to maritime employment than the one provided by the flag. In line with the traditional unilateralist approach to employment matters,²⁹ these approaches seek to protect residents living within the court's jurisdiction and hence either ignore the employment relationship's collective dimension or resort to a more easily manipulated connecting factor. The flag, for its part, has the advantage that it allows for equal treatment for all those working on board.³⁰ It is important to note here that public international law has not rejected the flag as the main connecting factor, as evidenced by MLC, 2006, and WFC 2007. This does not mean that the flag state jurisdiction should not be disregarded in the event of lack of contact with the employment contract, and to this end, private international law has already devised a specific legal mechanism: the escape clause.

Against the background of outsourcing, trade union activity is vital for improving living and working conditions on board, and the International Transport Workers Federation (ITF) plays a crucial role in this area. The last chapter of this book deals with collective labour relations and aspects of private international law concerning issues such as collective bargaining, calls for strike action and their consequences and those of other types of industrial action, and employee participation in the running of companies.

In contrast with the internationalisation of maritime employment, the legal framework of collective bargaining is strictly local, and each state establishes the conditions under which this may be undertaken. The legal reality is thus at odds with the fact that the purpose of any collective agreement is that it is binding on all those working on the same ship, even if their employment contracts are subject to different laws. This divergence triggers two types of problems; the first concerns the collective agreement itself and establishing the law that decides on its very existence, validity and scope of application, while the second affects the application of

²⁸ Article 52 of the Ukrainian Law on Private International Law specifically mentions the application of the law of the country of the flag's vessel where the employee works by default of choice of law or a law more closely related. However, Article 54 thereof provides for a number of unilateral rules that almost displace Article 52.

²⁹ With respect to the French market, see Audit (1986), pp. 33–40.

³⁰ And The application of the law of the flag can respond to protective purposes as well. A good example of this is provided by STSJ Andalucía, 10.12.1993, with comments by Pérez Martín (1996), pp. 386–389, although applying Spanish labour law as *loi de application immediate* to the employment relationships between a Spanish shipowner and Moroccan workers providing services on board a Spanish ship in Moroccan waters; contracts had been entered into in Morocco.

the collective agreement, namely, whether or not it actually modifies individual employment relationships, an issue that is governed by the law applicable to the latter, the *lex laboris*. Should the employment contracts aboard be subject to different laws, the collective agreement would have to satisfy each one's test to be applicable to particular employment relationships, and it is from this perspective that the relevance of the collective dimension in determining the law applicable to the employment contract is best appreciated.

Applying the *lex loci actus* is the best option when it comes to deciding on the right to strike and take industrial action, on the ground that these are fundamental rights. When the workers exercising these rights are the crew of a ship docked at a foreign port, the problem is deciding which law that is. Further conflict of law issues emerge with respect to the consequences of collective action, particularly with respect to tort liability arising from it. As a consequence of Court of Justice of the European Union (hereafter CJEU or CJ) case law, this issue has been the subject of legislative intervention, and Article 9 of Regulation (EC) No. 864/2007 of the European Parliament and of the European Council of 11 July 2007 on the law applicable to non-contractual obligations (hereafter Rome II)³¹ and the respective case law are analysed in Chap. 5.

The last sections of Chap. 5 discuss the topic of seafarers' rights to information, consultation and participation in company decision-making bodies, an area that has undergone a process of harmonisation, thanks to the European Union. However, seafarers are still excluded from the scope of most directives and regulations in this area for fear of encouraging the flight of merchant and fishing fleets to less demanding flags, although this exclusion is currently under review. In any case, it is still necessary to determine which law governs these rights, firstly to improve living and working conditions in the workplace—a ship in these cases—and secondly to contribute to the smooth running of the shipping or fishing company.

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³¹ OJ No. L 199 of 31.7.2007.

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