DECONSTRUCTING "ABANDONMENT OF SEAFARERS"

A study on the transnationality of abandonment of seafarers:
To what extent do private actors/ shipping industry stakeholders have an impact on abandonment of seafarers?

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Abstract

The Maritime Labour Convention amendments concerning abandonment of seafarers are expected to come into force in 2017, something long sought by seafarers' representatives. The Convention is already considered a success, being referred to as a 'super convention' or 'seafarers' bill of rights', and the amendments are expected to receive a similar reception. Although it is an international legal instrument, the Maritime Labour Convention also establishes, for contracting states, soft guidelines on how its provisions should be implemented. The Convention recognises that the seafarer is a transnational worker in that different states are entitled to adopt varying approaches to achieving the objectives of the law where the seafarer is concerned.

It is argued in this thesis that seafarers are transnational workers, hence that 'abandonment of seafarers' is a transnational phenomenon. That in turn means that the concept should not be confined merely to current international legal definitions. From a legal point of view, abandonment is a contractual breach committed by the employer. From a moral point of view, it is the employer severing their responsibility for their employees. Although this analysis is made largely through an English law lens, legislations of different countries are also studied. The evaluation undertaken in this study proves that there is in reality only a nominal differences between the legal rules of these countries in this area.

The thesis will also assert that third parties in the employer-worker relationship, the so-called 'private actors', also have responsibilities in preventing abandonment from occurring, or in providing assistance when abandonment does happen. These private actors are essentially those persons involved in the maritime trade network – including those having responsibility for safety, such as flag states, port states, classification societies and P&I Clubs.

In this regard, it is also stressed in this thesis that substandard shipping is directly connected to abandonment of seafarers; indeed, the Maritime Labour

Convention should thus be seen as an important tool to help combat substandard shipping.

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Lastly and foremost, I would like to thank my parents for all the support given to me throughout these years, in particularly my mother who even in a difficult period of her life, cared about me the way only a mother can. For this I will be forever thankful.

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List of Acronysms

CLC - 1969 International Convention on Civil Liability for Oil Pollution Damage (1969 Civil Liability Convention)
IACS - International Association of Classification Societies
IGO – International Governmental Organisation
ILO – International Labour Organisation
IMO – International Maritime Organisation
IOPC - The International Oil Pollution Compensation Funds
ITF – International Transport Workers Federation
ISM – International Safety Management
MARPOL - International Convention for the Prevention of Pollution from Ships
MLC – Maritime Labour Convention 2006
MOU – Memoradum of Understanding
P&I – Protection & Indeminity
RO – Recognised Organisations
SOLAS - International Convention for the Safety of Life at Sea 1974
STCW - International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978
UNCLOS – United Nation Convention of Law o the Sea
UNGA – United Nations General Assembly

To my parents

Introduction

Seafaring is one of the oldest existent professions, however for a long time it was overlooked, and seafarers remained within the fringes of society.[1] This does not seem to be the reality anymore, though, and in many countries seafaring is considered a prestigious career[2]. Indeed, the importance of the profession can be said to have been internationally recognised in 2009, when it was declared by the International Maritime Organization (IMO) that 2010 would be the year of the seafarer.[3]

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[1] See Chapter I

[2] For instance, in honour of the International day of the seafarer in 2015, a tribute to Filipino seafarers was published in one of the most prestigious newspapers of the country. The Tribute read:
"We honour each and every seafarer—the cornerstone of an industry that moves 90 percent of world trade. Over the years, our seafarers have largely contributed to the socio-economic development of our nation, with their ever growing annual dollar remittances, which for 2014 alone was estimated by the Bangko Central ng Pilipinas at $5.6 Billion. They have continued to be a pillar of financial stability for the country, helping provide employment to other Filipinos in ancillary services that support the seafaring industry.
"We commend our Filipino seafarers whose efficiency, resiliency, and competency continually make them the seafarer of choice worldwide. Indeed they are our country's source of pride, as they are a living testament to the Filipinos' dedication to duty and commitment to excellence.
"We extend our heartfelt thanks to the Philippine Government for their recognition of, and support for the maritime industry which plays a vital role in the socio-economic progress of our country.
"We would also like to thank ANGKLA Party-List, represented by Congressman Jesulito A. Manalo, for its successful enactment of R.A. 10635 which guarantees the protection of jobs for our Filipino seafarers.
"Finally, as a way of giving back to our Filipino Global Maritime Professionals for their contribution to the country, we implore all the stakeholders of the maritime industry, to continue supporting our seafarers and to help in the strict and proper implementation of laws and policies for their full protection." - - A Tribute to Our Filipino Seafarers. *Mabuhay ang mga Marinong Pilipino!* Philippine Daily Inquirer (Manila,25 May 2015) quoted in *Jose "Pepe" Abueva, '*Filipino Seafarers—Most In Demand In The World' (The Bohol Chronicle, 28 June 2015) <http://boholchronicle.com.ph/2015/06/28/filipino-seafarers-most-in-demand-in-the-world>

[3] In the 102nd session in London (29 June to 3 July 2009), the Council of the International Maritime Organization (IMO) agreed that the theme for the World Maritime Day would be "2010: Year of the Seafarer" – In February 2011, the then IMO Secretary – General Efthimios E. Mitropoulos release an open letter stating the three main objectives in naming 2010 as the year of the seafarer:

- "To increase awareness among the general public of the indispensable services you render to international seaborne trade, the world economy and society at large;
- To send a clear message to you that we recognize and appreciate your services; that we understand the extraordinary conditions and circumstances of your profession; that we care about you, and that we do all that we can to look after and protect you when the circumstances of your life at sea so warrant; and
- To redouble our efforts at the regulatory level to create a better, safer and more secure world in which you can operate."

The profession is far from an ordinary one, and is full of peculiarities. Not only does the seafarer spend most of his working hours on board a vessel, often in international waters, but seafarers are often employed by a company based in a country other than their own, and may work in a vessel flagged to a third country. On top of this, their work may be based in a fourth country! These are just some of the particular characteristics of the profession. These peculiarities can be said to make seafaring a unique profession, as they may cause the seafarer to face situations that most professionals will never have to face during their careers, and also characterise the transnationality[4] of the profession.

Indeed, seafarers' work crosses borders and it is exactly this transnational element of the profession that causes seafaring regulation to differ from others. In order to have effective regulation, international and national regulations should be observed, as well as all the "actors" [5]involved in the employment of seafarers.

This thesis will examine the scope of transnationalism and seafaring, using "abandonment of seafarers" as a platform for such scrutiny. Therefore, as a starting point for the further development of this thesis, it is necessary to explore the conceptualization of the abandonment of seafarers, and in order to do this it seems sensible first to look at the definitions of the word 'abandonment'.

A common dictionary defines Abandonment as:

"*To withdraw support or help despite allegiance or responsibility*"[6].

Whereas a legal dictionary defines it as:

(IMO, 'IMO Secretary-General Mitropoulos reaches out to seafarers in open letter', (Briefing: 10, March 3, 2011) http://www.imo.org/en/MediaCentre/PressBriefings/Pages/10-letter-to-seafarers.aspx#.V8F28umsKlK, last accessed on 12/02/2014)

[4] One of the premises of this thesis that will be supported through its entirety is that seafarers are neither international nor national employees, but transnational employees. See: Chapter 1

[5] The concept of Actors in Transnational shall be explained better in the justification of this thesis.

[6] Farlex clipart collection Based on WordNet 3.0 (Princeton University, Farlex Inc. 2003-2011)

> "*1.The relinquishing of a right or interest with the* ***intention of never again claiming it****. An abandonment is merely the acceptance by one party of the situation that a non performing party has caused. But a* ***rescission due to a material breach by the other party is a termination or discharge of the contract for all purposes****. 2. Family Law.* ***The act of leaving a spouse or child wilfully and without an intention to return."***[7]

A simplistic interpretation of both definitions will lead to the conclusion that abandonment is a rather broad concept, and accordingly abandonment of seafarer can arise in numerous situations. For instance, abandonment of seafarer will have occurred when:

- The shipowner breaches the seafarer's employment contract
- The seafarer is left unsupported despite the existence of an allegiance, which can be considered to be an indirect, rather than direct, obligation towards the seafarer

Abandonment of seafarers however has received special attention from the international community, which decided to first define it in 2001 by ILO Resolution A.930(22) "Guidelines on Provision of Financial Security in Cases of Abandonment of Seafarers". According to the Resolution abandonment of seafarer is:

> *"(...) the severance of ties between the shipowner and the seafarer. Abandonment occurs when the shipowner fails to fulfil certain fundamental obligations to the seafarer relating to timely repatriation* ***and*** *payment of outstanding remuneration* ***and*** *to provision of the basic necessities of life inter alia adequate food, accommodation and medical care. Abandonment will have occurred when the master of the ship has been left without any*

[7] Bryan A Garner, *Black's Law Dictionary*, (Abridged 7th Edition, West Group Minn. 2000), page 1

financial means in respect of ship operation".

In 2006, abandonment of seafarers was once more defined. The Maritime Labour Convention[8] provides that a seafarer will be considered abandoned:

> *"(…) where, in violation of the requirements of this Convention* ***or*** *the terms of the seafarers' employment agreement, the shipowner: (a) fails to cover the cost of the seafarers' repatriation;* ***or*** *(b) has left the seafarer without the necessary maintenance and support;* ***or*** *(c) has otherwise unilaterally severed their ties with the seafarer including failure to pay contractual wages for a period of at least two months."*

The MLC definition can be perceived as a more broad approach than the one provided by IMO, because in the former case, it is only necessary for one of the requisites described to be fulfilled in order for it to be considered 'abandonment', hence the use of the word 'or', instead of the word 'and' as is used in the IMO definition. Furthermore, the words used in the fourth situation provided by the MLC for when a seafarer can be considered abandoned, i.e. "*has otherwise unilaterally severed their ties with the seafarer"* [9] suggests that a seafarer will be deemed to have been abandoned whenever the employment contract has been unilaterally breached by the shipowner. Nevertheless, the MLC's definition is still considered to offer an exhaustive list of situations when a seafarer will be deemed to have been abandoned, with members of the industry perceiving abandonment of seafarers (as defined by the Convention) as specific breaches of contract caused by the shipowner. [10] This can be clearly perceived

[8] Amendments to the Code implementing Regulation 2.5 – Repatriation of the MLC, 2006 (and appendices), adopted by the Special Tripartite Committee on 11 April 2014, Amendments relating to Standard A2.5 , *Standard A2.5.2 (2),* due to come into force in 2017.
[9] *Ibid*
[10] See: Denis Nifontov, "Seafarer Abandonment insurance: a system of financial security for seafarers", in Jennifer Lavelle (ed), *The Maritime Labour Convention 2006 International Law redefined*, (Routledge 2014), p.125 paragraph 6.41 and p.130, paragraph 6.65

in the current policies provided by insurers in order to fulfil the Financial Security system established by the Convention.[11]

Indeed, it is essentially understood by the maritime industry that a seafarer will be deemed to have been abandoned when he/ she is not duly repatriated, has been left without basic necessities of life (including food, accommodation and medical care) and has not been paid properly. This understanding is clearly seen in the most recent IMO document regarding abandonment of seafarers. When highlighting the importance of the 2014 amendments to the MLC specifically in cases of abandonment, the document states that the "new requirement will help prevent the unfortunate situation of seafarers being stranded in port for long periods when shipowners abandon their crews without paying their wages or repatriating them"[12] hence limiting abandonment of seafarers to the situations mentioned above.

In practical terms it makes sense for both definitions to be limiting, and to confine abandonment of seafarers to an exhaustive list of contractual breaches, since the intention of International Instruments was to create a security fund for situations where seafarers were deemed to have been abandoned. If the Resolution or the MLC were to provide for a non-exhaustive list of contractual breaches, most likely, the Financial Security would not become a reality, since the risks of abandonment occurring would increase, hence also increasing the price of any means of Financial Security to be set. The downside is that the definition can also be said to set a limitation upon the shipowner's liability, as the security fund is limited to four months of unpaid wages and seafarers in abandonment situations are often left unpaid for longer periods of time. [13]

[11] Ibid. See Chapter V pp.272 -285
[12] IMO LEG 104/4, p.2 § 7
[13] It is recognized that in terms of employment law, the shipowner would still be liable for the seafarers' remaining unpaid wages, as pointed out abandonment of seafarer is often a consequence or is followed by the shipowner's insolvency, making it difficult for the seafarer to have his rights enforced.

More importantly, the amendments shall definitely make a difference on the life of seafarers, preventing these from remaining stranded in ports around the globe waiting for the vessel judicial sale in order to receive their outstanding wages. According to IMO/ILO joint database for abandonment of seafarers since its establishment until 31 January 2017, there have been 248 reported incidents, affecting 3,037 seafarers, who would now thanks to the Financial Security Fund would be able to be timely repatriated and paid (at least part)[14] of the outstanding wages.

It is important to note that the term 'abandonment of seafarer' was first introduced into the international arena in order to raise awareness of specific situations faced by seafarers. The word 'abandoned' at that point seemed to have been used in line with its general definition, rather than a legal one.[15]

Therefore, although the existing international legal definitions of 'abandonment of seafarer' are limited to specific situations, if one considers the legal and general definition of abandonment, a conclusion can be drawn that abandonment of seafarers should embrace many more situations than the ones described in the exhaustive list provided by the MLC,.Its common usage or understanding should be adopted instead of a strict and narrow legal definition. After all, its common usage better reflects the ordinary and extraordinary situations actually faced by seafarers. Indeed, abandonment should simply be perceived as a severance of ties unilaterally caused by the shipowners[16]. Therefore, any breach of a contract, either of an implied or express term, caused by solely by the shipowner should be perceived as abandonment of the seafarer. This is the approach advocated in this thesis.

[14] The Financial Security Schemes might not cover all the wages due to the seafarers, as they contain specific numbers of unpaid wages covered by it. See pp. 274 -285

[15] See: The Netherlands Institute for the Law of the Sea, *International Organizations and the Law of the Sea Documentary Yearbook* (Volume 14, Martinus Nijhof Publishers1998), p. 37 and ILO, *Final Report: Joint Maritime Commission (29th Session),* Geneva, 22-26 January 2001, (International Labour Office, 2001) , p.22

[16] As mentioned earlier it seems that the legislators when drafting the 2014 amendments to the MLC also had this idea on the back of their mind when defining abandonment of seafarers. See p.13

Most cases causes of 'abandonment of seafarer' involve:

- The arrest of the vessel;
- Accident – Shipwreck, grounding or sinking;
- Bankruptcy or insolvency.[17]

The year 1992-3, similar to the year 2009 but on a smaller scale according to IMO's abandonment database, was marked by several cases of shipping companies going bankrupt leading to a substantial number of abandonment cases, which reflects the third cause of abandonment listed above.[18] One of the companies was the Pakistan-based Gulf East Ship Management owned by thefinacial Gokal brothers, whose fortune was linked to the collapsed BCCI bank. In 1992, the company abandoned 21 crewmembers (Pakistanis and Maldivians) in Chittagong, Bangladesh. The crew were without wages since the previous year and were left without water, food and fuel for a period of more than a year, until the ship was finally sold and the judge decided the amount to be paid to the crew.[19]

Currently, the ship industry is said to be facing its worse downturn in the past few decades[20], and not unexpectedly this has had a direct impact on the number of abandonment of seafarer cases, even though this does not seem to have yet been reflected in the ILO abandonment of seafarers database (as some cases are not reported to the ILO or the reports can come with substantial delay). Two recent examples of

[17] *Ibid.*
[18] ILO Database on reported incidents of abandonment of seafarers, available on ILO's website.
[19] See: ITF Seafarers' bulletin 1993. Pages 22 -23 and ILO Database on reported incidents of abandonment of seafarers, available on ILO's website.
[20] Robert Wright, 'Container shipping lines mired in crisis', (Financial Times, 19 May 2016) < http://www.ft.com/cms/s/0/1e98963c-1853-11e6-bb7d-ee563a5a1cc1.html#axzz4IXbFfjnO>, last accessed on 02/07/2016; Alan Tovey, 'Shipping industry faces worse storm than after financial crisis, warns Maersk boss' (The Telegraph, 10 February 2016) <http://www.telegraph.co.uk/business/2016/02/12/shipping-industry-faces-worse-storm-than-after-financial-crisis/>, last accessed on 07/06/2016; and Jackie Northam, 'Amid Industry Downturn, Global Shipping Sees Record-Low Growth' (NPR, 20 August 2016) http://www.npr.org/sections/parallels/2016/08/20/490621376/amid-industry-downturn-global-shipping-sees-record-low-growth, last accessed on 07/07/2016

abandonment cases are the Five Stars Fujian, a coal carrier, and the medium-sized tanker Amba Bhakti, although, by the time this thesis was being written, neither case had been reported to ILO. Both cases are clear examples of the impact that the financial crisis in the shipping industry has had on the abandonment of seafarers. In the first case, the ship was arrested for one month on Australia's east coast, with supplies diminishing and the crew of 21 Chinese men unpaid since June 2016. In the second case, the medium sized tanker is currently still anchored in Shanghai in desperate need of repairs, and her crew composed of Indian and Bangladeshi seafarers were left without basic supplies and unpaid since February 2016.[21]

As should be noted, in abandonment of seafarer cases, the responsibility and liability of the shipowner is as straightforward as it can be, since he has a direct responsibility as the seafarer's employer that can undoubtedly either be found in national law or international law. Nevertheless, considering that the seafarer, as previously stated and as will rest proved in this thesis, is a 'transnational employee', the action of 'private actors' or stakeholders, which from a legal perspective can be considered third parties, needs to be taken into consideration when dealing with abandonment of seafarers, being this exactly what this thesis proposes to do. This thesis shall prove that the selected ship industry stakeholders play a vital role in preventing abandonment of seafarers from occurring, also determining their responsibilities and liabilities in regards to abandonment of seafarers

Justification

Although many studies have been conducted or are currently being conducted regarding seafarers' rights, a study like this one has never been carried out. The existent studies regarding seafarers' rights are essentially descriptive in nature. Furthermore, they are essentially focused on the shipowners' responsibilities and liabilities towards

[21] Henning Gloystein, 'Shipowners slash costs, leaving some crews unpaid, unsafe as downturn bites'(Hellenic Shipping News, 27 August 2016) < http://www.hellenicshippingnews.com/shipowners-slash-costs-leaving-some-crews-unpaid-unsafe-as-downturn-bites/>, last accessed on 01/11/2016

seafarers, and not on third party responsibilities and liabilities towards them. Indeed, intensive studies are already being conducted regarding shipowners' responsibilities and liabilities[22] towards seafarers, making further analysis on these points perhaps less needed. The author recognises that the same analysis conducted in a different (comparative) manner could arrive at significant findings regarding how seafarers' rights are enforced by countries with similar political and economic regimes, traditions. However, that is not the aim of this thesis.

This thesis will analyse the liability and responsibilities of selected shipping industry stakeholders and their role in abandonment of seafarer cases, either by way of assisting in preventing hardship or by providing for the seafarers' rights in these cases to be respected. The few studies that have been conducted regarding third parties restrict themselves to the analysis of Flag State responsibilities.[23]

Nevertheless, as this thesis will seek to prove, stakeholders (or private actors) play a vital role in abandonment of seafarer cases, being essential to guaranteeing an adequate protection for seafarers, and as such an assessment of their responsibilities and possible consequent liabilities is essential. This thesis will demonstrate that the chosen third parties play a crucial role in the enforcement and compliance of seafarers'

[22] See: D. Fitizpatrick and M. Anderson, *Seafarers' Rights* (Oxford University Press, 2005). Seafarers Rights International, a research centre located within ITF's headquarters, is also currently conducting research in diverse countries in order to ascertain the protection given to seafarers according to their national legislation in cases of abandonment of seafarer, death or injury, ship arrest and maritime liens. See: SRI, Legal Guides database available at: http://seafarersrights.org/seafarers-guides/seafarers-guides-results/?_sft_categories=abandonment-sri-guides&_sfm_file_access=Everyone, last accessed 02/07/2016

[23] See: F. Shawna, 'The Great Compromise: Labour Unions, Flags of Convenience and the Rights of Seafarers' in 19 Windsor Review Legal & social. Issues 85 (2005) and R. R. Churchill, 'The Meaning of the "Genuine Link" requirement in Relation to the Nationality of Ships', A study Prepared for the International Workers Federation (October 2000), http://www.itfglobal.org/seafarers/icons-site/images/ITF- Oct2000.pdf last accessed on 04/09/2015

rights. The research question that this thesis derives from has been based on the need for rigorous legal research in this area, which so far seems to have been overlooked.

Scope and Objectives of Study

Maritime law is a subject characterized by its internationalism and transnationality. Most maritime ventures involve an array of international participants, some of which may not even possess contractual relationships with each other, but the individual conduct of each during the maritime undertaking will usually have an effect on the safety or commercial viability of the venture for the others. Moreover, undeniably, the involvement of the sea provides a level of internationalism to maritime ventures, as they mostly fall under "international jurisdiction".

Based on the clear international aspect of maritime ventures, some might argue that this should be regulated by a uniform law, suggesting that a harmonization of law would facilitate relations between states and commercial relations between nationals of different states. Supposedly, a harmonization of maritime law would provide 'clarity' to individuals involved in maritime ventures hence avoiding unnecessary disputes or conflicts. However, what proponents of this seem to neglect is that even if a harmonization of law was feasible, different states would still be in charge of the interpretation and application of the particular piece of legislation and thus most likely these would differ from one state to another. Furthermore, in practical terms, this uniformity of law seems very difficult to achieve since countries around the world experience different realities and circumstances, and accordingly have different needs.[24]

[24]Professor Willian Tetley in William Tetley, 'Uniformity of International Private Maritime Law-The Pros, Cons, and Alternatives to International Conventions-How to Adopt an International Convention' in 24 Tul. Mar. L.J. 775 1999-2000, pp.797-811 points out the some of the advantages and disadvantages in uniformity of maritime law.

Discussions on uniformity of law aside, more importantly, particularly within the scope of this thesis, is the analysis of which field of law maritime law falls into. A maritime venture will more often than not cross national borders and while doing so it cannot be left unregulated. Therefore, due to this international element, maritime law can hardly be considered to fall only under the scope of national law. Nevertheless, maritime law does not seem to fall solely under the field of international law since it can hardly be considered to be fully embodied in the current concept of international law, even taking the broadest definition[25] found in the American *Black' Law Dictionary* into consideration*:*

> "International law. The legal principles governing the relationships between nations; more modernly, the law of international relations, embracing not only nations but also such participants as international organizations, multinational corporations, nongovernmental organizations, and even individuals (such as those who invoke their human rights or commit war crimes).- Also termed *public international law; law of nations; law of nature and nations; jus gentium; jus gentium publicum; inter gentes; inter-foreign- relations law, interstate law; law between states* (the word *state,* in the latter two phrases, being equivalent to nation or country).
>
> Customary international law. International law that derives from customary law and serves to supplement codified norms.
>
> Private international law. International conflict of laws; legal scholars frequently lament the name "private international law" because it

[25] *Ballentine's Law Dictionary* defines international law as: 1. The rules and principles which govern the relations and dealings of nations with each other. *New Jersey v Delaware, 291 US 361, 78 L Ed* 847, 54 S Ct 407. The usage of all civilized nations.
2. International law in its widest and most comprehensive sense includes not only questions of rights between nations, governed by what has been appropriately called the law of nations, but also questions arising under what is generally called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominion of another nation. Such was the force accorded to the term "jus gentium" by the Roman juris-consults, but today private international law is deemed quite separate and distinct from the law of nations." (Ballentine's Law Dictionary (3rd Edition, Lexinexs, 2010))

> misleadingly suggests a body of law somehow parallel to (public) international law, when in fact it is merely a part of each legal system's private law."[26]

As it can be seen by the above definition maritime law can hardly be said to fall into the scope of it entirely. Firstly, maritime law does not only embrace the relationship between nations, and secondly, it does not deal exclusively with conflict of laws. Maritime law also governs commercial relationships between businesses (or corporations), regulates international maritime commerce, governs personal liabilities in maritime transport, and even regulates maritime employment relationships. Accordingly, it seems that maritime law can neither be defined as purely international, nor national law, falling instead in the scope of what is now considered to be transnational law.

Transnational law[27] was first defined by Judge Philip Jessup in his 1956 Storrs Lectures. According to him, transnational law is:

> "(…) all law which regulates actions or events that transcend national frontiers…[including] [b]oth public and private international law…[plus] other rules that do not wholly fit into such standards categories… Transnational situations, then, may involve individuals, corporations, states, organizations of states, or other groups."[28]

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[26] Bryan A Garner, *Black's Law Dictionary*, (Abridged 7th Edition, West Group Minn. 2000), p. 658

[27] It is not the intention of this thesis to engage in a deep discussion of transnational law, this being a concept that can be considered relatively new and therefore the subject of intense debate. The discussion of transnational law in this thesis is only necessary to justify the premise that seafarers are transnational employees. Thus, the choice was of a simplistic approach to the subject by choosing to exploit Jessup's conceptualization of transnational law, since he was the first one to substantially deal with the topic in his 1956 Storrs Lectures, and his conception is still considered the leading one. See: Christian Tietje and Nowrot Karsten, ' Laying Conceptual Ghosts to Rest: The Rise of Philip C. Jessup's "Transnational Law" in the Regulatory Governance of the International Economic System' In Christian Tietje, Alan Brouder, and Karsten Nowrot (eds), *Philip C. Jessup's Transnational Law Revisited—On the Occasion of the 50th Anniversary of its Publication*, (Essays in Transnational Economic Law No.50, Halle-Wittenberg: Martin-Luther-Universität. 2006)

[28] Philip C. Jessup, *Transnational Law*, (Yale University Press 1956), pp. 2-3

Christian Tietje and Nowrot Karsten, were to later summarize Jessup's definition of transnational law as:

> "national and international law would be part of it in so far as they have these effects, and it could address both public (state and governmental) and private (nongovernmental, civil) society actors"[29]

Based on Jessup's definition of transnational law the renowned Professor William Tetley, in one of his later works, proposed three new definitions for international maritime law:

> *"International public maritime law* (or *public international maritime law)* concerns the legal relationship between States in respect of maritime matters.
>
> *Private international maritime law* (or *conflict of maritime laws)* is the collection of rules used to resolve maritime disputes as to choice of law, choice of jurisdiction and recognition of foreign judgements between private parties subject to the laws of different states.
>
> *International private maritime law* concerns the legal maritime relationships between private parties of different states."[30]

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[29] Christian Tietje and Nowrot Karsten, 'Laying Conceptual Ghosts to Rest: The Rise of Philip C. Jessup's "Transnational Law" in the Regulatory Governance of the International Economic System' In Christian Tietje, Alan Brouder, and Karsten Nowrot (eds), *Philip C. Jessup's Transnational Law Revisited—On the Occasion of the 50th Anniversary of its Publication*, (Essays in Transnational Economic Law No.50, Halle- Wittenberg: Martin-Luther-Universität. 2006), available at: http://www.wirtschaftsrecht.uni-halle.de/sites/default/files/altbestand/Heft50.pdf. Some scholars however treat transnational law as conceptually distinct from national and international law, because its primary sources and addressees are neither nation state agencies nor international institutions founded on treaties or conventions, but private (individual, corporate or collective) actors involved in transnational relations. For further discussion see: Zumbansen, Peer. 2002. Piercing the Legal Veil: Commercial Arbitration and Transnational Law. European Law Journal 8: 400-32.

[30] William Tetley, 'Uniformity of International Private Maritime Law-The Pros, Cons, and Alternatives

Professor Tetley's definitions of international maritime law appear to have been carefully considered, including all legal maritime relationships. Nevertheless, it seems to neglect that more than including private actors, the concept of transnational law also includes national and international law, and although Prof. Tetley's intention might have been to include national law in his definitions, this does not seem clear upon reading them. Therefore, Jessup's concept of transnational law still seems to be the most accurate when dealing with legal maritime relationships or maritime law in general.

Accordingly with the above reasoning, it can be concluded that maritime labour relationships are also governed by maritime law, hence seafarers[31] should be perceived as transnational employees[32]. Indeed, seafarers' rights are regulated by national and international legislation. Furthermore, due to the seafarer's unique employment conditions, any legal relationship arising out of his employment will undoubtedly be governed by transnational law. This thesis develops from this particular premise, i.e. that seafarers are transnational employees.

Furthermore, transnational labour relations are said to have an association with a transnational legal process which provides the base for understanding the issue of compliance with international law. 'Transnational legal process' has been defined by Professor Koh as having four distinct features:

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to International Conventions-How to Adopt an International Convention' in 24 Tul. Mar. L.J. 775 1999-2000, p.782

[31] This thesis is adopting the Maritime Labour Convention definition of seafarer: "seafarer means any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies". (Maritime Labour Convention 2006, Article II, paragraph 1(f)) Therefore, within the scope of this thesis, the master of a vessel shall be considered a seafarer.

[32] Seafarers, due to the nature of their job are often referred to in social studies as "transnationals". The social concept of transnationality differs from its legal concept but seems to find common ground in the fact that both refer to transnational as 'someone' or 'something' that crosses borders. For a more detailed view of seafarers as transnational employees from a social perspective see: Helen Sampson, In*ternational Seafarers and transnationalism in the twenty-first century,* Manchester University Press (Manchester:2013)

- It is *non-traditional, breaking down two* traditional dichotomies (between domestic and international, and public and private) that have historically dominated the study of international law.
- It is *non- statist:* the actors in this process are not just, or even primarily, nation-states, but include non-state actors as well.
- It is *dynamic,* not static. Transnational law oscillates from the public to the private, from the domestic to the international level and back down again.
- It is *normative.* New rules of law emerge from the transnational legal process. These rules are interpreted, internalized, and enforced hence beginning the process all over again. Accordingly, the concept embraces not just the descriptive workings of a process as well as the *normativity* of that process, focusing not simply upon how international interaction among transnational actors shapes law, but also on how law shapes and guides future interactions.[33]

This renowned legal scholar perceives the transnational legal process as describing the theory and practice of public and private actors, nation-states, international organizations, multinational enterprises, non-governmental organizations (NGOs) and private individuals interacting in a variety of private and public, international and domestic spheres, and also how they interpret, enforce and then ultimately internalize the rules of international law. [34]

Transnational labour relations are said to incorporate a set of rules, guidelines and/or principles to be observed by various states and accordingly requires input from all actors, namely, states, trade unions, employers' associations and the applicable international body through a process of social dialogue.[35]

[33] H. H. Koh 'Transnational Legal Process' in 75 Nebraska Law Review (1996), p. 184
[34] *Ibid*, p. 183
[35] For deeper discussion of transnational labour relations see: : Paul Smit, 'Transnational labour relations: a dream or possibility in SADC?'in African Journal of International and Comparative Law 2014

Therefore, it is clear that private actors play an essential role in the transnational legal process and as such are also vital players in terms of seafarer labour relations, these being transnational employees. This justifies the choice of this thesis to explore the role of private actors in cases of abandonment of seafarers and since the work carried out in this thesis is legal in nature, it was reasonable to justify the choice of private actors to be analyzed in this thesis, by justifying their status as stakeholders in the ship industry as well as that of third parties in the seafarers' employment relationship. Nevertheless, before justifying the selected private actors, it is necessary to discuss the second premise upon which this thesis is based.

The other premise upon which this thesis is founded is the fact that most reported cases of abandonment of seafarers (even in the strict sense of the term), can be said to have occurred on board a substandard vessel. For instance, in 1990, during an inspection in the Liberian/Greek owned vessel, Nikolas K, at the port of Flushing (Netherlands), it was found that the ship had unsanitary accommodations, besides having been previously detained because of a number of structural defects and other irregularities by Port State Control. Furthermore, it was found that most of the crew had no contract of employment and were forced to accept a 'Memorandum of Agreement', specifying that overtime (which was decided at the master's discretion) would be paid at one dollar per hour, and in the case of it being decided that the seafarer was causing problems on board, he could be instantly dismissed, having to pay not only the cost of his own repatriation, but also the air fare of a replacement crewmember.[36]A decade later, the Russian, Filipino and Ukranian crew on board the Greek owned St George would also be abandoned in Klaipedia once the ship was detained for repair. [37] More recently, in February 2016, the Perekopskiy vessel has reportedly been abandoned for a second time in Argentina, in substandard condition.[38]

[36] See: ITF Seafarers' bulletin 1991. Pages 24
[37] See: ITF Seafarers' bulletin 2001. Pages 36
[38] IMO abandonment database <http://www.ilo.org/dyn/seafarers/seafarersbrowse.details?p_lang=en&p_abandonment_id=238&p_search_id=160827213232> last accessed on 01/10/2016. The owner seemed to be going through financial

This conclusion can easily be drawn by the OECD definition of a substandard ship, as essentially any vessel that fails to meet basic standards of seaworthiness due to its physical condition, its operation, or the activities of its crew. A substandard ship is said to pose threats to both human life and/or to marine environments. [39] OECD's definition evidences the disastrous effect of substandard shipping on both environmental and human life.

Accordingly, it would not be incorrect assume that substandard shipping is directly connected to the abandonment of seafarers. The assessment of third-party liabilities in these particular cases might be especially important to seafarers considering that not only does the shipowner have numerous statutory limitations on liability, but most importantly, because often the ship is the shipowner's sole asset, and in case of this being substandard the chances are, especially in abandonment cases, that the seafarer will not be able to fully compensate the seafarer for his/her losses.

The recognition of the importance of stakeholders in the protection of seafarers can be considered fully recognised. The ITF has for a long time been conducting research into flag-state responsibilities, working together with Port State control in

hardship as the vessel was originally abandoned in 2008 and was in need of immediate repairs. Nevertheless, it was not possible to find more information about the incident. The vessel is a trailing suction hopper dredger, over 25 years old, having been built in 1988 <http://www.marinetraffic.com/en/ais/details/ships/shipid:906337/mmsi:-8510831/imo:8510831/vessel:PEREKOPSKIY>. It is important to highlight that during the years when this research was conducted, it was possible to form a database of reported abandonment of seafarers' cases since the 90s until today, some obtained through research conducted at ITF, Seafarers Rights International (research which would have not been possible without the help of Deirdree Fitzpatrick, to whom the author is extremely thankful), others through newspapers articles and news clips, and finally through the ILO abandonment of seafarers database. Although the database does not always contain all the necessary relevant information on every case, most cases alludes to the practice of substandard shipping.

[39] SSY Consultancy and Research Ltd *The Cost to Users of Substandard Shipping* (Report Prepared for the OECD Maritime Transport Committee, OECD Directorate for Science, Technology, and Industry, January 2001), p. 5
Http://www.oecd.org/oecd/pages/document/displaywithoutn av/0,3376,EN-document-notheme-1-no-no-12906-0,00.html last accessed on 20/05/2015

order to ensure that seafarers have their rights protected,[40] and it has for long recognised the role of the insurer in assuring that the seafarer will be fully compensated.[41]

This thesis shall demonstrate the link between substandard shipping and abandonment of seafarers, which shall be proven to be particularly helpful in assessing third party liability in cases of abandonment. Furthermore, in maritime law, life, property and environment are constantly included in the same boat. Thus, particularly in cases of third party liability, drawing a parallel among them seems to be a logical thing to do, especially in cases of substandard vessels when the three areas are affected; life, property and the environment. Since the essence of this thesis can be said to be definitional, it is important to highlight that "life"[42] for its purposes is considered in a broad sense (for the period that seafarers are at sea, that is where their life is).

Considering that the Maritime Labour Convention is the primary piece of international legislation studied in this thesis, a few parallels shall be made with other pieces of international legislation with similar provisions to those contained in the Convention. National legislations shall be mentioned whenever relevant. For simplicity, and taking into consideration that it is not the intention of this thesis to

[40] See Chapter III

[41] When advising seafarers for compensation in cases of death at sea, Seafarers Rights International claims that "P&I insurers can actively participate (through the use of representatives and lawyers worldwide) at an early stage to prevent claims being pursued, or they could attempt to settle claims at less than the legal entitlement of the claimant." Thus, clear acknowledging the importance of the Insurer in assuring seafarers their rights. See: http://seafarersrights.org/seafarers-subjects/death-and-injuries-at-sea/

[42] Two of the existent definitions for life in the online oxford dictionary are "The existence of an individual human being or animal; usually one's life); The period between the birth and death of a living thing, especially a human being" - http://www.oxforddictionaries.com/definition/english/life.
It must be borne in mind that the connection between SOLAS and MLC is clear. The latter makes express reference to the former in *Standard A3.1 – Accommodation and recreational facilities and Guideline B5.1.3 – Maritime labour certificate and declaration of maritime labour compliance.* The importance of SOLAS to seafaring has been recognized by ITF when highlighting the importance of IMO to the profession. See: ITF, IMO and ILO, available at; http://www.itfseafarers.org/ITI-IMO-ILO.cfm last accessed on 01/08/2016. The link between the two convention becomes even more clear with the reading of: International Labour Conference, 94th (Maritime) Session, 2006, Report I(1A) - Adoption of an instrument to consolidate maritime labour standards, International Labour Office Geneva: 2005, ISBN 92-2-117915-X, available at: http://www.ilo.org/public/english/standards/relm/ilc/ilc94/rep-i-1a.pdf last accessed on 01/08/2015, concerning the adoption of the MLC

conduct specific research into seafarers' rights according to national law, English law shall be the law most often referred to as an example, whenever relevant.

Defining the Private Actors

The selected private actors have a long-established importance[43] in the shipping industry as stakeholders, which in itself should be enough to justify their selection, however considering the legal aspects of the research conducted in this thesis, it is deemed necessary to justify their roles as third parties in the seafarers' employment relationship. Unfortunately, there is no single authoritative definition of a 'third party' in law. Domestic law and International Law generally deal with a 'third party' without actually defining it or doing so in a limited fashion just in order to determine to which third parties the legislation is referring to, but even in these cases, as in the case of the Vienna Convention Law of the Treaties, the flaws of the definition added to the other provisions of the convention leaves space for wider interpretation.[44] Thus, it may be concluded that the concept of third parties in both legal domains is far from being a comprehensively defined one, all tending to refer back to the general legal concept of third parties[45].

[43] This shall be demonstrated in chapters II, III and IV

[44] For a more detailed discussion on the subject see: Christian Tomushat, "International Organizations as Third Parties under the Law of International Treaties", *in The Law of Treaties Beyond the Vienna Convention*, ed. By Enzo Cannizzaro, Oxford Scholarship Online (2011), DOI: 10.1093.acprof:oso/9780199588916.001.0001

[45] Legal dictionaries will generally and broadly define a third party as someone outside of the transaction, more specifically an "outside party". In this context, the Black's Law Dictionary defines third party as: "one who is not a party to a lawsuit, agreement, or other transaction but who is somehow involved in the transaction; someone other than the principal parties…Also termed *outside party*." (Bryan A Garner, Black's Law Dictionary, Abridged 7th Edition, West Group (Minn. 2000), p. 1202) The Oxford Dictionary even more broadly, simply defines third party as Oxford Dictionary defines third parties as: *"A person or group besides the two primarily involved in a situation"* <See: http://www.oxforddictionaries.com/definition/english/primarily#primarily__2> last accessed on 01/11/2014

According to this definition and thanks in great deal to its broadness, it would not be difficult to identify the third parties in the context of this thesis, as this could be easily said to be any party outside of the seafarers' employment contract, who somehow has an interest in the claim, more specifically and for the purpose of this research in an abandonment of seafarer situation.

According to contract law, third parties will essentially be anyone other than the contracting parties.[46] Nonetheless, the law only provides rights for third parties when they are expressly provided in the contract, or when it was a contracting party's intention to benefit a third party. In this context it is not difficult to perceive how P& I Clubs would fit in this category, since they are the ones responsible for providing insurance for the crew, the funds for repatriation of seafarers and most likely will be the ones responsible for the Financial Security Fund established by the MLC in case of

[46] It was not until the Contracts (Right of Third Parties) Act 1999 that third parties to a contractual relation were accepted in England. Prior to that the common law 'privity of contract' rule , that essentially states that a contract cannot impose rights or confer obligations to anyone aside from the contracting parties, was seen as a trammel to allowing any rights to anyone outside the contractual relationship, i.e. anyone besides the contracting parties. (This was subject of much judicial and academic criticism to the extent that the Law Commission in 1996 issued a Report on Privity of Contract- Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com. No.242) which much of its recommendations were adopted by the 1999 Act. For a more detailed discussion on the subject see: Catharine MacMillan, 'A Birthday Present for Lord Denning: The Contracts (Rights of Third Parties) Act 1999' in The Modern Law Review, Vol. 63, No. 5 (Sep., 2000), pp. 721-738 Published by: Blackwell Publishing, URL: http://www.jstor.org/stable/1097046)
The 1999 Act did not abolish the doctrine of privity of contract but merely reformed it to allow in certain circumstances parties others than the contracting ones to have certain rights and obligations emanating from the contract itself. The Act is in fact perceived as a statutory exception to the privity of contract doctrine, a limited one nonetheless. (Catharine MacMillan, 'A Birthday Present for Lord Denning: The Contracts (Rights of Third Parties) Act 1999' in The Modern Law Review, Vol. 63, No. 5 (Sep., 2000), Published by: Blackwell Publishing, URL: http://www.jstor.org/stable/1097046. P.721 and Hugh Beale QC, *Chitty on Contracts - General Principles*, (32nd Ed., Volume 1, Sweet & Maxwell 2012), ISBN 978041404803, 18-002)
Indeed, this exception provided by the 1999 Act is limited to only two situations; when the contract expressly provides so and when the contract intends to confer a benefit to someone other than the contracting parties. Thus, the act fails to cover numerous situations, which have been perceived as problematic, such as cases of third parties who have suffered loss in consequence of the breach of a contract between others and who must seek a remedy in tort against the party in breach. (Contract (Rights of Third Parties) Act 1999, Section 1 and Hugh Beale QC, *Chitty on Contracts - General Principles*, (32nd Ed., Volume 1, Sweet & Maxwell 2012) , ISBN 978041404803, 18-024)
It is important to note that the 1999 Act does not actually define Third Parties. The closest thing to a definition attempted by the Act, can be found in its Section 3 of its Explanatory Notes, which states:
"The Act reforms the rule of "privity of contract" under which a person can only enforce a contract if he is a party to it. The rule means that, even if a contract is made with the purpose of conferring a benefit on someone who is not a party to it, that person (a "third party") has no right to sue for breach of contract." (Emphasis added).
Therefore, it can be understood that the Act 1999 accepts that anyone who is not a party in the contract, should be perceived as a Third Party, thus accepting the general concept of third parties and applying it specifically to situations arising out of contracts. Nevertheless, as already discussed, even though the Act might be said to broadly define Third Party, it only recognized those as having any rights emanating from the contract in two possible scenarios, when expressly provided, or when it was the contracting parties' intentions to benefit the third party.

abandonment of seafarers (according to the convention's definition). These forms of insurance contract are clearly for the benefit of the seafarers.

Third parties in international law proved to be an even greyer area than in contract law. International law seems at a first glance to only recognize states as third parties in inter-state relationships, not allowing any sort of responsibilities or obligations to be imposed upon these.[47] Nevertheless, treaties and contracts share many

[47]International Law, no differently from English national law does not provide any precise definition for Third Parties. In international law, the relationship between third parties and treaties is regulated by the principle *pacta tertiis nee nocent nee prosunt*, meaning that treaties do not create rights or obligations for a third party (State) without its consent. The principle can be seen in Article 34 of the Vienna Convention on Law of Treaties I and later in the Vienna Convention on Law of Treaties II with the appropriate modification *ratione personae* to international organizations. (Christian Tomushat, "International Organizations as Third Parties under the Law of International Treaties", *in The Law of Treaties Beyond the Vienna Convention* ed. By Enzo Cannizzaro, Oxford Scholarship Online (2011), DOI: 10.1093.acprof:oso/9780199588916.001.0001, p.1; and Malgosia Fitzmaurice, *Third Parties and the Law of Treaties*, Max Planck Yearbook of United Nations Law, Volume 6, 2002, 37-137)
In fact, it is in the 1969 and 1986 Vienna Conventions on the Law of Treaties that there can be found a definition for a Third Party in international law (as imprecise as it may be). The 1969 Vienna Convention simply defines "third State" as a state not a party to the treaty(Article 2 para. 1 lit.(h)), and following the same line of thought, the 1986 Convention defines "third State" and "third organisation" as a state or an international organisation not a party to a treaty. (Article 2 para. 1 lit.(h)) Furthermore, according to the 1969 Vienna Convention, a party to a treaty is "a State which expressed its consent to be bound ... and for which the treaty is in force"(article 2 para. 1 lit.(g)); the same is defined in the text of the 1986 Vienna Convention as "a party means a State or an international organisation which has consented to be bound by a treaty and for which the treaty is in force" (article 2 para. 1 lit.(g))
International law will most commonly refer to Third Party as Third State, which is easy to understand since States and not private individuals are parties in Treaties, international agreements and conventions. Indeed, States are considered to be the primary subjects of international law. Accordingly, it is easy to notice that international law also adopts a very general definition for Third Parties. (See: Gideon Boss, *Public International Law*, Elgaronline (2012) ISBN:9780857939555, eISBN:9780857939562, DOI:10.4337/9780857939562")
It must be observed at this point that this thesis when dealing with international law does not refer to treaties but to conventions, nevertheless they might be perceived as one and the same. Treaties are usually defined as an agreement (usually written) between two or more States (or a State/group of States and an IGO, or two IGOs), governed by international law and intended to create legal obligations. There should be little doubt at this stage that all the conventions mentioned in this thesis possess the same characteristics. The main distinction to be drawn between both instruments is that all conventions will be treaties but not all treaties will be conventions. Nevertheless, it is interesting to note that relating to treaties, a distinction is made between law-making treaties (normative treaties) and treaty contracts. The former lay down rules of general or universal application and are intended for future and continuing observance, whereas the latter resemble contracts in that they are concluded to perform contractual rather than normative functions (e.g. building an aircraft). These are negotiated between two or only a few States, and treat a particular matter concerning those States exclusively Such as contracts, these treaties expire when the parties have performed their obligations. This distinction makes clear that an analogy between contracts and treaties can be drawn, as they possess similar features (negotiated between parties, considered to only create rights and obligations to the negotiating parties), to the extent that some treaties might have contractual rather than normative functions. This analogy might give an even clearer

similarities, as does the law of treaties and contract law, hence, it seems reasonable to consider that the same principles of the latter could apply to the former, i.e., if the convention was drawn for the benefit of anyone other than the contracting states, there seems to be no reason to not recognize that one as a third party, similar to the position in contract law.

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perspective that international law perceives third parties the same way contract law does. (See: Alina Kaczorowska, *Public International Law*, (4th Edition, Routledge 2010) , p. 26 and Christian Tomushat in his work make a express parallel among treaties and contracts, acknowledging that they are both instruments of self-commitment. _ Christian Tomushat, "International Organizations as Third Parties under the Law of International Treaties", in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention*, (Oxford Scholarship Online, 2011) DOI: 10.1093.acprof:oso/9780199588916.001.0001, p. 1)

It is important to note that articles 34 and 35 of the Vienna Convention Law of Treaties I, that regulates inter-state treaties, expressly provides for the protection of Third States only. Nevertheless, the Vienna Convention Law of Treaties II envisages the possibility of international organizations to act as Third Parties in international Law. Article 34 of the Convention states that: "A treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization". The recognition of international organizations by international law should not come as a surprise, considering that these organizations were recognized by the International Court of Justice as subjects of international law, of a specific nature nonetheless, as they are neither sovereign nor equal to States, but most importantly due to the fact that diplomatic history accounts for treaties concluded between States intending to impose obligations on an international organization. One example of such a treaty would be the Peace Treaty of Versailles which provides for the German territory of Saar to be administrated by the League of Nations.(See: Article 49(1)). This recognition should come as no surprise at this point because if the parallel between contracts and treaties exists, logic will dictate that similar situations in both legal spheres would generate the same understanding. Thus, if contract law recognizes as a third party someone to whom the contract expressly imposes rights and obligations, the same would be expected in treaty law. (For a more detailed discussion on International Organizations acting as Third Parties please refer to: Christian Tomushat, "International Organizations as Third Parties under the Law of International Treaties", in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention*, (Oxford Scholarship Online, 2011) DOI: 10.1093.acprof:oso/9780199588916.001.0001)

Accordingly, apparently international law only considers States and International Organisations as possible third parties. Although the rationale, as already explained makes sense since these are the recognized subjects of international law, it implies that only States have rights against other States in case one of them breaches a treaty. This assumption raises the question of what happen when an innocent individual is harmed by a breach of an international law caused by a State. Couldn't this individual be considered a Third Party in this case? This would seem to be a grey area of international law.

Bearing in mind the similarities among treaties and contracts, and the recognition of international organizations as possible Third Parties in treaties, it can be concluded that if a convention is drafted for the benefit of a Party (individual) and imposes rights and responsibilities upon another Party (individual), these should also be considered Third Parties in International Law in the same way they are in Contract Law. Henceforth, this will be the approach taken by this thesis. Nevertheless, differently from contract law, unfortunately, as this thesis will demonstrate, International Law does not provide a remedy to an injured Third Party in these scenarios.

Accordingly, it does not seem wrong that in conventions drafted for the benefit of seafarers, as is the case of the MLC and several other ILO instruments analysed in this thesis, for seafarers to be considered third parties. Specifically, as in the case of the MLC, if these conventions expressly establish responsibilities and obligations upon states in order to guarantee the seafarers' rights. Thus, in these cases, states might be perceived on occasion as even having a direct obligation towards seafarers, but most of the time any obligation would not be as direct a responsibility as the one between shipowner and seafarer, but an indirect one.

Therefore, in any circumstance, the ratifying states do have responsibilities and obligations ensuring seafarers' rights. It is the understanding of this author that coastal, port and Flag States respectively share a responsibility towards seafarers according to the Conventions they have ratified. Consequently, it should not be difficult to perceive the seafarer as an injured third party if a state fails to fulfil its international obligations. Therefore, even with the remote possibility that seafarers are not perceived as the beneficiary of the convention (as they might be, looking at SOLAS for instance, which was designed to ensure safety of life at sea, hence benefiting the seafarer even if indirectly), they should still be perceived as third parties. The problem lies in the fact that although contract law has progressed a bit further than international law, currently providing for the first type of situation (when the contract is made for the benefit of a third party), international law currently does not provide for either type of situation.

Neither contract law nor international law provide (direct remedies) for situations when someone outside the contractual relationship has suffered an injury or a loss. However, the lack of provision covering these types of situations, does not prevent the injured party from being classified as a third party. The third party in this type of situation will only be able to seek a remedy in tort law. classification societies will fall into this category, as it will be later demonstrated in this research, a breach by a Classification Society of its contract with the shipowner may directly and indirectly

affect the seafarer. The same is true for classification societies functioning as recognized organizations.

When analysing third parties in tort law[48], it was clear that the subject is still in need of much further analysis and discussion, which is not the intention nor the focus

[48] There does not seem to be a definition, or anything close to it, of Third Parties in Tort Law. The reason for it might be that the idea of making someone responsible for the harm committed by another directly opposes to the basic notion of individual moral responsibility, which is the core of the English corrective-justice-led tort system. Nevertheless, the existence of a Third Party liability is accepted as a form of tortious liability.(For a deeper discussion on the subject please see: Claire McIvor, *Third Party Liability in Tort* (Hart Publishing 2006))

There are not many academic works written on this particular form of tortious liability. Apparently, the only extensive research conducted on the subject was made by Dr. Claire McIvor, who suggests in her work that third party liability in tort is intrinsically connected to the rule of omission, so much so that the misconceptions existing in the latter would be the core of the current "state of unintelligibility" of the former. (Claire McIvor, *Third Party Liability in Tort*, (E-theses – Durham University 2003) p.3, available at: <http://etheses.dur.ac.uk/3693/>)

McIvor's premise seems to be very accurate, explaining in great deal the difficulty, discussed later in this chapter, of imposing liability on third parties in tort. It is not difficult to perceive that in tort cases it is a lot easier to rule the defendant liable for a positive action than for a negative one, most commonly in cases of negligence, as McIvor's argues the "term 'omission' should be used exclusively for the purpose of referring to the alleged source of the defendant's negligence". (Claire McIvor, *Third Party Liability in Tort*, (E-theses – Durham University 2003) , available at: <http://etheses.dur.ac.uk/3693/>, p.5) The problem lies with the fact that the law of tort does not recognise a duty of care for omission thus negligence cases based solely on omissions are deemed to fail, unless they fall into the plethora of exceptions established over the years on an ad hoc basis which is itself problematic. For the purposes of this thesis, perhaps the more relevant discussion on the subject of omissions in tort would be the one drawn by Honore, who argues that it is possible to designate certain "norms imposing distinct duties" as being so important that their violation by whatever means would attract reproach. According to the renowned scholar, one distinction to be made between a distinct duty and a mere background duty imposed by an ordinary norm is that the former is owed to specific persons as imposed by the particular circumstances of the individual agent involved, whereas the latter is owned by each to all. One example of these distinct duties would be those owed by persons who create a danger, to those endangered. Accordingly, it can be concluded that these distinct duties are high-ranking social or moral duties to which strong arguments may support their translation into legal duties. According to Honore, and the majority of academic accounts on the subject, these strong arguments would be:

- The agent has positively created a risk of harm
- The agent occupies an office or position of responsibility
- The agent is well placed to meet a need, such position creating a situation of dependency
- The agent is recipient of a benefit
- The agent has given an undertaking

(See T. Honore, "Are Omissions less culpable?", in P. Cane and J. Stapleton (ed.s), *The Law of Obligations: Essays for Patrick Atiyag*, (Clarendon Press1991), p.33; J. Logie, 'Affirmative Action in the Law of Tort: The Case of the Duty to Warn' in (1989) 48 CLJ 115; J.C. Smith and P. Burns, 'Donaghue V Stevenson – The Not So Golden Anniversary' in (1983) 46 MLR 147, p.173; Claire McIvor, *Third Party Liability in Tort*, (E-theses – Durham University 2003), available at: <http://etheses.dur.ac.uk/3693/>) pp.8-10)

of the present research. Nonetheless, the analysis confirmed that third party liability exists in tort by way of omission (which is itself the subject of intense academic debate). The role of classification societies is essential to the maritime industry as a whole, hence as it will be seen, failure in efficiently fulfilling one of its functions can have a fundamental impact in maritime casualties. As will later been seen, the classification society's exercise of its functions, or lack of it, can have a direct impact on seafarers. Thus, the rule of omissions could be seen as applicable to classification societies due

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When establishing the well-known 'neighbour test', Lord Atkin seemed to share the same view of Honore that omissions are highly connected to moral and social duties. According to his lordship:

> "The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."
> (*Donoghue v Stevenson* [1932] AC 562)

Furthermore, it can be observed from the extract above that Lord Atkin shares Honore's view of omissions as expanding the scope of the duty of care. Indeed, in his speech, his lordship can be said to have set the train of the Caparo test (discussed further along this chapter) in motion, when requiring foreseeability and reasonableness in order to determine a duty of care in the tort of negligence.

Undoubtedly, if omission exceptions were more widely accepted, there would be a lot more claims in tort for Third Party liability in cases of Negligence. Furthermore, it is undeniable that most cases whose tortfearsor is a third party involve the tort of negligence. Indeed, one of the central premises of this chapter is that Third Parties can be found liable in the tort of negligence for the abandonment of seafarers. As discussed previously, the 1999 Act did not deal with all the issues concerning third parties, in particular with cases when the contract generates a duty of care to a Third Party, the breach of which will enable the latter to sue the breaching party in tort for negligence.(Hugh Beale QC, *Chitty on Contracts - General Principles*, (32nd Ed., Volume 1, Sweet & Maxwell 2012) , ISBN 978041404803, 18-024) In several cases, persons providing professional services, such as solicitors, insurance brokers, safety consultants, valuers and surveyors have been held liable in tort to persons other than their immediate clients for negligence in the performance of their contracts with these clients.(See: *Ross v Caunters [1980] Ch. 287*; *White v Jones [1995] 2 A.C. 207*; *cf. Smith v Clarement Haynes, The Times, September 3, 1991* as a title of example); In these cases, the third party is not the tortfeasor but the person who suffered the tort is, because it refers to the Third Party in contract Law and not in Tort. Nevertheless, the Third Party in these situations has no recourse in contract law (as these situations are not recognised as an exception of the doctrine of privity by the 1999 Act), only in tort.

It can be concluded that the Third Party in tort law is a rather grey area. Although, no current definition stands, it can be assumed that the accepted position is that a Third Party in tort law is the party who has actually not committed the wrongdoing him/herself, but can be found liable for it nonetheless, mostly in tort of negligence based on an omission. This assumption can be drawn from the fact that although no palpable definition of third party currently stands, third party liability in tort is accepted. Furthermore, it is important to note that in certain situations when contract law is not applicable, third parties in contract law can rely on tort to have a valid claim against the breaching party.

to their vital role, which shall become clear later in this research. Consequently, undoubtedly, classification societies should find their liability regulated by tort law.

Therefore, the 'private actors' selected to be analysed in this research are the following:

- P&I Clubs – Insurance Companies
- Classification Societies
- Flag States
- Port States
- Coastal States

Not coincidentally, all the third parties analysed are considered to be a member of what is known as the "Maritime safety chain". The reason why this can be hardly considered a coincidence is the fact that all of the mentioned third parties are essential not only to ensure the safety of the sea, but also to regulate shipping in general. All of them perform vital functions for the sustainability of shipping as whole. Indeed, they could even be considered third parties in any sort of "shipping law" relationship, because their role in the industry has an impact in any shipping transaction, i.e. charterparties or pollution accidents. Therefore, it should not come as a surprise that they also have a vital role in ensuring seafarers' safety at sea, to say the least. This does not necessarily mean that they will incur liability if they fail to do so. This shall, hopefully, become clear as this thesis progresses.

Methodology

This thesis will prove that the selected shipping industry's stakeholders have an essential role in seafarer abandonment cases, incurring responsibilities and possible liabilities. Two premises were relied upon in order to justify such a hypothesis:

- Seafarers are transnational employees
- The existence of a link between substandard shipping and abandonment of seafarers

These two premises are validated throughout this thesis. Chapters II and III in particular, focus on the validation of both premises. In order to prove these premises the concept of transnational law, abandonment of seafarer and substandard shipping were analysed.

The research demonstrated that the concept of transnationality is still an evolving one, having its roots in the United States but having been incorporated in other nations as well. The lack of material in this area is evident, with all the leading materials being written by American academics. The problematic nature of transnational law seems to be founded upon the fact that some legal scholars conducting research in different fields will justify the use of the concept of transnationality for relationships that have "crossed borders", without further elaborating on that, it not being clear if the concept is as laid out by Jessup, the pioneer in the field, or if the principle is adopted in the same manner in each piece of research. It seems clear, nonetheless, that most scholars will justify the notion of transnational law through an already settled analysis of international and national law concepts and the subsequent realization that the legal relationship studied does not necessarily fall under either concept, as in the case of maritime law for instance.[49]In this thesis the concept of transnational law developed by Jessup and subsequently Kohl was adopted; their being considered the pioneering authorities in the field avoids the need for fruitless further discussion.

When considering the term "abandonment of seafarer", the legal and normative approach towards it was researched and analysed. Although the term can be said to have acquired a specific legal definition in this decade, the research demonstrated that the terminology has been used in previous decades also to raise awareness of seafarers'

[49] See pp.18-23

conditions. The normative approach proved that the term has been used even before seafarers were granted any minimum rights and was always used in a context of calling attention to the struggles faced by these employees. Undoubtedly, the current definition contained in the MLC took into consideration the normative approach confining "abandonment of seafarers" to extreme contractual breaches of employment.

In order to analyse "abandonment of seafarers" it was deemed necessary to analyse the evolution of seafaring and seafarers' rights, taking into consideration historical developments and normative characteristics. This was also necessary in order to demonstrate the transnational character of seafarers' labour relations.

The analysis conducted regarding the practice of substandard shipping was essential in order to determine the choice of private actors to be analysed in this thesis. The research demonstrated that these selected shipping industry' stakeholders are essential in the prevention of substandard shipping, having been held liable on certain occasions by determined jurisdictions when such substandard shipping had been confirmed. Furthermore, the research demonstrated the existent link between abandonment and substandard shipping.

Finally, except for in chapter IV, a comparative study was not carried out in this thesis, as English law was used as a primary source of legislation throughout, hence used as example whenever analysis of national legislation was deemed necessary. National laws of other jurisdictions were referred to wherever relevant. Accordingly, in chapter IV, the legislations chosen to be analysed were those of the United States of America and France, due to the eminent judgments handed down in those jurisdictions in relation to classification societies and their part in the most infamous maritime incidents involving substandard shipping, i.e. the Prestige and the Erika incidents.

Thesis Structure

Chapter I seeks to prove the transnationality of seafarers' rights, or rather of maritime labour law. The chapter shall trace a timeline of the development of seafarers' rights over the years. The chapter will demonstrate the effect that international organisations had on seafarers' rights and how such dynamics work, and shall assist in understanding the connection made throughout this thesis with international conventions not specifically designed to protect seafarers but that do have an impact in assuring their protection. It shall determine the impact that the perception of seafarers had on the development of their rights and the origin of the terminology of "abandonment of seafarer".

Chapter II intends to analyse what is known as the 'maritime safety chain'. Chapter II shall be dedicated to the analysis of the network of responsibilities in the maritime industry and the liability of its entities, especially towards third parties. The focus of the chapter will not rest solely on shipowner liability, but also on the responsibilities and liabilities of the other members of the chain, namely the flag State, port State, Classification Society and insurer, and P&I Clubs. Special attention will be given to the impact that the safety chain has on seafaring. Accordingly, chapter II will make a general analysis of these parties' roles within the industry, in order to demonstrate the link between "substandard shipping" and "abandonment of seafarers", which is essential in order to determine third parties' liabilities and responsibilities in relation to abandonment of seafarers. The chapter shall demonstrate the relevance that the chosen third parties have as regards abandonment of seafarers.

Chapter III focuses on demonstrating states' responsibilities and liabilities, in their roles of flag, coastal or Port State. As this chapter will prove, states not only by emanating rights regarding seafarers play a vital role in assuring that seafarers have their rights enforced, they also play a role in preventing abandonment of seafarers from happening. States, more than being mere regulators or convention signatories, play an

active role preventing abandonment of seafarer from happening and as such may incur responsibilities and liabilities if abandonment happens.

Chapter IV consists of arguing the classification societies' responsibilities and possible liabilities towards seafarers. In order to ascertain this, the chapter will explain classification societies' roles and their importance within the shipping industry. The chapter will prove that these stakeholders are relied upon to ensure that the shipowner complies with some of his basic responsibilities towards seafarers. Considering that classification societies do not have a contractual relationship with seafarers and can hardly be considered legislated upon by international regulations, their liability shall be ascertained by tort law, hence some national legislations shall be analysed. The legislations selected, apart from English Law - which as explained previously was taken as a base for this thesis - were chosen based on renowned cases concerning the liability of classification societies in substandard shipping, which as will be demonstrated in chapter II, has a direct link with abandonment. Additionally, all the cases were considered in tort law, since the claimants in the cases were, similarly to the position of seafarers as against classification societies, not in a contractual relationship.

Chapter V focuses on demonstrating P&I Clubs' responsibilities and obligations towards seafarers. This chapter shall also cover the new responsibilities brought to insurers by the Maritime Labour Convention with regards to abandonment of seafarers. It draws a comparison between the Financial Security Scheme provided for by the Convention in cases of abandonment of seafarers, with compulsory insurance provided by other international instruments. Considering the importance of English Law to the marine insurance industry, this is the only national legislation analysed in this part. The chapter shall prove that P&I clubs are crucial players in assuring that seafarers have their rights respected.

Chapter I – Developments in seafarers' employment

"As long as there have been labourers – under ancient slavery, under feudalism, and in the social systems of the modern world – there have been seamen"[50]

This chapter will trace a timeline demonstrating how seafarers' employment has evolved over the years until the present day. The purpose of this chapter is to demonstrate the changes of and developments in regards to seafarers' rights, going from national legislation to international regulations and a combination of both. It seeks to prove how international organisations and other private actors have had a direct impact on the development of seafarers' rights and consequently on 'abandonment of seafarers'. Indeed, this chapter shall confirm the transnationality of seafaring, by showing how seafarers have had their rights developed through a combination of national and international regulations, as well as through the action of private actors. Furthermore, the chapter will show the origin of the terminology 'abandonment of seafarers'. Thus it will be demonstrated how the transnational legal process has had and continues to have a direct impact on abandonment of seafarers.

The chapter will start with the regulation and perception of seafarers during early periods in legal history, which is indispensable to confirm the origin of the terminology of 'abandonment of seafarer', to the development of trade unions and international organisations. Finally, it will discuss the newest international piece of regulation on seafarers' rights, the Maritime Labour Convention (MLC). The reason for the MLC being the only regulation discussed in this chapter is a matter of concision, and further and primarily because the Convention encompasses the majority of international instruments regarding seafarers' rights. Most importantly, the Convention deals with the term 'abandonment of seafarers' bringing specific regulation to the situations that according to the convention constitute abandonment of seafarers, imposing new responsibilities and liabilities that before were only found in guidelines. Furthermore, the Convention has been considered a tool in the combatting of

[50] Bruce Nelson, *Workers on the waterfront : seamen, longshoremen, and unionism in the 1930s.*, (University of Illinois Press,1988), page 11

substandard shipping, which confirms the connection between substandard shipping and abandonment. [51]

This chapter will deal with a few social aspects of seafaring. The reason for this is that for this chapter to achieve its full purpose in demonstrating how seafarers' rights have developed, and demonstrating the rationale behind why their rights might be considered to have taken longer to develop than other employment rights, the analysis of their social and political status over the years is crucial. Furthermore, this is also necessary in order to demonstrate when and how the term "abandonment of seafarers" developed, proving that the terminology was born far prior to any international instrument, having historical roots.

I. 1. - From 3100 BC until the 19th Century – The earliest traceable regulations

Seafaring is undoubtedly one of the world's oldest professions, with the history of the sea being traceable back to shortly before 3100 BC[52]. Nevertheless, the regulation of seafarers' employment can hardly be traced as far back, unsurprisingly, since records indicate that seafaring was initially a profession performed by slaves.[53]

I.1.1 – The *Praetor's Edict*

A truly large scale of international transportation and commerce started being experienced by the world during the early days of the Roman Empire.[54] The Roman law at the time, the *Praetor's Edict*, which epitomized the law applicable to the whole population of the Empire, the Roman citizen or Barbarian, the *Jus Gentium*, contained a section on *nautae*, which can be translated as sailor, and therefore seafarer. The provisions of the section were also extended to innkeepers and stable keepers and its

[51] See Chapter I pp.77-86
[52]. Lione Casson, *The Ancient Mariners*, (2nd Edition, Princeton University Press 1991), page 4. – The book first points out the use of slaves by Egyptians, one of the first Nations to start trading with other countries by sea, tracing back to 2600 b.c. References about slaves being seafarers are also made on the Rhodian Sea Code; See: Water Ashburner, *The Rhodian Sea Law*, (Clarendon Press, 1909)
[53] *Ibid*, p.6
[54] http://www.jaysromanhistory.com/romeweb/transprt/shiptrav.htm, last accessed on 20/10/2015

purpose was to impose strict duties upon providers of services to travellers, regarding their belongings and goods. Deirdre Fitzpatrick and Michael Anderson in their book Seafarer's Rights argue that in this context the term *Nautae* is perhaps better understood as shipowners.[55]

I.I.2 – The *custumals*

In Medieval Europe, a collection of rules were made, described and presented as the customs of the sea. These were rules of behaviour, common at the time, where members of a particular group expected and accepted the customs or *custumals* applicable to them. Medieval lawyers accepted the idea that a person might to some extent carry his law with him as part of his recognized legal personality. During the Medieval age, trade by sea was at full steam; merchants began importing silks, cottons and rare spices from all over the then-known world[56]. Therefore, it was vital for courts in cities and countries with constant contact with seafarers to set forth the customs of the sea since these courts had to settle seafaring disputes.

The *custumals* are best considered as practice guides for judges instead of legislative codes or statutes in the modern sense, since this set of rules appears to derive from the particular solutions adopted by courts with substantial relevant experience, particularly those in seaports. Their guidance was given by describing accepted and usual practice, and were written down and promulgated.

[55] D. Fitizpatrick and M. Anderson, *Seafarers' Rights* (Oxford University Press, 2005), page 2 - It is difficult to attest the accuracy of Fitzpatrick and Anderson's statement due to the difficulty of finding records of how those responsibilities and obligations were exercised. Thus, a contrary argument to the statement could be that shipowners were responsible for the hiring of seafarers to provide such services to travellers in relation to their belongings and goods, and thus the primary responsibility for the performance of this obligation was on the seafarers. Nevertheless, as seafarers were often slaves, and hence an extension of their owners, their actions would reflect the actions of the latter, which would justify Fitzpatrick and Anderson's assumption of the true meaning of the word 'nautae'.

[56] http://www.medieval-life.net/history_main.htm., last accessed on 10/10/2015

Similar to private shipping law, the *custumals* were concerned primarily with the rights and obligations of carriers and cargo owners. Despite having some provisions specifically addressed to seafarers, there is nothing approaching a code of law governing their rights and duties. Usually, what the *custumals* have to say on seafarers is limited and obscure. Both, the *Praetor's Edict* and the *custumals* provided only for the seafarer's obligations, omitting, or leaving aside their rights and liabilities.

I.1.3 – The *Rhodian Sea Code*

The *Rhodian Sea Code*[57] is the earliest codification of written maritime customs. Even though it was a Byzantine creation, probably written in the 7th and 8th[58] century, it reflects the customary law of the previous centuries. The *Rhodian Sea Code* covers all aspects of commercial shipping. Seafarers are specifically covered by chapters 5 to 7, which establish their liability for fights and the responsibility of the shipowner for seafarers' personal injuries.

The Code provides in its Chapter 46 that if the long boat was to break off from the ship and the seafarers were lost, the captain had to pay their representatives their earlier wages to a complete year. However, it is clear that it refers to seafarers that sailed *ad partem*, which is to say that received an aliquot part of the profits in lieu of wages. Nevertheless, chapter 46 apparently refers to a fixed wage, contemplating a hiring by the year commencing from the time when presumably the sea was open to navigation until it was closed. In the case of a seafarer being killed under the circumstances mentioned in the chapter in the course of the year, his representatives were entitled to wages due to him until the end of the year. [59]These provisions are of

[57] Rhodes is a small Greek island and it was a famous and prosperous port in the second or third century B.C. Due to their flourishing commerce, they had many commercial and maritime customs which they would carry with them to all the ports to which they sailed. That is why the compilation of these customs was named 'The Rhodian Sea Law' – L Pleionis, *The Influence of the Rodhian Sea Law to the other maritime Cod*es , (Extrait de la Revue Hellenique de droit international, 1967), page 173
[58] Water Ashburner, *The Rhodian Sea Law*, (Clarendon Press, 1909). Ashburner, claims the codification period as being in the 7th or 8th Century AD
[59] *Ibid*, page clxviii

enormous value; until today families often have to face endless legal battles only to receive what was owed to their deceased family member, not to mention compensation for the loss.

Although the manuscripts of the code are slightly obscure, they seem to distinguish between three classes of seafarers: the one who receives a share under the term of the contract (c.I); the seafarer who hires himself out, receiving a fixed wage (c.III); and a slave who is let out by his master as seafarer (c. IV).

Furthermore, the *Rhodian Sea Code* contained two statutes, *Ragusa* and *Zara*, describing in detail as to the various systems under which the mariner may be hired. Furthermore, the statute of Ragusa provides for the case of the seafarer falling ill, but it lacks clarity. Article VII, 23 provides that if the mariner falls ill before the ship leaves Ragusa, he is not bound to the ship and that if he falls ill outside Ragusa and is put ashore, he is entitled to his share for that voyage, as if he were present, and to his expenses, i.e. an allowance for food. However articles that appear to be later additions, provide that if the seafarer fell ill during the voyage and was put ashore, or died, he was only entitled to pay for the period of his actual service (VII, 24, 25; St. Lesina, V, 5, p.212) and nothing is mentioned about any allowance, much less about the seafarer repatriation.

Under the *statute of Zara*, the seafarers received a fixed wage and as a rule they were hired for the whole period the sea was open, i.e. from 1st March until 30th November, and wages were payable in thirds (IV, 43; IV, 44). Whenever the seafarer remained on board the ship after the 30th of November, the ship not being in Zara by the date, he was entitled to a proportional increase of wages (IV, 43, 76). In the case of the seafarer dying in the first period of three months, his representatives were entitled to his wages for the whole of that period. If his death was to occur after this period, his representatives were entitle to his wages apportioned up to day of his death (IV, 63). However, there is an exception to this rule, in the case of the seafarer dying in defending

the ship or in the course of service, then his heirs are entitle to the whole period of nine months (IV, 78). It is hard to determine however, what would be considered "in the course of service".

Most importantly, the statute provided that the seafarer who fell ill during a voyage and was left behind was entitled to his wages up to the time of his leaving the ship, and to a small payment per day for a month (IV, 61).

The *Rhodian Sea Code* was proven to be of extreme relevance to the Codes that followed it. For instance, the Basilica was a civil law code compiled about the year A.D. 890 by the Byzantine Emperor Leo the Wise. Its book 53 dealt with maritime law, and is divided into eight titles. The first title dealt specifically with captains, owners' agents, mariners and inn-keepers and writs brought by them or against them. The eighth title is about the *Rhodian Sea Law*. Although some authors understand that the *Rhodian Sea Law* formed a part of the Basilica, most authors agree that 'The Sea Law fills up gaps in the law of the Basilica. It deals with matters which that law does not deal with at all, or deals with only imperfectly…' The former deals with maritime offenses that are not dealt with in the Basilica. *The Basilica Code* was different from the other codes of this period, because it was a compilation of positive rules enacted by Byzantine Emperors while the other embodied customs[60], giving it a special place in the history of maritime legislation.

In terms of seafarers' rights, is odd that the *Rhodian Sea Code* contains many gaps and confusing articles regarding seafarers' rights, whist it was expected to fill the gaps and imperfections in past legislations. This is evidence of the fact that at the time, seafarers' rights were not a main concern at all.

[60] L Pleionis, *The Influence of the Rodhian Sea Law to the other maritime Cod*es , (Extrait de la Revue Hellenique de droit international, 1967), page 177/ 178

I.1.4 - *'La Court de la Chaene'* and '*La Court de la Fond'*

Once the Crusaders conquered the Holy Land and the other lands of Eastern Mediterranean, the settlers that followed them tried to keep their own customs distinct from those of the native population but nevertheless influenced by them.

The most famous of the new kingdom was the Latin Kingdom of Jerusalem, established by the end of the first Crusades at the end of the 11th century. Two Courts were founded in the Kingdom by its first King, the 'The High Court of the Barons' and the 'The court of Bourgeois". Two codes, compilations of the usages and customs taken by the Leaders of the Crusades, followed the creation of the courts.[61]

The court of the Bourgeois was later on divided, creating two new Courts on Maritime, *' La Court de la Chaene'*, and one mercantile, '*La Court de la Fond'* to settle all the disputes among merchants and various nations who resorted there. These courts are of extreme importance to maritime law, since they can be considered the first courts that had international jurisdiction in commercial and maritime matters, and which applied a common law to merchants and mariners of different origins.

I.1.5 - The '*Livre des Assises'*

The '*Livre des Assises'* was the codification of the Maritime Law of the Kingdom of Jerusalem. It was divided in seven chapters. Chapter IV dealt with the obligation of the sailor towards the shipmaster. It provided that a seafarer that refuses to go on the voyage must pay back double the amount he has received in advance. Once again, seafarers' rights were not mentioned. All these codes make it clear how seafarers were the weak part of the relationship, with their rights barely been mentioned, and in a confusing manner when mentioned, and provided seafarers with the minimal compensation possible, if any at all.

[61] *Ibid*, page 179

I.1.6 – The *'consoli del mare'*

Following the collapse of the Roman Empire in A.D. 476, some Italian seaports became famous for their commerce, especially the port of Venice and the Port of Genoa. Later on a regime similar to that of city-states was established in these towns. In order to secure their trade and to avoid disputes with foreign merchants they established the *'consoli del mare'*. These 'maritime consuls' were appointed by the authorities of the city states of which they were citizens and they were supposed to apply the already existing maritime customs in disputes in which foreign merchants were involved. At the time, there were '*the console dell'arte del mare*' at Pisa, *'the console del commercio*' at Florence, ' *the Magistratura degli Stranieri'* at Venice and some other at Trani, Almafi, and Genoa. The contribution of these 'consolidation of customs' was enormous for the uniformity of the rules of Mediterranean Trade, with their appointment also being one of the first steps toward the creation of international law.[62]

By the eleventh century, compilations of the maritime customs applied by these 'consuls of the sea' appeared. The most relevant of them are: The Tabula Amalfitana, The *Constitutum Usus* of Pisa and The Decisions of Trani. [63]

The Tabula Amalfitana was a compilation of maritime customs based on Roman Law and Byzantine tradition from the first quarter of the 11th Century and contains 66 articles, a great number of which deal with trade in association.

An interesting aspect of the Tabula, is that its article 15 provides for a common fund, perhaps the capital of association, from which was supposed to be paid the ransom of associates or mariners who may be captured in the exercise of their duties. When reading this provision, the author could not avoid making an analogy between this fund and the Financial Security system provided in the proposal for the amendment of the

[62] *Ibid*, page 180
[63] *Ibid*

Maritime Labour Convention 2006.[64] Both funds are fruits of an association of shipowners and intend to provide for seamen when they face a distinct 'stressful and inhumane' situation. At the time of the creation of The Tabula Amalfitana pirate attacks were common. Nowadays, pirate attacks with a whole crew being kept prisoner are frequently reported, often requiring assistance from shipowners. Nevertheless, what happens to the crew after they are freed is another problem to be discussed later on.

The Tabula Alamafitana provided for seafarers in its articles 1-3, 14 and 26. Articles 1-3 provided for the seafarers to receive their wages in advance, but in cases of their refusal to continue their services, they were accused of fraud and had to pay a fine which passed into the common fund. Article 26 provided that a seafarer was to have their wages as long as the ship was in service, but if she was captured or wrecked, the wages received in advance should be returned. Article 14 provided that the association would pay for the seafarers' medical treatment. Once again it is hard to visualize many rights of the seafarers at the time, if any.[65]

The Constitutum Usus of Pisa had a very clear influence on the *Rhodian Sea Law*, it contained customs and usages in maritime law. It is a compilation of the customs which 'the consuls of the sea' had applied. Its article 30 is about salvage and the reward for seafarers, which is to be 5 % of the goods saved.[66]

The Decisions of *Trani* consisted of 32 'decisions' which started with the words: 'The said consuls of the sea propound …". Decision 10 provided that the seafarers engaged for the voyage share in its profits, and they continue to do so during any period of illness, however decision 12 provided that if they left the ship they would lose half of their share. Nevertheless, according to decision 11, a seafarer was entitled to leave

[64] Proposal for the text of an amendment to the Maritime Labour Convention, 2006, 1 to be presented to the future Special Tripartite Committee with a view to adoption in accordance with Article XV of the Maritime Labour Convention, 2006
[65] L Pleionis, *The Influence of the Rodhian Sea Law to the other maritime Cod*es , (Extrait de la Revue Hellenique de droit international, 1967), page 181
[66] *Ibid*

in some cases without any loss, for instance, when he was appointed the captain of another ship. Furthermore, Chapter 9 provided that the master of the ship could only dismiss a seafarer for blasphemy, quarrelling, stealing, or debauchery. Decision 28 (which is similar to the provision of Chapter 6 of the Rhodian Sea Law) provided that the seafarer had the right of self-defence if the master struck him, even though he passed to the other side of the chain which separates the rowers from the rest of the ship.[67]

I.1.7 - The *Rolls of Oleron*

Once cities in Northern Europe became involved in the maritime trade, they adopted similar customs of the sea to deal with the ships that came within their jurisdiction. Both in common law and civil law jurisdictions, the first recorded source of modern maritime law and the most important and influential of the medieval Sea Codes, are the *Rolls of Oleron*.[68] It cannot be determined with certainty the date of the promulgation of the Rolls, but most scholars accept as a date the second half of the 13th century or even earlier, although the oldest existing manuscript is from the early 14th century.[69] The Rolls are a collection of maritime customs made in the form of judgments accepted by the maritime court of the island of Oleron, and they are also the first accepted collection of maritime customs made in an Atlantic Seaport. [70]They reflect the indirect influence of the *Rhodian Sea* Law. The Rolls contains many basic principles of modern maritime law, including the notion that the shipowner is relieved from responsibility for damage to cargo caused by *damnum fatale*, such as pirates and shipwreck, being therefore of central importance in the development of maritime law in Northern Europe.[71]

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[67] *Ibid*, page 182

[68] D. Fitizpatrick and M. Anderson, *Seafarers' Rights* (Oxford University Press, 2005), page 6

[69] The most detailed research into the origin of the Rolls was done by Krieger who reached the conclusion that the Rolls dated from the last half of the 13th century. KF Krieger, *Ursprung and Wurzlen der Roles d'Oleron* (Cologne, 1974) pp. 38-40

[70] L Pleionis, *The Influence of the Rodhian Sea Law to the other maritime Cod*es , (Extrait de la Revue Hellenique de droit international, 1967), page 183

[71] D. Fitizpatrick and M. Anderson, *Seafarers' Rights* (Oxford University Press, 2005), page 8

The Rolls recognized two kinds of seafarers: those who served for the entire voyage and those who did so for monthly periods (and payments) (Article 20). Articles 6 and 7 provided for the seafarer's medical expenses as part of the expenses of the ship, and they were supposed to be paid during their illness. Nevertheless, article 19 provided that seafarers were bound to serve the ship up to the end of the voyage, if they came within the first category defined in article 20, regardless whether they fell ill. It is hard to envisage, especially when dealing with special types of infirmities contracted at sea, how the seafarer would be able to carry on his duties in such a state.[72]

The '*Consulate of the Sea'* is another collection of maritime customs, which possessed the force of law in the consular Court of Barcelona during the 13th Century. It contains 334 Chapters and is divided into three parts. The first part includes the code of proceedings of the court of the Consuls of the Sea of the city of Valencia, to which a special jurisdiction within maritime commerce had been granted. This first part comprised 45 chapters. The second part of the code contained 252 chapters and included the written customs of the sea, dealing with disputes arising between merchants or seafarers, and shipowners. The third part contained 37 chapters, concerning municipal government usages of warships, the duty of, and the relations between the owners, officers and crew of these vessels, and concerning privateering expeditions at a time when a permanent state of war existed in the Mediterranean.[73]

In its second part, the *Consulate of the Sea* recognized four different types of arrangement for the seafarer's service: sailing on shares, which meant receiving some of the voyage's profits, serving monthly, or by the mile, or at the discretion of the shipowner in charge who would pay the seafarer at the end of the voyage.[74]The Code provided that the seafarers had to obey the captain, who had the right of punishing them, even by imprisonment in the case of a quarrel[75]. However, seafarers had the right of

[72] L Pleionis, *The Influence of the Rodhian Sea Law to the other maritime Cod*es , (Extrait de la Revue Hellenique de droit international, 1967), page 182
[73] *Ibid*
[74] Chapters 202 and 203, 84 and 116, 85, 115, 181
[75] Chapter 118

self-defence if while trying to escape to the bow of the ship, they were attacked by the captain.[76]

Furthermore, the *Consulate* provided that the association of shipowners had an obligation to equip the ship with all its necessities, and in the case of a refusal by any of them, the captain was entitled to borrow money on the account of that part owner.[77] Although there is no specification of what the ship's 'necessities' are, one may assume that at least fuel and food would be included. This provision carries a remarkable resemblance, in the author's opinion, with the shipowner's obligations provided by the Maritime Labour Convention 2006 articles, particularly article 5 (c) of the Proposal for the text of an amendment to the Maritime Labour Convention, 2006, to be presented to the future Special Tripartite Committee, with a view to adoption in accordance with Article XV of the Maritime Labour Convention, 2006.

The *Rolls of Oleron* provided the foundation for other medieval collections, for instance the Rules of Wisby, and the Laws of the Hanse league. Also, the English Court of Admiralty used to rely on the Rolls, incorporating it into the 14th century book of Admiralty practice known as the Black Book of the Admiralty. Furthermore, once the power of nation states was consolidated in Europe, the Rolls of Oleron, together with the Judgements of the Damme and the Rules of Wisby became the foundation for the elaboration of national maritime and commercial codes.[78]

It is clear that all of these earlier Codes were of immeasurable value for maritime law in general. However, in general, they barely dealt with seafarers' rights, much less provided positively for them, which is not strange considering the fact that mention is made to seafarers having been slaves, and in other cases, it can be assumed that they were generally from the society's lower classes. Furthermore, it is important to note that it is difficult if not impossible to ascertain the extent to which the few rules relating

[76] Chapter 120
[77] Chapter 200
[78] D. Fitizpatrick and M. Anderson, *Seafarers' Rights* (Oxford University Press, 2005), page 6

to seafarers' rights were enforced.

I.2 – The 19th Century

The situation may have started to change during the 19th century, however the perception of the profession and its men seems to have remained derogatory. In 1850, James Milne wrote the book 'Ocean life: Or an appeal on behalf of the mental, moral, and religious improvement of seamen'. The book is nothing if not a written document showing how people of the time perceived seafarers, and an analysis of this group's social behaviour.

> "To a very lamentable extent, our sea-faring population consists of men who are far inferior to what it is their privilege to be, in point of morality, intellect, and general intelligence, the masses of whom, generally speaking, spring from the lowest grades of corrupted society, uneducated and depraved, and who exert a powerful an baneful influence over those who have had a superior training, when they become associated in the seafaring capacity."[79]

Although Milne's book is apparently an attempt to attract Church sympathy towards the seafarer community, oddly enough it is also keen in attributing responsibility to seafarers for property lost at sea, due to their "negligence, inexperience, drunkenness, and dissipated habits".[80]

Nevertheless, Milne's book is undoubtedly a call to the population of the time to acknowledge seafarers, and their need for more rights and better life conditions. "It is therefore the duty of every man who fears God and loves his country, to feel interested

[79] James Milne, *Ocean Life* (Partridge and Oakey, 1850), page 26
[80] *Ibid*

in the social, moral, and religious condition of the seamen".[81]

Lord Stowell had already noticed the injustice placed upon seafarers, who were often taken advantage of. In the *Minerva* (1825) case, he pointed out the necessity of their protection:

> " On the one side there are gentlemen possessed of wealth, and intent, I mean not unfairly upon augmenting it, conversant in business, and possessing the means of calling in the aid of practical and professional knowledge. On the other side is a set of men, generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of procuring useful information, and almost ready to sign any instrument that may be proffered to them; and by all accounts requiring protection, even against themselves."[82]

In the *Minerva* case it was shown that the settled printed form (i.e. the seafarer's employment contract), which seafarers were required to execute contained an engagement to submit themselves to all the penalties and forfeitures of an Act passed for the express regulation of the West India Trade and confined exclusively to that commerce.[83]

Although by that time, the court of Admiralty had asserted its rights to examine whether the clauses of a ship's articles were reasonable and therefore binding upon seafarers, in the courts of Westminster Hall stricter principles of construction obtained, and the ignorance and improvidence of seafarers, and their inability to appreciate the meaning and effect of such instruments, led to frequent scandal in cases of great cruelty

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[81] James Milne, *Ocean Life* (Partridge and Oakey, 1850), page 110. The use of the word "abandoned" in the book is something that strikes the reader's attention. Milne often refers to seafarers as being an abandoned part of the society, having little or no importance since their existence did not matter to the general population(See: Milne, pp. 49, 51 and 56)

[82] Charles Abbott and Baron Tenterden, *A Treatise of the Law relative to Merchant Ships and Seamen* (London : Shaw & Sons, 1901), page 223

[83] *Ibid*

and injustice. Finally, the 5&6 Will. 4, c.19, which repealed all previous acts on the subject, was passed. By this act, the written agreement between the master and the seafarer was required to specify the wages to be paid, the capacity in which the seafarer was to act, and the nature of the intended voyage. The Act was repealed by the General Merchant Seamen act (GMSA), which re- enacted the requirements of the former act as to the nature of agreements with the seamen, and provided that they should also contain a statement as to the quantity of provision the seamen was to receive. Later on, the GMSA was consolidated by the Merchant Shipping Act, 1894.[84]

In a subsequent case, the *George Home* (1825), regarding seafarers' wages, Lord Stowell said it would take him inordinately long to point out half the impertinencies with which seafarers' contracts were stuffed, and that it was high time to correct this.[85]

In 1887, The Supreme Court of the USA left clear that it shared the same position as the parliament of the UK, by stating in the *Arago* that :"seamen are treated by the congress as well as by the Parliament of the UK as deficient in that full intelligent responsibility for their acts which is accredited to ordinary adults". The court's ruling affirmed that the provision of the 13th Amendment and subsequent legislation barring involuntary servitude did not apply to seafarers. Meaning that seafarers were still subject to arrest and imprisonment for desertion and absence without leave. [86]

Perhaps due to the close ties between the merchant marine and the navy, and the fact of seafarers being considered pariahs, the latter were subject to a code of discipline unthinkable even in the worst sweatshops and lumber camps of early industrial capitalism. Flogging was a traditional form of correction in the British navy and was lawful in the American merchant marine as well. Flogging was finally

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84 Charles Abbott and Baron Tenterden, *A Treatise of the Law relative to Merchant Ships and Seamen* (London : Shaw & Sons, 1901), page 223

85 *Ibid*

86 Elmo Paul Hohman, *History of American Merchant Seamen* (Hamden, Conn: Shoe String Press, 1956) pp 28-29 - In the US, seafarers along with American Indians had dubious distinction of being regarded by law as wards of the federal government

outlawed in 1850. However, Frederick Law Olmsted in his book of 1861 about slavery in America, stated with apparently no exaggeration that American seafarers were "more wretched and are governed more by threats of force than any other civilized labourers in the world." Olmsted was one of the many that compared seafarers with chattel slaves, being well qualified to do so. Besides having travelled extensively through the 'cotton kingdom', in the 1840s he sailed before the mast for two years.[87]

The outlawing of flogging in 1859, although putting an end to that most notorious form of punishment, did not end the sadistic brutality to which seafarers were subjected. Thus, in 1895 the sailor's union published a pamphlet about the death of fourteen seafarers as a result of shipboard discipline "under circumstances which justify the charge of murder", but where only three convictions had been obtained. As wrong as it may seem today, in 1893, T.F. Oakes, the then president of the Northern Pacific Railway Company ruled: "a shipmaster has the right to a beat a seaman who is unruly".[88]

Remarkably, for centuries, the seafarer was regarded by law and custom as less than human, often treated worse than a chattel slave, or a pack animal. He (the idea of female seafarers was not even considered) felt the burden of an archaic, semi-feudal tradition of the sea, and a code of laws that perpetuated this bondage.

The truth of that time was that everyone regarded seafarers' living and working conditions as deplorable. Nevertheless, there seemed to be a general consensus that a seafarer was not only a reflection of his conditions, but was also in some significant measure responsible for them.[89]Therefore, a very prejudiced vision of seafarers emerged placing them in the fringes of society, with the latter unwilling to consider the needs of seafarers.

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[87] Bruce Nelson, *Workers on the waterfront : seamen, longshoremen, and unionism in the 1930s.*, (University of Illinois Press,1988), page 12
[88]*Ibid*, page 14
[89]*Ibid*, page 18

I.2.1 - "Abandonment" in the 19th Century

The Shipowner's Manual written in 1804[90] titled one of its topics "Abandonment". Basically, the topic deals with the right of a shipowner to abandon his ship and be covered by the insurance, entitling a shipowner the right to abandon the ship when it was taken or kept by the enemy or detained by any foreigner power, or seized for the service of the government. The topic mentions the goods on board the ship, and the value of these to be recovered. Nevertheless, the topic fails to mention the crew on board the ship when it was abandoned. It is almost like the only things of value on board a vessel, at its time of abandonment, were goods.[91]

Nevertheless, the Manual provides for the repatriation of seafarers in a previous section. It provided that British governors, ministers, and consuls residing abroad were required to provide for British seafarers' repatriation, when stranded in a foreign port by reason of shipwreck, capture, or other unavoidable accident (note that the reasons for a seafarer being stranded in a port are the same as the ones given for abandonment of a ship).[92] Seafarers were supposed to be sent home in any ship of the Royal Navy or in any merchant ship. The provision also required that every master of a merchant ship homeward bound take all seafarers on board 'home'.[93] The master of a merchant ship was to receive payment for each seafarer that he would bring to England that was not originally part of his crew.[94] Notably, the Manual provided that in the event of the master failing to pay the crew, even if having money to do so, the shipowners remained

[90] Unknown author, *Ship owner's Manual* (7th edition, D Akenhead and Sons, on the Sandhill 1804), page 201
[91] *Ibid*, pp. 201/203
[92] Most of the time, the abandonment of a ship implies also the 'abandonment' of seafarers. Nowadays, often when a seafarer is deemed to be abandoned, it is because the shipowner has gone bankrupt, with the ship seized by creditors.
[93] This provision, although somewhat poorly written, can be analogically interpreted as a prohibition imposed on the shipmaster from abandoning the seafarer in a foreign port.
[94] By 32. Geo. III. C. 33, Unknown author, *Ship owner's Manual* (7th edition, D Akenhead and Sons, on the Sandhill 1804), page 134

liable for the payment, in proportion to their respective shares in the ship.[95]

The subsequent act, the Merchant Shipping Act 1984 (MSA) provided that if the ship was transferred or disposed to a foreign port, and the seafarer did not consent in writing to complete the voyage if this was to continue, or if the service terminated in that port, the master was bound in addition to pay the seaman due wages, to provide him with adequate employment on board some other British ship bound to the British port at which he was originally shipped, or to any port in the United Kingdom agreed by him with a passage home, or to deposit a sum sufficient to defray the expenses of his maintenance and passage home. This deposit was to be made with the British consular officer, or, in the absence of any such officer, with one of the British merchants residing in the Port, and not interested in the ship. The seafarer was supposed to determine the amount to be deposited, and no appeal was possible from his decision even if the named sum was insufficient. Seafarers were to indorse upon the agreement with the crew the particulars of any such payment, provision or deposit to be made. If the master failed without reasonable cause to comply with any of the above agreement regarding expenses of maintenance or passage home, the seaman was entitled to recover them as wages due. And in the case of these being defrayed by any other person, and unless the seamen was guilty of barratry, they were considered a charge upon the ship and upon the owner, and were recoverable from the owner. [96] The only questionable part of this provision, in the author's opinion, is the seafarer having to determine the amount of his repatriation expenses. As previously observed, seafarers were often illiterate and incapable of performing these kinds of calculations.

The MSA went further on the subject and provided that if a seafarer was wrongfully forced onto shore, or left behind by any person belonging to a British ship, the offence was punishable as a misdemeanour. The seafarer was not to be discharged

[95]Unknown author, *Ship owner's Manual* (7th edition, D Akenhead and Sons, on the Sandhill 1804), page 133 - Resolution A.930(22) "Guidelines on Provision of Financial Security in Cases of Abandonment of Seafarers" states that abandonment occurs when "(…)Abandonment will have occurred when the master of the ship has been left without any financial means in respect of ship operation"
[96] Merchant Shipping Act 1894, s. 186 (1) (2) (3) (4)

or left behind by the master unless he first obtained sanction or certificate at any place elsewhere than in a British possession, of the British Consular Officer. Furthermore, it provided for the delivery of accounts of wages due, and for the payment of those wages by the shipmaster on the basis of leaving a seafarer ashore on grounds of unfitness or inability to proceed.[97]

Therefore, as it may be perceived in these two acts, even the earliest 19th century legislation provided for the seafarer's repatriation and the payment of due wages. Furthermore, it can be noted by the reading of both acts' provisions that masters at the time were considered agents of the shipowner.

It is important to note that in the 17th, 18th and 19th centuries, most European countries, in particular the most well-known maritime nations, all had similar maritime legislation, based on the *Rhodian Code* and the *Roles of Oleron*.[98]

I.2.1.1 - The East India Company's Maritime case

The East India Company's Maritime case of 1834 is extremely interesting, as it might be the first reported case of 'abandonment of seafarer', and it demonstrates that even prior to the advent of international instruments, seafarers could already find protection in national legislation. In the case, seafarers are compared to regular employees, and thus have the same rights as conferred upon the latter.

The East India Company was a trading company that went bankrupt. The aim of the 1834 case was to compensate seafarers previously hired for their losses that followed the company's insolvency. The case tries to demonstrate that seafarers were indeed company employees; "the Commander and Officers were allowed to be

[97] *Ibid* s 187, 188 and 189
[98] See D. Fitizpatrick and M. Anderson, *Seafarers' Rights* (Oxford University Press, 2005) – L Pleionis, *The Influence of the Rodhian Sea Law to the other maritime Cod*es, (Extrait de la Revue Hellenique de droit international, 1967)

recommended by the Shipowners; but they were recommended to the *service of the Company*. They were examined and approved by the Honourable Court, and sworn into the service of the *Company*; they were paid by the *Company*, and not by the *Owners.*" [99] Also, the Company didn't always charter the ships from voyage to voyage; some were owned by the Company, and officers serving in the chartered ships were placed on the same footing of those serving in Company ships.[100] [101] Furthermore, the seafarers' pledge tries to demonstrate that their employment relationship should be considered the same as the Company's inland employees, with the seafarers being entitled to the same rights.[102]

Unfortunately, there are no records on how the case was resolved. Nevertheless, this does not remove its importance, it being one of the first cases demanding compensation for seafarers. Furthermore, the case considers a question still debated today, which hopefully will be resolved with the advent of the MLC[103], i.e., 'who is the

[99] East India Memorial, 1834, page 4
[100] East India Memorial, 1834, page 12
[101] An Appeal to the Majesty's Government and the East India Company for justice in the claims of Compensation, 1834, page 2/3.
[102] An Appeal to the Majesty's Government and the East India Company for justice in the claims of Compensation, 1834, page 14/16
[103] The MLC broad definition of shipowner, intends to cover not only the 'traditional shipowners' but also manning agencies, charterers (…), anyone that would have assumed the responsibility of the operation of the ship from the owner. According to the MLC a shipowner is:
"(…) the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities imposed on shipowners in accordance with this Convention, regardless of whether any other organization or persons fulfil certain of the duties or responsibilities on behalf of the shipowner."(MLC, Article II. 1 (a))
The definition has raised a lot of debate as some believed that it did not make very clear who the shipowner should be, since apparently according to it a shipowner could be a third-party manager even if another entity carries out certain MLC shipowner duties and responsibilities. However, this confusion according to Dr Cleopatra Doumbia-Henry (ILO department of standards director) seems to be due to a misunderstanding when reading the 'regardless' part of the definition. According to Dr. Doumbia-Henry the "regardless ..." phrase simply clarifies that the entity identified as an MLC shipowner, whether the owner of the ship, ship manager or other entity, may indeed not be the one fulfilling all the duties and responsibilities of the shipowner under the MLC..(Liz MacMahon, 'ILO stands by labour convention's shipowner' (lloydslist, August 2013))
According to the IMO Maritime Labour Convention, 2006 (MLC, 2006) Frequently Asked Questions (FAQ) document; "this comprehensive definition was adopted to reflect the idea that irrespective of the particular commercial or other arrangements regarding a ship's operations, there must be a single entity, ―the shipowner, that is responsible for seafarers' living and working conditions. This idea is also reflected in the requirement that all seafarers' employment agreements must be signed by the shipowner

seafarer's employer?[104] Indeed, the case is remarkably similar to current abandonment of seafarer cases, especially considering that the Company was facing *financial hardship* at the time of the incident, which, as will be demonstrated in this thesis, is the main cause of abandonment of seafarers until today.

I.2.2– The beginning of the 'internationalization' of seafaring and the consequent unionism

The seafarer era of 'sailing' (lasting from the 16th to the 19th centuries) mainly involved the British Isles and northern Europe. Traditionally, the deck sailors were Scandinavian. They formed the backbone of the Sailor's Union of the Pacific long after the demise of sailing ships. The 'black gang' was by tradition from the province of the Irish, and the cooks and stewards were of many nationalities. Nevertheless, gradually, on the West Coast, the shipowners began to employ Chinese and Filipino workers, first in the stewards' department and then in all the unlicensed ratings. This led the ISU leadership to engage in increasingly strident calls for 'Asiatic Exclusion'.[105]

The late 19th Century was marked by the beginning of 'internationalized crews'; more and more seafarers from China, India, Africa, Somalia, and South East Asia could

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or a representative of the shipowner". (IMO, 'Maritime Labour Convention, 2006 (MLC, 2006) Frequently Asked Questions (FAQ)' (Online revised Edition, ILO 2012) <www.ilo.org/mlc>, last accessed on 10/11/2015)
This definition could indeed represent a significant change in seafarers' rights being enforced, since sometimes the owner of the ship may not be as easily located as the charterer or the manning agency. Nonetheless, ship managers could not disagree more with the understanding that they could be considered to be the shipowner for the purpose of the MLC as the Director of V.Ships group Mr. Matt Dunlop stated: "We fail to understand how anybody can consider how a service provider, such as a third-party manager, can come under the definition of MLC shipowner. There is no ambiguity in the definition". (Liz MacMahon, 'MLC 2006: Who is the shipowner and why does it matter?' (lloydslist, August 2013)).It is up to Member States of the MLC to clarify the definition of the shipowner when implementing the convention.

[104] The Company tried to place the seafarers as employers of the Shipowners initially. East India Memorial, 1834, page 5. Until today, discussions occurred about who are seafarers' rightful employer, shipowners or manning agencies.

[105] Bruce Nelson, *Workers on the waterfront : seamen, longshoremen, and unionism in the 1930s.*, (University of Illinois Press,1988), page 32

be seen on board ships.[106] British, Australian and American seafarers felt threatened by this new trend. The Australian Seamen trade union, recently formed at the time (1878), began a strike to prevent 'non- white' cheap labour on Australian ships, reinforced by the White Australia Policy of 1891-1901. The Seamen's Bill 1915 in the US gave support to the US union demands of 'US Jobs for US Seamen'. The Bill also expanded the parameters of seafarers' rights and required that at least three-quarters of the crew be able to understand English.[107]

In the 1880s, trade unions began to spread on an international scale, generating a view from more progressive leaders that conditions on ships had to be raised for everyone at sea. Clearly the establishment of these trade unions was of extreme importance to giving seafarers more rights. Throughout collective bargaining agreements they were able to assure seafarers' rights, and by being able to 'speak' in the name of seafarers in front of government authorities, their protection was increased.[108]

From the beginning of the unions' inception, seafarers demanded that their union create a method of hiring that would free them from the enslavement of crimps. In 1886, in the US, the sailortown boarding masters were not only determining who would work on board ships, but were also receiving an advance of the seamen's wages in return for providing them with bed, board, booze and clothing. As a response to the seafarers' demands, the Coast Seamen's Union, less than one month after its establishment, opened its own shipping office in San Francisco. For the first time anywhere in the world seamen appointed their own job dispatcher and attempted to take control of the hiring process.[109]

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[106] D. Fitizpatrick and M. Anderson, *Seafarers' Rights* (Oxford University Press, 2005), page 19, p. 19
[107] *Ibid*
[108] *Ibid*
[109] Bruce Nelson, *Workers on the waterfront : seamen, longshoremen, and unionism in the 1930s.*, (University of Illinois Press,1988), page 40

Nevertheless, shipowners like seafarers, perceived control of hiring as a life and death matter. Therefore, in June 1886 they formed an employer's association that operated its own shipping office. All hiring was to be conducted through this agency and no man was eligible for a job unless he surrendered his union book and obtained a grade book in return. This black listing or 'fink book', as the seafarers used to call it, was to be a bone of contention in maritime labour relations for more than half a century in the US. [110]

Finally, in 1895, The Maguire Act in the USA represented a victory for seafarers, by outlawing imprisonment for desertion in the coastwise trade. Nevertheless, the biggest victory would come with the La Follette Seamen's act 1915. The act extended the earlier ban against imprisonment to American seafarers in overseas and inter-coastal trades and also decreed that foreign seafarers deserting their ships in US ports could not be imprisoned. It allowed American seafarers to receive half of their pay on-demand in virtually any port, and specifically prohibited the payment of an advance on the seamen's wages to crimps or other "landsharks"[111].

The most important accomplishment of the *La Follete* act, however, was its dramatic impact on the wages of foreign seafarers. The law granted them the right to abandon ship in US ports without fear of imprisonment, thus virtually compelling foreign shipowners to pay their men higher wages in order to keep them from deserting to American vessels. [112] Therefore, the act in this sense seems to be even better than the MLC in granting rights to international seafarers.

[110] *Ibid*
[111] *Ibid*, page 44
[112] *Ibid*

I.2.2.1 – The International Transport Workers' Federation

In 1896 the International Transports Workers Federation[113] was founded, intending to protect seafarers' rights on an international scale.[114]. The Federation is said to have been created out of the urgent and practical need for international solidarity in a time when port employers and shipowners in northern Europe set out to break a series of dockers' and seafarers' strikes and to crush the unions which had organized them.[115]

On the ITF's website, in a section discussing the ITF and seafarers, there exists a statement which clearly demonstrates the international nature of the institution, it reads:

> "The ITF has been helping seafarers since 1896 and today represents the interests of seafarers worldwide, of whom over 600,000 are members of ITF affiliated unions. The ITF is working to improve conditions for seafarers of all nationalities and to ensure adequate regulation of the shipping industry to protect the interests and rights of the workers. The ITF helps crews regardless of their nationality or the flag of their ship." [116]

Currently, the Federation is said to comprise around 700 unions, representing more than 4.5 million transport workers from 150 countries. [117] Since 1948, ITF runs a

[113]It is interesting to note that the beginning of trade unions comes shortly after the anti-slavery movements and the consequent abolition of slavery, which seems sensible since it was when seafarers (who initially appeared to be slaves) started to acquire rights. See: Bob Reinalda, *Routledge history of international organizations: from 1815 to the present day*,(Routledge 2009) ISBN: 6612234830, 9786612234835, pp. 35-56

[114] D. Fitizpatrick and M. Anderson, *Seafarers' Rights* (Oxford University Press, 2005), page 19

[115] Harold Lewis, *The International Transport Workers' Federation (ITF) 1945-1965: an organizational and political anatomy*, (ProQuest Dissertations Publishing, 2003. U174147.), pp.2-3

[116] http://www.itfseafarers.org/itf_and_seafarers.cfm, last accessed on 14/11/2015

[117] http://www.itfglobal.org/en/about-itf/ last accessed 10/09/2014

campaign aimed at the elimination of Flag of Convenience vessels.[118] The campaign is said to aim at ensuring that seafarers employed on FOC ships are not exploited. The establishment of a proper regulatory framework for global shipping is also said to be promoted in the campaign. The Federation is in charge of seafarer's representation at the tripartite negotiations at ILO Maritime Sessions and meetings in the ILO Joint Maritime Commission and is a non-governmental organisation at the IMO.[119]

As Northrup pointed out, ITF is a union with very distinguishing features:

> "The International Transport Workers' Federation (ITF) is unique among the International trade union Secretariats (ITSs) in several ways. Unlike the other ITSs, the ITF directly represents employees, sometimes with their consent, and often without authorization; it signs' agreements with individual companies; it has even negotiated an agreement with its counterpart, the International Shipping Federation [ISF]; by virtue of the strategic location of many of its affiliates, it has been able to exert enormous economic power through boycotts in order to gain its objectives; and as a result of this power, it has accumulated considerable financial reserves"[120]

Although the ITF nowadays is said to protect seafarers in diverse nations, including Third World countries, its original purpose at the time of its inception and which persisted for a few decades, does not seem to differ much from the purposes of the general trade unions created at the time, discussed in I.2.4. [121]This can be perceived

[118] The campaign however is not free from criticism. See: Unknown Author, 'ITF in the Campaign against the Flags of Convenience and the Danger of dancing with wolves' in UNIFICAR – Revista do Sindicato Nacional dos Oficiais da Marinha Mercante SINDIMAR n. 35 (2013), pp 66-69 and Julia Constantino Chagas Lessa, 'How wide are the shoulders of a FOC Country', in M. Musi (ed), *New Comparative Perspectives in Maritime, Transport and International Trade Law* (Libreria Bonomo Editrice: Bologna, 2014) pp. 234-237

[119] John N. K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, p. 167

[120] Herbert R. Northrup and R.l. Rowan, *The International Transport Workers' Federation And Flag Of Convenience Shipping*, (Olin Inst November 1983), ISBN-13: 978-0895460424 p. 1

[121] The ITF was founded by European socialist oriented unions thus it is not surprising that the ITF FOC

in the then ITF general secretary speech in 1994, when addressing ITF's FOC Campaign:

> "The ITF is, and has always been an organization led by its members. The majority of those members come from the traditional maritime countries [32 percent from Western Europe in December 1993] - the shipowning countries, and the Flag of Convenience Campaign ... has been and still is led primarily by the desire of those unions to defend and maintain their jobs"[122]

Furthermore, policies concerning the FOC campaign are established by the ITF's Fair Practice Committee ("FPC"), which was originally operated almost exclusively by delegates from unions in developed countries. The structure of the FOC only changed after several incidents almost led to the rupture of the ITF with unions in Asia, particularly India and Singapore. Since then, the FPC was enlarged to include representation from developing countries also.[123]

I. 3 - The 20th and 21st Centuries

The Internationalization of seafaring continued and has continued throughout the 20th and 21st centuries. By the end of the 1990s, black seamen constituted a large percentage of the deck sailors in US coastwise trade. By 1915 more than half of East Coast firemen were Spanish or Latin American.

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campaign quickly evolved into one to "regain the lost jobs", which meant to transfer the jobs back from Third World seafarers to those in developed nations. (H. Northrup, 'The International Transport Workers Federation Flag of Convenience Shipping Campaign 1983-1995' in 23 Transp. L.J. 369 1995-1996, p.374)

[122] David Cockroft, Address to the 1994 North American Maritime Ministry Conference, *The ITF and the Maritime Ministry* at 4 (1994) (on file with the ITF) in H. Northrup, 'The International Transport Workers Federation Flag of Convenience Shipping Campaign 1983-1995' in 23 Transp. L.J. 369 1995-1996, p.374

[123] H. Northrup, 'The International Transport Workers Federation Flag of Convenience Shipping Campaign 1983-1995' in 23 Transp. L.J. 369 1995-1996, p.374

Ethnic hostilities became common on board ships. In the engine rooms, ethnic hostilities were so divisive that even the xenophobic Furuseth, the then International Seafarers Union (ISU) president, openly in favour of white supremacy, noted that "nationality prejudice is running mad" among the firemen. He complained that the 'the Irish and the Liverpool Irish in Boston… think themselves superior to everyone else". The antagonism between the entrenched Irish Minority and the Spanish speaking majority became so intense that the latter voted to take the marine firemen's union out of the ISU and into IWW in 1913.[124]

Furthermore, as if differences of nationality were not enough, the unity of the common seafarer was disrupted by craft separation and by rivalry between the men on different kinds of ships. The sense of separation and rivalry could even be felt within the International Seamen's union. [125]

In 1979, Charles Rubin, a seafarer himself, recalled: 'I had nothing but contempt for the guys on the passenger ships" – especially for the stewards that worked for tips. They had to cater to the passengers all the time. And sailors were the same. A lot of the guys didn't act natural when passengers were around. They'd get all 'perfumed up' and worry about how they looked". However, said Rubin, it was different on the freighters. We did not have to worry about catering passengers. We could act natural, dress as we pleased and concentrated on [the fight for] conditions".[126] As can be noted, seafarers, despite having begun to demand their rights, had a degree of separation among themselves. It was like they believed in the need to acquire more rights, but only for some seafarers, not for others.

Maritime law and tradition were often used to thwart resistance to authority, on the high seas or even in a port. An example of this is the 'mutiny' of the SS California

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[124] Bruce Nelson, *Workers on the waterfront : seamen, longshoremen, and unionism in the 1930s.*, (University of Illinois Press,1988), page 32

[125] *Ibid*

[126] Lawrenson, *Stranger at the Party*, (1st ed., Random House 1975), p.212, and R. Boyer, *the Dark Ship*, (Little, Brown 1947), p.240; interview with Charles Rubin, Oct. 6, 1979

in 1936, which was actually a sit down strike. It occurred while the vessel was docked at the port of San Pedro and even though the charge of mutiny could only apply to acts of resistance at sea, shipowners and the department of commerce exerted extreme pressure to arrest the strikers as mutineers. Another example of the concept of mutiny being wrongly applied in order to favour shipowners, is the case of the Steamship Colombia. As the vessel approached the Panama Canal, three Filipino stewards refused to do work assigned to them because they were duties usually performed by deck seafarers. They were put in irons, upon which 28 other stewards decided to stop work, endangering the safety and life of passengers, and the latter had to make their own beds. On the next day the three stewards (for obvious reasons) changed their minds, being released and returned to work. Despite the return of the three seafarers to work, once onshore all the twenty eight stewards were arrested and taken to trial, and charged with mutiny on the high seas, an offense that under American Law was punishable by as much as five years in prison and fine of $1000 (a rather hefty sum at the time).[127]

Therefore, seafarers faced a legal system that time and again proved to be weighed against them in favour of their employers, but the unique conditions of seafaring life, and the lack of an international agreement on these matters confronted them with obstacles to effective organization and mobilization for further rights.[128]

I.3.1 – International Organizations

At the beginning of the 20th century, the necessity for an international legal regime of the sea was clear. Globalization was at full steam, with most crews becoming internationalized. Thus, by 1908, shipowners had formed their own international organization, the International Shipping Federation (ISF), and in 1919, the International Labour Organization (ILO) was established. The negotiations of the ILO of several international conventions dealing with seafarers' labour conditions were participated in

[127] Bruce Nelson, *Workers on the waterfront : seamen, longshoremen, and unionism in the 1930s.*, (University of Illinois Press,1988), page 34
[128] *Ibid*

by the ITF, ISF and other bodies. Within a year of its establishment, three conventions of the ILO addressed specific seafarers' issues: The ILO Minimum Age (Sea) Convention 1920, the ILO Unemployment Indemnity (Shipwreck) Convention 1920 and the ILO Placing Seamen Convention 1920. The latter convention aimed at eliminating commercial agent charging fees for seafarers, instead seeking to have these fees paid by shipowners. Nevertheless, an insignificant number of seafaring countries ratified this convention. The Convention was after more than 70 years replaced by the ILO Recruitment and Placement of Seafarers' Convention 1996, which recognized the recruitment of seafarers as part of a global market, most seafarers being tied to private recruitment agencies. However, little has changed, and illegal payments continue to be extracted from seafarers. Furthermore, there continue to be few guaranteed measures for repatriation in cases of seafarer abandonment.[129]

I.3.1.1 – The International Labour Organization (ILO)

The establishment of the ILO can be considered to have originated from the support of labour movements of the time, which had begun to understand that international cooperation in the fields of labour relations and social security was essential in preventing different national legislations from affecting international competitiveness of workers. Indeed, socialist parties and trade unions alike realised that in order to avoid unfair international competitive practices, it was necessary to have an internationally coordinated national compact, including regulations for the labour market and systems of social insurance. Accordingly, trade unions realised that an international regime with common standards in the fields of labour relations and social insurance was needed in order to prevent the welfare state from failing before it had even started. Moreover, in 1919 the international trade union movement, noting the importance of establishing an international framework of employment relations, unlike previously, manifested its desire to be engaged in these international arrangements.[130]

[129] *Ibid* pp. 21/22
[130]Bob Reinalda, *Routledge history of international organizations: from 1815 to the present day*,(Routledge 2009) ISBN: 6612234830, 9786612234835, pp. 223-224

The ILO was formed after World War I as part of the peace settlement under the Treaty of Versailles, reflecting the belief that universal and lasting peace can be accomplished only if it is based on social justice.[131] Its inception was part of the beginning of what was described as "[o]ne of the most creative innovations of the international diplomatic community in the 20th Century…"[132]

One of ILO's unique characteristics is its tripartite decision-making structure composed of governments, trade unions and employers, being the only United Nations' (U.N.) agency so constituted. ILO's tripartite structure makes it a unique forum, which allows governments and the social partners of economies and Member States to freely and openly debate and devise labour standards and policies. Currently, the ILO comprises 186 Member States.[133]

The ILO structure comprises three main organs: the International Labour Conference, the Governing Body and the International Labour Office, headed by a director. The annual International Labour Conference is the general assembly of the Member States; the Governing Body a kind of executive committee with a coordinating function; and the International Labour Office the permanent secretariat. According with ILO's tripartite structure, every national delegation to the ILO's annual Labour Conference is composed of two government representatives, one trade union representative and one employer representative.[134]

The ILO's tripartism, together with effective social dialogue is believed to be

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[131] ILO, Origins and history, available at: http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm

[132] Douglas M. Johnston and W. Michael Reisman, *The Historical Foundations of World Order: The Tower and the Arena* (Martinus Nijhoff Publishers 2008), p. 730

[133] ILO, Tripartite constituents, available at: http://www.ilo.org/global/about-the-ilo/who-we-are/tripartite-constituents/lang--en/index.htm

[134] Bob Reinalda, *Routledge history of international organizations: from 1815 to the present day*,(Routledge 2009) ISBN: 6612234830, 9786612234835, p.227

necessary in order to achieve effective promotion of better wages and working conditions, as well as peace and social justice. These instruments of good governance foster cooperation and economic performance, assisting in the creation of an enabling environment for the realization of the objective of 'Decent Work' at the national level. According to the ILO, Social dialogue and Tripartism cover:

- "Negotiation, consultation and information exchange between and among the different actors;
- Collective bargaining;
- Dispute prevention and resolution; and
- Other instruments of social dialogue, including corporate social responsibility and international framework agreements."[135]

The scope of the ILO can be found in the preamble of its constitution, which reads as follows:

> "Whereas universal and lasting peace can be established only if it is based upon social justice;
> And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when

[135] ILO, Tripartism and social dialogue, available at: http://www.ilo.org/global/topics/workers-and-employers-organizations-tripartism-and-social-dialogue/lang--en/

employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures;

Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries;"[136]

These stated ILO concerns and values were applied since the very beginning to seafarers' labour conditions, as it can be seen in an extract from the Preamble of the ILO *National Seamen's Code Recommendation 1920:*

"In order that, as a result of the clear and systematic codification of the national law in each country, the seamen of the world, whether engaged on ships of their own or foreign countries, may have a better comprehension of their rights and obligations, and in order that the task of establishing an International Seamen's Code may be advanced and facilitated, the International Labour Conference recommends that each Member of the International Labour Organisation undertake the embodiment in a seamen's code of all its laws and regulations relating to seamen in their activities as such."[137]

The ILO seems to have achieved the above recommendation a few decades later, with the advent of the Maritime Labour Convention (MLC). Nevertheless, seafarers have never been left totally unprotected, especially considering that the MLC is nothing if not the consolidation of several ILO instruments regarding seafarers' rights. Therefore, since the ILO's early days, seafarers have always been under the

[136] ILO Constitution, Preamble, available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#A2 last accessed on 01/07/2016

[137] R009 - National Seamen's Codes Recommendation, 1920 (No. 9)

auspices of the organization.[138]

I.3.1.2 – International Maritime Organisation (IMO)

It has long been acknowledged that the best way of improving safety at sea is by developing international regulations intended to be followed by all shipping nations, and thus the concept of a permanent international body to implement and oversee uniform international standards for the safety of ships started to be debated during the nineteenth century.[139] In 1889, during an international maritime conference held in Washington, the creation of such a body was recommended, however, the concept was not considered convenient, so the idea was rejected. Nevertheless, the truth was that the shipping industry of the day would not agree to any imposition capable of restricting its activities and commercial freedom, correctly perceived as unavoidable under the mandated activities of an international regulatory organisation. This view remained during the twentieth century and cause protracted delays in the ratification of the founding instrument for the eventual international body, the IMCO Convention.[140]

Nevertheless, maritime disasters led states to adopt a series of treaties relating to the safety of ships and tonnage measurement (treaties covering signalling, and prevention of collisions had been adopted in the first half of the twentieth century) [141]even prior of the establishment of the IMO. Nevertheless, these treaties did not achieve a wide acceptance, hence were not implemented by all maritime countries, resulting in non-uniform international standards being applied, with the risk even of

[138] See: ILO, Seafarers' Rights Overview, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/presentation/wcms: _230030.pdf, last accessed on 15/09/2015

[139] IMO, Brief history of IMO, available at http://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx, last accessed on 15/09/2015

[140] John N. K. Mansell, Flag State Responsibility: Historical Development and Contemporary Issues (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, p. 121

[141] The Unification of Certain Rules of Law with respect to Collisions between Vessels. Brussels, 23 September 1910; International Convention on the Safety of life at Sea. London, 31 May 1929; International Convention Respecting Load Lines. London, 5 July 1930; and the Convention Relating to the Tonnage Measurement of Merchant Ships. Warsaw, 1934.

some treaties contradicting others.[142]

Despite the states' early manifestations regarding the need for establishing an international body to regulate shipping, it was only after the establishment of the United Nations itself that this would become a reality. It was only in 1948 at an international conference in Geneva that a convention formally establishing the IMO was adopted.[143] The Convention only came into force a decade later, in 1958, with the organization meeting for the first time the following year.[144]

It is interesting to note that the aims of the IMO, outlined in Article 1 of its Convention, make no reference to marine pollution, and only a passing reference to safety. A dominant emphasis in the Convention was given to economic action for the promotion of "freedom" and to "end discrimination", which, along with references to a "world without discrimination" and action against "unfair restrictive practices" caused a number of states to enter reservations when they became signatories to it.

> "Article 1: (a) To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to encourage the general adoption of the highest practical standards in matters concerning maritime safety and efficiency of navigation; (b) To encourage the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination; assistance and encouragement given

[142] John N. K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, p. 121 and IMO, Brief history of IMO, available at http://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx, last accessed on 15/09/2015)

[143] IMO's original name was Inter-Governmental Maritime Consultative Organization, or IMCO. The name was changed in 1982 to IMO

[144] IMO, Brief history of IMO, available at http://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx, last accessed on 15/09/2015

by a Government for the development of its national shipping and for the purposes of security does not in itself constitute discrimination, provided that such assistance and encouragement is not based on measures designed to restrict the freedom of shipping of all flags to take part in international trade; (c) To provide for the consideration by the Organization of matters concerning unfair restrictive practices by shipping concerns in accordance with Part II; (d) To provide for the consideration by the Organization of any matters concerning shipping that may be referred to it by any organ or specialised agency of the United Nations; (e) To provide for the exchange of information among Governments on matters under consideration by the Organization."[145]

The focus in Article 1 of the IMO Convention upon matters unrelated to the safety of ships or protection of the marine environment raised suspicion in the maritime community about the role of the new organization, resulting in slow entry into force of the Convention (10 years after it was first formed). There was a general belief that the Convention was constructed largely for the benefit of the dominant shipping nations of the time (IMO 1998, p. 4). Many of the 18 States which ratified the Convention during the 1950s registered declarations or reservations that resulted in a very limited scope for the Organization when the Convention finally received the necessary number of ratifications to enter into force in 1958. Accordingly, it was clear from the large number of reservations made, that economic and commercial matters should not be a part of the organization's mandate.[146]

[145] "It was no coincidence that all the Scandinavian countries made a statement – and an unusually strong one – to the effect that they would consider a renunciation of the Convention if IMCO were to assume competence in matters of the kind mentioned in Articles 1(b) and (c). The Scandinavian countries (led by Norway), as well as Greece, have always been strong supporters of the principle of the freedom of international shipping, which according to their philosophy, should be upheld through virtually unrestricted maritime shipping regulated by nothing but free and fair competition" John N. K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, p. 121 and IMO, Brief history of IMO, available at http://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx)

[146] For instance, Denmark's reservation reads:

"The Government of Denmark supports the work programme adopted during the first Assembly of the Organization in January 1959 and holds the view that it is in the field of

It was not until 1975 that Article I (a) of the IMO Convention would be amended by Res. A.358 (IX) to add the words "and the prevention and control of marine pollution from ships; and to deal with legal matters related to the purposes set out in this Article".

Article 2 of the IMO Convention, deals with the functions of the Organization, limiting its role to a consultative and advisory one. Article 3, in stating that the Organization should "provide for the drafting of conventions, agreements, or other suitable instruments, and recommend these to governments and to international organisations, and to convene such conferences as necessary", made clear that the Organization did not have the authority to adopt or amend treaties. [147]

Nevertheless, the reason behind the creation of the IMO is left clear by the organisation's first task which was to adopt a new version of the International Convention for the Safety of Life at Sea (SOLAS), the most important of all treaties dealing with maritime safety, which took place after the infamous Titanic accident. [148]

The ITF holds a consultative status at the IMO, being a permanent representative to the organization, and monitors ITF affiliated unions who participate

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technical and nautical matters that the Organization can make its contribution towards the development of shipping and seaborne trade throughout the world."

"If the Organization were to extend its activities to matters of purely commercial or economic nature, a situation might arise where the Government of Denmark would have to consider resorting to the provisions regarding withdrawal contained in article 59 of the Convention." Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-1&chapter=12&lang=en last accessed on 01/10/2016

See Also: John N. K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, p. 123

[147] The full text of the Convention is available at: https://cil.nus.edu.sg/rp/il/pdf/1948%20Convention%20on%20the%20International%20Maritime%20Organization-pdf.pdf, last accessed on 15/09/2015

[148] IMO, Brief history of IMO, available at http://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx and IMO. History of SOLAS (The International Convention for the Safety of Life at Sea), available at: http://www.imo.org/en/KnowledgeCentre/ReferencesAndArchives/HistoryofSOLAS/Pages/default.aspx, last accessed on 15/09/2015

in the various committees, aiming to ensure that seafarers' interests are addressed and protected when any new regulation is being considered. According to the ITF, IMO conventions are important to Seafarers "because they have a direct impact on living and working conditions." [149]

I.4 – The "Human Element"

The importance of institutions focused on protecting and generating more seafarer rights is undeniable. For instance, in 1972, The United Seamen's Service[150], promoted the XVIth International Conference on Social Welfare. The Conference was pioneering in having as one of its subjects the "human factor in safety of the sea", heightening seafarers' importance in shipping operations.[151] Later, in 1997, twenty five years after the Conference, the International Maritime Organization (IMO) started using the term 'human element'[152] in reference to a complex multi-dimensional issue affecting maritime safety, security and marine environmental protection involving the entire spectrum of human activities performed by ships' crews, shore based management, regulatory bodies and others', adopting Resolution A.850(20).[153] This demonstrates the importance of such institutions visioning the protection of seafarers' rights.

The referred-to resolution evoked a previous resolution (A.680(17)) which invited governments to encourage those responsible for the management and operation of ships to develop, implement and assess safety and pollution prevention management systems and also resolution (A.772(18)), concerning fatigue factors in manning and

[149] ITF, Inside the Issues - IMO and ILO, available at: http://www.itfseafarers.org/ITI-IMO-ILO.cfm
[150] An institution founded in 1942 to promote welfare of American seafarers and their dependents, seafarers of all nations. http://unitedseamensservice.org/
[151] United Seamen's Service, *The Maritime Industrial Revolution and the Modern Seafarer: Sessions Sponsored by United Seamen's Service, Reporting a Symposium at the XVIth International Conference on Social Welfare* (United Seamen's Service 1972), page 8.
[152] http://www.imo.org/ourwork/humanelement/Pages/Default.aspx, last accessed on 15/09/2015
[153]http://www.imo.org/OurWork/HumanElement/VisionPrinciplesGoals/Pages/Default.aspx, last accessed on 15/09/2015

safety, aiming at increasing awareness of the complexity of fatigue and encouraging all parties involved in ship operations to take these factors into account when making operational decisions.[154]

Furthermore, resolution A.850(20) acknowledged the need for increased focus on human-related activities in the safe operation of ships, and the need for achieving and maintaining high standards of safety and environmental protection for the purpose of significantly reducing maritime casualties.[155]

The recognition of the importance of the 'Human Element" in shipping is of extreme importance. In 2001, IMO "noting the importance in the plan of action of the International Maritime Organization (IMO) of the human element, which is central for the promotion of quality shipping, and the core mandate of the International Labour Organization (ILO), which is to promote decent conditions of work",[156] created Resolution A.930(22). The resolution was the first international instrument offering guidelines on provision of Financial Security in cases of abandonment of seafarers.[157] Later on, in 2006 the ILO conceived the Maritime Labour Convention (MLC) providing comprehensive rights and protection at work for the world's more than 1.2 million seafarers. The convention came into force on 20th August 2013.[158]

Furthermore, recognizing once again the importance of the 'Human element" to the maritime industry, the IMO proclaimed 2010 the "year of the seafarer". Secretary-General Mitropoulos, when proposing it, reportedly said, "the unique hazards confronting the 1.5 million seafarers of the world - including pirate attacks,

[154]http://www.imo.org/OurWork/HumanElement/VisionPrinciplesGoals/Pages/Default.aspx, last accessed on 15/09/2015

[155] The resolution was updated by resolution A.947(23) Human element vision, principles and goals for the Organization adopted by the 23rd Assembly in November-December 2003 http://www.imo.org/OurWork/HumanElement/VisionPrinciplesGoals/Pages/Default.aspx, last accessed on 15/09/2015

[156] Extract from the text of the IMO Resolution A.930(22)

[157] IMO Resolution A.930(22)

[158] http://www.ilo.org/global/standards/maritime-labour-convention/lang--en/index.htm , last accessed on 15/09/2015

unwarranted detention and abandonment - coupled with the predicted looming shortage of ships' officers, make it ever more incumbent to take immediate and effective action to forestall a situation from developing in which ships are not manned with sufficient skilled personnel".[159]

Coincidence or not, also in 2010, Seafarers' Rights International (SRI) was founded. The institution was created in response to "the growing need to raise awareness of seafarers' rights and to provide a resource for seafarers and for all stakeholders with a genuine concern for the legal protection of seafarers around the world."[160] One of the areas worked in by SRI is the conduct of research and analysis on subjects of importance for seafarers,[161] such as abandonment.

I.5 – The Maritime Labour Convention (MLC) – The ultimate recognition of the transnationality of seafaring and most importantly of 'abandonment of seafarers'

The MLC is considered to be the "fourth pillar" of quality shipping, since it supposedly complements three main IMO Conventions: the International Convention for the Life at Sea, 1974, as amended (SOLAS); The International Conventions on Standards of Training, Certification and Watchkeeping 1978, as amended (STCW); and the International Convention for the Prevention of Pollution from Ships 73/78 (MARPOL). It is often referred to as the "super convention", a "charter of rights" and the "seafarers' bill of rights".[162]

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[159] http://www.imo.org/blast/mainframe.asp?topic_id=1773&doc_id=11506, last accessed on 15/09/2015

[160] http://www.seafarersrights.org/about-us/, last accessed on 15/09/2015

[161] http://www.seafarersrights.org/about-us/what-we-do/, last accessed on 15/09/2015

[162] Moira L. McConnell: "Making Labour History and the Maritime Labour Convention: Implications for International Law-Making (and Responses to the Dynamics of Globalization)" in Aldo Chircop, Theodore McDorman and Susan Rolston (eds.) *The Future of Ocean Regime-Building* (Brill Online Books and Journals: 2009) DOI: 10.1163/ej97809004172618.i-786, E-ISBN: 9789047426141, pp 349-384

The Convention is in essence a consolidation of 68 ILO instruments[163], including conventions and recommendations, some of which are 94 years old, some of which never entered into force for lack of ratification and some of which (despite the number of ratifications) were only enforced by an insignificant number of countries. Therefore, the Convention includes the majority of existing International Maritime Labour instruments, which are 72 in number.[164]

The MLC is already considered to be a historic mark in ILO convention drafting. The Convention is even considered to be a "global pilot project for exploring innovative approaches to implement the concept of decent work for ***transnational workers and employers***".[165] (Emphasis added)

The Convention, which runs to more than 100 pages, was adopted by the 94th (Maritime) Session of the International Labour Conference (ILC) of the International Labour Organization (ILO) by a record vote of 314 in favour, none against, and two abstentions for reasons unrelated to the core of the Convention. This is a reflection of the tripartite support given to the Convention, which is the combined work of ILO Member States, International Shipping Federation (ISF) representatives and the International Transport Workers' Federation (ITF). Furthermore, the relative shortage of amendments submitted to the final text proposed by the International Labour Office for such a comprehensive and complex convention was almost unprecedented. The Convention is even more remarkable, considering that it:

- Adopts an entirely new format for ILO conventions; bringing in a new

[163] A few examples are the : C007 - Minimum Age (Sea) Convention, 1920 (No. 7), C022 - Seamen's Articles of Agreement Convention, 1926 (No. 22) and C178 - Labour Inspection (Seafarers) Convention, 1996 (No. 178)

[164] ILO, Compendium Of Maritime Labour Instruments - Maritime Labour Convention, 2006, Seafarers' Identity Documents (Revised) Convention, 2003 Work in Fishing Convention and Recommendation, 2007, Second (Revised) edition, 2015, available at: http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_093523.pdff., last accessed on 01/02/2016

[165] Interview with Cleopatra Doumbia Henry. Available at: http://www.ilo.org/global/ standards/maritime-lab our-convention/news/WCMS_23 6264 /lang- en/index.htm, last accessed on 01/02/2016

approach to the updating/amendment of ILO conventions; It sets out a code that lays out the more technical and evolving dimensions governing labour conditions in the maritime transport industry.[166]

- Covers close to the full gamut of socio-economic issues in the maritime sector, including the very controversial question of social security protection, shipowner's liability and repatriation; and
- Sets out a new comprehensive enforcement and compliance system based on Flag State inspection and certification of the requirements of the Convention, complemented by Port State control inspections and on board and onshore complaint handling systems. At the time of its adoption, the Director-General of the ILO was moved to describe this Convention, and the process by which it was developed, as "historic", and as a model for a way forward to achieving "fair globalization". The Convention requires Flag States to inspect the vessel and issue a Maritime Labour Certificate covering the 14 points set out in Appendix A5-I (16 when the 2014 amendments will enter into force). The Certificate is valid for five years, subject to an intermediate inspection required to take place between the second and third anniversary of the date the certificate was issued by the competent authority (also in charge of the intermediary inspection). Furthermore, in order to ensure compliance between inspections, the Convention provides for a Declaration of Maritime Labour Compliance (DMLC). Part I is completed by the competent authority and identifies the national requirements, while Part II is drawn up by the shipowner and identifies the measures adopted to ensure ongoing compliance with the national

[166] This represents a novelty in ILO Convention's structure, as is the inclusion of a simplified amendment process for the Code (Article XV) via the Special Tripartite Committee (Article XIII), meaning that the Code can be amended without the need to adopt a protocol, which would require a new ratification from Member States. (See: (See: Jon Whitlow and Ruwan Subasinghe, 'The Maritime Labour Convention, 2006: A model for other industries?' in International Journal of Labour Research (2015), Vol.7, Issue 1-2, p.119)

requirements between inspections.[167]

The Convention's success is attributed in large part to the MLC's philosophy, "promoting decent work and a fair globalization". This is said to translate into secure decent work for seafarers and a level playing field for shipowners, since the Convention will help prevent unscrupulous shipowners and inept Flag States from continuing engagement in unfair competition by effectively permitting substandard working conditions.[168]

The Maritime Labour Convention undoubtedly 'personifies' the Seamen's Code intended by the ILO since its formation. The Convention is a clear, effective instrument in enforcing minimum rights of seafarers. In addition, the Convention clearly recognizes the transnationality of the seafarers' employment relationship, not only by establishing a network of responsibilities between Flag States, Port States and even seafarers' exporter states but by recognizing the role of national legislations in ensuring seafarers' rights. The Convention more often than not provides for rights without actually establishing how this is supposed to be achieved, leaving it up to Member States to decide how to implement the Convention,[169] which contains more guidelines than detailed regulations. The Convention guidelines often refer to national legislations to determine how supplemental rights are to be provided, and it utilizes the word 'should' more often than the word 'must'[170], meaning that the Convention offers

[167] Moira L. McConnell: "Making Labour History and the Maritime Labour Convention: Implications for International Law-Making (and Responses to the Dynamics of Globalization)" in Aldo Chircop, Theodore McDorman and Susan Rolston (eds.) *The Future of Ocean Regime-Building* (Brill Online Books and Journals: 2009) DOI: 10.1163/ej97809004172618.i-786, E-ISBN: 9789047426141, pp 349-351 and Jon Whitlow and Ruwan Subasinghe, 'The Maritime Labour Convention, 2006: A model for other industries?' in International Journal of Labour Research (2015), Vol.7, Issue 1-2, pp.119-120

[168] Jon Whitlow and Ruwan Subasinghe, 'The Maritime Labour Convention, 2006: A model for other industries?' in International Journal of Labour Research (2015), Vol.7, Issue 1-2, p.124

[169] For an idea, see the guidance provided in: International Labour Standards Department, *Maritime Labour Convention, 2006* (MLC, 2006), *Frequently Asked Questions (FAQ)*, Fourth Edition 2015, ILO www.ilo.org/mlc, last accessed on 01/02/2016

[170] Just as a title of example, Guideline B2.2.2 – Calculation and payment provides:

"1 (…)

2.(…)

3. National laws or regulations or collective agreements may provide for compensation for overtime or for work performed on the weekly day of rest and on public holidays by at least equivalent time off duty

Member States a large amount of discretion in how to apply and enforce Convention provisions.

I.5.1 – Abandonment provisions in the Maritime Labour Convention

As mentioned in the introduction[171] of this thesis, the Maritime Labour Convention is the second international instrument bringing a specific definition to 'abandonment of seafarers', the first one being IMO Resolution A.930. The MLC definition is found in the first set of amendments to the Convention which were approved by the Special Tripartite Committee on 11 April of 2014 at the 103rd session of the International Labour Conference, at ILO headquarters in Geneva. The amendments are expected to come into force at the beginning of 2017.[172] Thus, currently, the original version of the MLC remains the only text in force.

The amendment covering abandonment will expand the requirements for Financial Security provided in Regulation (and Standards and Guidelines) 2.5, which covers repatriation of the seafarer. In summary, the amendments provide a definition of the term 'abandonment of seafarer', and require a Financial Security to be provided through a social security system, or insurance or national fund, by the shipowner. The Financial Security must cover up to four months' wages and entitlements, repatriation costs and essential needs such as food, accommodation and medical care. The amendment entrusts Flag States to ensure that such Financial Security is available by

and off the ship or additional leave in lieu of remuneration or any other compensation so provided.
4. National laws and regulations adopted after consulting the representative shipowners' and seafarers' organizations or, as appropriate, collective agreements should take into account the following principles: (…)
5. Each Member should, after consulting with representative shipowners' and seafarers' organizations, have procedures to investigate complaints relating to any matter contained in this Guideline" (highlight added)

[171] See Introduction pp.12-13

[172] ILO, International Labour Organization overwhelmingly supports new international law to protect abandoned seafarers and provide Financial Security for death or long-term disability of seafarers, 11 June 2014

means of certificates to be displayed on board, the form of which is also provided by the amendments. [173]

It is important to note that although the current text of the MLC does not currently include the specific abandonment provisions found in the amendment, the Convention already has provisions dealing with accommodation, provisions, medical care, wages and repatriation, which are the rights which must be infringed in order for the seafarer to be considered 'abandoned'. In fact, accordingly to the amendment of the MLC definition of abandonment of seafarers, only one of these rights needs to be fulfilled in order for the seafarer to be considered abandoned.

For instance, MLC Regulation 2.5 covers repatriation of seafarers, providing for seafarers the right to be repatriated at no cost to themselves, except when the seafarer is found to be in serious default of his or her obligations according to national laws and collective bargaining agreements.[174] The current text provides in Standard A2.5 for the modalities of repatriation at the end of the seafarer's service, whether at the end of the contract or in case of early termination, as long as the latter amounts to fair dismissal. Matters regulated, and which must be seen to by Member States, include when and how the payment for repatriation is to be made, and eligible costs. The Regulation places secondary responsibility for the repatriation of the seafarer upon the Flag State, even providing that the state where the seafarer is to repatriate to, or the state of the seafarer's nationality, is entitled to claim repatriation expenses from the Flag State in situations where the former end up footing the cost.[175]

Nevertheless, the regulations, as they currently stand, fail to tackle one of the most common reasons for the occurrence of 'abandonment of seafarers'. As previously

[173]Amendments to the Code implementing Regulations 2.5and 4.2 and appendices of the Maritime Labour Convention, 2006 (MLC, 2006), adopted by the Special Tripartite Committee on 11 April 2014, I. Amendments to the Code implementing Regulation 2.5 – Repatriation of the MLC, 2006 (and appendices), *Standard A2.5.2* – The Financial Security provided by the MLC will be discussed in more details in Chapter V of this thesis.
[174] See MLC Regulation 2.5 and Standard A2.5 paragraph 3
[175] See MLC Standard A2.5.5

mentioned in this work[176], at the root of failure to repatriate are often financial difficulties faced by the shipowner, and although the original text places some burden on Member States, the drafters of the original text did not devise any solution for circumstances where the shipowner is no longer in the picture or refuses to contribute. The Financial Security provided by the amendment covering abandonment intends to exactly solve this situation, as it will be seen in Chapter V.

Seafarers' wage provisions are found in Regulation 2.2 of the Convention. Essentially, the regulation places a responsibility on Flag States to ensure that seafarers are paid monthly and in accordance with collective agreement, that they receive monthly accounts of the payments due and that they are provided with means to send their earning to their families, dependants or legal beneficiaries.[177] Thus, the Convention places the burden of ensuring that the shipowner is complying with its obligations regarding wages on Flag States. Nevertheless, the convention has no provisions contemplating the possible failure of the shipowner to fulfil their obligations, leaving it for Member States to decide what happens in that event.[178]

Title three of the MLC deals exclusively with accommodation, recreational facilities and food. It provides that each Member State shall ensure that ships flying its flags provide for decent living accommodations and recreational facilities and their maintenance. It requires Member States to adopt laws and regulations requiring the shipowner to comply with minimum standards for safe and decent living accommodation.[179]

[176] See pp. 15-16
[177] See MLC Regulation 2.2, Standard A2.2, paragraphs. 1, 2 and 3
[178] See MLC guideline B2.2.2, paragraph 3
[179] See: MLC Title 3, Regulation 3.1 and Standard A.3.1

I.5.2 – Further and possible amendments to the MLC

The second set of amendments also approved by the Special Tripartite Committee on 11 April of 2014, falls under *Title 4. Health Protection, Medical Care, Welfare and Social Security Protection,* more specifically under Regulation (and Standards and Guideline) 4.2, entitled 'Shipowner's liability'. The current provision in its brevity provides that the shipowner must provide Financial Security and cover certain expenses in the event of the need for medical intervention. The amendment adds seven additional paragraphs to the existing seven. The added paragraphs provide for seafarer's rights in relation to payment of expenses and the modalities for Financial Security. Furthermore, a new segment Standard A4.2.2 entitled Treatment of contractual terms has been added. Standard A4.2.2 defines 'contractual claims', the nature of the Financial Security scheme, encouraging Member States to put in place effective dispute resolution mechanisms for this purpose. The amendment provides forms for the evidence that Financial Security has been set. The appendix provides for a model release and receipt form for the seafarer to sign upon receipt of funds.[180]

A second group of amendments to the Convention has been approved in the Second meeting of the Special Tripartite Committee in Geneva on February 2016, and still does not have provision regarding when it will come into force. The new group of amendments concern Regulation 5.1, regarding Flag State responsibilities of the MLC and 4.3, titled *Health and safety protection and accident prevention,* with the first amendment proposed by shipowners' representatives and the latter by seafarers' representatives.[181]

[180]Amendments to the Code implementing Regulations 2.5and 4.2 and appendices of the Maritime Labour Convention, 2006 (MLC, 2006), adopted by the Special Tripartite Committee on 11 April 2014, II. Amendments to the Code implementing Regulation 4.2 – Shipowners' liability of the MLC, 2006 and Appendix B4-i Model Receipt and Release Form

[181] ILO, Final Report Second meeting of the Special Tripartite Committee established under Article XIII of the Maritime Labour Convention, 2006 (MLC, 2006) (Geneva, 8–10 February 2016), STCMLC/2016/7, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/meetingdocument/wcms_459566.pdf, last accessed on 01/02/2016

The first set of the second approved amendments shall add a new paragraph to *Standard A5.1.3 – Maritime labour certificate and declaration of maritime labour compliance*. The new standard essentially provides that when a new certificate of compliance cannot immediately be issued and made available to a ship, but a renewal inspection has been completed - prior to the expiration of the maritime labour certificate - which found the ship compliant with MLC requirements, the competent authority, or the recognized organization duly authorized for this purpose, may extend the validity of the expired certificate for a further period not exceeding five months from the expiry date, and endorse the certificate accordingly. [182]

The second set of amendments was proposed by the seafarers' representatives and essentially concerns the elimination of harassment and bullying on-board ships. Essentially two new subparagraphs were added to *Guideline B4.3.1 – Provisions on occupational accidents, injuries and diseases and Guideline B4.3.6 – Investigations,* respectively. The first guideline provides for Members States of the Convention to ensure that national guidelines for the management of occupational safety and health address certain issues such as HIV, emergency and accident response, and now harassment and bullying.[183] The second guideline provides for Members States to investigate "the causes and circumstances of all occupational accidents and occupational injuries and diseases resulting in loss of life or serious personal injury, and such other cases as may be specified in national laws or regulations", providing an exhaustive list of cases, which shall soon include bullying and harassment, to be followed by investigations.[184]

During the Second Tripartite meeting in February 2006, consideration was also given to the seafarers' amendment proposal concerning the payment of full wages to seafarers who are being held captive by pirates. Nevertheless, shipowners and

[182] Amendments to the Code relating to Regulation 5.1 of the MLC, 2006 *Standard A5.1.3 – Maritime labour certificate and declaration of maritime labour compliance*
[183] MLC, Guideline B4.3.1 – Provisions on occupational accidents, injuries and diseases (2)
[184] MLC, Guideline B4.3.6 – Investigations

government representatives expressed a negative view of the amendment[185], leading the committee to establish a working group to examine all relevant issues and prepare appropriate amendments to the MLC Code for consideration at the next meeting of the Special Tripartite Committee. [186] It is important to note, however, that some countries like Denmark already provide for situations like this hence the proposed amendment seems a practicable one. [187]Furthermore, this author believes that the only way that seafarers cannot be considered entitled to their full wages once held captive by pirates would be if their employment contract was deemed frustrated, or if the pirate attack was considered a force majeure event. Otherwise, the employment contract should still be considered valid, with the seafarers entitled to the full wages. Otherwise, the seafarers should be considered as having been abandoned by the shipowner.[188]

I.6 - Concluding Remarks

As it has been demonstrated, although seafaring is one of the oldest professions, the evolution of its regulation occurred at a much slower pace than the evolution of shipping and trade regulations themselves. This lack of regulation was highly connected to the societal perception of seafarers, who were often slaves, illiterate and in the majority considered a lowly part of society. Thus, it would have appeared that society had 'abandoned' them and neglected to give them their rights, 'abandonment' at sea being just a natural consequence of this.

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[185] ILO, *Final Report Second meeting of the Special Tripartite Committee established under Article XIII of the Maritime Labour Convention, 2006* (MLC, 2006) (Geneva, 8–10 February 2016), STCMLC/2016/7, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/meetingdocument/wcms_459566.pdf

[186] ILO, *Second meeting of the Special Tripartite Committee established under the Maritime Labour Convention, 2006, Resolution concerning the establishment of a working group of the Special Tripartite Committee*, (8-10 February 2016) STCMLC/2016, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/meetingdocument/wcms_452072.pdf, last accessed on 01/02/2016

[187] *Ibid*

[188] Unfortunately, a more intrinsic and profound discussion of the subject, although interesting, cannot be made in this thesis for reasons of concision and coherence, since this would cover the study of national legislations and the shipowner's responsibilities accordingly, this not being within the scope of this thesis. For a more detailed discussion on the subject see: Julia Constantino Chagas Lessa, 'Abandonment of seafarers following a piracy attack – breach or no breach of the employment contract?' in MarIus nr. 424, 2013

Legislation covering seafarers' rights started to develop faster once society was made aware of their legitimacy and importance. The growth of trade unions, a result of the industrial revolution itself, particularly in maritime nations, raised awareness of seafarers' struggles and the consequent need to improve their rights. Therefore, national legislations were improved and amended. The subsequent advent of International Organizations such as the IMO and ILO helped ensure that seafarers were better protected at an international level, with the creation of international instruments to be followed by their member states.

The advent of the ILO represented a minimum set of standards being established internationally, including a minimum wage, and although these changes might have been welcomed by some, it represented a step back for others since the minimum wage established by the organization was lower than the minimum wage in most developed countries[189]; some countries had also managed to develop seafarers' rights much further than the minimum rights established by the Organisation's international instruments. In a way, the minimum rights established by the ILO made seafaring a more attractive career to developing countries, more so than developed ones, and it can be considered to have "legalized" once and for all the hiring of international crews.

Nevertheless, although the perception of seafarers might have changed in some countries as proven by their national legislations, and at an international level, some countries still demonstrate reluctance in enforcing seafarers' minimum rights. For instance, in Myanmar, seafarers were obliged to join the Myanmar Overseas Seafarers' Association (MOSA), a state-linked seafarer's organization, not affiliated with the ITF, as a condition of employment. The *340th Report of the Committee on Freedom of Association* published by the International Labour Organization (ILO) points out that membership in MOSA "explicitly limits seafarers' right to establish and join

[189] See: Malcolm Latarche, 'Working for the Yankee dollar'(shippinginsight in 11 April 2016) < https://www.shipinsight.com/working-for-the-yankee-dollar>, last accessed on 01/02/2016

associations of their own choosing"[190]. Furthermore, accordingly to sources, when MOSA was launched, then Prime Minister General Khin Nyunt urged seafarers to "'refrain by their words and actions from harming the State'".[191] To make matters worse, according to The International Trade Union Confederation, another state-controlled organization, the Seaman's Employment Control Division (SECD) charges a fee for issuing the documents required for employment as a seafarer and gives mandatory lectures warning prospective seafarers not to complain about working conditions aboard ships, and to stay away from the Seafarers' Union of Burma (SUB) and the International Transport Workers Federation (ITF).[192] Thus, it seems fair to say that the Myanmar government is more concerned with pleasing shipowners than with protecting seafarer interests.

The situation of seafarers in Myanmar is not an isolated case. Several other governments, besides that of Myanmar, have chosen to overlook their seafarers' rights, in order to attract more investments from the shipping industry. And as the above example demonstrates, a seafarer will many times remain silent about their rights being violated, since failure to do so may result in strong government disapproval or sanction, with the risk even of the seafarer being placed in jail.[193]

Nevertheless, what is important to highlight in these cases is that national governments refusing to enforce minimum rights of seafarers are constantly the subjects of harsh criticism and scrutiny from the international community. In the case of Myanmar's seafarers, even a human rights violation representation has been made

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[190] ILO, *340th Report of the Committee on Freedom of Association* published by the International Labour Organization (ILO Mar. 2006, Sec. 1099).

[191] International Trade Union Confederation (ITUC). 'Annual Survey of Violations of Trade Union Rights' (Burma 2007) http://survey07.ituc-csi.org/getcountry.php?IDCountry=MMR&IDLang=, last accessed on 01/02/2016

[192] International Trade Union Confederation (ITUC). 'Annual Survey of Violations of Trade Union Rights' (Burma 2007) http://survey07.ituc-csi.org/getcountry.php?IDCountry=MMR&IDLang=, last accessed on 01/02/2016

[193] See: ITF, *Out of Sight, Out of Mind. Seafarers, Fishers and Human Rights. A report by the International Transports Workers Federation* (International Workers Federation, June 2006 ISBN: 1-904676-18-9) <http://www.itfseafarers.org/files/extranet/-1/2259/HumanRights.pdf>, last accessed on 01/02/2016

against the government.[194] Furthermore, the system of compliance contained in the MLC is likely to prevent situations like these from arising, as it provides for cooperation between States.

As this chapter demonstrated, seafarers' rights are contained in a combination of national and international regulations, with their development being highly depended upon "Private Actors", i.e. trade unions and International Organisations. Nevertheless, as this thesis will prove there are other private actors necessary to ensure the better protection of seafarers' rights. Indeed, the shipping industry is composed of several stakeholders who have their share of responsibility in ensuring seafarers' rights.

[194] International Trade Union Confederation (ITUC). 'Annual Survey of Violations of Trade Union Rights' (Burma 2007) http://survey07.ituc-csi.org/getcountry.php?IDCountry=MMR&IDLang=, last accessed on 10/07/2014

Chapter II- The Maritime Safety Chain and the connection between substandard shipping and abandonment

The notion of the existence of a safety chain in the Maritime Industry can be found in International Instruments, such as the ISM Code[195], SOLAS[196], MARPOL[197], STCW[198] and more recently in the MLC[199]. All these instruments provide expressly for shipowners, Flag States and Port States' obligations. The insurance and classification societies' obligations are not expressly provided for in these instruments as they derive from shipowners' and Flag States obligations, as will be explained in detail further along this thesis.

The maritime safety chain is known to be indispensable to the shipping industry as it forms a network of protection, ensuring that standards established by international instruments are complied with, assisting in the prevention of accidents. The failure of one of the members of the safety chain in fulfilling its function may lead to a domino effect, with an accident being the result. As this chapter will demonstrate, substandard shipping is one of the main causes of accidents, and in the most recorded major

[195] International Safety Management Code. The purpose of the code is to "provide an international management and operation of ships and for pollution prevention". See: http://www.imo.org/OurWork/HumanElement/SafetyManagement/Pages/ISMCode.aspx, last accessed on 01/02/2016

[196] IMO Convention for Safety life at Sea 1974, the convention provides for the safety of merchant ship and it was conceived after the infamous TITANIC accident. See IMO website for more information: http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS),-1974.aspx, last accessed on 01/02/2016

[197] International Convention for the Prevention of Pollution from Ships (MARPOL) Adoption: 1973 (Convention), 1978 (1978 Protocol), 1997 (Protocol - Annex VI); Entry into force: 2 October 1983 (Annexes I and II). The main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. For more information see: http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx, last accessed on 01/02/2016

[198] International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, For more information see http://www.imo.org/OurWork/HumanElement/TrainingCertification/Pages/STCW-Convention.aspx

[199]Maritime Labour Convention 2006. See ILO website: http://www.ilo.org/global/standards/maritime-labour-convention/lang--en/index.htm, last accessed on 01/02/2016

accidents, the failure of one or more members of the maritime safety chain was confirmed.

Furthermore, this chapter shall illustrate the link between abandonment of seafarers and substandard shipping, as many of the reported cases of abandonment of seafarers concerned substandard vessels. Indeed, there might be abandonment of seafarer cases occurring in relation to vessels that are not substandard, but there will rarely be a case of substandard shipping where a seafarer will not be deemed to have been 'abandoned', as a substandard vessel will most likely not be considered a safe place to work.

Accordingly, this chapter shall demonstrate the link between substandard shipping and abandonment of seafarers, and the importance of the selected Private Actors in preventing both. This shall essentially be done by the analysis of major accidents caused by substandard vessels.

II.1 – The Erika and the Prestige incidents

Analysis of two of the most well-known Maritime disasters of all time, those of the Erika and the Prestige, demonstrates how the maritime safety chain works and how essential it is for participants in the chain to work effectively and in unison. Such concerted action would not only to avoid substandard shipping practices and consequent 'abandonment' but also, accidents which directly endanger seafarers' lives. The two cases are major examples until today of pollution accidents, but also of total abandonment of seafarers, and disregard of any sort for their lives. In the case of the Prestige, the 27 year old oil tanker was so clearly substandard that at the time of the accident not only had two major oil companies, Repsol and BP (British Petroleum), already declassified the ship, advising against its use[200], but its former captain, Mr

[200] Judgment No. 865/2015, Criminal Chamber of the Supreme Court, January 14th 2016, par. 1, p. 6

Kostazos, had relinquished command of the vessel due to its "poor condition".[201] Thus, there was already enough evidence to conclude that the vessel could not be considered a safe work environment, an implied term of the employment contract[202], for its crew, which in itself amounts to 'abandonment'.

The Erika incident polluted over 400km of French coast in 1999. The accident was caused by the vessel's failure to resist a storm, due to its undoubtedly substandard condition. The incident pointed out the failure of several members of the chain, who had failed to fulfil their obligations. First, the accident demonstrated the lack of an efficient Port State control, as the vessel had been inspected numerous times by Port State inspectors and never detained despite its substandard condition. Secondly, the vessel was classed with an IACS[203]-member Classification Society at the time of the accident, and had just completed a five year survey with all its statutory reports up-to-date.[204] Thirdly, the shipowner clearly failed to keep his/her vessel seaworthy. Finally, the Erika incident was attributed to the fact that the vessel was registered in a so called Flag of Convenience country, which popularly and in summary means a country with lax regulations, thus making it easier to avoid international regulatory compliance burdens.[205]

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[201] *Ibid.*, par. 8, p. 40

[202] Section 9 of the MGN 20 (M+F), which implements the EC Directive 89/391
Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997 in the UK provide that the shipowner needs to provide a safe workplace and working environment. Furthermore, Section 2 of the Regulation provides that it is the shipowner's duty "to protect the health and safety of workers and others affected by their activities so far as is reasonably practicable". The section defines two of the principles for ensuring health and safety to be:

1. *"(a) the avoidance of risks, which among other things includes the combating of risks at source and the replacement of dangerous practices, substances or equipment by non- dangerous or less dangerous practices, substances or equipment;*
2. *(b) the evaluation of unavoidable risks and the taking of action to reduce them;"*

Clearly, none of these obligations were observed in the case of the Prestige or are observed in cases of any other substandard vessel.

[203] IACS stands for 'International Association of Classification Societies', and as will be explained further along in this chapter, the Association Members are supposed to be the most well renowned and trustworthy classification societies, in charge of the classification of more than half the world's fleets.

[204] R. M. F. Coles and E. Watt, *Ship Registration: Law and Practice*, (2nd Edition, Informa law for Routledge, 2009)

[205]See for instance: L. J. Herman, 'Flags of Convenience – New Dimensions to an Old Problem' in McGill Law Journal Vol. 24 No 1, Montreal, 1978

The Erika had clear warning signs that something was not quite right with the vessel. She had changed ownership seven times, changed classification societies repeatedly between four different classifications, and changed the Flag State three times from Panama to Liberia to Malta.[206] Nevertheless, the vessel apparently never raised Port Stated control suspicion, never being detained in any of the inspections to which she was submitted despite the fact, as it was confirmed later on, that the ship was clearly substandard.

The Prestige incident happened a couple of years after the Erika, in 2002. The oil tanker split into two and sank 30 miles off the coast of Spain, leaking over six thousand tonnes of fuel off the Galician Coast. The oil impacted more than 200 kilometres of the Galician coast, in northern Spain. Once again, the vessel had not ever been detained in any Port Inspection and had been duly classified by the American Bureau of Shipping over the years. Furthermore, the vessel was also registered in a country considered to be a Flag of Convenience state.[207]

The similarities between the two incidents are clear; both vessels were undeniably substandard. Nonetheless they passed Classification Society surveys, and Flag and Port State Control. The similarities do not stop there. In both cases the crew was criminalized and arrested under different accusations, which included the crime of

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The definition of a Flag of Convenience Country will be discussed in more detail on Chapter III, pp.112-117

[206] Tribunal de Grande Instance [T.G.I.] [ordinary court of original jurisdiction] Paris, L l`eme ch. , Jan. 16, 2008, No.9934895010, slip op.at 123-25 (Erika), translated in The Language Works, Inc., Erika Judgement 123-25 (April 22, 2008) at 103

[207] See: WWF, The Prestige Oil Tanker Disaster – facts, available at: http://assets.wwf.org.uk/downloads/prestige.pdf; IOPC, Incidents involving the IOPC Fund Report 2010, (IOPC, 2010) <http://www.iopcfunds.org/uploads/tx_iopcpublications/2010_ENGLISH_INCIDENT_REPORT.pdf> last accessed on 01/02/2016, pp. 12-13, and I. Naeemullah, 'A Decade Later, $ 1 Billion Saved: The Second Circuit Relieves a Maritime Classification Society of Unprecedented Liability for Environmental and Economic Damages in Reino Unido de Espana v. American Bureau of Shipping Inc.' in 37 Tul. Mar. L.J. 639 2012 -2013, p. 639

marine pollution caused by the vessels and endangering innocent lives[208], despite the undeniable fact that the crew had also been endangered by the accident. Moreover, it was questioned in both cases if the refusal of the Coastal States to offer refuge to both vessels in distress was also a contributing factor to the accidents.[209] All the facts of the incidents and the issues raised by them will be discussed in further detail later in this paper. Nevertheless, even before engaging in a more detailed discussion about the incidents, one thing is crystal clear: in both incidents, several members of the safety chain failed to fulfil their obligations.

The impact of both accidents was so great that the European Commission decided to take measures to improve maritime safety in 2003, introducing stricter rules in the European Union, such as to forbid single-hull oil tankers transporting heavy fuel oil to enter or leave European ports, and to adopt a timetable for the withdrawal of single hull oil tankers by the year 2010, allowing the Union to call on the European Maritime Safety Agency, which is responsible for monitoring the effective implementation of European maritime safety legislation and finally by strengthening the legislation relating to the inspection of ships by the Port State, classification societies and traffic monitoring and information systems aimed at improved traffic monitoring in European waters. [210] All these changes introduced by the European Commission will be discussed in the following sections. It is interesting to note that the Commission in its '3rd set of measures in favour of maritime safety' recognizes the existence of a "safety chain" and is clear that its goal is to combat substandard shipping.[211]

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[208] See: IOPC, Incidents involving the IOPC Fund Report 2010, (IOPC, 2010) <http://www.iopcfunds.org/uploads/tx_iopcpublications/2010_ENGLISH_INCIDENT_REPORT.pdf>, last accessed on 01/02/2016

[209] S. Baughen, 'Maritime Pollution and State Liability' in Baris Soyer and Andrew Tetterborn (eds) *Pollution at Sea: Law and Liability*, (1st Edition, Routledge, 2012), pp.226

[210] European Commission Directorate General for Energy and Transport, *A new step forward for maritime safety in Europe – The 3rd set of measures in favour of maritime safety*, (European Commission, March 2007), p.1

[211] *Ibid*, p. 2

Another case study which clearly demonstrates the flaws in safety chains is the San Marco case. The vessel was initially known as MV Soral, a 1968 Panamax dry bulk carrier, owned by a succession of one ship brass companies until it eventually was sold to a company named Sea management, in March 1991, for $ 3.2 million, then subsequently traded as the San Marco under the ownership of another brass plate company, Shipping of Nicosia, Cyprus. The vessel was ultimately detained by the Canadian Coast Guard (CCG) in May 1993. The reasons for the detention were serious structural, fire-fighting and life endangering defects. Following the detention the vessel's P&I Club withdrew its cover. Upon the owner's refusal to conduct immediate repairs, its Classification Society, Bureau Veritas (BV), withdrew class after an inspection. The irony of this event relies on the fact that in that same month, the vessel had been inspected by an Hellenic Register of Shipping (HRS) surveyor for a class transfer from BV and found to be in "good condition and well- maintained" hence being issued clean class certificates, without any repair recommendations were issued for the vessel. Furthermore, the vessel had BV clean certificates, without any recommendations, valid until 1995. [212]

In that same year, towards the end of June, the CCG allowed the vessel to depart from the Vancouver port under tow at the request of the shipowner. However, despite the HRS issuing a clean class certificate and the vessel having BV certificates valid until 1995, the Canadian port authority only allowed the vessel to be towed unmanned. Nevertheless, shortly after leaving Canadian waters the tow to San Marco was cut and a crew put on board by a helicopter. From then on the vessel continued to trade, unrepaired, with clean HRS certificates. It is arguable that if the Canadian Port State control had the legal power to demand repairs before departure, the vessel would have been prevented from trading in such a dangerously unseaworthy condition (it is important to remember that it may also be costly to a Port State to keep a vessel berthed

[212] Ian Middleton, 'Holes in the System' (Seatrade Review, January 1994), pp. 6-7 cited in Steyn Theuns, 'Port State Control: The Buck Stops Here-Does It, Should It, Can It?' (Australian National University) <http://www.anu.edu.au/law/pub/icl/portstat/PORTSTATECONTROL.html>, last accessed on 01/02/2016

for a long period of time). Nevertheless, as this was not the case, the San Marco managed to "slip through the safety net".[213]

Not long after being detained by the Canadian Port State Control, on November 1993, the San Marco, whilst around 150-200 miles off the South African coast on a voyage from Morocco to Indonesia, lost some 14x7 metres of shell plating from both sides of her No.1 hold and all 5000 tons of cargo in that hold. The vessel found refuge in Cape Town and was soon detained by the Department of Transport. As is often the case, the vessel was subsequently sold for scrap at public auction, as it was clear that she could not continue to trade without a substantial and costly amount of repairs.[214]

Therefore, the San Marco case demonstrates that even prior to the Erika or the Prestige, it was already clear that in order to avoid the practice of substandard shipping, it is necessary for shipowners, classification societies, insurers, Flag State administrators, and even Port State authorities[215], to do their jobs properly.

II. 2 - Substandard Shipping and abandonment

Indeed, substandard Shipping has been pointed out as the main cause of oil pollution. Researchers consider that oil pollution can be largely attributed to "the poorly equipped and maintained vessels, inadequate crews, and unregulated on-board operations that result from the failure of convenience nations to exercise due control over the vessels".[216] In the case of the Erika and the Prestige most commentators will

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[213] Oya Özçayır, 'Port State Control', Paper Presented At "The Impact Of Caspian Oil And Gas Development On Turkey And Challenges Facing The Turkish Straits" conference held by İstanbul Bilgi University Maritime Law Research Center and the Department of International Relations in İstanbul on 9 November 2001., <www.dieselduck.net> last accessed on 01/02/2016 , p.2

[214] *Ibid*

[215] It is argued here that the Canadian Port Authority acted within its legal limits. However, it is necessary to bear in mind that the vessel definitely had been submitted to Port State control prior to her detention in Canada having never been previously detained.

[216] M. Boos, 'The Oil Pollution Act of 1990: Striking the Flags of Convenience?' in 2 Colo. J. Int'l Envtl. L. & Pol'y 407 1991, page 419

argue that all these outline factors were present in both cases (inadequate crewing to a lesser extent)[217].

Furthermore, substandard shipping does not only cause environmental disasters. As may be noted from the above, the crew in those cases was left at their own risk, and had their lives and physical integrity put at risk, and were later jailed for it, though it was questionable whether they were to blame. [218]Realistically, they were as much victims as were the Spanish and French coasts, suffering almost equally drastic consequences as a result of the accident. They remained in custody for several months and had to wait years for trials and, luckily[219], were eventually acquitted[220]. It is unnecessary to discuss the impact which pending criminal decisions can have on anyone's life, either in a personal or professional level context, as this is obvious. In the case of the Prestige, the shipowner could not be located at the time of the incident and the bail of the crew ended up being paid by the London P&I Club.[221] Thus, it is not difficult to perceive, especially in the case of the Prestige, how situations like these could be considered 'abandonment of seafarers', since the shipowner not only failed to provide seafarers with a safe work environment, but failed to own up to his/hers

[217] In the Case of the Erika a few general articles partially blamed the Filipino Master for the accident. Nonetheless, academic and technical articles abstained themselves from commenting about the adequacy of the crew. Most articles written about the crews of both vessels were about their criminalization. See: Anders Björkman, *'Not Learning From Marine Accidents - Some Lessons Which Have Not Been Learnt'* - Paper presented at the 'Learning from Marine Incidents II' conference in London 14 March 2002, Heiwa Co, France <http://heiwaco.tripod.com/rinapaper.htm.>, last accessed on 01/02/2016. See also: http://news.bbc.co.uk/1/hi/programmes/correspondent/883110.stm

[218] See: Ove Oving, *Criminalisation of the ship's master and his crew* (Swedish National Road and Transport Research Institute, 2012), available at: http://lnu.diva-portal.org/smash/get/diva2:603791/FULLTEXT01.pdf, last accessed on 10/11/2016

[219] In a recent decision, January 2016, the Supreme Criminal Court of Spain held the Master of the Prestige criminally liable for the incident, giving him a two year prison sentence, and ordering him to pay a twelve month fine at a daily rate of 10 euros, as well as ordering an 18-month disqualification from the exercise of his profession as a ship's captain, plus payment of one twelfth part of the costs of the trial at first instance, and making him also civilly liable to pay compensation. See: Cassation Appeal No.:1167/2014, Judgment No.: 865/2015, *Incidents Involving The IOPC Funds* – 1992 Fund – Prestige, Available At: Http://Www.Iopcfunds.Org

[220] See: Dr. F. Arizon, 'The Prestige; the Court of Appeal's judgment, 2014' (Arizon Abogados SLP 2014) < http://www.arizon.es/the-prestige/> and Seafarers' Rights International, High Profile Cases>, last accessed on 01/02/2016

[221] See: Unknown author, 'London Club agrees to put up bail for Prestige master' (Maritime Risk International, February 2003)

responsibilities after the accident since even if the master is to have been found to have acted negligently, the shipowner remains liable vicariously[222] , and the responsibility to pay due wages and to repatriate the crew still belongs with the shipowner.

[222] Vicarious liability is a form of strict liability, not based on the breach of any personal duty. As held in *E v English Province of Our Lady of Charity and another*, vicarious liability imposes on the corporation/ employer a duty to compensate the victim for the damage resulting from the negligent or other tortious act of its employee even though the employer was not personally at fault, hence being a form of strict liability. (9[2012] EWCA Civ 938; [2012] WLR (D) 204, para 19) In summary, vicarious liability is founded on the responsibility of a corporation/ employer for those it uses as helpers to carry out its activities, i.e. employees. It is important to note that due to changes in "employment relationships" during times such as the use of agency workers, in order for vicarious liability to be established, there must be an employment relationship or a relationship akin to an employment relationship and that there is a sufficiently close connection between the employment and the tortious acts such that it would be fair, just and reasonable to hold the defendant liable.(Andrew Hogarth and Thea Wilson, 'Vicarious Liability and Non – Delegable Duties', paper presented at the Annual Personal Injury and Employment Conference, London (22 May 2014 – Kings Bench Walk), p.5)
In the *case The Catholic Child Welfare Society v Various Claimants and the Institute of the Brothers of Christian Schools* [2012] UKSC 56 at [35]. Lord Phillips identified five "policy reasons that usually make it fair, just and reasonable" to impose vicarious liability.

- The employer is more likely to have the means to compensate the victim than the employee - the "deep pocket" argument.
- The tort was committed as a result of an activity undertaken by the employee on behalf of the employer- the "delegation of task" argument.
- The employee's activity is likely to be part of the business activity of the employer - the "enterprise liability" argument.
- The employer by employing the employee created the risk of the tort -the "risk creation" argument
- The employee will have been under the control of the employer - the "control" argument.

The importance of the control argument nevertheless should be perceived as a limited one in order to establish liability, as recognised by Lord Phillips himself, as well as academics (See: Simon Deakin, Angus Johnston, and Sir Basil Markesinis QC, *Markesinis and Deakin Tort Law* (7th Edition, Oxford Press 2012), pp. 558–9; and Paula Giliker, *Vicarious Liability in Tort: A comparative perspective* (Cambridge University Press 2010), ch. 3. (cf. Philip Morgan, 'Recasting Vicarious Liability' in [2012] C.L.J. 615, 642–7.) The reasoning seems to be that is "no longer realistic that a superior can direct how a person performs a task (John Bell, 'The Basis Of Vicarious Liability*'* in The Cambridge Law Journal, 72 (2013)., p 18, doi:10.1017/S0008197313000238.See also: *Cassidy v Minister of Health* [1951] 2 K.B. 343)
Moreover, normally vicarious liability will arise out of offenses of strict liability, which are those that do not require intention, recklessness, or even negligence as to one or more elements in the actus reus. However, the UK Crown Prosecution Services (CPS, "Corporate Prosecutions", available at < http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/>) recognizes that there might be offenses of strict liability which do not impose vicarious liability, at the same pace that there might be offences requiring meas rea and yet imposing vicarious liability, by application of the identification principle, where 'the acts and state of mind' of those who represent the directing mind and will will be imputed to the company (*Lennards Carrying Co and Asiatic Petroleum* [1915] AC 705, *Bolton Engineering Co v Graham* [1957] 1 QB 159 (per Denning LJ) and R v Andrews Weatherfoil 56 C App R 31 CA.) According to the CPS the "identification principle acknowledges the existence of corporate officers who are the embodiment of the company when acting in its business. Their acts and states of mind are deemed to be those of the company and they are deemed to be 'controlling officers' of the company. Criminal acts by such officers will not only be offences for which they can be prosecuted as individuals, but also offences for which the company can be prosecuted because of their status within the company. A

Leaving aside the criminal charges[223], the abandonment of seafarers in the above mentioned cases can also be said to have occurred in part due to the actions of the Coastal State, in refusing to offer a place of refuge to the vessel, giving priority to saving costs of a possible environmental disaster and its aftermath (such as any inevitable clean up), instead of prioritizing the human "life at sea". Furthermore, the classification societies when classifying a clearly substandard vessel also showed very

company may be liable for the act of its servant even though that act was done in fraud of the company itself" (*Moore v I. Bressler Ltd* [1944] 2 All ER 515) – undoubtedly, the master of the vessel would fall into this category.

Therefore, according to the existing understanding of vicarious liability, there should be no doubt that in the "criminalization" cases quoted in this thesis, the shipowner was vicariously liable for the criminal liability imposed on the shipowner. It is curious to note that most likely in every seafarer criminalization case the shipowner could be held vicariously liable, at least according to English law.

New Zealand seems to follow a similar approach to that of the UK. In the case of the MV Rena - a Liberian-flagged, Greek-owned, 235-metre container vessel that struck into a Reef in New Zealand, polluting the coast of the country. The master and the Second officer were charged under the New Zealand Maritime Transport Act 1994 with "operating a vessel in a manner causing unnecessary danger or risk" and under the Resource Management Act 1991 for "discharging a harmful substance from a ship", with the latter also suffering further chargers under the Crimes Act 1961 for wilfully attempting to pervert the course of justice by altering ship's documents. It seems that the master and the second officer acted without the knowledge of the shipowner, without a direct order. Nevertheless, the shipowner was also charged under section 338 (1B) and 15(B) of the Resource Management Act 1991, which relates to the "discharge of harmful substances from ships" in the coastal marine area. See: Maritime New Zealand, 'Maritime New Zealand Charges Owner of Rena', (World Maritime News, 5 April 2012) http://worldmaritimenews.com/archives/51394/maritime-new-zealand-charges-owner-of-rena andChris Browne and Kerryn Webster, 'Charges laid in relation to MV Rena grounding' (International Law Office, 2 August 2012) <http://www.internationallawoffice.com/Newsletters/Shipping-Transport/New-Zealand/Wilson-Harle/Charges-laid-in-relation-to-MV-Rena-grounding>)

Nevertheless, it is important to note that although apparently vicarious liability can be found in the case of the Rina, the case is not relevant for the purpose of this thesis, as it does not seem to amount to an abandonment case, as, different from all the cases quoted in this thesis, there is no report that the vessel was substandard, the only reported (and admitted) cause of the accident being the deviation and attempt to make the voyage timely.

[223] It is important to highlight that this thesis does not intend to produce an analysis of "criminalization of seafarers", i.e. to study the different cases when seafarers were found criminally liable for actions which they bear very little responsibility for, since, as stated previously, it seems that not every seafarer criminalization case will involve abandonment. A study like that would have to include a comparative analysis of national criminal laws and the liabilities, as well as their limitations provided by international conventions, such as MARPOL. Therefore, the analysis of cases of criminalization of seafarers are only included in the present study to the extent that cases like these can be considered abandonment according to the concept adopted by this thesis. For a deeper discussion on "criminalization of seafarers" see: Ove Oving, *Criminalisation of the ship's master and his crew* (Swedish National Road and Transport Research Institute, 2012), available at: http://lnu.diva-portal.org/smash/get/diva2:603791/FULLTEXT01.pdf and Elizabeth Fortugne, 'Dismantling the Exxon Valdez: How Misunderstanding One Maritime Accident Led to the Criminalization of an Entire Profession'in Journal of Maritime Law & Commerce, Vol. 46, April. 2015, pp. 201-259

little regard for the seafarers whose lives would be put in danger, with the same being able to be said for the Port States and Flag States, it being difficult however to include, at least at this stage, the insurer as a responsible party. [224]

The above cases therefore illustrate how substandard shipping can have a severe impact on seafarers' lives. Indeed, in most cases of abandonment of seafarers, they were working aboard substandard ships, which most likely were carrying cheap cargo, hence being able to be easily 'disposed of by the shipowner'. It is no wonder that the International Transports Workers' Federation is strongly against substandard shipping.[225] As well as that pointed out by Professor John Hare:

> "While oil pollution casualties may well have highlighted substandard shipping as a green issue, the continuing loss of seamen's lives is the crux of the issue and the catalyst that has given strength to the arms of the ILO, the IMO, and the ITF in coordinating international reaction."[226]

The European Commission also recognized the impact that substandard vessels have in the "human element" of shipping:

> "These efforts had to be continued in order to address enduring weak points in the safety system and to guarantee competitive, high quality maritime transport, more appropriate to the human and natural environment and

[224] One point that should be made is the fact that in cases of criminalization of seafarers, it is a fact that the industry, and even all the members of the 'safety net', can be considered to bear responsibility for the abandonment of the seafarer. As already stated in the case of the Prestige, the London P&I Club paid for the master's and crew bail. Also, one must note the commotion that the most recent judgment in the Prestige case condemning the Shipmaster has caused in the industry, which has not spared any criticism regarding the decision. See: Tom Leander, 'ASF blasts latest Prestige judgment' (lloydslist, London, 10 March 2016); Andrew Spurrier, 'Prestige master sentenced to two years in prison', Fairplay (London, 28 January 2016) and Namrata Nadkarni, 'Spain sentences Prestige captain to prison', (The Marine Professional, 28 January 2016) <http://www.imarest.org/themarineprofessional/item/2131-spain-sentences-prestige-captain-to-prison>, last accessed on 11/08/2016

[225] ITF, 'ITF's Campaign against flags of convenience and substandard shipping, Annual report 2004' (ITF 2004) www.itfglobal.org, last accessed on 01/02/2016

[226] J. Hare, 'Port State Control: Strong Medicine to cure a Sick Industry' in 26 Ga. J. Int'l & Comp. L. 571 1996-1997, page 574

without the problems posed by "dustbin ships".[227]

In the case of *the Rhone*, there was no environmental disaster, only fourteen Turkish seafarers stranded in the Port of Ceuta- Spain. The seafarers had neither been repatriated, nor had their wages been paid.[228] The only real similarity between the Rhone and the case of the Prestige and the Erika is the fact that the three ships fell in the category of substandard ships/shipping. Since the Rhone only really impacted the lives or livelihoods of these 'unlucky' fourteen seafarers, and in part the Port of Ceuta since the vessel took up a profitable berth for quite some time due to the refusal of the crew to leave the ship before receiving their wages, the Rhone case was not nearly as drastic nor as costly as the other two cases, hence it was much less publicized and studied, so further details on the case have not been made publically available.[229] Nonetheless, it can be concluded that the vessel had not suffered previous Port detentions and it had been accessed and cleared by a Classification Society, otherwise it would not be transiting in international waters.

Another example of substandard shipping and abandonment is the case of the *Playtera,* a Greek-owned Maltese vessel, arrested in the port of Rotterdam in 1993 because of its clear lack of condition to sail. The crew's accommodation was totally unliveable, besides the fact that the ship was completely unseaworthy. After twenty days of negotiations the owners agreed to pay the crew back-dated wages and repatriation.[230] This particular case also demonstrates the importance of an effective Port Control and how the performance of one member of the maritime safety chain can help in preventing abandonment from happening.

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[227] European Commission Directorate General for Energy and Transport, *A new step forward for maritime safety in Europe – The 3rd set of measures in favour of maritime safety*, (European Commission, March 2007), p.2

[228] See: http://www.seafarersrights.org/seafarers_subjects/abandonment_topic/case_study__rhone.htm

[229] The author could not find any more information about the vessel with the available data, not even in the IMO abandonment database as the vessel is not listed there. See: http://www.ilo.org/dyn/seafarers/seafarersBrowse.list?p_lang=en, last accessed on 01/02/2016. Unfortunately, the IMO relies on Port States and ITF to report abandonment cases in order to keep an updated database, and it is not always the case that abandonment cases are reported to the organization.

[230] See: ITF Seafarers' bulletin 1993. Page 12

II.3 – International Recognition of the need of the Maritime Safety Chain to prevent substandard shipping and consequently abandonment

The International Maritime Organization recognizes the need for a functional network of responsibilities, hence recognizing the importance of the safety chain, in order to prevent substandard shipping as it can be perceived by an extract from one of the IMO's former Directors, Mr. William O' Neil, whilst in his second term (1994-1998); "the organization acknowledges that is not the deliberate intent of states to allow substandard vessels to operate under their flags. A few States, specially developing nations, do not have adequate resources for policing their fleet, even lesser the fleet of other vessels arriving at their ports".[231] What can be concluded from the former IMO Director's thoughts is his recognition of the importance of States' cooperation in the elimination of substandard vessels, and given that this was a statement on Port and Flag State Implementation and Port State control, it can be inferred that the only way of effectively doing this is through an effective 'network of cooperation', which the Director acknowledges.

Another important international organization can also be said to have recognized the importance of an effective network of responsibilities. Since 2004, the ILO contains a list of abandoned vessels, specifically including information on seafarers who have been abandoned and their current status. The database was created in the Fifth Session of the Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers (Joint Working Group), held in London at the Headquarters of the International Maritime Organization (IMO) from 12 to 14 January 2004. There is no specific requirement of who has to report the cases, "governments and relevant organizations are invited to do so"[232], most reports are made by the ITF and a few by

[231] http://www.imo.org/imo/vmd/86messag.htm, last accessed on 01/02/2016 See also: J. Hare, 'Port State Control: Strong Medicine to cure a Sick Industry' in 26 Ga. J. Int'l & Comp. L. 571 1996-1997

[232] See IMO/ILO/WGLCCS5/3 and database available at http://www.ilo.org/dyn/seafarers/seafarersbrowse.home, last accessed on 11/10/2016

Port States and even fewer by Flag States (The USA seems to be the only Flag State reporting cases of abandonment). A lot of the vessels abandoned were actually detained by Port State authorities due to substandard conditions, with the crew later been found to also have been 'abandoned' according to the meaning given by Resolution A.930(22) "Guidelines on Provision of Financial Security in Cases of Abandonment of Seafarers". The database itself demonstrates how there is a network of cooperation attempting to stop substandard shipping and the consequences that result from it.

The OECD[233] Maritime Committee recognized the connection between substandard shipping and the abandonment of seafarers as early as 2001. In a report conducted for the organization entitled 'The Cost to Users of Substandard Shipping', it was acknowledged that one of the costs for seafarers can be "possible non-payment of crew at the end of their tour of duty, plus **subsequent abandonment** and non-repatriation". It is not clear what definition was given to 'abandonment of seafarer' as mentioned in the report, as it is dated January 2001, and the first international definition for 'abandonment of seafarer' is dated November 2001 (A.930(22) Guidelines on Provision of Financial Security in Cases of Abandonment of Seafarers). Nevertheless, it does not seem unreasonable to assume that the definition used in the report may have been taken from the ILO/ IMO Working Group meetings carried out in November 2000, which discussed the issue and the proposed guidelines, hence it should be thought to refer to what is considered in this thesis to be the strict definition of abandonment. [234] It is important to note however that the report points out further potential consequences of substandard shipping to seafarers, all of which it is asserted in this thesis constitute abandonment of seafarer, i.e:

- Loss of life, personal injury and/or incapacitation that thereby impedes claimant's livelihood.

[233] Organisation for Economic Co-operation and Development
[234]SSY Consultancy and Research Ltd, *The Cost to Users of Substandard Shipping*, Report Prepared for the OECD Maritime Transport Committee, OECD Directorate for Science, Technology, and Industry, January 2001, pp. 11/12

- Inadequate crew remuneration, quality of living quarters, medical treatment and off-duty time.
- Negligence by the owner and/or master of a substandard vessel, in terms of ensuring due maintenance of on-board safety equipment. This can jeopardise the wellbeing of crew in the event of an accident.
- Potential criminal prosecution if the ship is involved in a casualty incident.[235]

II. 4 – The Role of the Insurer preventing substandard shipping

The importance of safety chain members fulfilling their obligations in order to prevent substandard shipping should be clear at this point, and obligations of most members of the maritime safety chain have been mentioned, even if briefly. Nonetheless, one important member of this chain has not yet been mentioned: the Insurer. This is due to the fact that its responsibility can be said to only materialize after the failure of the other members of the chain. Essentially, the Insurer has the obligation to pay the victims of a maritime casualty. However, compulsory insurance, as is invariably the case, can be said to not only ensure better protection to victims but to "also help eliminate substandard ships and make it possible to re-establish competition between operators", as stated in the Preamble of the Directive 2009/20/EC of the European Union and of the Council of 23 April 2009 on the Insurance of Shipowners for Maritime Claims and its purposes.[236]

The CLC 1969 and CLC 1992[237], the International Convention on Civil Liability for Bunker Oil Pollution 2001, and the Nairobi International Convention on Removal of Wrecks 2007, EC Directive 2009/20/EC13 and most recently the Maritime Labour Convention, all provide for compulsory insurance which in most of these cases

[235] *Ibid*
[236] Preamble, paragraph 4
[237] International Convention on Civil Liability for Oil Pollution Damage 1969 and 1992

is coupled with a right of direct action, the victim having the right to proceed directly against the insurer.

Furthermore, through IMO conventions, the IOPC fund was established,[238] with the purpose of providing financial compensation for oil pollution damage that occurs in Member States, resulting from spills of persistent oil from tankers. [239] Similarly, the confirmed amendments to the Maritime Labour Convention also provide for a Financial Security system in the case of abandonment of seafarers, which may be in the form of a social security scheme or insurance or a national fund or other similar arrangements.[240] As the IOPC Fund was a result of incidents such as the Erika and the Prestige, the MLC provision is also a consequence of incidents such as the Rhone. Indeed, the crew of the Rhone falls within the MLC definition of abandoned seafarer, which reads as follows:

> "(…) in violation of the requirements of this Convention or the terms of the seafarers' employment agreement, the shipowner: (a) fails to cover the cost of the seafarers' repatriation; or (b) has left the seafarer without the necessary maintenance and support; or (c) has otherwise unilaterally severed their ties with the seafarer including failure to pay contractual wages for a period of at least two months." [241]

[238] International Oil Pollution Compensation Funds (IOPC Funds)

[239] The framework for the IOPC Fund was the 1969 International Convention on Civil Liability for Oil Pollution Damage (1969 Civil Liability Convention) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution (1971 Fund Convention). Nevertheless, Although the Funds were established under Conventions adopted under the auspices of IMO, they are completely independent legal entities.
See: http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-the-Establishment-of-an-International-Fund-for-Compensation-for-Oil-Pollution-Damage-(FUND).aspx and http://www.iopcfunds.org/about-us/ for more information, last accessed on 01/02/2016

[240] MLC, A. Amendments relating to Standard A2.5, paragraph 3. The amendments are expected to be in force in 2017

[241] Appendix I Proposal for the text of an amendment to the Maritime Labour Convention, 2006, to be presented to the future Special Tripartite Committee with a view to adoption in accordance with Article XV of the Maritime Labour Convention, 2006. – The decision confirming amendments agreed by the Special Tripartite Committee on 11 April this year was taken on 11 June 2014 at the 103rd session of the International Labour Conference at ILO headquarters in Geneva. Although these amendments will

The establishment of such funds in particular, added to the mentioned conventions regulating safety at sea, oil pollution, and seafarers' rights, may lead to the false impression that our current international legal framework is completely self sufficient to cover any sort of compensation claims in the event of a maritime casualty[242], especially since all these conventions were the result of a joint effort of several members of the safety chain. However, this is not exactly the case. Many times in the event of maritime casualties, when several members of the chain fail to fulfil their responsibilities, the amount of compensation available in the funds will not prove to be enough. This was the case in three of the accidents mentioned so far. Although the MLC amendments are not yet in force, nor was the Convention itself at the time of the Rhone incident, a brief look at the case demonstrates that even if the funds were available, they would not have been enough to compensate the crew.

II.5 – Concluding Remarks

Very little doubt should exist regarding the intrinsic relationship between substandard shipping and abandonment of seafarers. Most reported abandonment cases happen in relation to substandard vessels, and, as will be demonstrated as this thesis progresses, at a time when the shipowner is facing some sort of financial hardship (which is often the reason for the substandard condition of the vessel).

Furthermore, the importance of the members of the maritime safety chain has been established, since the efficiency of one member of the chain can assist in preventing substandard shipping (and consequently abandonment) from happening, as well as the fact that failures by members of the chain can be said to have caused some

become law, the original version of MLC remains the current text for the time being, because the amendments will not enter into force until 2017.
See: http://www.ilo.org/ilc/ILCSessions/103/reports/WCMS_248905/lang--en/index.htm for more information on the amendments.

[242] Maritime casualty here means any casualty which occurred as a direct consequence of substandard shipping, possibly resulting in 'abandonment of the seafarer' in its strict or broad sense.

of the most severe maritime disaster and abandonment of seafarer cases of all time.

This chapter demonstrated that the Private Actors selected to be analysed in this thesis have an essential role in preventing abandonment from occurring, and accordingly their failure in fulfilling their obligations may be susceptible to legal consequences. These possible legal consequences for these private actors in relation to seafarers and the responsibility of the members of the safety chain in preventing abandonment, is exactly what shall be analysed in the following chapters.

Chapter III – States

This chapter intends to demonstrate States' legal responsibilities and obligations in preventing 'abandonment of seafarer' from occurring. This shall be done by the analysis of States performing three different roles, namely those of Flag States, Port States and Coastal States. [243]

Flag States and Port States are inherent members of the maritime safety chain, having an indisputable responsibility in preventing malpractice within the shipping industry, such as substandard shipping and abandonment of seafarers. States exercise different functions in each role in order to prevent these incidents from happening.

As already showed in Chapter I, Flag States, due to the MLC have an express obligation to ensure that the shipowner provides for the seafarers' repatriation through a Financial Security scheme. The Convention imposed what can only be characterized as an express responsibility between the shipowner and the Flag State to repatriate the seafarer, which means that if the first fails to fulfil its obligation, the latter must do so.[244]

Since the advent of the SOLAS, MARPOL and STWC exercise an inspection role together with the Flag State to ensure compliance with the conventions. The MLC has given even more inspection power to States, since now they need to also assure

[243] The author acknowledges the fact that Seafarer exporter countries also play a vital role in preventing abandonment of seafarers from occurring, with this role being recognized by the MLC. See See: Julia Constantino Chagas Lessa, 'MLC: Much Ado About Nothing?' in European Transport Law Journal (2014), pp 119-132. Nevertheless, for a matter of concession all the Private Actors selected in this thesis, apart from Coastal States, are considered to be members of the maritime safety chain which has for a long time been recognized as indispensable for the safety of life at sea, and prevention of substandard shipping (see Chapter II). The analysis of Coastal States was chosen to be briefly done in this chapter, since their role has been often questioned to have been an important part in accidents such as the Prestige, a case scrutinized in this thesis. Unfortunately, the analysis of seafarers' exporter countries role would require to go beyond the scope of this thesis and most importantly the second premise that it intends to prove.

[244] MLC Standard A2.5, 5

compliance with the convention. Therefore, Port State control is deemed to assist the non-occurrence of abandonment of seafarers even as described by the MLC.[245]

Coastal States do not exercise any sort of inspection power according to any convention. Nevertheless, since in this thesis the term "abandonment of seafarer" is considered in all its broadness, the refusal of a Coastal State to offer refuge to a vessel in distress can be considered "abandonment of seafarer", since the refusal may endanger the seafarer's life, as in the case of the Prestige. Often, the decision to refuse refuge prioritises the costs of a possible clean up over the life of the seafarers on board the vessel. Thus, it seems sensible to analyse the legality of a Coastal State's denying refuge and consequently endangering seafarers' lives.

In order to analyse the responsibilities and obligations of the three State's roles mentioned above, i.e. Flag State, Port State and Coastal State, each topic shall begin with a general analysis of each role within the shipping industry, and move on to a more specific analysis, to finally make an analysis based on international law, of possible liabilities that States might have in each of their roles regarding seafarers who are deemed to have been abandoned.

III.1 - Flag States

According to article 91 of the United Stations Convention on the Law of the Sea (UNCLOS), a vessel has to observe the law of the flag it flies,[246] thus carrying the nationality of that State. This article of the Convention is in fact nothing more than the

[245] For instance, the MV Kamil, detained by Italian Port authorities in 2014 was found in substandard condition, with a complaint having been made to the ITF. The deficiencies found in the vessel clearly made it an unsafe place to work. See: Paris MOU Report, M/V Kamil, accessible at: https://www.parismou.org/sites/default/files/Caught%20in%20the%20net%20Kamil.pdf, last accessed on 01/02/2015

[246] Article 91 of the UNCLOS reads as follows: "1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect."

enactment of an ancient principle of maritime law previously codified by article 5 of the Geneva Convention on the High Seas 1958. Long before these Conventions had been drafted in 1982, as far back as 1927, legal theorists already claimed that vessels were, in a juridical sense, floating portions of the state whose flag they fled.[247] Although this fiction was later abandoned with the advent of the 1958 Convention, the understanding that a ship is subject to the law of its flag remained with the adoption of a more functional approach.[248]

Consequently, no doubts exist regarding the importance of a ship's flag since it is through it that the law which governs the ship will be known. Shipowners are free to choose in which country they wish the register their ships. This so called Freedom of Registration finds its corollary on the Freedom of the High Seas, cornerstone of International Law.[249] In 1916 the Permanent Court of Arbitration in *the Muscat Dhows* Case, where Britain challenged France to issue to subjects of Muscat registration documents authorising them to fly the French flag, held that:

> "Generally speaking it belongs to every sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants"[250]

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[247] In *the SS Lotus (France Vs Turkey), 1927 P.C.I.J (ser.A) No 10 (Sep 7)* The Permanent Court of International Justice stated at par. 62 that:
"It is certainly true that – apart from certain special cases which are defined by international law - vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law"

[248] "There is an intimate connection between the ship and the state nationality she acquires which carries with it the application to the ship of the laws of the flag-state. It is under these laws that the captain exercises his authority and enforces it. The ship may be a chattel, a piece of moveable property, but she is governed by special laws and her independence, while on high seas, from any control other than that of the authorities of the flag-state is universally recognized. It is not necessary to speak of her territory." - C.J. Colombos, *The International Law of the Sea*, (6th edition Longmans, London:1967), page 288

[249] Julia Constantino Chagas Lessa, 'How wide are the shoulders of a FOC Country', in M. Musi (ed), *New Comparative Perspectives in Maritime, Transport and International Trade Law* (Libreria Bonomo Editrice: Bologna, 2014), p. 232

[250] James Brown Scott (ed.) The Hague Court Reports (Oxford University Press 1916), 93-96

Consequently, under UNCLOS, a Flag States must "effectively exercise its jurisdiction and control in… technical… matters over ships flying its flag." [251] Moreover, states are obliged to "take such measures for ships flying its flags as are necessary to ensure safety at sea with regard, inter alia, to: (a) the construction, equipment and seaworthiness of ships", which explicitly include measures to see "that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships."[252] These general Flag States commitments in the UNCLOS derive from previous maritime conventions governing specific subject areas. The Load Lines, SOLAS, STCW MARPOL and more recently the MLC[253] conventions provides for the Flag State to conduct periodic surveys verifying the compliance of structural integrity of the ships flying their flags, the operability of essential shipboard engineering systems, accommodations, seafarers' employment contracts, the existence of insurance, in summary the compliance of the ship with the provisions of the relevant convention. [254]Nevertheless, each of the mentioned conventions allows the Flag States to delegate the survey responsibilities to recognized organizations.[255] It is well known that Flag States routinely delegate these responsibilities to classification societies, that will thus work as "recognized organizations"[256] In practice a vessel is only allowed to sail with certificates of compliance on board, these are said to constitute the 'core element' of Port State control as they are prima facie evidence of compliance. [257]

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[251] UNCLOS art.94 (1)
[252] *Ibid* art 94 (3) (a) and (4) (a)
[253] Some relevant Flag State Responsibilities will be discussed in more detail further along in this chapter.
[254] See:. B.D. Daniel, 'Potential Liability of Marine Classification Societies to Non Contracting Parties' in 19 U.S.F. Mar. L.J. 183 2006-2007, page 212.
[255] Load Lines art. 13, SOLAS chap.1, pt. , Regulation 6; MARPOL, Annex I, regulation 4, para 3 ; and MLC
[256] The IMO has issued Resolutions establishing standards for "recognized organizations." Int'l Maritime Org [IMO], Guidelines for the Authorization of Organizations Acting on Behalf of the Administration, IMO Assem. Res. A. 739 (18) (Nov, 4, 1993) (on file with the University of San Francisco Maritime Law Journal); Int'l Maritime Org. [IMO], Guidelines for the Authorization of Organizations Acting on Behalf of the Administration, IMO Assemb. Res. A. 789 (19) (Nov. 4, 1993) (on file with the University of San Francisco Maritime Law Journal). All the Flag States parties of SOLAS have determined that IACS members meet IMO Criteria. Ship Safety, Lloyd's Register: We started with a Cup of Coffee, http://www.lr.org/About+Us/Our+History .htm, last accessed on 01/02/2016
[257] See: O. OZCAYIR, 'The Use of Port State Control in Maritime Industry and Application of the Paris MoU' in 14 Ocean & Coastal L.J. 201 2008-2009, p. 206

Indeed, by formally ratifying the United Nations Conventions on the Law of the Sea or by informally expressing commitment to its terms as done by the United States, essentially every maritime nation has agreed that the Flag State is primarily responsible for safety surveys of the vessels flying its flag. [258]Likewise, by ratifying SOLAS, nations have agreed that the certification of vessels by classification societies, both under the regulations of SOLAS itself and under classification society rules, is essential to the flag States' role in promoting the safety of the vessels that fly its flag. The same is true for the control of ocean pollution and enforcement of seafarers' rights, and the corresponding importance of recognized classification societies [259]in the fulfilment of this role. The societies represent Flag States who have ratified conventions such as the International Convention on the Prevention of Pollution from Ships and similar safety and pollution control treaties as well as the Maritime Labour Convention.[260] The importance of Flag States properly implementing their duties has been repeatedly highlighted by annual United Nations General Assembly (UNGA) Resolutions on Oceans and the Law of the Sea.[261]

[258] UNCLOS Article 94 (5) emphasizing the importance of internationally accepted standards and as highly uttered by Churchill and Lowe these are "dictated **by** practical necessity. While each State remains free in theory to apply its own legal standards relating to such matters as seaworthiness and crew qualifications to ships flying its flag **. . .** there would be chaos if these standards varied widely or were incompatible. Furthermore, because safety measures usually involve extra costs for shipowners, and because shipping is a very competitive industry, most States are reluctant to impose stricter safety legislation on their shipowners than other States impose upon theirs. For these reasons, therefore, the international community has developed a set of uniform standards to promote the safety of shipping." (R.R. Churchill and A.V. Lowe, *The Law Of The Sea*, (3rd ed. Manchester University Press 1999) ISBN: 978-0-7190-4382-6, p.265)Thus due to UNCLOS Article 94 (5) a Flag State might be bound to a standard even if it did not specifically adopt it, for this the standard just needs to be "generally accepted".
Furthermore, article 217 (1) of UNCLOS legislates over Flag state Responsibility for effective enforcement of international rules, standards, and regulations, irrespective of where a violation occurs.

[259] Their role will be explained further along in this paper.

[260] B.D. Daniel, 'Potential Liability of Marine Classification Societies to Non Contracting Parties' in 19 U.S.F. Mar. L.J. 183 2006-2007, page 212

[261] See *e.g.* UNGA Resolution 67/78 on Oceans and the law of the sea (UN Doc. A/RES/67/78 of 11 December 2012), para. 135; UNGA Resolution 67/79 on Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments (UN Doc. A/RES/67/79 of 11 December 2012), para. 6.

Therefore, the primary responsibility for ensuring compliance of ships with standards provided by international conventions governing safety, pollution and crew conditions belongs to Flag States. In order to fulfil their responsibilities, Flag States must have the means and the will to implement the requirements established in international conventions. Ideally, Flag States should have an adequate legislative and regulatory apparatus as well as a maritime authority with enough staff in order to monitor the enforcement of standards on board their ships. Some consider that it is in this context precisely that Flag of Convenience Countries are lacking. FOC countries are considered to be unwilling and/or unable to enforce the regulations imposed by such international instruments ratified by them.[262] Accordingly, there is a belief that it is easier for shipowners to register substandard vessels in the registries of these countries rather than in more stringent ones. [263]

III.1.1 – Flag of Convenience Countries

Flag of Convenience Countries are said to, irrespective of cost saving factors, allow shipowners to evade regulations which control vessel design, construction, manning and equipment, and to avoid international rules and international standards applied under treaties. This 'permissiveness' is pointed out as the reason for some of the major maritime pollution disasters, such as the Erika and Prestige and the reason for breaches of seafarers' rights, as in the case of the Rhone. Even though this may have been the case with the first two, since the Erika was registered in Malta, and the Prestige in the Bahamas, with both countries being considered FOCCs, this is not the case with *the Rhone*, which was registered in Turkey.[264]

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[262] See: M. Boos, 'The Oil Pollution Act of 1990: Striking the Flags of Convenience?' in 2 Colo. J. Int'l Envtl. L. & Pol'y 407 1991, p. 415

[263] Camille Goodman, 'Flag State Responsibility in International Fisheries Law – effective fact, creative Effective Fact, Creative Fiction, or further work required?' in 23 Austl. &NZ. Mar. L.J. 157, 160 (2009). p 159

[264] See: L. J. Herman, 'Flags of Convenience – New Dimensions to an Old Problem' in McGill Law Journal Vol. 24 No 1, Montreal, 1978 and Julia Constantino Chagas Lessa, 'How wide are the shoulders of a FOC Country', in M. Musi (ed), *New Comparative Perspectives in Maritime, Transport and International Trade Law* (Libreria Bonomo Editrice: Bologna, 2014) pp. 227-25

The reality is that the whole FOC concept is a rather fluid one, as currently there is no standard definition of a FOC. Essentially, FOC countries are considered to be countries typically 'not involved in waterborne trade', that become ship registers merely as a source of revenue'[265], hence not possessing a strong willingness to enforce any relevant legislation, and especially since they want to remain as attractive as possible to shipowners.[266]

A FOC Country cannot be strictly defined at this point; any definition that may be given to it will be deemed to be inaccurate or at the least controversial. Nonetheless, FOC Countries are easily identifiable, due in large part to their early connections with 'flagging out' but mostly because of ITF's list of Flag of Convenience Countries. The list is elaborated by the ITF's Fair Practices Committee, a joint committee of ITF seafarers' and dockers' unions, and part of the ITF campaign against the concept of FOC. Thus, according to the current ITF list the mentioned states Malta and Bahamas would be considered FOCCs, but Turkey would not be.[267]

The countries are chosen for the list based on the fact that they allow on their register ships which are beneficially owned and/or controlled by companies incorporated elsewhere, i.e. the absence of a 'genuine link' between the flag and the owner of the vessel.[268] First of all, that which constitutes a 'genuine link' between flag and ship is, since the inception of this notion at the 1957 Convention on the High Seas, a debatable point.[269] Secondly, this does not seem to be accurate because if this was the

[265] See: J. J. Buckley, *The Business of Shipping*, (8th Edition, Centreville: Cornell Maritime Press, 2008), page 28

[266] See: Julia Constantino Chagas Lessa, 'How wide are the shoulders of a FOC Country', in M. Musi (ed), *New Comparative Perspectives in Maritime, Transport and International Trade Law* (Libreria Bonomo Editrice: Bologna, 2014) pp. 227-252

[267] See ITF website for more information and the full list of FOC countries: http://www.itfglobal.org/flags-convenience/flags-convenien-183.cfm

[268] " A flag of convenience ship is one that flies the flag of a country other than the country of ownership" (ITF, "What are Flags of Convenience", available at http://www.itfglobal.org/en/transport-sectors/seafarers/in-focus/flags-of-convenience-campaign/), last accessed on 01/02/2016

[269] See: S. Tache, 'The Nationality of Ships: The Definitional Controversy and Enforcement of Genuine Link' in 16 International Lawyer, 301 (1982)

case, as evaluated by the UNCTAD 2013 Report[270], every country should be on the list, particularly as regards second registers. The list seems in fact to be based on countries whose ships were found to be failing to grant seafarers' minimum rights. The nations considered to be the main FOC countries, which are Panama, Liberia and Honduras, are referred to collectively as 'Panlibhonco'. Coincidentally these countries are also the top registers in the world.[271]Finally, even if the 'genuine link' theory was correct, this conceptualization would not be applicable to the case of the Rhone, which involved a Turkish crew, in a Turkish ship managed by a Turkish company.

This imprecision of the FOC concept and the prejudice surrounding the countries included in the mentioned ITF list can be clearly perceived in *Carbotrade SpA v Bureau Veritas*[272]. In *Carbotrade*, the claimant contended that the ship 'flew the United Kingdom's flag [more specifically the flag of Gibraltar] simply as a flag of convenience."[273] The Second Circuit held that by registering the flag in Gibraltar rather than in Liberia, where the shipowner was incorporated, the latter had subjected the vessel to the more stringent regulation of the United Kingdom, totally refuting any claim that Gibraltar flag was a mere flag of convenience.[274] Therefore, in this particular instance the claimant suggests by its claim that the ship should have been registered in Liberia, one of the most well-known country considered to be a FOC, in preference to the United Kingdom, a country known for the enforcement of international conventions and strict and well established maritime laws. This proves that the 'genuine link' theory cannot always explain FOCCs, as in this case the place with less of a 'genuine link' was less of a FOCC than the country suggested by the claimant, despite the possible absence of such a link.

In the case of the Prestige a lot of criticism surrounded the fact that the shipowner was never located, leaving the crew to face all the criminal charges on their

[270] UNCTDAD Report on Maritime Transport 2013
[271] *Ibid*
[272] 99 F.3d 86, 1997 AMC 98
[273] *Carbotrade*, 99 F, 3d at 92
[274] *Ibid*. at 95-96

own, among other things. This was attributed to the fact that vessel was registered in a FOC country. However, the reality was that the owner was never found because the underlying company was registered in Liberia, hence the vessel's registration (which was in the Bahamas) had nothing to do with the non-location of the owner.[275]

The fact is that countries considered to be Flag of Convenience ones have taken many steps in order to provide for better safety and regulatory compliance, aiming to avoid expensive detentions and remain attractive to shipowners. As was mentioned, the two countries considered the main FOCCs, Panama and Liberia, actually feature on the white list of the Paris MOU secretariat Report, which means that their ships are some of the least susceptible to detention.[276]

The Flag of Convenience States are parties to all the major safety conventions, including the 'four pillars' of shipping (SOLAS, STCW, MARPOL and MLC) and more responsible registries ensure stricter compliance. For instance, Liberia requires a 'decision maker' who is contactable 24 hours a day in the event of any accident arising from one of its ships, as a condition for the issuance of a Permanent Certificate. Further, the country stipulates that vessels seeking registration not be more than 20 years old, although subject to certain conditions vessels exceeding this age limit may be accepted for registration. Panama does not provide for any age limitation, however vessels over 20 years old are subject to a special inspection before the Permanent Certificate of Registry can be issued**.** Furthermore, both countries make annual levies on ships in their registers for casualty investigation and international participation. [277]

Furthermore, international registries are no longer dependent on smaller non – mainstream operators for their revenues. The demolition of much of the least seaworthy

[275] The Prestige was registered owner was a Liberian company; Mare Shipping, Inc. However, the shipowner was Universe Maritime, Ltd. (Greece) – Carlos Llorente, 'The "Prestige" in The American Courts', in CMI *Casualties / liabilities in the offshore sector* (CMI Yearbook 2014), p 174
[276] See: R. M. F. Coles and E. Watt, *Ship Registration: Law and Practice*, (2nd Edition, Informa law for Routledge, 2009), page 2
[277] *Ibid*, page 7

tonnage during the ship recession of 1980 and the elimination of many of the smaller and less experienced ship operators during the same period enhanced the quality of vessels in the open registries, including the 'FOC registries'. [278]

Yet, the International Transport Workers Federation (ITF) reportedly stated that in 2001, 63% of all reported ship losses at sea, measured by tonnage, were accounted for by just 13 flag of convenience registers, the five worst performers being Panama, Cyprus, St. Vincent, Cambodia and Malta.[279] Indeed, many consider the feasibility and permissibility of re-flagging, which consists in re-registering the vessel in a less stringent country, commonly a FOC one, to be detrimental to an effective Flag State Jurisdiction. [280] Corroborating with this is the fact that the three most well-known maritime disasters, i.e. Torrey Canyon, Erika and the Prestige, involved vessels registered in FOC countries.

Nevertheless, it is important to note that this freedom of registration is much like the Common Law Countries' corporate 'internal affairs doctrine'[281] which allows a businessman to register his/her company in any country regardless of his/ her own nationality or where the business is primarily carried on. Furthermore, the European Court of Justice ruled that the policy attempted to be enforced by ITF in its campaign

[278] *Ibid*, page 10

[279] Michael Richardson, 'Crimes under Flag of Conveniences' (yaleglobal, 2003) <http://yaleglobal.yale.edu/content/crimes-under-flags-convenience>, last accessed on 10/05/2015

[280] See: Camille Goodman, 'Flag State Responsibility in International Fisheries Law – effective fact, creative Effective Fact, Creative Fiction, or further work required?' in 23 Austl. &NZ. Mar. L.J. 157, 160 (2009),p.159 and Tamo Zwinge, 'Duties of Flag States to Implement and Enforce International Standards and Regulations - And Measures to Counter 9eir Failure to Do So' in Journal of International Business and Law: Vol. 10: Iss. 2, Article 5 (2011)

[281] The 'Internal affairs doctrine' is a choice of law rule which selects the law of the incorporating state to govern disputes over a corporation's internal affairs, regardless of where the corporation conduct its business. Accordingly, corporations can choose the corporate law applicable to their internal affairs by incorporating in the state of their choice. See: J. Daammann, 'The Incorporation Choices of Privately Held Corporations' in J Law Econ Organ 2011, 27 (1): 79-112. DOI: 10.1093/jleo/ewp015 First published online: June 26, 2009; B. L. Segal, 'The Internal Affairs Doctrine—Rights and Duties of Shareholders, Directors, and Officers of Foreign Corporations Doing Business'(State Bar of Michigan, 2007) <http://www.michbar.org/business/BLJ/Spring2007/segal.pdf> and F. Tung, 'Before Competition: Origins of the Internal Affairs Doctrine' in the Journal of Corporation Law (2006)

against FOC is not objectively justifiable, due to the restrictions of freedom of establishment that it would impose. [282]

III. 1.2. Flag States and MLC abandonment of seafarers' provisions and eventual implementation challenges

Flag States have an important role in the MLC in ensuring that its provisions are correctly implemented and enforced. Although, the convention also imposes responsibilities in Coastal or/and Port States, as well as Labour-supplying States, it is clear that the majority of the obligations under the Convention are directed towards Flag States. This can be clearly perceived in the amendments covering "abandonment of seafarers". It is up to Flag States to ensure that the Financial Security Scheme is set in place and that the ships flying its flag carry "a certificate or other documentary evidence of Financial Security issued by the Financial Security provider."[283]

III.1.3 – Flag State "exclusive" jurisdiction in regards to seafarers

Despite the fact that articles 92 (1) and article 94 (2) (b) of UNCLOS, as well as maritime customary law[284], give Flag States exclusive jurisdiction on the high seas, and jurisdiction over the ship's master, officers and crew in respect of administrative, technical and social matters concerning the vessel, and this being the seafarer's place of work, where in factual terms he/she spends most of the time, it is questionable if when dealing with seafarers' rights the law of the Flag will be the prevailing one, much less the exclusive one.

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[282] Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, at par.89

[283] Amendments to the Code implementing Regulation 2.5 – Repatriation of the MLC, 2006 (and appendices) adopted by the Special Tripartite Committee on 11 April 2014, adopted by the Special Tripartite Committee on 11 April 2014, Standard A2.5.2, 3 and 5

[284] See p.109

In the *Queen on the application of Fleet Maritime Services (Bermuda) Limited v The Pensions Regulator [2015] EWHC 3744 (Admin),* Mr. Justice Leggatt highlighted his strong and substantiated opposition to the argument that a ship should be regarded as a seafarer's base of work. He pointed out that a ship could only be regarded as a place of work for the purpose of identifying the country where a seafarer is working at any given time if legally the ship was perceived as part of the territory of the Flag State. The distinguished Judge observed that for the purposes of the 2008 Act as well as other employment legislation, the determination of a seafarer's base of work depends on where the ship to which the seafarer is assigned is located at the relevant time. Therefore, to determine if a seafarer "ordinarily works" in the UK, it is necessary to identify the Port or other fixed place in the UK as the seafarer's base.[285]

Mr Justice Leggatt's ruling concurs with the court of Appeal's decision in *Diggins v. Condor Marine Crewing Services Ltd [2010] ICR 213,* which rejected the suggestion that Mr Diggins was based on the ship where he worked. Elias LJ ruled that in his view "(…) if one asks where this employee's base is, there can only be one sensible answer: it is where his duty begins and ends."[286]

Therefore, in both cases concerning the applicability of English legislation[287] to a seafarer's employment relationship, it was ruled that it should be determined if the seafarer ordinarily works in the UK, the Flag of the vessel being of very little importance in determining this. According to Mr. Justice Leggatt a seafarer will be deemed to be ordinarily working in the UK:

[285] *The Queen on the application of Fleet Maritime Services (Bermuda) Limited v The Pensions Regulator* [2015] EWHC 3744 (Admin) paragraphs 60-63
[286] *Diggins v. Condor Marine Crewing Services Ltd [2010] ICR 213,* paragraph 30
[287] *The Queen on the application of Fleet Maritime Services (Bermuda) Limited v The Pensions Regulator* [2015] EWHC 3744 (Admin) dealt with auto enrolment in the Pensions Act 2008, whereas *Diggins v. Condor Marine Crewing Services Ltd* [2010] ICR 213 dealt with the applicability of the Employment Act 2002, in a unfair dismissal case

- During any period when the seafarer is working from a base situated in the UK even if the vessel on which he/she works spends most of its time outside the UK so that the majority of the work is performed outside the UK.
- When the seafarer lives in the UK and his/her tours of duty habitually begin and end at a port in the UK[288]

Therefore, the UK courts when dealing with seafarers' rights seem not to give a lot or any consideration to the law of the Flag State in determining where the seafarer "ordinarily works" and accordingly the applicable law to the relationship.

The European Court of Justice seems to believe that a Flag State should not be deemed to have exclusive jurisdiction when dealing specifically with seafarers' rights. Although, in *Poulsen and Diva Navigation*[289], the court ruled that the law governing the crew's activities depends on in which State the ship is registered[290], in *Eliniko Dimosio v Stefanos Stroumpolis and others*, the court ruled that international public law does not seem to contain rules reserving solely to the Flag State of a vessel the possibility of introducing a guarantee covering outstanding wages of seafarers. [291]The court highlighted that the latter case differed from the previous one since it concerned the Directive 80/987 which unlike Regulation No 3094/86, the object of the first case, "is not intended to govern an activity performed on a vessel by the crew on board of the vessel (…) but simply to place each Member State under an obligation to guarantee that the outstanding wage claims of employees, especially those who had previously been employed on board a vessel, will be satisfied after their employer has been declared insolvent in that Member State."[292]

[288] *The Queen on the application of Fleet Maritime Services (Bermuda) Limited v The Pensions Regulator* [2015] EWHC 3744 (Admin), paragraph 50
[289] C 286/90, EU:C:1992:453
[290] *Ibid*, paragraphs 18 and 20
[291] C 292/14 *Eliniko Dimosio v Stefanos Stroumpolis and others*, at paragraph 62
[292] *Ibid*, paragraph 61

It is interesting to highlight that *Eliniko Dimosio v Stefanos Stroumpolis* is in fact a case dealing with abandonment of seafarers as defined by IMO Regulation A.930 (22) and the MLC. The Greek seafarers had been hired to work in a Maltese flagged vessel berthed at the port of Piraeus in the summer of 1994. Nevertheless, the vessel remained detained at the port due to an attachment order and the seafarers never received payment after their period of engagement, terminating their contract in December 1995. The company owning the vessel, which had their headquarters located in Piraeus, was declared insolvent in June of the following year by a Greek Court. The seafarers ended up not receiving any payment in connection with the insolvency due to the lack of realisable assets, which led them to claim their payment directly from the Greek government under Directive 80/987 which has a social objective to guarantee employees a minimum of protection at EU level following the employer's insolvency through payment of outstanding claims resulting from employment contracts.[293]

In the above case, the European Union Court of Justice, took a protective approach towards employees taken by most employment courts, ruling that the Directive 80/987 applied to seafarers living in a Member State engaged in that State by a company with registered offices in a non-member country but its actual head office in that Member State.[294]

Accordingly, it can be perceived that despite Article 94 of UNCLOS giving exclusive jurisdiction to Flag States, this exclusivity does not seem to apply to employment rights.

[293] *Ibid*, at paragraphs 20,21, 22 and 30
[294] *Ibid*, at paragraph 28.1

III.1. 4 – Actions against Flag States

The UNCLOS and IMO conventions provide for several actions which can be taken against Flag States by other states with regard to ship safety and pollution from vessels. Two types of actions (Port State control and dispute settlement procedures) concern states failing to discharge Flag State responsibilities.[295]

Port State control will be discussed in a separate section of this paper. In regards to dispute settlement procedures, the International Convention for the Prevention of Pollution from Ships provides for the possibility of unilateral reference to arbitration if the settlement of a dispute concerning its interpretation or application by negotiation between parties has proved to be impossible and if these parties do not otherwise agree. Moreover, any party to the Convention, which has an interest of a legal nature and may be affected by the decision in the case, may, after giving written notice to the parties which originally initiated the procedure, join the arbitration procedure with the consent of the Tribunal.[296]

Furthermore, action can be taken against a Flag State in breach of its duties under ILO conventions concerning maritime labour standards (i.e. the MLC), in the context of the complaints procedure and follow-up actions under the ILO Constitution. France, for instance, has filed two complaints against Panama concerning the protection of seafarers and both of them resulted in a settlement. [297] Nonetheless, the parties of a complaint may propose to refer it to the International Court of Justice (ICJ) if it does

[295] See: : Takey Yoshinobu, 'International Legal Responses to the Flag State in Breach of its Duties: Possibilities for Other States to Take Action against the Flag State' in Nordicjoumal of Intemationai Law 82 (2013) 283-31

[296] 29' International Convention for the Prevention of Pollution from Ships (2 November 1973, as modified by the 1978 Protocol (London, 1 June 1978) and the 1997 Protocol (London, 26 September 1997) and regularly amended) 1340 UNTS 61, Article 10.And Protocol II, Article VI

[297] Information is available on the ILO website. ILO, 'Complaints', <virww.ilo.org/global/ standards/applying-and-promoting-international-labour-standards/complaints/lang-en/ index.htm , last accessed on 01/02/2016

not agree with the recommendations of the ILO Commission.[298] There has been no case brought to the ICJ so far. Finally, if a member state fails to carry out a recommendation of the Commission of Inquiry or the decision of the ICJ within the applicable timeframe, the Governing Body "may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith". [299]Nonetheless, it is unclear by the reading of Article 33 of the ILO Constitution which sanctions member States can adopt in case of failure to comply with the Commission recommendations.[300]

The fact is that most of the time states will attempt to take diplomatic measures in disputes involving other nation states. This was clearly the position adopted by the US Courts in *Reino the Espana v Am. Bureau of Shipping*[301], which decided to take diplomatic sensitivities into account when dismissing Spain's claim. The court applied diplomatic salve, recognizing "the gravity of the injury Spain alleges it has suffered" and emphasizing that it did not "mean… to diminish those injuries."[302]This case will be discussed in further detail in this paper but summarily what happened was that Spain wanted the defendant to be tried under American Law, despite the fact that the cause of action took place in Spain and its sovereignty, because only under US law was there a chance of actually winning the lawsuit.[303]

Therefore, successful claims against Flag States can be said to not be the easiest thing to achieve, if at all. Furthermore, nations may create legislative immunity for ships flying their flags, as is the case of Bahamas, which includes in its Merchant

[298] See Constitution of the International Labour Organisation (1 April 1919 (adopted by the Peace Conference and became Part XIII of the Treaty of Versailles), entered into force 28 June 1919, last amended in 1997 (not yet in force)) (ILO Constitution), Article 29.
[299] *Ibid*, Article 33.
[300] See: Takey Yoshinobu, 'International Legal Responses to the Flag State in Breach of its Duties: Possibilities for Other States to Take Action against the Flag State' in Nordicjoumal of Intemationai Law 82 (2013) 283-31, pp. 283-31
[301] Reino de Espana, 691 F. 3d at 476 n.9, 2012 AMC at 2123 n. 9
[302] *Ibid* at 475-76, 2012 AMC at 2136.
[303] See: Rory B.O. Halloran, 'A decade Later $1 Billion Saved: The Second Circuit Relieves a Maritime Classification Society of Unprecedented Liability for Environmental and Economic Damages in Reino de Espana v. American Bureau of Shipping. Inc.' in 37 Tul. Mar. L.J. 639 2012- 2013, pp 639-654

Shipping Act a legislative exception providing that any government appointee is immunized from liability for issuing statutory certificates of good faith.[304]

The OECD Maritime Transport Committee in 2001 concluded that: "Some flag States disregard their responsibilities to the principle of safe shipping because these, too, are not sufficiently exposed to real liabilities. To some degree, they are able to offload the notional responsibility of enforcing standards by engaging classification societies to perform their ship certification duties. However, there is no guarantee that the societies to which these duties are entrusted are those with the greatest commitment to rigorous enforcement of international requirements."[305] Following a similar line of thought, Dr. Winchester from the Seafarers International Centre at the University of Cardiff, recognizing the necessity of a network of responsibility in the shipping industry in order to achieve effective regulation, reportedly said that:

> "Effective regulation depends upon the existence of a network of shared responsibility. All stakeholders in the maritime industry need to take an active stance in the maintenance of vessel standards and their operation. However, the Flag State is often the weak link in the regulatory chain."[306]

The conclusion of the OECD Maritime Committee seems accurate as Flag States do not seem to face many liabilities. Similarly, Dr. Winchester's comment can accurately reflects the fact that out of all the recognized members of the safety chain, perhaps Flag States (especially those dedicated more to ship registry than to trade itself) would be the least eager to comply with their responsibilities, particularly because if they fail to do so, they will hardly suffer any consequence, whereas Port and Coastal States for instance may face costly clean ups, among other things. Nevertheless, it might not be in the interests of a Flag State not to perform its responsibilities, since due

[304] The Bahamian Merchant Shipping Act, 1976, 16 Acts of the Commonwealth of the Bahamas 161 § 278
[305] SSY Consultancy & Research Ltd, 'The cost to users of substandard shipping', (OECD Maritime Transport Committee, January 2001), p. 35
[306] http://www.sirc.cf.ac.uk/fsa.aspx, last accessed on 01/02/2016

to this "network of responsibility", lack of compliance on its part could result in expensive detentions and loss of interest in the Flag state as a registry location.[307]

III.2 - Coastal State

In respect of pollution threats, the UNCLOS provides Coastal States with degrees of enforcement authority based on the proximity of the offending vessel to shore and the gravity of the violation. The Convention essentially grants Coastal States the right to inspect and detain vessels suspected of MARPOL violations within their territorial waters, and limited power to investigate suspected violations within the 200 –miles exclusive economic zone it created.[308]These provisions have increased Coastal State authority to address MARPOL violations close to shore. Nonetheless, beyond that, states continue to have limited powers to enforce international pollution agreements. [309]

The 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution governs the rights of Coastal States to take measures to prevent pollution. Article 1 grants member states the rights to take "measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences."

Nevertheless, before taking such measures the Coastal State must consult other states affected by the casualty, especially the Flag State, and promptly inform of the proposed measures to any person physical or corporate known to the Coastal State or

[307] See: Julia Constantino Chagas Lessa, 'How wide are the shoulders of a FOC Country', in M. Musi (ed), *New Comparative Perspectives in Maritime, Transport and International Trade Law* (Libreria Bonomo Editrice: Bologna, 2014), pp. 227-252

[308] The authority given by UNICLOS however is not unlimited. See: M. Boos, 'The Oil Pollution Act of 1990: Striking the Flags of Convenience?' in 2 Colo. J. Int'l Envtl. L. & Pol'y 407 1991, pp.414-415

[309] Collins, 'The Tanker's Rights of Harmless Discharge and Protection of Marine Environment' in 18 J. Mar. L. & Com. 275, 275-77 (1987), at 287

made known to it during the consultations, to have interests which can be affected by the measures to be adopted. Finally, the Coastal State should take into account the views of all these affected parties.[310] This clearly demonstrates the existence of a network in the maritime industry in the case of a casualty and how the parties should seek the best solution for everyone involved. These requirements may only be dispensed of in cases of extreme urgency but even then the Coastal State must '**use its best endeavours to avoid any risk to human life, and to afford persons in distress any assistance of which they may stand in need, and in appropriate cases to facilitate the repatriation to ships**' **crews**, and to raise no obstacle thereto".[311]

Furthermore, according to Article V of the 1969 Convention, the measures taken by the Coastal State shall be "proportionate to the damage actual threatened to it" and should "not go beyond what is reasonably necessary to achieve the end mentioned in Article I and shall cease as soon as that end has been achieved; they shall not unnecessarily interfere with the rights and interests of the Flag State, third States and of any persons, physical or corporate concerned." Following this provision, Article VI states that: " Any Party which has taken measures in contravention of the provisions of the present Convention causing damage to others, shall be obliged to pay compensation to the extent of the damage caused by measures which exceed those reasonably necessary to achieve the end mentioned in Article I." Unfortunately, the article gives no right of claim to any private party hence compensation would only be claimable by an affected state party of the convention[312], which is strange considering that the previous article clearly provides for private parties.

In the USA, the Oil Pollution Act of 1990 was drafted to prevent marine oil pollution in US waters and to provide compensation for oil spillage by the

[310] 1969 Convention Art III (a) (b). Para (c) See S. Baughen, 'Maritime Pollution and State Liability' in Baris Soyer and Andrew Tetterborn (eds) *Pollution at Sea: Law and Liability*, (1st Edition, Routledge, 2012), p. 229
[311] *Ibid*, para, (f)
[312] See S. Baughen, 'Maritime Pollution and State Liability' in Baris Soyer and Andrew Tetterborn (eds) *Pollution at Sea: Law and Liability*, (1st Edition, Routledge, 2012), p. 229

establishment of a fund to compensate the victims and by increasing the liability of shipowners and expanding the type of damage for which they can be held liable. [313] The Act goes as far as having a double-hull requirement for ships "operating on the waters and subject to the jurisdiction of the United States, including the Exclusive Economic Zone (EEZ)[314]"[315]. This requirement seems to 'run afoul of the UNCLOS[316] provision that costal states cannot impose in its territorial waters or its EEZ, CDEM standards exceeding generally accepted international rules.[317] Moreover, the most remarkable characteristic of the Act is that its grants US authorities a great deal of discretion in evaluating the sufficiency of foreign regulations. The fact is that vessels that do not comply with the standards provided by the US Act will be excluded from the country's waters hence mere flag regulation (even if this means compliance with international regulations such as MARPOL, which has being ratified by virtually every country) will not suffice for the transit of vessels in US waters. Some believe that the enforcement schemes and manning standards provided by the vessels can be said to assist in the combat of substandard shipping, providing for safer vessels.[318] This consideration of the consequences of the Act is hard to verify, however what is clear is the amount of power and control given to the US acting as a Coastal and Port State by its own Act. The Act however fails to assess what are to be the consequences if these requirements as laid down by it are not met.

[313] Oil Pollution Act of 1990, Pub, L. No. 101-380, 104 Stat.484 (1990)

[314] The EEZ is a zone extending up to 200 miles from a country's shore – M. Boos, 'The Oil Pollution Act of 1990: Striking the Flags of Convenience?' in 2 Colo. J. Int'l Envtl. L. & Pol'y 407 1991, p 418

[315]Oil Pollution Act of 1990, at § 4115 (a) (2), 104 Stat. 484, 518

[316] Although the USA has not ratified the UNCLOS it accepts it as customary law. See: Iosif Sorokin, 'The UN Convention on the Law of the Sea: Why the U.S. Hasn't Ratified It and Where It Stands Today' (Travaux: The Berkeley Journal of International Law Blog, , 30 March 2015) <http://berkeleytravaux.com/un-convention-law-sea-u-s-hasnt-ratified-stands-today/>; Christopher Mirasola, '*Why the US Should Ratify UNCLOS: A View from the South and East China Seas*' in Harvard Law School National Security Journal, 15 March 2015 <http://harvardnsj.org/2015/03/why-the-us-should-ratify-unclos-a-view-from-the-south-and-east-china-seas/>; and for an earlier criticism see: James L. Malone, 'The United States And The Law Of The Sea After Unclos III' in Law and Contemporary Problems Vol. 46: No.2 (1983)

[317] Bevan Martin, *Port State Jurisdiction and the Regulation of International Merchant Shipping*, (Springer 2014), p. 419

[318] *Ibid* and M. Boos, 'The Oil Pollution Act of 1990: Striking the Flags of Convenience?' in 2 Colo. J. Int'l Envtl. L. & Pol'y 407 1991, pp. 407-426

It is unquestionable that a vessel in distress[319] endangers the lives of those on board. Thus, in light of humanitarian reasons, customary international law generally recognizes that a vessel in distress has the right to enter any port.[320] As stated in the 1809 Eleanor judgement: "(…)real and irresistible distress must be at all times a sufficient passport for human beings under any such application of human rights".[321] Nevertheless, it is well established that a Coastal State is not obliged to accept a damaged vessel in distress but that it should assist in seeking to prevent or minimize the loss of life while at the same time protecting its valuable natural resources and the security and well-being of its own coastal communities.[322]In the *Toledo*, Barr J concluded that the right of a foreign vessel in serious distress is not absolute and is mainly humanitarian and not economic. [323] Moreover, the International Law Commission left clear its position that human life is what needs to be considered in cases of distress when commenting on Article 24 of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001[324], which deals with

[319] In the *Eleanor* case 1809, Lord Stowell attempted to define situations when a ship could be considered in distress: "(…) it must be something of grave necessity (…) It is not sufficient to say it was done to avoid a little bad weather, or in consequence of foul winds, the danger must be such as to cause apprehension in the mind of an honest and firm man. I do not mean to say that there must be an actual physical necessity existing at the moment; a moral necessity would justify the act. Where, for instance, the ship has sustained previous damage, so as to render it dangerous to the lives of the persons on board to prosecute the voyage: Such a case, though there might be no existing storm, would be viewed with tenderness, but there must be at least a moral necessity. Then again, where the party justifies the act upon the plea of distress, it must not be a distress which he has created himself, by outing on board an insufficient quantity of water or of provisions for such a voyage, for there the distress is only a part of the mechanism of the fraud, and cannot be set up in excuse for it, and in the next place the distress must be proved by the claimant in a clear satisfactory manner." The Eleanor, supra. The dictum of this judgment was cited by the Supreme Court of Canada in The May v The King of 1931. Canada, Supreme Court judgements, 28 April (1931) S.C.R. 381-382

[320] See: Yoshifumi, Tanaka, *Key Elements in International Law Governing Places of Refugee for ships: Protection of Human Life, State interests, and Marine Environment*, Journal of Maritime Law and Commerce 45.2 (April 2014): 157-180

[321] The *Eleonor.* 165 English Reports 1067

[322] IMO Resolution A.949 (23) ,1.19

"Place of refuge means a place where a ship in need of assistance can take action to enable it to stabilize its condition and reduce the hazards to navigation, and to protect human life and the environment."

[323] S. Baughen, 'Maritime Pollution and State Liability' in Baris Soyer and Andrew Tetterborn (eds) *Pollution at Sea: Law and Liability*, (1st Edition, Routledge, 2012), p. 232

[324] "*Article 24. Distress*

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

situations of distress (which in practice have mainly been situations involving vessels and aircrafts[325]) by stating that the article is "limited to cases where human lives are at stake".[326]

IMO Resolution A.949 (23) entitled "Guidelines on Places of Refuge for Ships in Need of Assistance' as of December 5, 2003[327] recognizes "the need to balance both the prerogative of a ship in need of assistance to seek a place of refuge and the prerogative of a Coastal State to protect its coastline." The guidelines provided for the obligation of a Coastal State by stating that: "When permission to access a place of refuge is requested, there is no obligation for the Coastal State to grant it, but the Coastal State should weigh all the factors and risks in a balanced manner and give shelter whenever reasonably possible"[328]. However, the guidelines provide a clear distinction between "ship in need of assistance" and "ship requiring rescue of persons on board", Paragraph 1.18 provides that a "ship in need of assistance means a ship in a situation, apart from one requiring rescue of persons on board, that could give rise to loss of the vessel or an environmental or navigational hazard". Indeed, the guidelines were specifically drafted to handle potential pollution cases, as it is made clear by paragraphs 1.8 and 1.9.[329] Thus, the guidelines likewise Directive 2009/17/EC

(*a*) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
(*b*) the act in question is likely to create a comparable or greater peril."

[325] UN, Report of the International Law Commission on the work of its fifty-third session, Article 24, commentary 2

[326]UN, Report of the International Law Commission on the work of its fifty-third session, Article 24, commentary 6

[327] The IMO guidelines were drafted after and in many regards as a consequence of the Prestige incident where there was reluctance from the Coastal State to provide the vessel with a place of refuge, as will be seen later on. See: V. Foley and C. Nolan, 'The Erika Judgment – Environmental Liability and Places of Refuge: A Sea Change in Civil Criminal Responsibility that the Maritime Community Must Heed' in Tulane Maritime Law Journal, 2008, Vol.33:41, p. 55

[328] IMO Resolution A.949 (23), pmbl and § 3.12

[329] *Ibid*, §1.8 "There are circumstances under which it may be desirable to carry out a cargo transfer operation or other operations to prevent or minimize damage or pollution. For this purpose, it will usually be advantageous to take the ship to a place of refuge.
1.9 Taking such a ship to a place of refuge would also have the advantage of limiting the extent of coastline threatened by damage or pollution, but the specific area chosen may be more severely threatened. Consideration must also be given to the possibility of taking the affected ship to a port or terminal where the transfer or repair work could be done relatively easily. For this reason the decision on the choice and use of a place of refuge will have to be carefully considered."

establishing a Community vessel traffic monitoring and information system and the Draft Instrument of Places of Refuge developed by the Committee Maritime International (CMI)[330], neglected to consider if a Coastal State is obliged to offer a place of refuge in order to prevent the losses of human lives. However, it is reasonable to assume by the reading of these international instruments together that a State is only obliged to act diligently to save the lives of those in distress, and as long as this can be done without offering the vessel a place of refuge, the Coastal State has complied with its obligations under international law should it fail to so offer. This line of thought also finds support in the UNCLOS, which provides in its Article 18(2)[331] an exception for innocent passage which "shall be continuous and expeditious" except in cases when assistance is needed by persons, ships or aircraft in danger or distress or due to force majeure, in which occasion passage will also include "stopping and anchoring". Nonetheless, it must be note that the drafting of the article is limiting and leaves room for debate since it stresses that this exception will only apply to cases in cases which "are incidental to ordinary navigation or are rendered necessary by force majeure or distress", but failing to define 'ordinary navigation' or 'force majeure' or 'distress'.

The fact is that States often do not seem to have any problem refusing to grant a place of refuge to ships in distress. The Erika and The Prestige were denied a port of refuge numerous times. Yoshifumi Tanaka considered if this practice could have changed the international customary law of offering a place of refuge to ships in distress, under the ordinary view that customary international law results from a combination of two elements: an objective element of "extensively and virtually

[330]Directive 2009/17/EC Of The European Parliament And Of The Council of 23 April 2009 amending Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system in Article 1.2 (v) defines ship in need of assistance as: "ship in need of assistance" means, without prejudice to the provisions of the SAR Convention concerning the rescue of persons, a ship in a situation that could give rise to its loss or an environmental or navigational hazard" whereas the Draft Instrument of Places of Refuge developed by the Comite Maritime International (CMI) article 1 (b) Defines "ship in need of assistance" means a ship in circumstances that could give rise to loss of the ship or its cargo or to an environmental or navigational hazard". Neither instrument makes reference to human life at risk.

[331] UNCLOS, Art 18 (2) Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress, or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

uniform" State practice, and the subjective or psychological element known as opinion juris, and he reached a negative conclusion. He noted that so far the number of cases of refusal remains limited, hence it is debatable if these can be considered to represent "extensive and uniform" State practice, and it is not possible to be assured of the State opinion juris on the matter. Furthermore, since the right of entry into foreign ports by ships in distress is a long established rule of customary international law on humanitarian grounds, caution must be taken before any change in the law is made, as international instruments most likely take this customary law into consideration, differentiating between ships requiring rescue of persons on board, from the category of ships in need of assistance where the crew is safe, to which the Coastal State can refuse to offer places of refuge. Furthermore, there is substantial case law recognising the mentioned customary law. For instance, the ICJ stated in 1949 Corfu Channel case that 'elementary considerations of humanity" are "general and well recognized principles", dicta confirmed by the International Tribunal of the Law of the Sea (ITLOS) in the MW Saiga (No.2) case: "Considerations of humanity must apply in the law of the sea, as they do in other areas of international law" and in the MV Toledo case, the Irish High Court also indirectly accepted that ships in distress where human life is at risk have the right to enter into ports of foreign States. Tanaka also underlined the fact that the refusal of refuge to a ship in distress can give rise to dangerous situations, as was said to be the case in *the Prestige*.[332]

There is some suggestion that the absence of international law prohibiting a vessel from navigating through coastal water jurisdiction of a particular state provided it is upon the high seas or in 'innocent passage', hence permitting the traffic of substandard ships, leaves Coastal States more susceptible to maritime casualties. Especially since not every vessel that navigates in Coastal State water has been subject to that particular State Port-control (i.e. was not subject to Port State inspection in that

[332] See: Tanaka Yoshifumi, 'Key Elements in International Law Governing Places of Refugee for ships: Protection of Human Life, State interests, and Marine Environment' in Journal of Maritime Law and Commerce 45.2 (April 2014): 157-180, pp. 3 -4

particular jurisdiction). [333] Perhaps with this in mind the EC Directive 2009/16 on Port State control, provides in article 3.1 that : " If a Member State performs an inspection of a ship in waters within its jurisdiction, other than at a port, it shall be considered as an inspection for the purposes of the directive". Hence, the directive allows States to inspect ships navigating in the coastal waters, while in innocent passage.

In the Erika the court had no apparent trouble rejecting the argument that the denial of a place of refuge was a factor in the accident.[334] Therefore, although it is clear that a balance must exist between the protection of the Coastal State's coastline and the protection of human life, it is not so clear what this balance should be. Some authors suggests that with the use of helicopters and other modern equipment, it is possible to preserve human life without having to offer the vessel a place of refuge however this author is of the opinion that this would require Coastal States to have contingency plans for this sort of situation which is currently not always the case.

Counterclaims in the Amoco Cadiz and Prestige incidents raise the question whether Coastal States can be found liable if they do not take the necessary measures within their power to prevent an oil spill. In the first case, the counterclaim was brought against France on the grounds that it had negligently failed to establish and to implement an effective and tested oil spill contingency plan; despite the knowledge since 17 March 1978 that an accident involving an oil tanker created the potential for pollution, it did not take any effective initiative to prevent accidents of that kind; it had acted negligently under its duty to contain and clean up the oil spill hence causing or at least aggravating the damage. The court accepted the counterclaims, refusing France's

[333] See: John N. K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, pp 234-235

[334] Tribunal de grande instance [T.G.I] [ordinary court of original jurisdiction] Paris, lleme ch., Jan. 16, 2008, No 9934895010, slip op. At 223 (Erika), translated in the LanguageWorks, Inc., Erika Judgment 223 (Apr.22, 2008). The court recognized that the máster and the manager had treated the Coastal State with "nonchalance" and that there were failures on the "shipboard Oil Pollution Emergency Program' or SOPEP however it was not certain that these failures had a casual role in the sinking and resulting pollution. It was later decided that there was insufficient evidence that a different management of the crises would had prevented the outcome of the accident. (Erika judgment at 225 and 226)

claim for dismissal. [335]In the Prestige, ABS (the Classification Society)[336] filled a counterclaim against Spain under the allegation that the sink of the Prestige could have been avoided if Spain had not handled the case negligently in refusing to allow the vessel to enter the place of refuge on the Spanish coast despite repeated distress calls to Spanish authorities hence preventing the salvage efforts of the Smit Tak Salvage. Also impugned was the failure to seek competent expert advice as required by Spain's National Plan for Contingencies caused by Accidental Marine Pollution. Although the counterclaim was dismissed as ABS was found not to be liable, the acceptance of the US Court of these counterclaims demonstrates that Coastal States may be held responsible, at least to a certain extent for casualties if they do not take appropriate measures.[337] [338] It is important to underline that in all the cases mentioned the crew was put at risk by the refusal of place of refuge by the Coastal State, having to be rescued (only to be arrested later on) once the vessels had ruptured and were sinking.[339]

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[335] S. Baughen, 'Maritime Pollution and State Liability' in Baris Soyer and Andrew Tetterborn (eds) *Pollution at Sea: Law and Liability*, (1st Edition, Routledge, 2012), p. 233

[336] This case will be analysed in further detail later on.

[337] ABS v Reino de Spana.

[338] Industry experts believe that had Spain offered the Prestige a place of Refugee, and dealt with the situation differently, the consequences of the incident could have been far less bad. (. (See: GardNews 2005, 'The criminalization of seafarers – From master mariner to "master criminal', GardNews (February/ April 2005. Issue 177) <http:// www.gard.no/gard/ Publications/GardNews/RecentIssues/gn177/art_13.htm.>, last accessed on 01/02/2016) Moreover, the master of the Prestige was arrested under the charges of obstruction and deliberate pollution, since he refused to obey Spanish authorities' instructions which included starting the vessel's engines and proceeding to sea (i.e. international waters), and leaving Spanish coastal waters. (See: Abelard, 'The Prestige case study: the politics of irresponsibility' (Aberlard News, 31 December 2002))

[339] See: Permanent Commission of Inquiry into accidents at sea (CPEM), 'Report of Enquiry into the sinking of the Erika off the coasts of Brittany on 12 December 1999', available on: www.bea-mer.development-durable.gouv.fr/IMG/pdf/RET_ERIKA_En_Site.pdf, Maritime Knowledge Centre, 'Information Resources on The "Erika" Accident and the 2001 Amendments to Regulation 13G of Annex I to MARPOL 73/78' (Last update: 28 January 2010), available on www.imo.org/en/knowledgeCentre/InformationResourcesOnCurrentTopicsArchives/Documents/Erika%20_28%20January%202010.pdf; Maritime Knowledge Centre, Information Resources on the "Prestige"(Last update: 28 January 2010), available on www.imo.org/en/KnowledgeCentre/InformationResourcesOnCurrentTopicsArcives/Documents/PRESTIGE%20_28%20January%202010.pdf, last accessed on 01/02/2016. For more in the legislatives changes made in safety at sea after the incidents see: Justine Wene, 'European and International Regulatory Initiatives Due to the *Erika* and *Prestige* Incidents' (2005) 19MILAANZ Journal, pp 56-73 and Commission of European Communities, 'Communication from the Commission to the European Parliament and the Council on Improving Safety at Sea in Response to the Prestige accident' (COM (2002) 681 Final, Brussels 3/12/2002)

A Coastal State's failure to exercise due diligence to prevent environmental damage may result in liability to other States affected by the incident. Article 111 (3) of the 1992 International Convention on Civil Liability for oil pollution damages provides that: "If the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such a person". It is important to note that States are included in the convention definition of 'person' contained in its Article 1(2). Furthermore, Article 195 of UNCLOS makes it a contravention for States "to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another" in taking measures to prevent marine pollution. Thus, there is basis to believe that denying a place of refuge, requiring the ship to seek refuge elsewhere might be an infringement of the referred article hence a breach of the Coastal State's international obligations. In the case of the Prestige, Spain's denying the vessel a place of refuge was so evident that the country tried to hold the master liable for remaining in their coastal waters after refusal. [340] It is important to note that this Spanish attempt would also face difficulty with UNCLOS Article 192 which places a general obligation on States to protect the marine environment in the ocean as a whole without distinguishing international waters from coastal waters. This general obligation was confirmed by the International Tribunal of the Law of the Seas (ITLOS) by stating that "(…) each Party may be entitled to claim compensation in light of the *erga omnis* character of the obligations relating to preservation of the environment of the high seas (…)".[341] Thus a State owes to the international community an obligation to protect the high seas as a whole.

[340] See: Cassation Appeal No.:1167/2014, Judgment No.: 865/2015, *Incidents Involving The IOPC Funds* – 1992 Fund – Prestige, Available at: Http://Www.Iopcfunds.Org

[341] ITLOS advisory opinion, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area List of cases: No. 1,ADVISORY OPINION OF 1 FEBRUARY 2011, paragraph 180:

"No provision of the Convention can be read as explicitly entitling the Authority to make such a claim. It may, however, be argued that such entitlement is implicit in article 137, paragraph 2, of the Convention, which states that the Authority shall act "on behalf" of mankind. Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of

Moreover, IMO Resolution A.949(23) Guidelines on places of refuge for ships in need of assistance, provides for the establishment of a Maritime Assistance Service (MAS) by Coastal States, also recommending the establishment of procedures to receive and act upon requests for assistance with a view to authorising, where appropriate, the use of a suitable place of refuge. [342]In order to assist States' establishing the 'appropriateness' of granting a place of refuge, the guidelines enumerate factors to be taken into consideration when assessing the risks arising from a ship in need of assistance in Appendix 2.[343] It is important to note that the first criteria to be assessed

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the environment of the high seas and in the Area. In support of this view, reference may be made to article 48 of the ILC Articles on State Responsibility, which provides:
Any State other than an injured State is entitled to invoke the responsibility of another State . . . if:
(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole."

[342] Paragraph 3.4

[343] IMO Guideline on Place of Refuge 2003, Appendix 2, article 2, Assessment of risks related to the identified event taking into account:
.1 Environmental and social factors, such as:
- safety of those on board
- threat to public safety
What is the nearest distance to populated areas?
- pollution caused by the ship
- designated environmental areas
Are the place of refuge and its approaches located in sensitive areas such as areas of high ecological value which might be affected by possible pollution? Is there, on environmental grounds, a better choice of place of refuge close by?
- sensitive habitats and species
- fisheries
Are there any offshore and fishing or shell fishing activities in the transit area or in the approaches to the place of refuge or vicinity which can be endangered by the incoming ship in need of assistance?
- economic/industrial facilities
What is the nearest distance to industrial areas?
- amenity resources and tourism
- facilities available
Are there any specialist vessels and aircraft and other necessary means for carrying out the required operations or for providing necessary assistance? Are there transfer facilities, such as pumps, hoses, barges, pontoons? Are there reception facilities for harmful and dangerous cargoes? Are there repair facilities, such as dockyards, workshops, cranes?
.2 Natural conditions, such as:
Prevailing winds in the area.
Is the place of refuge safely guarded against heavy winds and rough seas?
Tides and tidal currents.
- weather and sea conditions
Local meteorological statistics and number of days of inoperability or inaccessibility of the place of refuge.

is the 'the safety of those on board'. The appendix also provides guidelines for a contingency plan by Coastal States. [344]Following these lines it is not difficult to understand how the courts of the Amoco Cadiz and the Prestige were able to accept the counterclaims against the Coastal States involved in the accident.

In the UK, unless there is statutory provision for compensation, the failure of a public body responsible for maritime pollution incidents in exercising a statutory power or performing a statutory duty will not give rise to a cause of action. Furthermore, a decision to refuse entry could not be considered a breach of a duty of care, as there is no basis for finding that the secretary of state has assumed responsibility for ships in distress seeking refuge in the UK. The same is true for a decision admitting a vessel in distress into UK waters. Only positive acts of the SOSREP,[345] which directly could be

- bathymetry
Minimum and maximum water depths in the place of refuge and its approaches. The maximum draught of the ship to be admitted. Information on the condition of the bottom, i.e., hard, soft, sandy, regarding the possibility to ground a problem vessel in the haven or its approaches.
- seasonal effects including ice
- navigational characteristics
In the case of a non-sheltered place of refuge, can salvage and lightering operations be safely conducted? Is there sufficient space to manoeuvre the ship, even without
propulsion? What are the dimensional restrictions of the ship, such as length, width and draught? Risk of stranding the ship, which may obstruct channels, approaches or vessel navigation. Description of anchorage and mooring facilities in the place of refuge.
- operational conditions, particularly in the case of a port
Is pilotage compulsory and are pilots available?
Are tugs available? State their number and horsepower. Are there any restrictions? If so, whether the ship will be allowed in the place of refuge, e.g. escape of poisonous gases, danger of explosion, etc. Is a bank guarantee or other Financial Security acceptable to the Coastal State imposed on the ship before admission is granted into the place of refuge?

[344] *Ibid*, .3 Contingency planning, such as:
- competent MAS
- roles and responsibilities of authorities and responders Firefighting capability
- response equipment needs and availability
- response techniques
Is there a possibility of containing any pollution within a compact area?
- international co-operation
Is there a disaster relief plan in the area?
- evacuation facilities

[345] Secretary of State's Representative Maritime Salvage & Intervention

considered to have caused more damage than if no intervention had taken place, can give rise to liability.[346]

III. 3 - Port State Control

As previously stated, Flag States are primarily responsible for ensuring compliance of ships with standards provided by international conventions governing safety, pollution and crew conditions. The irritation among the international community at the unwillingness or inability of many Flag States, not only FOCCs but also less-developed nations, to exercise proper control of their ships, or enforce international standards, led to a need for Port states to monitor the compliance with these standards. The concept of Port State Control is not a new one, it has been sanctioned by UNICLOS 1982, in articles 25 and 218 and numerous other conventions, including SOLAS[347], MARPOL[348], STCW[349] [350] and more recently the MLC,[351]referred to as the four pillars of shipping. Thus, Port State control does not consist of the increase in the number of international conventions but rather to operate as a cooperative mechanism designed to enhance compliance with existing conventions.[352] Thus, many academics suggest that

[346] S. Baughen, 'Maritime Pollution and State Liability' in Baris Soyer and Andrew Tetterborn (eds) *Pollution at Sea: Law and Liability*, (1st Edition, Routledge, 2012), pp 238-240

[347] IMO Convention for Safety life at Sea 1974, the convention provides for the safety of merchant ship and it was conceived after the infamous TITANIC accident. See IMO website for more information: http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS),-1974.aspx, last accessed on 01/02/2016

[348] International Convention for the Prevention of Pollution from Ships (MARPOL) Adoption: 1973 (Convention), 1978 (1978 Protocol), 1997 (Protocol - Annex VI); Entry into force: 2 October 1983 (Annexes I and II). The main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. For more information see: http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx, last accessed on 01/02/2016

[349] International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, For more information see http://www.imo.org/OurWork/HumanElement/TrainingCertification/Pages/STCW-Convention.aspx, last accessed on 01/02/2016

[350] See O. Ozcayir, 'Flags of Convenience and the need for international Cooperation' in 7 Int'L Mar. L.J. 111 (2000), page 6/7 and R. M. F. Coles and E. Watt, *Ship Registration: Law and Practice*, (2nd Edition, Informa law for Routledge, 2009), page 7

[351] Maritime Labour Convention 2006. See ILO website: http://www.ilo.org/global/standards/maritime-labour-convention/lang--en/index.htm, last accessed on 01/02/2016

[352] Ted McDorman, 'Port State Control: A comment on the Tokyo MOU and Issues of International Law' in 7 Asian Y.B. Int'lL. 229 (1997), p. 229

Port State control is not an option, but an obligation under international law for members of these conventions.

It is important to underline that the concept of Port State Control is a rather old one. International Maritime Conventions that entered into force at the beginning of the century had already provided for it based on the principle of territorial jurisdiction of a State.[353] In 2013 the Maritime Labour Convention came into force, increasing even more the responsibilities of Port States.[354] Regulation 5.2 is dedicated exclusively to Port State responsibilities, which includes onshore seafarer complaint handling procedures.[355]

As it has already been asserted the law applicable to the vessel is the law of the flag State, i.e. the state where the vessel was registered. Nevertheless, it is also an international legal principle that the Port State has absolute jurisdiction over vessels within its waters, as if the foreign vessel was a foreign citizen visiting the country:

> "It is universally acknowledged that once a ship voluntarily enters port it becomes fully subject to the laws and regulations prescribed by the officials of that territory for events relating to such use and that all types of vessels, military and other, are in common expectation obliged to comply with the coastal regulations about proper procedures to be employed and permissible activities within internal waters."[356]

Therefore, a vessel must comply with the laws and regulations of the Port State regardless of its place of registration. According to international law, the authority of the Port State must prevail while the ship is in the Port. Nonetheless, there are some potential exceptions to this principle, such as cases of government vessels or cases

[353] *Ibid*, page 206
[354] The MLC is greatly a compilation of ILO instruments however most of the documents that the convention replaces did not have the provision of Port State Control.
[355] MLC, regulation 5.2.2
[356] M. S. Mcdougal and W. T. Burke, The Public Order of the Oceans 156 (New Haven Press 1987)

where the vessel is not voluntarily in the port but is there due to a force majeure event. Therefore, with the exception of a few rare cases, the law of the Port State will prevail over the law of the Flag State while the vessel is in Port.[357]Article 218, 219, and 220 of UNCLOS 1982 regulate the enforcement of applicable international rules and standards for the protection of the marine environment by Port and Coastal States ("[w]hen a vessel is voluntarily within a port or at an off-shore terminal"), extending the jurisdiction of Port State/ Coastal States to foreign vessels responsible for pollution accidents beyond the limit of any state jurisdiction. [358]

It is important to note that the role of the Port State in the 'safety net' is not to replace the Flag State in fulfilling its responsibilities but rather to provide what can be called an 'assistance' to the latter in fulfilling its obligations, by carrying out inspections. The primary responsibility to prevent substandard shipping belongs to the Flag State, which should make sure that the vessel complies with the appropriate international instruments before allowing it to sail.[359] Port States through inspections followed by notations of possible deficiencies the ship may have, notify the shipowner and the Flag State in order for the appropriate measures to remedy the situation to be taken. Indeed, as Dr Ozcayir highlights; "When flag States fail to meet their commitments, port States must act as the last safety net in the control system."[360] The Directive 2009/16/ EC on Port State control also makes this clear in its justification:

> "(…) there has been a serious failure on the part of a number of Flag States to implement and enforce international standards. Henceforth, as a second line of defence against substandard shipping, the monitoring of compliance with the international standards for safety, pollution prevention and on-board living and working conditions should also be

[357] *Ibid*, p. 231
[358] See: O. Ozcayir, 'The Use of Port State Control in Maritime Industry and Application of the Paris MoU' in 14 Ocean & Coastal L.J. 201 2008-2009, p. 20. OZCAYIR, *The Use of Port State Control in Maritime Industry and Application of the Paris MoU*, 14 Ocean & Coastal L.J. 201 2008-2009, pg 206
[359] See Chapter III.1
[360] See: O. Ozcayir, 'The Use of Port State Control in Maritime Industry and Application of the Paris MoU' in 14 Ocean & Coastal L.J. 201 2008-2009, p. 201

ensured by Port States, while recognizing that Port State control inspection forms are not seaworthiness certificates"[361]

III.3.1 – Consolidation of International Measures on Port State Control

The IMO has since the 90s consolidated its Port State control measures through Resolution A.787 (19), revoked in 2011 by Resolution A.1052 (27). The Resolution and its annexures established the procedure for Port State Control. They provide for identification of substandard ships, submission of information regarding deficiencies and reporting allegations under the MARPOL amongst other things. Guidelines are also provided for detention and reporting procedures. [362]

The IMO provisions not only require surveys and inspections to ensure vessels' compliance with international conventions, they enable Port State control officers to inspect foreign ships to check operational requirements "when there are clear grounds that the master or crew are not familiar with the essential ship board procedures relating to safety of ships".[363] The Resolution states that if conditions are not valid, or if there are clear grounds for believing that the condition of the ship or of its equipment or crew are not adequate, more detailed inspection can be carried out. The provisions demonstrate a clear focus on the ability of the crew to man the vessel. Since 2000, the IMO has a **"White List"** of countries deemed to be giving "full and complete effect" to the revised STCW Convention (STCW 95).[364] The List distinguishes the States that have displayed and established a plan of full compliance with the STCW-95 Convention and Code. It was developed by an unbiased group of "competent persons" at the IMO by creating criteria such as what system of licensing the administration has, training centre oversight, processes of certificate revalidation, Flag State control, and

[361] Directive 2009/16/ EC, (6)
[362]Resolution A.1052 (27) available at: http://www.imo.org/KnowledgeCentre/IndexofIMOResolutions/Documents/A%20-%20Assembly/1052(27).pdf, last accessed on 01/02/2016
[363] *Ibid*
[364] http://www.imo.org/blast/contents.asp?topic_id=68&doc_id=513, last accessed on 01/02/2016

Port State control. Countries who do not feature on the list are expected to face stricter Port State control, and a Flag State might refuse to accept seafarers with certificates issued from countries not featuring in the list.[365]

The first effective step towards uniformity of Port State control on a regional basis was The Paris Memorandum of Understanding (MOU)[366] of 1982[367], which superseded the so-called Hague Memorandum, signed in 1978 by the eight European countries, which intended to ensure that foreign vessels entering these countries ports complied with the Requirements of the International Labour Organization (ILO) Convention No.147, which provides for minimum standards for merchant shipping.[368]

A parenthesis should be open at this point to call attention to the fact that the Hague memorandum was created to make sure of compliance with an ILO convention, and not an IMO one. It is a well-known fact that the two organizations cooperate with each other, but the main concern of the first is the protection of seafarer. Furthermore, it can be easily understood by the preamble of ILO Convention No 147 that it was designed to prevent substandard vessels and guarantee a minimum level of safety and conditions for seafarers on board merchant vessels. This just confirms that substandard shipping directly affects seafarers and encourages the realization that before the international regulatory organisations were concerned with pollution and subsequent costs, they were first worried about the lives and conditions of work of those working

[365] *Ibid.* It is important to note that Panama and Liberia (main FOC countries) as well as Philippines (main seafarer exporter country) feature on the IMO white list. See: IMO website for further information.
[366] Ratified by 28 European States plus Canada and Russia
[367] The Paris MOU is an international agreement between now 28 maritime authorities mostly from European Countries (Belgium, Bulgaria, Canada, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Norway, Poland, Portugal, Romania, the Russian Federation, Slovenia, Spain, Sweden and the United Kingdom). It aimed to establish a harmonized system of Port State Control with the ultimate purpose to eliminate substandard shipping practices by the adoption of preventive measures The Memorandum was adopted in 1982 and superseded the Hague Memorandum signed in March 1978, which had eight European Countries as members and had a view to ensuring that seagoing ships under foreign countries flags complied once in their port with the requirements of ILO Convention n.147 - Merchant Shipping (Minimum Standards) - One of the instruments that now make part of the MLC. See: https://www.parismou.org
[368] Richard W.J. Schiferli, 'Regional Concepts of Port State Control: A Regional Effort with Global Effects' in 11 Ocean Y.B. 202 1994, pp 202-203

at sea. In fact, it was only after the Amoco Cadiz in March 1978[369] that a strong political and public demand in Europe, especially in France, for more stringent regulations regarding the safety of shipping, assuming that some Flag States were negligent with respect to exercise proper control of vessels, emerged. This demand led to the conclusion that the Hague Memorandum should be upgraded to a more comprehensive control framework, not only covering working and living conditions but also seeing to the wider implications of maritime safety and pollution prevention. [370]

In fulfilling their commitments under the memorandum, maritime authorities carry out inspections which consist in the first instance of physical inspection on board the ship in order to ensure that she is in possession of the necessary certificates and documents relevant for the purposes of the MOU; in the absence of these or if there are reason for believing that the condition of a vessel or her equipment and crew do not meet international standards, a more detailed inspection can be carried. Authorities may detain the ship if they feel that it does not meet the required international standards.[371]

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[369] The M/V Amoco Cadiz was a very large crude carrier, of approximately 230 thousand deadweight tons, which grounded off the Brittany coast of France while en route from Kharg Island in the Persian Gulf to Rotterdam, with a full cargo of crude all, resulting in an oil spillage of approximately 130 miles in the French Coastline. See: James W. Barlett, 'In Re Oil Spill by the Amoco Cadiz - choice of law and a pierced corporate veil defeat The 1969 Civil Liability Convention 1969' in 10 Mar. Law. 1 1985, pp 1-23

[370] C147 - Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), Preamble. See also: IMO and ILO websites for more information

[371] R. M. F. Coles and E. Watt, *Ship Registration: Law and Practice*, (2nd Edition, Informa law for Routledge, 2009), pp 7/8. Schiferli, summarized the commitment of the Paris MOU Member States as:

- "Each Maritime authority will give effect to the provisions of the memorandum
- Each authority will maintain an effective system of port state control to ensure that foreign merchant ships visiting its ports comply with the standards laid down in the relevant international conventions and all the amendments thereto in force. In this context, it should be noted that a participating maritime authority regards a ship flying the flag pf another partner as a foreign ship
- There will be no discrimination as to flag
- Each country will have to achieve an annual total of inspections corresponding to 25% of the estimated number of individual ships that entered the ports of its state during 12- month period. In practice this will result in an inspection rate of around 90% of all ships using ports in region.
- Each authority will consult, cooperate, and exchange information with the other authorities in order to further the aims of the memorandum
- Insofar as the relevant conventions do not contain requirements for small ships, the authorities should be guided by the any certificate or document as issued by the flag state will take, if necessary, such action to ensure that those ships are not clearly hazardous to safety,

III.3.1.1 – The Paris Memorandum of Understanding and its successors

The Paris MOU provides for its Secretariat to publish a raking of eighty flag States according to the number of vessels detained during the preceding three years. The countries are ranked according to the lowest number of vessels detained following inspection. The results of the last report published in 2012, rank Panama and Liberia at number 32 and 14 respectively. On the black list which contains the countries with the highest risk of detention, out of the fourteen countries listed, only five are considered to be FOC countries according to the ITF's list.[372] It is important to note that the Paris MOU does not permit flag discrimination, which means that even though it does not allow for an extension of the scope of Port State control beyond convention requirements, this shall not guarantee a more favourable treatment to ships that fly the flag of States which have not ratified a particular convention. [373]

The MOU, due to its success, led to the establishment of regional port State control measures beyond Europe into other parts of the world. These alliances include the 1992 Vina del Mar Agreement between ten Latin American countries; the 1993 Tokyo MOU signed between nineteen countries in the Asia/ Pacific region; the 1996 MOU in the Caribbean Region; the 1996 MOU in the Caribbean Region; 1997 Mediterranean MOU between eleven North African and Mediterranean littoral States; the 2000 Black Sea MOU signed by six regional States; and the Riyadh MOU signed in 2006 among GCC countries. Undoubtedly, this wide network of supranational scrutiny and enforcement is an essential factor in order to raise operating standards.[374]There are countries which are members of more than one MOU, such as

health, or the environment." Richard W.J. Schiferli, 'Regional Concepts of Port State Control: A Regional Effort with Global Effects' in 11 Ocean Y.B. 202 1994, p. 204

372 Paris MoU, '2012 Annual Report on Port State Control' (Paris MoU, 2012) <https://www.parismou.org/sites/default/files/Annual%20Report%202012%20%28final%29.pdf.> pp. 20-21, last accessed on 01/02/2016

373 Richard W.J. Schiferli, 'Regional Concepts of Port State Control: A Regional Effort with Global Effects' in 11 Ocean Y.B. 202 1994, p. 205

374*COLES*, 8/9

Canada and Russia, members of the Paris and Tokyo MOU, with the latter being also member of the Black Sea MOU; Bulgaria and Romania, members of the Paris and Black Sea MOU; Malta and Cyprus, members of the Paris and Mediterranean MOU; and the Netherlands and France, members of the Paris and Caribbean MOU, with the latter also having ties with the Indian Ocean MOU.[375][376]

III.3.2- National Approaches

In Europe, Council Directive 35/21/ EC established common criteria for control of ships by Port States and harmonizing procedures of inspection and detention throughout EU. Moreover, in 2002 the European Parliament and Council created the body proposed initially in 1993[377], founding the Committee on Safe Seas and the Prevention of Pollution from ships (COSS). The committee must ensure conformity between maritime legislation of the European Union and International Conventions concerning, inter alia Port State control, SOLAS and MARPOL as implemented by its Member States.[378]

These changes are in large part a consequence of the Erika incident, in which the oil spillage polluted over 400km of the French Coast. The accident demonstrated the lack of an efficient Port State control, as it had been inspected numerous times by Port State inspectors. Moreover, the vessel was classed with an IACS-member Classification Society at the time of the accident, and had just completed a five year

[375] Paris MoU, 'Port State Control, Consolidating Progress, Annual Report 2013' (Paris MoU 2013) <https://www.parismou.org/sites/default/files/Paris%20MoU%20Annual%20Report%202013%20revised_1.pdf>, last accessed on 01/02/2016

[376] For reasons of simplicity this paper will focus its analysis on the Paris and Tokyo MoU, the two most well-known MoUs. This is due to their relevance and available resources hence it is believed that for the purposes of this paper, including to demonstrate how Port State control works in preventing substandard shipping, and assuring ship compliance with existing international instruments in order to increase shipping quality, an analysis of only these two Regional forms of Port State control shall suffice.

[377] At the European Commission's communication: A Common Policy on Safe Seas. See: See: R. M. F. Coles and E. Watt, *Ship Registration: Law and Practice*, (2nd Edition, Informa law for Routledge, 2009), page 9

[378] See: R. M. F. Coles and E. Watt, *Ship Registration: Law and Practice*, (2nd Edition, Informa law for Routledge, 2009), p. 9

survey and all its statutory reports were up-to-date, nonetheless, it failed to resist a storm.[379] As a matter of fact, even the Paris MOU itself was a consequence of a Maritime casualty. The Amoco Cadiz in March 1978 generated a strong political and public demand for stronger regulation in regards to shipping safety as it was concluded that a few Flag States were negligent in regards to their international obligations in this respect. Hence, it was necessary that the Hague memorandum would only certify ship compliance with ILO Convention 147[380] to be upgraded to a more comprehensive control framework, not only covering working and living conditions, but also including wider implications of maritime safety and pollution prevention.[381]

The United States has since 1994 promoted a rigorous public policy of foreign vessel inspection, conducted by the United States Coast Guard ("USCG"). Their mission statement states that "Coast Guard members protect marine resources and maritime commerce, as well as those who live, work, or recreate on the water."[382]The USCG established a probing Port State system, aiming to eradicate the presence of substandard ships in U.S. waters.[383]

The United States Code grants the USCG legislative authority.[384] In 1978, the Coast Guard issued new procedural rules at 33 CFR Subpart 1.07, establishing an

[379] See: *Ibid*

[380] James W. Barlett, 'In Re Oil Spill by the Amoco Cadiz - choice of law and a pierced corporate veil defeat The 1969 Civil Liability Convention 1969' in 10 Mar. Law. 1 1985, pp 1-23

[381] Richard W.J. Schiferli, 'Regional Concepts of Port State Control: A Regional Effort with Global Effects' in 11 Ocean Y.B. 202 1994, p. 203

[382] http://www.gocoastguard.com/about-the-coast-guard/discover-our-roles-missions/ports-waterway-security, last accessed on 01/02/2016

[383] 'Substandard ship' is described by Paragraph C13 of the USCG's Instruction Procedures as: "In general a vessel is regarded as substandard if the hull, machinery, or equipment, such as for life-saving, fire-fighting and pollution prevention, are substantially below the standards required by U.S. laws or international Conventions owing to: (a) the absence of required principle equipment or arrangement; (b) gross non-compliance of equipment or arrangement with required specification; (c) substantial deterioration of the vessel structure or its essential equipment; (d) non-compliance with applicable operation and/or manning standards; or (e) clear lack of appropriate certification or demonstrated lack of competence on the part of the crew. If these evident factors as a whole, or individually endanger the vessel, person on board, or present an unreasonable risk to the marine environment, the vessel should be regarded as substandard ship". http://www.uscg.mil/hq/g-m/nmc/pubs/msm/v2/c.19.htm, last accessed on 01/02/2016

[384] 46 U.S.C. §§ 3301-3318 (1975 and Supp. 1997).

informal agency process for deciding civil penalty cases that did not require more formal procedures, such as the formality associated with hearings before an Administrative Law Judge. The rules ensure administrative due process while keeping the procedures simple for all concerned.[385]

The USCG provides that all vessels of 1600 GRT or more ought to give advanced notice of their arrival. It then checks the vessel details against its own records and that of its register and assigns points to each ship for compliance with international conventions, previous track records and those of sister ships in the same ownership or management, ratings of the flag and its classification society. The goal is to recognize high risk vessels, their owners, and their classification societies and to take appropriate action. [386] According to a rating system, the ship is then categorized as Priority I, II or II. Priority I as being high risk hence requiring inspection before they are even allowed into port limits. If possible defects should be rectified even before the vessel enters into port. According to USCG Regulations:

> "PSC examinations are not intended nor desired to be analogous to an inspection for certification of a U.S. flag vessel. Rather they are intended to be of sufficient breadth and depth to satisfy a boarding team that a vessel's major systems are in compliance with applicable international standards and domestic requirements, and that the crew possess sufficient proficiency to safely operate the vessel. The Examinations are designed to determine that required certificates are aboard and valid, and that a vessel conforms to the conditions required for the issuance of required certificates. This is accomplished by a walk-through examination and visual assessment of a vessel's relevant components, certificates and documents, and may be accompanied by limited testing of systems and the crew. When the

[385] See: COMSTIST 16200.5B. available at: http://www.uscg.mil/directives/ci/16000-16999/CI_16200_5B.pdf, last accessed on 01/02/2016

[386] Ports and Waterways Safety Act, 33 U.S.C.A. §§ 1221-1232 (1986). See Hare, 'Flag and Port State Control – Closing Net on Unseaworthy Ships and the Unscrupulous Owners' in Sea Changes No. 16; 57 – 71 (1994), p. 583

examination reveals questionable equipment, systems or crew incompetence, the board team may expand the examination to conduct such operational tests or examinations deemed appropriate."[387]

Like the MOUs, with small differences, the U.S. Coast Guard's Port State control policy also publishes lists with the Flag States and classification societies which have failed Port State control in the past twelve months. One can say that the U.S. Coast Guard unlike the MOUs offers only a black list of Flag States and classification societies with an additional black list of owners &operators who have also run afoul of Port State control. The lists also serve as a guide to help assessing priority ratings of a vessel under inspection upon the declared policy that "if any of these entities fails to fully undertake its responsibilities for a ship's safe operation, then the ship is likely to be considered a substandard vessel by the USCG."[388] The USCG publishes monthly detentions records giving full details of the vessel and the defects on its website and in *Lloyds List*.[389]

Furthermore, the USCG implemented in 2001 an initiative called QUALSHIP 21, quality shipping for the 21st century, to identify high-quality ships, and provide incentives to encourage quality operations. The Coast Guard noted that its efforts to eliminate substandard shipping focused on improving methods to identify poor-quality vessels provided few incentives for the well run, quality ship. Since regardless of the vessel position on the ranking list, all vessels entering U.S. waters were inspected at least once a year, hence under their policy, vessels operating with higher quality standards share nearly the same examination intervals as those vessels operating at lower-quality standards. Nevertheless, the Coast Guard recognized that numerous vessels are operated responsibly, and are typically found with few or no deficiencies

[387] See: http://www.uscg.mil/hq.g-m/nmc/pubs/msm/r2/c19.htm, last accessed on 01/02/2016
[388] See: http://www.uscg.mil/hq/g-m/psc/detained.htm, last accessed on 01/02/2016
[389] *Ibid*. See See J. Hare, 'Flag and Port State Control – Closing Net on Unseaworthy Ships and the Unscrupulous Owners' in Sea Changes No. 16; 57 – 71 (1994), pp. 583/584 for more detail

hence deserving to be recognized as such. [390]

According to the USCG 2013 Report there was a slight increase in the number of ships detained in 2013 for environmental protection and safety related deficiencies from 105 to 121. Nevertheless, the total number of ships detained in 2013 for security related deficiencies remained at 8. There was also a decrease in Flag Administration safety performance for 2013 from the previous year, with the overall annual detention rate increasing from 1.17% to 1.29%. However, the 3-year rolling detention ratio dropped from 1.30% to 1.11%, representing the lowest three year safety detention ratio the Coast Guard ever recorded. The Flag Administrations of Antigua and Barbuda, Sierra Leone, Tuvalu, Italy, and Dominica were removed from the Targeted Flag List. Flag Administration security performance remained very high and tied with 2012 for the lowest recorded number of security related detentions. [391] As can be perceived in the Report, the USCG did not report any MLC related deficiency in the vessels inspected, which should not be a surprise, as the US has not ratified the convention.

It is not quite clear which incentives the QUALSHIP 21 offers, but the obvious conclusion ought to be that of lesser inspections. The initiative requires Flag States to have taken part in the IMO Voluntary Member State Audit Scheme (VMSAS) in order to qualify for the QUALSHIP 21 program. The IMO Member State Audit Scheme is intended to provide a Member State a comprehensive and objective assessment of how effectively it administers and implements those mandatory IMO instruments which are covered by the Scheme, i.e. SOLAS, 1974, as amended; the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 and the Seafarers' Training, Certification and Watchkeeping (STCW) Code; the Protocol of 1988 relating to the International Convention on Load Lines, 1966 (1988 Load Lines Protocol). The audit is currently voluntary, with countries such as Panama, Liberia,

[390] See: https://www.uscg.mil/hq/cgcvc/cvc2/safety/qualship/Qualship_Pamphlet_Updated_23Jun11.pdf. , last accessed on 01/02/2016

[391] See: http://www.uscg.mil/hq/cgcvc/cvc2/annual_report/annualrpt13.pdf, last accessed on 01/02/2016

Turkey and Australia among others already being audited. However from 1st of January 2016, the audits are mandatory.[392] The VMSA demonstrates the efforts of the IMO to ensure the full compliance of its Member States with its main conventions, often referred to as pillars of quality shipping. The fact that the US Coast Guard requires states to have taken part in the audit scheme shows the reliance upon and the acknowledgement of the importance of these international instruments, besides clearly demonstrating how the maritime safety chain parties attempt to work together in unison to prevent substandard shipping.

It cannot go unnoticed that Liberia, the favourite registry of U.S. Oil tankers, features on the 2014 list of qualified flag administrations. [393]The country submitted to VMSA in 2007, with the result being that the Flag State had a few non-conformities needing attention which could be summarized as:

- to make the promulgation of changes and amendments to IMO instruments more efficient;
- To better document the oversight activities of Recognized Organizations;
- To document a higher degree of detail the training and individual capabilities of the hundreds of surveyors who make up Liberia's worldwide network of nautical inspectors, auditors and casualty investigators.

Thus, two of the non-conformities found in the audit are highly connected to classification societies since Liberia delegates its Flag State responsibilities to these who act as recognized organizations.[394]

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[392] See: http://www.imo.org/OurWork/MSAS/Pages/default.aspx and http://www.imo.org/OurWork/MSAS/Pages/AuditScheme.aspx, last accessed on 01/02/2016

[393] See: http://www.uscg.mil/hq/cgcvc/cvc2/safety/qualship.asp, last accessed on 01/02/2016

[394] See: https://www.liscr.com/liscr/Portals/0/VIMSAS%20AUDIT.pdf and https://www.liscr.com/liscr/AboutUs/VoluntaryIMOMemberStateAuditScheme/tabid/215/Default.asp, last accessed on 01/02/2016

Nevertheless, Panama still features in the USCG target list for Flag Administration, alongside a few other countries, some considered to be FOC (Belize, Bolivia, Honduras, Cyprus, Vanuatu, Saint Vincent and Grenadines and Malta) while others not (Egypt, Lithuania, Mexico, New Zealand, Peru, Philippines and Turkey).[395]Also, on the target list of Recognized Organizations feature only two classification societies, which have surveyed Panamanian vessels, thus working as Recognized Organizations for the Panamanian (Flag) State. [396]

Australia is a country known for its conspicuously effective Port State control program. The Australian Safety Maritime Authority (AMSA) conducts Port State control in Australia. It also publishes monthly statistics in the local and international shipping media and on its website hence making the detentions public. Australia is a member of the Asia Pacific MOU and as such it needs to comply with its 25% inspection target, which is easily surpassed by AMSA. The Commonwealth Navigation Act 1912 of Sec 210[397] provides the basis of AMSA inspections. According to the terms of the section, if the Authority has grounds to suspect that a ship is unseaworthy it may order the ship to be provisionally detained, and shall immediately give the master of the ship notice of the provisional detention with a statement of the grounds for the detention. Following the detention a report must be commissioned as to whether the ship is unseaworthy or substandard[398], a distinction that, as commented by Professor Hare, is a question of semantics rather than anything else; "Substandard ships (or let's throw the euphemism aside and call them unseaworthy ships) have no place in our ports. They belong only in the scrapyard".[399]Professor Hare's position seems also to be

[395] See http://www.uscg.mil/hq/cgcvc/cvc2/safety/flag_list.asp, last accessed on 01/02/2016

[396] http://www.uscg.mil/hq/cgcvc/cvc2/security/rso/targeted_rso/RSOs.pdf , last accessed on 01/02/2016and See Hare, op Cit. pp 586-588 for more information.

[397] Commonwealth Navigation Act, 1912, sec. 210 (Autl.) (Detention of unseaworthy and substandard ships).

[398] See: http://www.amsa.gov.au/vessels/ship-safety/incident-reporting/, last accessed on 08/08/2016

[399] See: J. Hare, 'Flag and Port State Control – Closing Net on Unseaworthy Ships and the Unscrupulous Owners' in Sea Changes No. 16; 57 – 71 (1994) , http://www.uct.ac.za/depts/shiplaw/portstat.htm., last accessed on 08/08/2016

shared by the European commission in Directive 2009/16/EC which essentially justifies the necessity of Port State control in combating substandard vessels but states that Port State inspections forms are not to be perceived as seaworthiness certificates, hence making a clear connection between the substandard nature or otherwise of ships, and their seaworthiness.[400]

In 2008, Australia was audited by the IMO as part of the Voluntary IMO Member State Audit Scheme. The Report can be considered to be an appraisal of Australia's Port State Control. The two recommendations for further development contained in the report are incredibly specific, dare one say fussy, both regarding the SOLAS convention, and receiving immediate response by AMSA. The first recommendation essentially requires Australia to offer more assistance to a vessel detained at the request of the Flag State (administration) to ensure that the ship shall not sail until it can proceed to the sea or leave port for the purpose of proceeding to an appropriate repair yard without danger to the ship and persons aboard in compliance with SOLAS Chapter 1, regulation 6. AMSA replied to this recommendation stating that even though it believes that this onus should be borne by the Flag State, if requested it could render such assistance under the Commonwealth Navigation Act 1912. The Second recommendation to include into national legislation SOLAS chapter V regulation 7 which refers to resolutions A.225 (VII), A.530 (13), A.616(15), A.894(21)) which are non-mandatory, although implemented by AMSA. Australia's response was that there were no specific provisions in the Australian Maritime Safety Authority Act, 1990 (section 6(5)) which provided for the government to undertake measures consistent with its obligations under SOLAS. [401]

New Zealand was a pioneer in semi-privatizing its state maritime authority.[402]As early as 1994, New Zealand conferred most of its maritime authority

[400] See: Directive 2009/16/EC (6)

[401] See: http://www.amsa.gov.au/forms-and-publications/about-amsa/publications/AMSA-Aboard/2009-Winter/documents/Audit_Report_Australia_05-02-09.pdf, last accessed on 08/08/2016

[402] : D. Haarmeyer and P. Yorke, *Port Privatization: An International Perspective* (Policy Study No. 156, April 1993), Available at: http://reason.org/files/6a983123788632131171e022e6466a7a.pdf; last

upon its newly established Maritime Safety Authority.[403] New Zealand's Maritime Transport Act (1994) empowers the Authority to detain any ship and impose conditions for its releases where the "operation or use of (the ship) endangers or is likely to endanger any person or property, or the health and safety of any person"; or where "the appropriate prescribed maritime document is not for the time being in force in respect of the ship, or the master of any member of the crew of that ship." Furthermore, "where the Director is satisfied, on clear grounds, that the master is not, or crew are not, familiar with essential shipboard procedures for the safe operation of the ship".[404] The country is also a party to Asia Pacific MOU.

It is important to note that both the Australian and New Zealand domestic legislation have taken similar proactive measures concerning the liability of their Port State control officers. The Australian Commonwealth Navigation Act 1912, contains amendments absolving officials from liability for "anything done under the provisions of (the Navigation Act) unless direct proof of corruption or malice given."[405] Meanwhile, the New Zealand statute absolves members and employees of the authority from personal liability for acts done in "good faith in pursuance or intended pursuance of the functions or powers of the authority or of the director."[406] Professor John Hare suggests that all States should follow the Australian and New Zealand approach, enacting an indemnification of officials taking actions in good faith since allowing damages to be claimed against Port State control authority would 'unduly inhibit Port State control'. [407]Professor Hare's opinion is founded upon positive actions taken by Port State authorities, i.e. detentions, nevertheless it is not entirely clear if Port States

accessed on 08/08/2016; J.Tongzon, and W. Heng, 'Port privatization, efficiency and competitiveness: Some empirical evidence from container ports (terminals)' in Transportation Research Part A: Policy and Practice, Volume 39, Issue 5, June 2005, pp. 405–424
Greece to Proceed With Piraeus Port Privatization, Available at: http://www.wsj.com/articles/greece-to-proceed-with-piraeus-port-privatization-142357399

[403] Maritime Transport Act § 55, 1994
[404] Maritime Transport Act § 55, (d) 1994 See HARE, op cit. pg 590
[405] Navigation Act, 1912 § 384 (1)
[406] Maritime Transport Act, § 34
[407] See J. Hare, 'Port State Control: Strong Medicine to cure a Sick Industry' in 26 Ga. J. Int'l & Comp. L. 571 1996-199, pp 591-592

officers and subsequently the Port State itself should be immune from any liability resulting from negative actions, i.e. omissions or negligence, which are harder to justify via the principle of good faith, and which were the cause of many maritime casualties, such as the Erika which, as already stated, despite its substandard condition, cleared several port inspections.

III.3.3 – Unilateral Vs Regional Vs Global Port State Control

Schiferli in his work from 1994 created what one can call a 'comparative chart' showing the advantages and disadvantages of unilateral, global and regional Port State control and reached the conclusion that the latter is indeed the most efficient form of control hence making the MOUS the best form of Port State control and 'weapon' against substandard shipping. Schiferli appointed as the only disadvantage of Regional Port State control the shift of substandard shipping to other regions. [408]

PORT STATE CONTROL	Advantages	Disadvantages
Unilateral effort	It can be exercised to the extent deemed necessary by the Port State in question The scope of unilateral Port State control can be enlarged to include even the Port State's national requirements The commitment involved is to be determined exclusively by the Port State.	Such efforts are less effective than when performed in cooperation with other Port States, because relevant information is missing; subject ships are no longer under surveillance once they have sailed from Port State's territorial waters; and no enforcing or monitoring rectification of deficiencies is possible after the ship has left the Port State's territory. It is less cost effective, since all financial implications of performing Port State control rest on each individual Port State It implies a high probability of a diverging implementation of this form of control, including inspections procedures. It places a disproportional burden on ships' staff, which may be confronted with various

[408] Richard W.J. Schiferli, 'Regional Concepts of Port State Control: A Regional Effort with Global Effects' in 11 Ocean Y.B. 202 1994, pp. 212/132

		Port States control regimes in consecutive ports. It may cause distortion of competition between regional ports
Global Port State Control	It will have maximum impact on the operation of substandard ships, as ships will be under constant surveillance. It ensures maximum availability of relevant information to Port States. It allows for maximum harmonization of Port State control performances. The cost of operating this system of Port State control will be minimal.	It lacks, for geographical reasons, sufficient commitment by participating Port States. It would require an international convention to administer the system, which would imply lengthy ratification procedures; time consuming, rigid amendments procedures; time-consuming, rigid amendment procedures; and much compromise, which is detrimental to the necessary commitment. In other words, the commitment would be equivalent to the lowest common denominator. It is difficult to adjust to maritime developments that require immediate – and often region related – response by Port States.
Regional Effort	There is maximum commitment from participating region countries, sharing common safety and environmental interests. This effort promotes effective use of regionally available information. Ships remain under surveillance as long as they operate in the region, which significantly reduces the possibilities for substandard ships to operate in that region The cost of operating this system is equally shared by all participating Port States. A harmonized regional approach of Port State control procedures prevents excessive burden on ships'	It is only effective in eradicating the operation of substandard ships in that particular region; it tends to generate a shift of operation of substandard ships to other areas.

	staff and allows for effective deployment of available resources of participating Port States. Harmonized Port State control procedures prevent distortion of competition between regional ports.	

Indeed, Regional Systems tend to be the best form of Port State control because they give participants the opportunity to ban substandard ships from their region in an efficient manner without jeopardising the fair competition among the regional ports involved, as unscrupulous shipowners will not be able to avoid their ports. [409]These regional agreements are based on specific common interests between members; it is a fact that pollution accidents often affect more than just one country. [410]

Although regional Port State control is the most effective form of control, it is not flawless. Nevertheless, the fact that most countries nowadays belongs to a MOU or have strong Port State control measures like the United States and Australia makes it very difficult (or at least it should) for substandard ships to exist, as, at least in theory, they have hardly any places in which they can trade. Furthermore, as could be seen in the previous section, Coastal States can be said to have responsibilities even when ships are in international waters. Thus, there is very little doubt that Port State control is an effective form of controlling substandard shipping. Even in the 90s, renowned academics were already of the opinion that it was an effective method; Dr Edgar Gold attributed 99.9995 per cent of safely arrived oil cargo to the work of Port State Control; Professor Ronald B. Mitchell attributed it to tanker owner compliance with international standards due to the increased possibility of detentions due to Port State control, and Professor John Hare noted that vessel losses had probably decreased due

[409] It is said that initially there was a certain reluctance of Port States to exercise stronger control by enforcing international conventions on vessels in their waters due to economic reasons. Ports with stricter rules and regulations would be and are far less attractive to shipowners than those less strict. This would make shipowners opt to trade using the latter ports, especially if these were located in the same region. This follows the principle of ship registration, by with shipowners trying to find the most attractive/ 'beneficial' State in which register its ship. See: Ted McDorman, 'Port State Control: A comment on the Tokyo MOU and Issues of International Law' in 7 Asian Y.B. Int'lL. 229 (1997), p. 235

[410] *Ibid*, page 214

to the same reason. [411]Nowadays, a simple glimpse at the recent MOU Reports can be said to demonstrate that the number of substandard vessels has decreased, as have the number of detentions. The latest Paris MOU report from 2013 shows the efforts of countries to move to the 'White List' or "Grey List' to avoid inspections and detentions. The 2013 Report also displays that black listed flagged vessels avoid trading in ports of the Member States, most likely fearing the risk of detention. However, in 2013 the Paris MOU recorded an increase of 87% from the previous year in the number of ships refused access, the highest number since 2005, with 28 ships being refused entry. Whilst 17 of these ships were reportedly banned for multiple detentions, nine were banned for failing to call at an indicated repair yard. [412] This does not by any means represent a failure of Port State Control, especially since an increase in the number of bans was expected, it only demonstrates how strict Port State control is, especially bearing in mind that further areas of compliance have been added with the advent of the MLC. In contrast to the Paris MOU Report, the Tokyo MOU Report 2013 shows a continuous decrease in the number of detentions and detention rates for the past three years. It is important to note also that the two MOUs' lists also differ, some countries feature in one of the lists but not in the other, probably because of an insufficient number of inspections. Furthermore, whereas in the Paris MOU Georgia improved its performance moving to the 'Grey List', in the Tokyo MOU it continues to be in the 'Black List'. Countries like Vanuatu and Malaysia which feature in the 'Grey List' of the former are in the 'White List' of the latter. It is important to note nonetheless, that the two countries considered as being the main FOC countries, i.e. Panama and Liberia, feature in the 'White List' of both MOUs.[413]

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[411] *Ibid*, p. 241

[412] In 2013 Kazakhstan, Saudi Arabia and Switzerland moved from the 'Grey List' to the ' White list', whilst Georgia, Lebanon, Saint Kitts and Nevis, Lybia and Albania moved to from the 'Black list' to the 'Grey list'. Meanwhile Bolivia disappeared from the 'Black List' due to insufficient number of inspections. Paris MoU, 'Port State Control, Consolidating Progress, Annual Report 2013'(Paris MoU, 2013) <https://www.parismou.org/sites/default/files/Paris%20MoU%20Annual%20Report%202013%20revised_1.pdf>, last accessed on 08/08/2016

[413] See: Tokyo MoU, 'Annual Report on Port State Control in the Asia-Pacific Region 2013' (Tokyo MoU, 2013) <http://www.tokyo-mou.org/inspections_detentions/detention_list.php> ; Paris MoU, 'Port State Control, Consolidating Progress, Annual Report 2013'(Paris MoU, 2013) <https://www.parismou.org/sites/default/files/Paris%20MoU%20Annual%20Report%202013%20revis

It is important to note that, as already mentioned regarding 2013 with the advent of the Maritime Labour Convention, MOUs adopted amendments to their memorandums, adding new areas of compliance. These areas included employment agreements, hours of work and rest, payments of wages, repatriation at the end of the contract and seafarers' complaint handbook.[414]Port State control seems to be such a strong weapon in the combat of substandard shipping that the shipping industry itself was concerned that Port States would be overzealous, increasing drastically the number of detentions. However, both MOUs discussed in this chapter, claim to have taken a very pragmatic approach in adopting the MLC. According to the Secretary General of the Paris MOU, through a 2013 press release, the shipping industry and Flag States were informed how ships would be treated at Member State ports, and ships were only detained in cases of significant non-compliance. Nevertheless, according to the report, since the entering into force of the MLC, 21 ships were detained for non-compliance with the convention (10 – wages, 7 - calculation and payment of wages, 5– fitness for duty, hours of work and rest, 4 – quantity of provisions, and 2 – sanitary facilities).[415] By the first year of the entry into force of the MLC, 20 August 2014, 113 ships were detained by one of the Paris MOU Authorities for MLC-related deficiencies, representing 17.4% of the total number of detentions (649) in the Paris MOU during this period.[416] In 2015, in relation to the Tokyo MOU, at least four of the detentions

ed_1.pdf>; and Paris MoU, 'Performance List 2013' (Paris MoU, 2013) <https://www.parismou.org/sites/default/files/WGB%202011-2013.pdf> , last accessed on 08/08/2016

[414] The amendments containing provisions for abandonment of seafarers were only approved in June 2014 and are still not in force.

[415] Paris MoU, 'Port State Control, Consolidating Progress, Annual Report 2013'(Paris MoU, 2013) <https://www.parismou.org/sites/default/files/Paris%20MoU%20Annual%20Report%202013%20revised_1.pdf> and Tokyo MoU, 'Annual Report on Port State Control in the Asia-Pacific Region 2013' (Tokyo MoU, 2013) <http://www.tokyo-mou.org/inspections_detentions/detention_list.php> , last accessed on 08/08/2016

[416] Accordingly to the Paris MoU press release during the first year 7.4% (3,447) of the total number of 46,798 deficiencies recorded were linked to the MLC. Of these, 160 (4.6%) were classified as having a ground for detention resulting in 113 detained ships. The most frequent deficiencies recorded as grounds for detentions were related to "payment of wages" (39,5%), and "manning levels for the ship" (28.6%). Other areas with high deficiency levels are "health and safety and accident prevention" (43.1%), "food and catering" (15.4%) and "accommodation" (10%). See: https://www.parismou.org/results-first-year-maritime-labour-convention, last accessed on 08/08/2016. In 2016, the Paris MoU was set to conduct from the 1st of September to the 30th of November a Concentrated inspection Campaign (CIC) on the

reported can be attributed to a failure of compliance with the MLC. Therefore, it is evident that Port States are doing their best to assure compliance with the convention.[417]

Therefore, it is clear that the increase of Port State control and its efficacy is also essential in order to guarantee Flag State compliance, since the latter will try to avoid unwanted detentions. Accordingly, undoubtedly Port State control is indispensable in order to prevent substandard shipping. Nevertheless, it is not clear which sort of liability Port States will encounter when failing to fulfil their duties efficiently. This is due to the fact that Port State control is treated more as an auxiliary mechanism of compliance, rather than main one. Furthermore, Port States can be perceived as victims of substandard shipping, as they many times have to bear some of the costs of this.

III. 3- Concluding Remarks

The Chapter demonstrated that through a system of inspections, Flag and Port States, especially since the advent of the Maritime Labour Convention, have means of preventing abandonment of seafarers. Differing from Port States, Flag States have more direct obligations towards seafarers, such as to repatriate them if the shipowner fails to do so. However, seafarers are unlikely to sue Flag States for any failure in fulfilling their obligations. Indeed, the failure of Flag State, Port State and Coastal States in fulfilling their obligations will generally only amount to a diplomatic incident.

MLC 2006. 2006). The aim of the CIC is to verify that the minimum standards for working and living conditions have been implemented on board of inspected vessels. Secretary General Richard Schiferli stated: "Working and living conditions on board have always been a prime area of attention. With the introduction of the MLC enforcement opportunities have greatly improved. Three years after the entry into force, the time is right to focus on the MLC during a concentrated inspection campaign". See: Paris MoU, Press Release- 'Launch of Concentrated Inspection Campaign on MLC,2006' (Paris MoU, 28th July 2016) https://www.parismou.org/launch-concentrated-inspection-campaign-mlc2006, last accessed on 08/08/2016 The launch of this CIC shows the importance attributed to the need to provide the seafarer with a safe and heathy work environment.

[417] It is important to bear in mind that member port State previous to the MLC already conducted inspections to assure compliance with relevant ILO instruments. See: https://www.parismou.org/about-us/organisation and http://www.tokyo-mou.org/ for more information

Furthermore, it is unlikely that a seafarer would be successful in a claim against States for failure in fulfilling their international obligations. It is unlikely that a Court would hold a Port State, or a Flag State, liable in tort for the damage caused to a seafarer for their failure in performing their obligations established in international instruments.

As it was shown, Coastal States, even though their responsibility towards preventing abandonment of seafarers is substantially lesser than of Flag and Port States, do hold a certain amount of responsibility for preserving life at sea. As explained in this thesis' introduction, life for its purpose is understood as encompassing human life, hence seafarers' lives. Leaving a seafarer in distress on the high seas cannot be perceived in any other way besides constituting abandonment. Nevertheless, the refusal of Coastal States in providing refuge will hardly lead to a legal action, especially considering all the legal justifications they can invoke in order to justify refusal.

It is in fact the network system of compliance that ensures that international standards and regulations are effectively implemented. The European Union already bans substandard ships under certain conditions from entering their ports. The adoption of the Third Maritime Safety Package on 11 March 2009 emphasizes even more the European Union's efforts to combat substandard shipping. As Tawo Zwinge stated well: "It is to be hoped that collective refusal of access to ports will eventually obviate the need of substandard vessels to navigate at all as they would have no place to go anymore"[418]

Accordingly, the chapter confirmed that States have obligations and responsibilities in preventing 'abandonment of seafarers' from occurring, and may even be considered as the ones committing the act of abandonment, which is particularly true in the case of Coastal States.

[418] Tamo Zwinge, 'Duties of Flag States to Implement and Enforce International Standards and Regulations - And Measures to Counter 9eir Failure to Do So' in Journal of International Business and Law: Vol. 10: Iss. 2, Article 5 (2011), p.321 Available at: h:p://scholarlycommons.law.hofstra.edu/jibl/vol10/iss2/5, last accessed on 08/08/2016

Chapter IV- Classification Societies

Even though classification societies can still be considered an unsatisfactorily regulated area of transport law, their importance in the shipping industry is undeniable. They play a vital role in the inspections of ships and making sure these comply with industry standards and most importantly with international and national regulations.

A brief definition of classification societies: these are independent legal entities, which establish basic minimum standards for the design, construction and maintenance of the principal hull and machinery of vessels, issuing essential certificates, which are relied on by important sectors of the maritime industry as an assurance that the classed vessel is likely to be reasonably suited for its intended use, being vital for insurance and marketing purposes.[419] They emerged out of a necessity of shipowners to provide evidence that their vessel had been built to a suitable standard for insurers and charterers.[420] Thus, classification societies are broadly defined as: "organizations which survey and classify ships according to their condition for insurance and other purposes".[421] However, this definition can be considered to be very simplistic and hardly demonstrates the importance of these institutions to maritime law.

As this Chapter will demonstrate, classification societies have a dual role. They conduct inspections on behalf of the shipowner in order to ensure that the vessel is up to standard, and also act as Recognised Organisations on behalf of Flag States. As such they must, through inspections, ensure the vessels' compliance with International Conventions such as SOLAS, MARPOL and now the MLC. Flag States will often rely on classification societies' expertise and knowledge in conducting these inspections,

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[419] Jan De Bruyne, 'Liability of Classification Societies: Cases, Challenges and Future Perspectives' in Journal of Maritime Law and Commerce 45.2 (April 2014): 181:232,.p.2

[420] John N. K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, p. 126

[421] Marine Insurance Glossary, 'Glossary of Marine Insurance and Shipping Terms' in 14 U.S.F. Mar. L.J. 332 (2001-2002)

since these institutions have existed prior to any International Convention. As the Chapter will assert by the analyses of the history and inception of classification societies, these can even be considered to have an auxiliary regulatory role, as the knowledge of their inspectors have being relied on in order to improve standards in the shipping industry.

It is up to classification societies to certify if vessels are in compliance with the Conventions known as the pillars of Maritime Law, and if they are not up to standard, pointing out deficiencies and recommending adjustments where necessary. A vessel will not sail without a classification society's report attesting her satisfactory condition. Accordingly, the classification society will be the one assuring that the vessel is not substandard and is safe to sail, hence performing a vital role in preventing 'abandonment of seafarers', from happening. As already discussed in this thesis, as a substandard vessel can hardly be considered a safe work place[422], and although the primary responsibility in providing a safe place to works fall with the shipowner, it is questionable whether a classification society negligent while performing its duties will not also bear some sort of responsibility, particularly in tort.

It is important to note in this regard that national regulations recognize the importance of third parties, essentially directors or heads of companies, and not only of the employer, in maintaining the safety of the working environment. [423] In the UK for instance, if a health and safety offence is attributable to any neglect on the part of, any

[422] An implied obligation accordingly to most national legislations. See Section 9 of the MGN 20 Merchant shipping and fishing vessels: health and safety, which implements the EC Directive 89/391 as a title of example. See Chapter I pp.92-97

[423] In France, the Labour Code requires the head of the establishment to "take the necessary action in order to ensure the safety and protection of the physical and mental health of the people working in the respective establishment, including temporary workers." (*Labour Code, Art. L-230-2 para 1)*
The Centre for Corporate Accountability prepared a survey for the Health and Safety Executive of the UK in 2007 regarding company's directors' responsibilities to ensure the health and safety of the work place. Most legislations analysed imposed some sort of responsibility and therefore liability in company's directors. See: Centre for Corporate Accountability, *International comparison of health and safety responsibilities of company directors*, (Health and Safety Executive, 2007) < http://www.hse.gov.uk/research/rrpdf/rr535.pdf>, last accessed on 08/08/2016

director, manager, secretary or other similar officer of the organisation, or happens with their consent, then he or she, as well as the organisation can be prosecuted under section 37 of the Health and Safety at Work Act 1974. According to Section 37(1) of the 1974 Act states that:

> "Where an offence under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

Accordingly, the section allows directors and also managers to be prosecuted by an offence relating to health and safety in the work environment. In *R v Boal,* [1992] 3 All ER 177, managers were defined as persons who "are in a position of real authority, the decision-makers within the company who have both the power and responsibility to decide corporate policy and strategy. It is to catch those responsible for putting proper procedures in place; it is not meant to strike at underlings." As this chapter will prove by the analysis of classification societies' history and roles, these have an important and undeniable role in assuring that procedures are put into place, as policy makers of health and safety themselves.

Truly, classification societies do not fall into either of the categories. They can neither be classified as directors or managers of the seafarers' employer. Nevertheless, as this chapter will prove, classification societies play a vital role in deciding policies and assuring that proper procedures are put into place. Thus, their role in assuring the health and safety of the seafarers' work environment should not be taken lightly.

Furthermore, classification societies will attest to the vessel's compliance with international instruments, which are essential to secure the seafarers' safety while on board the vessel, such as SOLAS and MLC hence a negligent survey could possibly jeopardise the life of a seafarer.

Accordingly, this Chapter intends to analyse classifications societies' responsibilities in preventing abandonment of seafarers either by acting on behalf of Flag States, assuring the compliance of the vessel with International Conventions, particularly with the MLC, or by acting on behalf of the shipowner in assuring that the vessel is not substandard.

This Chapter shall start by demonstrating the importance of classification societies through the analysis of the classification Society's inception and its historical development. It will then move on to the analysis of the classification society's dual role, which is also essential to demonstrating the reliance of the industry upon these institutions and the conflict of interests that the performance of this dual role might represent in terms of efficiency. Finally, classification societies' third party liability shall be analysed.

In order to conduct classification societies' third party liability analysis, three different jurisdictions have been chosen to be analysed; England, the United States of America, and France. England has been chosen due to the fact that English law is the basis of this thesis. The USA and France were the countries of the courts which dealt with Classification Society third party liability in the Prestige' and the Erika' incidents respectively and considering how extensively both cases have been dealt with throughout this thesis, they have been chosen as a further basis.

It is important to note that a direct analysis of how courts deal with classification society liability towards seafarers was not possible to be made due to the nonexistence of any judgment of this kind, even though some suggestion has been made by American

scholars that such cases have been in the majority successful but settled out of court.[424] Therefore, it was necessary to make a general analysis of classification Societies third party liability according to the existent case law in order to reach a conclusion on how Courts would deal with cases involving seafarers and classification Societies.

IV.1 –Historic Development of the Classification Society – its inception

Classification Societies are not a new concept; in fact, they existed since even before the IMO[425] or more importantly the UNCLOS I from 1858, hence before governments realized the transboundary of merchant shipping and the necessity to regulate it in an efficient and harmonized manner in order to guarantee maritime safety. Its origins can be traced back as far as the late seventeenth century, with the creation of Lloyd's, named after the London coffee house where merchants, marine underwriters and others connected to the industry would gather and "read" the printed news-sheet called Lloyd's News published by the owner of establishment, Edward Lloyd, containing information on foreign and war news, trials, executions, parliamentary proceedings, and marine news and gossip. After Lloyd's death his relatives carried out the business founding Lloyd's List in 1734 with a focus upon shipping news, mainly gathered from correspondents, Lloyd's agents, around the world. A Register society was finally incorporated in 1760 and by 1764 a Register of ships was published to give information on the conditions of ships to merchants and marine underwriters. Nevertheless, issues regarding the secrecy of classification quickly became apparent and although the ratings provided by classification societies became essential to underwriters, they were not popular among shipowners and shipbuilders as they discriminated against certain shipbuilding areas and the information was confidential to insurers. Thus, in 1797 as a direct response to the Register Publication of that year, shipowners opened their own register, which due to its failure in the long term merged

[424] See Chapter IV.2.2

[425] The International Maritime Organization - IMO first known as Inter-Governmental Maritime Consultative Organization -IMCO, was created in the mid-19th Century. See: http://www.imo.org/About/HistoryOfIMO/Pages/Default.aspx, last accessed on 08/08/2016

with Lloyd's register in 1834, forming Lloyd's Register of British and Foreign Shipping. This new organization, which included merchants, shipowners, and underwriters, published rules for the survey and classification of ships hence the name 'Classification Society' or 'Class'.[426]

The concept of Class only really proliferated internationally in the early nineteenth century, as the size and complexity of ships increased as well as the heavy losses of these, generating a requirement from insurers for standards of construction of these ships. In the winter of 1821, when 2000 ships and 200,000 seafarers were "lost" at sea and several French Marine Insurance Companies went bankrupt, the necessity of an efficient class rating system became particularly marked. It was not long after this that other classification societies started to emerge (as doubts emerged regarding Lloyd's rating system). Thus, the Bureau Veritas (BV) in 1829, Registri Italiano Navale (RINA) in 1861, the American Bureau of Shipping (ABS) in 1862 and Det Norske Veritas (DNV) in 1864, classification societies all active to this date, were established in different nations across the world by marine insurers, following the Lloyd's model of non-profit organizations undertaking surveys of the hull and machinery of ships for the underwriter so a standard construction could be classified and insurance obtained by the shipowner. All these societies developed similar methods of evaluating risks by a process of assessing the condition of the ship and 'rating' them, which would be done through a visit to the ship by an experienced captain based in the Port where the vessel was located.[427]

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[426] See: Lloyd's Register, A Brief History: It started with a cup of coffee, available at http://www.lr.org/en/about-us/our-heritage/brief-history/, last accessed on 08/08/2016; JD. Bell, 'The Role of Classification in Maritime Safety', 9Th Chua Chor Memorial Lecture, Singapore, 13 January 1995, IMO Library; Lloyd's Register, From Coffee House to Post-Modernist Building, Infosheet 31, available at http://www.lr.org/en/_images/213-35658_31-lloyds-register-pics.pdf and John N. K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, pp 126/127

[427] *Ibid* and WE Jenkin, 'The OCIMF view of recent classification society progress', Paper to the International Seminar on Tanker Safety, Pollution Prevention, Spill Response and Compensation, (Hong Kong: 06 November 2002), http://www.itopf.com/fileadmin/data/Documents/Papers/jenkins.pdf, last accessed on 08/08/2016

In the first half of the nineteenth century several factors led classification societies away from solely ratings and changed the relationship between Class and the shipowner and eventually the Flag State. Shipowners started to demand more and more value from Class than just a survey of construction and the occasional rating. They wanted evidence by regular certification of the ongoing standard of the vessel. The response came through the concept of classification certificates issued by a number of years dependent upon a regular survey of the vessel which consequently provided the classification societies with a regular source of income, enabling them to develop their technical resources and international coverage. Another consequence was the need for all classification societies to produce clearly understood and uniform guidance to their surveyors, who would now no longer be only shipmasters but also engineers. This was the birth of the "Class Rules", now paramount in the regulatory framework for the design and construction of the ships. [428]

The class of a vessel is paramount for its value, as it will affect its price and its workability, as no charterer will hire a vessel without class (all contracts for operating merchant vessels demand the shipowner to produce a class certificate before finalizing the contract, which often also demands that the ship remain in class for its entire duration). The economic value of Class is so extensive that some commentators summarized it with the small and direct sentence "no cash without class"[429]. Basedow and Wurmnest summarized the importance of Class in six bullet points:

- "Purchasers of ships require a class certificate to complete a purchase.
- Most arm's length voyage and time charters expressly require owners to maintain the class of the ship throughout the term of the charter. Bareboat charters put this obligation on charterers.

[428] John N. K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, p. 128
[429] J. Basedow and W. Wurmnest, *Third Party Liability of Classification Societies*, Hamburg Studies on Maritime Affairs 2, (Springer 2005), p. 7

- Hull underwriters set the insurance premiums according to the class of a ship. Ships not holding an appropriate class will be insured only for a very high premium if at all. Additionally, the standard insurance contract clauses exclude insurance coverage for damage when the vessel went to sea without holding the highest class of an established Classification Society. The rules of the P&I Clubs also require that the ship holds a certain class.
- Banks that issue ship financing loans against a ship mortgage as security, require proof of the class when entering into a contract, and make failure to maintain the mortgaged ship in a valid class a cause for termination under the loan agreement.
- Parties contracting with carriers will only entrust their cargo to a ship with the highest class, as they would otherwise incur higher insurance premiums for the transportation of their goods.
- Crew members might attempt to negotiate higher pay as a risk premium for sailing on a ship with a lower class." [430]

Therefore it can be noted that all members of the shipping industry rely on the Class of a vessel, including seafarers, who will only see the vessel/ their working place after signing the contract – since most likely the vessel will be anchored in a different country from the one in which the contract was made, hence relying heavily on the information given, in particular the class of the vessel. Nevertheless, as Basedow and Wurmnest point out, not every interested party relies solely on the class certificate issued by a Classification Society, this being particularly true in the case of hull underwriters, P&I Clubs and charterers, which sometimes conduct their own ship inspections to validate themselves the ship's condition (this will be analysed and

[430] *Ibid*. See also: Cf Clause11 (2) Norwegian Saleform 1993, Cf only Clause 6 of the BIMCO standard form NYPE 93 (new York Produce Exchange Form), Cf Clause 10 (a) (i), 13 and 15 of the BIMCO Standard bareboat charter form (BARECON 2001). Cf. *e.g*., § 58 ADS in connection with § 23.1 of the DTV. Kaskoklausen 1978 (version August 1994) Cf. only the "Klassifikation-und Altersklausel" for insurance cover according to the DTV-Guterversicherungsbedingugen

explained in more depth further along in this work).[431] Nevertheless, undoubtedly, the historical origins of the classification societies demonstrate their interrelationship with these sectors of the maritime industry, in particular the insurance industry.

IV.1.1 – Duo Role

At the same time as the birth of "Class Rules", with the evolution of national legislations concerning the safety of ships, Flag States also began to carry regular surveys to verify the condition of the remainder of the ship and its equipment, especially regarding safety and navigational and they were increasingly accepting classification societies' surveys of hull and machinery as verification of standards of these components hence avoiding duplication of surveys. Eventually, Flag States also began to delegate their statutory power to classification societies, which already had technical expertise and personnel to carry out the complex task of surveying ships. [432]

Ever since, classification societies have been playing a role in assessing standards of vessels, consequently assuring of their seaworthiness long before the concept of the shipping safety chain was envisaged. Therefore, their proliferation can in a large part be considered a consequence of maritime casualties. Even though, the initial motivation behind the creation of these societies was strictly economic, they were playing a role in guarantying the safety of shipping since before any other member of the maritime safety chain, by inspecting a vessel's seaworthiness and/or substandard conditions. Thus, it can even be argued that shipowners themselves were responsible for promoting safety at sea, by instituting regular ship inspections in order to guarantee standards of construction/ safety, essential requirements in ensuring a vessel's seaworthiness (even though a Classification Society cannot be liable for vessel

[431] J. Basedow and W. Wurmnest, *Third Party Liability of Classification Societies*, Hamburg Studies on Maritime Affairs 2, (Springer 2005), p 8

[432] *Ibid*, pp 128/129 and JD. Bell, 'The Role of Classification in Maritime Safety', 9Th Chua Chor Memorial Lecture, Singapore, 13 January 1995, IMO Library Lloyd's Register, From Coffee House to Post-Modernist Building, Infosheet 31, available at http://www.lr.org/en/_images/213-35658_31-lloyds-register-pics.pdf, p.5, last accessed on 08/08/2016

unseaworthiness due to the time gap between surveys, among other things, it is undeniable that when the CS issues its survey, at that particular time at least, it is also attesting to the vessel's seaworthiness), making them more appealing to charters.

This dual role undertaken by classification Societies led to more responsibilities and most importantly conflicting interests. Therefore, in the late 19th Century to preclude this inherent conflict of interest, classification societies drew up detailed regulations regarding complete surveys of a vessel and its equipment, including their traditional area of hull and machinery. The consequence of this was the increase of Flag State reliance on classification societies, by delegating all their responsibilities under national and international law to the latter. This led classification societies to severe their traditional ties to underwriters and start offering services straight to shipowners. Ever since, classification societies have been carrying out regular surveys to ensure the ship is "in Class" for insurance purposes (private role), while concurrently undertaking statutory surveys on behalf of the Flag State (public roles), hence that which was to obviate their conflict of interests merely increased it.[433] Not surprisingly there is a widespread misunderstanding inside and outside the shipping industry regarding the role of classification societies, with associated issues regarding the effective implementation of IMO instruments on behalf of Flag states. [434]

Furthermore, after the Second World War, when Liberia and Panama registries started to attract a great number of Greek and American shipowners, there was an expansion of the coverage and mandate of Class. The fact that these Flag States and newly emergent nations, with hardly any maritime tradition, had a clear lack of infrastructure and maritime administration, and according to critics no desire to oversee and enforce statutory regulation (this might have been the case when some of these

[433] John N. K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, p. 129
[434] LD. Barchue, *Making a case for the Voluntary IMO Member Audit Scheme*, (IMO October 2005), p.1

registries were created however this does not seem to be the case anymore[435]), generated an increased reliance on classification societies, which at the time had already an important position in the shipping industry, having set up worldwide networks to survey the ships in Class. Thus, it seemed logical to some Flag States to delegate to these organizations the Class and statutory surveys as Recognized Organizations.[436] In fact, a majority of IMO members adopted this approach. [437] Rationally, this makes total sense as it is more economically viable to rely on experts already with the required knowledge and practical experience than to train new professionals to do the job, besides being, theoretically at least, more efficient. It is important to note, however, that Flag States can only delegate inspection, surveying and certification functions, not the grating of enforcement or exemptions. The instruments are clear about what functions can be delegated to RO, being clearly an exhaustive list. [438] SOLAS, for instance, makes clear that the list of functions that can be delegated is an exhaustive one in its Chapter I, Regulation 6 (a):

> "The inspection and survey of ships, so far as regards the enforcement of the provisions of the present regulations and the grating of exemptions therefrom, shall be carried out by the officers of the administration. The

[435] All of the countries considered to be Flag of Convenience countries are parties to all the major safety conventions, including the 'four pillars' of shipping, i.e. SOLAS, STCW, MARPOL and MLC and more responsible registries ensure even stricter compliance. For instance, Liberia (considered to be the second major FOC country) requires a 'decision maker' who is contactable 24 hours in the event of any accident rising from one of its ships as a condition for the issuance of a Permanent Certificate, it also stipulates that vessels seeking registration not be more than twenty years old, although subject to certain conditions vessels exceeding this age limit may be accepted for registration. Similarly, Panama, considered the main FOC country, although it does not provide for any age limitation, vessels over twenty years of age are subject to a special inspection before the Permanent Certificate of Registry can be issued**.** Furthermore, both countries make annual levies on ships in their registers for casualty investigation and international participation. (Julia Constantino Chagas Lessa, 'How wide are the shoulders of a FOC Country', in M. Musi (ed), *New Comparative Perspectives in Maritime, Transport and International Trade Law* (Libreria Bonomo Editrice: Bologna, 2014), pp. 227-252)

[436] "Recognized Organizations" it is a term found in IMO Resolution A.739 (18), Guidelines for the Authorization of Organization Acting on behalf of the Administration, to denote those survey and Classification Societies organizations "acting on behalf of the Administration (flag state) to perform statutory work on its behalf"

[437]John N. K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, p. 131

[438] See for example MLC Regulation 5.1.1, 3.

Administration may, however, entrust the inspection and surveys either to surveyors nominated for the purpose or to organization recognized by it."

Therefore, the ultimate responsibility to enforce compliance and grant exemptions still lies with the Flag State, these being clearly non-delegable, with only inspections and surveys representing delegable duties.

IV.1.2 - International Association of Classification Societies (IACS)

At the same pace that the interest in classification societies started to increase so did the competition amongst them, which led to a decline in the quality of the services. In 1969, due to concerns of the "traditional" classification societies regarding what were considered to be 'substandard' classification societies, the International Association of Classification Societies (IACS) was founded, representing the twelve major classification societies (including ABS, RINA, BV and DNV) and accounting for more than 90% of the World's tonnage. On its website, IACS introduces itself as an institution "Dedicated to safe ships and clean seas, IACS makes a unique contribution to maritime safety and regulation through technical support, compliance verification and research and development."[439] Through its members' extensive technical and research facilities, and its role as a Non-Governmental Organization (NGO) at the IMO, IACS is able to develop Rules hence exercising a great deal of influence upon IMO Instruments, where it holds consultative status since 1969[440]. It is important to note that the Prestige and the Erika had been surveyed by members of the IACS (ABS and RINA respectively), at the time of their accident.

It is interesting to note that despite the clear important role that IACS has in the maritime industry, which demonstrates without a shadow of a doubt the relevance of the classification societies in preventing substandard vessels, it attempts to exempt

[439] See: http://www.iacs.org.uk, last accessed on 08/08/2016

[440] John N. K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, p.131

these institutions of any liability whatsoever. In a document on classification societies available in its Website, after describing the importance of these organisations and their surveys, it reads:

> "However, such a certificate does not imply, and should not be construed as, a warranty of safety, fitness for purpose or seaworthiness of the ship. It is an attestation only that the vessel is in compliance with the Rules that have been developed and published by the Society issuing the classification certificate. Further, Classification Societies are not guarantors of safety of life or property at sea or the seaworthiness of a vessel because the Classification Society has no control over how a vessel is manned, operated and maintained between the periodical surveys which it conducts."[441](Emphasis added).

This statement seems at least odd since it seems to exempt the Classification Society of any liability acting either on behalf of the shipowner or on behalf of the Flag State, and seems to minimise the current reliance on their certificates, even though a ship shall not be allowed to sail without one. Seaworthiness, as it will be demonstrated

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[441] See: IACS, "Classification Societies – WHAT, WHY and HOW?', (IACS, 2015) <http://www.iacs.org.uk/document/public/explained/WHAT,%20WHY%20and%20HOW%20Jan%202015.PDF>, p. 4, The same "disclaimer" can also be found in another IACS Publication: IACS, 'IACS Objectives, Strategy and Action Plan (2014-2015)' (IACS, 2015) http://www.iacs.org.uk/document/public/explained/IACS%20Strategy%202014.pdf., last accessed on 08/08/2016 In the same publication it can be found IACS definition of Classification Society by defining its functions and goals:
"*the purpose of a Classification Society ("CS") is to provide classification and statutory services* (when authorised by flag Administrations or other governmental organisations) *and assistance to the maritime industry and regulatory bodies as regards maritime safety and pollution prevention, based on the accumulation of maritime knowledge and technology;*
2. *the objective of ship classification is to verify the structural strength and integrity of essential parts of the ship's hull and its appendages, and the reliability and function of the propulsion and steering systems, power generation and those other features and auxiliary systems which have been built into the ship in order to maintain essential services on board for the purpose of safe operation of a ship* (taking into account the effect on the environment).
3. *Classification Societies aim to achieve this objective through the development and application of their own rules and by verifying compliance with international and/or national statutory regulations on behalf of flag Administrations* (verification of compliance with statutory regulations includes inter alia, safety and security management systems and living and working conditions on board ships as stipulated in IMO and ILO international Conventions)."

further along in this thesis, it is indeed recognised as not being possible to be the responsibility of a Classification Society leading to liability. It seems to be a general understanding among national courts that it is the shipowner's non-delegable obligation to provide a seaworthy[442] vessel,[443] with international instruments following similar approaches. This approach seems to take into consideration that a valid Classification Society Certificate can last up to five years hence it does not assure how the vessel will be manned or taken care of after the certificate has been issued. Thus, it should be understood that the shipowner has to exercise due diligence to keep the vessel seaworthy. Nevertheless, it is important to note that Article 94. 2 (a) of UNCLOS, clearly makes Flag States responsible to take measures to ensure the seaworthiness of a vessel:

> "Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:
> (a) the construction, equipment and seaworthiness of ships;"

Therefore, considering that Classifications Societies act in many occasions as ROs it seems wrong to assume that they would be immune of any liability for negligence in every case concerning the seaworthiness of a vessel, with the same being true to cases of safety life at sea.[444] Of course that Classification Society can always also rely on Flag States' immunities in order to scape liability.

[442] Currently there is no universal definition for seaworthiness. It is generally understood that a seaworthy vessel is one that is fit for the voyage to be undertaken. In *Kopitoff v Wilson (1876) 1 QBD 377* where it was held that the carrier should provide a vessel "fit to meet and undergo the perils of the sea and other incidental risks which of necessity she must be exposed in the course of the voyage" (at p.380). In *McFadden v. Blue Star Line*, [1905] 1 K.B. 697*seaworthiness* was defined as "that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it". (at p 706)

[443] See pp 185-224

[444]See Chapter III, pp. 124-135

Despite the creation of the IACS, concerns regarding efficiency remained, especially due to the clear conflict of interest in the Classifications Societies' role, which Mansell efficiently explained by way of an example: "a Classification Society requiring a shipowner to improve safety, the costs of which will inevitably result in reduced profits and earning capacity." Thus, "in order to keep the shipowner's business the Classification Society may reduce its requirements, or place "conditions of class" on the ship to enable it to continue to trend in a standard of lesser safety". [445]In the late seventies, marine insurers in the United Kingdom and Scandinavia became very critical of the clear loopholes in Class rules, such as wide variations in the delivery of Class services, unwarranted extensions of Class for substandard vessels and the secrecy of information of Class surveys. There was also criticism surrounding the fact that this secrecy of information was due to the contractual arrangements between the shipowner and his Classification Society, and the fact that Class rules disregarded the operation of the ship.[446] The result of this was the creation of inspections teams by P&I Clubs to focus upon matters not covered by Class such as hatch covers, cargo holds, navigational aids and safety equipment.[447]

In 1980 one commentator noted that "it has become generally recognized that a vessel's being validly 'in Class' with one of the major [Class] societies means very little to a potential charterer"[448]. Remarkably, in the 80s criticism against classification societies grew even further, with charterers of oil tankers, usually large oil companies also questioning the standards of the surveys. According to them, surveys were not detecting important safety issues such as deterioration of ship's hull. This clear inefficiency of class surveys coupled with a flood of environmental disasters from oil spills led to the creation of comprehensive independent vetting systems for chartered

[445]John N. K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, p 132
[446] See Boisson, 'Responsibilite des societies de classification. Fault-it remettre en cause les principles du droit matime?'in [1995] DMF, p.372 and Lloys List, 'Do we need more class distinction?', (Lloyds list, October 1979) <http:lloydslist.com>, p. 9 last accessed on 08/08/2016
[447] See P Sporie, 'Clubs keep an eye on ship standard', (Lloyds list, 2 March 1982) <lloydslist.com>, p.34, last accessed on 08/08/2016
[448]Lloyds Register of Shipping- Fairplay (2005) Opinion. 18 August, p.48

tankers, with similar initiatives also having been established for chemical tankers in 1994.[449]

The questioning of classification societies' credibility in the 90s did not stop there (in fact it is still an on-going issue); hull and cargo insurers, the International Union of Marine Insurers from 1987, had concerns regarding the clear conflict of interests of classification societies when performing public and private services. This conflict of interest is evident when there is a classification society, acting also as RO, requiring a shipowner to increase safety hence increasing his/her costs which will inevitably result in reduced profits and earning capacity. In scenarios like this most likely the shipowner will 'negotiate' with the classification society (which is also his/her service provider), in order to keep his/ her business going, the reduction of the requirements, or place "condition of class" on the ship, enabling the vessel to navigate in a standard of lesser safety[450] (clear examples of cases like this, having already been quoted along this essay; Erika, Torrey Canyon, Almoco Cadiz). Indeed, a more lax sanction and more acceptable one by shipowners is that of Class Recommendations. The fact is that there are numerous Classification Societies, performing public and private functions[451], making class a very competitive business and efforts made by classification societies to persuade shipowners with larger fleets to transfer Class has led to an unacceptable flexibility of standards[452], since shipowners have the commercial freedom to transfer Class – "class hopping", which can lead to Classification Societies reducing their standards in order to keep the shipowner, or result in lowers standards and reducing compliances costs from the "new" classification society. The fact that

[449] Boisson, 'Responsibilite des societies de classification. Fault-it remettre en cause les principles du droit matime?'in [1995] DMF, p. 374

[450] John N. K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, p. 132

[451] See: Paris MOU website an IMO

[452] Boisson, 'Responsibilite des societies de classification. Fault-it remettre en cause les principles du droit matime?'in [1995] DMF, p 373

there are not clear standards from transfer of Class between classification societies exacerbates the danger of Class hopping. [453]

In light of all this criticism, IACS attempted to restore classification societies' liabilities, through a number of initiatives, such as establishing a permanent Secretariat in London in 1990 and a procedure for transferring Class was agreed between all IACS members. It also introduced quality management systems and an enhanced survey system was developed for bulk carriers and tankers. [454]Furthermore, in 1998, IACS adopted the Transfer of Class Agreement (TOCA), which provides that a vessel's "new" Classification Society has the right of access to the full classification history of the vessel, and the "old/ previous" Classification Society must make all the existing class history available. This system aims to provide a reliable exchange of information between the concerned societies and prevent 'class hopping'. Moreover, it is said to make virtually impossible substandard vessels remaining in the organization's regime.[455]However, this hardly seems to be the case as two of the most commented cases of the past two decades (the Erika and the Prestige) involved vessels which were eventually considered to be clearly substandard vessels, classified by members of IACS, as already stated. Regardless, accordingly to the latest Paris MOU list of Recognized Organizations meeting the low risk criteria, only one of IACS members does not feature in the list, i.e. the Indian Register of Shipping, which features in the medium risk criteria[456] and according to Lloyds List, nine out of the 12 members of IACS are in the top 10 classification societies. [457] Even though this seems impressive at first sight, from the 39 RO's inspected only two featured in the high risk list and only

[453] LD. Barchue, *Making a case for the Voluntary IMO Member Audit Scheme*, (IMO October 2005), p.2 and John N. K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, p. 132

[454] John N. K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, pp. 132/133

[455] Jan De Bruyne, 'Liability of Classification Societies: Cases, Challenges and Future Perspectives' in Journal of Maritime Law and Commerce 45.2 (April 2014): 181:232., p. 7

[456] See: https://www.parismou.org/inspections-risk/ship-risk-profile/ros-meeting-low-risk-criteria and https://www.parismou.org/sites/default/files/Performance%20lists%202014%20RO.pdf, last accessed on 08/08/2016

[457] See: http://www.lloydslist.com/ll/news/top100/classification/, last accessed on 08/08/2016

one in the very high risk list, DNV GL being the only one without any reported detention.[458][459] Furthermore, the Paris MOU project entitled "caught in the net", which supposedly reports major cases of detentions where the vessel is in a clear substandard condition, only reported two vessels in 2014, in both cases the Classification Society was an IACS member, and in one of the cases (M/V Hudson) it was also the RO.[460]In the United Kingdom, out of the seven reported detentions of 2014, six had IACS members as classification societies and recognized organizations.[461] IACS claims that its members represent more than 90% [462]of world tonnage, however despite this, substandard shipping certainly does not only exist within the less than 10% not represented by members of the association. Nevertheless, it cannot go unmentioned that according to data collected between 1997 and 2011, most vessels lost at sea are over 20 years old, a consideration taken on board by some IACS members, which will not class sea-going vessels above this age.[463] Therefore, members of IACS seem to be proactively taking measures to increase safety at sea.

The establishment of several transparency-enhancing measures by IACS was not enough to prevent it from being criticised. The effectiveness of the activities and the functioning of IACS are constantly objects of criticism and for a long time it has

[458] See: https://www.parismou.org/inspections-risk/ship-risk-profile/ros-meeting-low-risk-criteria and https://www.parismou.org/sites/default/files/Performance%20lists%202014%20RO.pdf, last accessed on 08/08/2016

[459] It might be relevant to note that out of the eleven recognized Classification Societies by the European Union, ten are members of the IACS, only the Polish Register of Shipping being a non-member. The European Union, through EMSA (European Maritime Safety Agency) conducts regular inspections of EU vessels and they assess each of the authorized Classification Societies every two years to assure the quality of the services provides by the Classification Society. Only the eleven authorised Classification Societies can act as Recognized Organizations for EU member States, the same limitation is not applicable to the owner of an EU flagged vessel. See: http://www.emsa.europa.eu/implementation-tasks/visits-and-inspections/assessment-of-classification-societies.html

[460]See: https://www.parismou.org/publications-category/caught-net; https://www.parismou.org/sites/default/files/CINT%20Report%20Hudson%20Leader.pdf and https://www.parismou.org/sites/default/files/Caught%20in%20the%20net%20Kamil.pdf, last accessed on 08/08/2016

[461] See: https://www.gov.uk/government/news/7-foreign-flagged-ships-under-detention-in-the-uk-during-september-2014

[462] See: http://www.iacs.org.uk, last accessed on 08/08/2016

[463] N. Butt, Prof. D. Johnson, Dr. K Pipe, N. Pryce-Roberts and N. Vigar, *15 Years of Shipping Accidents: A review for WWF*. (Southampton Solent University 2012), p.29

not been considered a self-policing organization. This criticism can hardly be considered to be a surprise. As an example, the Association database, which registers compliance with the International Safety Management Code (ISM), is incorrect, excluding information from administrations that directly certified vessels and neglecting to submit their data hence underestimating the percentage of ships that comply with the ISM Code. Furthermore, some believe that it is essential that IACS restricts the margin of discretion which individual members have in relation to certain Unified Requirements, e.g. the Polar Code. [464]

It also cannot go unnoticed that IACS inhibits competition among classification societies, by creating a significant competitive advantage for societies which comply with *its* requirements. It has been argued by the European Commission that some IACS procedures could possibly infringe Article 101 of the Treaty of the Functioning of the European Union by preventing non-members of IACS from joining the Association as well as their participation in IACS working groups, and finally by denying their access to IACS technical background documents. The Association also failed to enact "admission requirements that were objective and to provide sufficiently adequate systems for including Non-IACS [classification societies] in the process of developing IACS technical standards", instead the Association established qualitative membership criteria and guidance for their application. Further, as a response to the European Commission inquiries, the Association started to allow non-members participation in technical working groups and granted them full access to IACS technical resolutions and related background documents. These IACS commitments were eventually made binding by a European Commission Decision from 14 October 2009, which put an end to the Commission's inquiry but did not decide if there had been an infringement of the competition rules.[465]

[464] Jan De Bruyne, 'Liability of Classification Societies: Cases, Challenges and Future Perspectives' in Journal of Maritime Law and Commerce 45.2 (April 2014): 181:232.
[465] *Ibid*

IV.1.3– Attempts to Regulate

In 1994, recognizing the importance of classification societies and the lack of regulations concerning them, the European Community (EC) made a regulatory attempt by introducing Council Directive 94/57/EC on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations. The preamble of the Directive demonstrates the concern of the European community with the way classification societies were running their surveys and acknowledges the lack of uniform international regulation.

> "[A] large number of the existing Classification Societies do not ensure either adequate implementation of the rules or reliability when acting on behalf of national administrations as they do not have adequate structures and experience to be relied upon and to enable them to carry out their duties in a highly professional manner
> (…)
> Whereas at present there are not uniform international standards to which all ships must conform at the building stage and during their entire life, as regards hull, machinery and electrical and control installations; whereas such standards may be fixed according to the rules of recognized Classification Societies or to equivalent standards to be decided by the national administrations (…)" [466]

[466] A parenthesis must be made regarding this last quotation taken from the Council Directive, which particularly demonstrates not only the importance of classification societies as third parties in the shipping industry, but also the transnational character of the latter, by leaving clear the need to use the standards of construction recognized by these or equivalents accepted by national administrations most likely assisted by international regulations ratified by each particular jurisdiction. It is important to highlight that uniform international legislation or an international harmonization of any field of law is difficult, if not impossible, to achieve, considering that countries need to be willing to ratify international conventions, as it could be seen previously, many countries do not possess this willingness, it therefore being difficult, if not impossible, to find an international convention that has been ratified by every single country in the world. Nevertheless, this does not prevent non- ratifying countries from absorbing some of the provisions contained in international conventions and make customary (as the case of the USA with the UNCLOS) or even national law.

The Directive's objective is to ensure that only governmentally recognized classification societies are allowed to function within the EC and, once recognized in one EC country, it cannot be refused by another Member State. The Annex of the Directive states that only existing, well known classification societies have chances of recognition by EC member States.[467][468]

Regardless of the undeniable importance of Class for many years, and its wide acceptance by the shipping industry, including the IMO, it was only with an amendment in 1998 of SOLAS that Class Rules were finally codified. According to the amendment:

> "In addition to the requirements contained elsewhere in the (SOLAS) regulations, ships shall be designed, constructed and maintained in compliance with the structural, mechanical, and electrical requirements of a Classification Society which is recognized by the Administration in accordance with the Provisions of Chapter XI/1[469], or with applicable national standards of the Administration which provide an equivalent level of safety."[470]

The amendment is rather restrictive, as it only covers the design, construction, and electrical requirements of Classification Societies, hence only the most traditional mandate of Class. Furthermore, the amendment is criticised for not specifying a standard of Classification Society, limiting itself to references to two mandatory

[467] See Council Directive 94/57/ EC, 15-18. See also: H. Hanku, The Classification Syste, and its problems with special reference to the liability of Classification Societies, 19 Tul. Mar. L.J. 1 1994-1995, pp.6-7

[468] At the moment only eleven authorised classification societies can act as Recognized Organizations for EU member States, the same limitation is not applicable to the owner of an EU flagged vessel. See Supra n.222

[469] SOLAS, Chapter XI, Special Measures to enhance maritime safety, Regulation 1, Authorization of Recognized Organization: "Organizations referred to in regulation I/6 shall comply with the guidelines adopted by the Organization by resolution A.789 (18) as may be amended by the Organization, and the specifications adopted by the Organization by resolution A.789 (19), as may be amended by the Organization, provided that such amendments are adopted, brought into force, and take effect in accordance with the provisions of article VII of the present Convention concerning the amendment procedures applicable to the annex other than Chap. 1"

[470] SOLAS Chapter II-1, Part A-1, Reg. 3-1

resolutions (i.e. SOLAS XI/1 and Resolution A.739 (19)).[471]Even though, IACS firmly believes that only its members meet the narrow requirements provided by the provisions[472], the SOLAS amendments are not restricted to IACS members. [473] It is important to note that Resolution A.739 (19) was also adopted by the International Convention of Load Lines, 1966 (1988 Load Lines Protocol) under chapter I of annex I to annex B and by MARPOL, under Annex I and Annex II of the MARPOL Convention.

It was only in 1998 and 2004, with the advent of the ISM Code and the International Ship and Port Facility Security (ISPS) Code respectively, that the role of Class was finally broadened (with the delegations which would go beyond their original technical mandate of hull and machinery), at the same pace as the blurring of the already blurred boundaries between Classification Societies' public and private roles. [474]

Although, SOLAS chapter II-1, Part A-1, reg.3-1 makes reference to "the applicable standards of the Administration that provide an equivalent level of safety", the lack of clear standards among Recognized Organization (mostly Classification Societies) are often targets of criticism, most often as a consequence of the views of many of the so called Flag of Convenience countries which would have no reason to enforce any level of standards (the broad discretionary powers given by several IMO instruments is said to permit Flag States through equivalency and exemption provisions a wide variance in national laws and their implementation and enforcement[475]) as ship

[471] See John N. K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, p. 134

[472] IACS, "Classification Societies – WHAT, WHY and HOW?', (IACS, 2015) <http://www.iacs.org.uk/document/public/explained/WHAT,%20WHY%20and%20HOW%20Jan%202015.PDF>, p. 4, last accessed on 08/08/2016

[473] The Tokyo MoU and the Paris MoU list of detentions and inspections list at least ninety RO/ Classification Societies, being clear in both cases that the list is not exhaustive as it finishes with "others" at the end. See: http://www.tokyo-mou.org/doc/ANN11-corrigendum.pdf and https://www.parismou.org/inspection-search. , last accessed on 08/08/2016
See also: John N. K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8. p 134.

[474] *Ibid*

[475] See: LD. Barchue, *Making a case for the Voluntary IMO Member Audit Scheme*, (IMO October 2005), p.1 and John N. K. Mansell, *Flag State Responsibility: Historical Development and*

registration was only perceived as a source of revenue. As already discussed in part IV.4 of this chapter, this does not seem to be the case any longer, as countries will aim to avoid at all costs their ships being target of Port Control, causing costly delays to the shipowner, a fact that may be perceived when noting that the countries with the FOC stigma feature in the white list of the Paris MOU and Tokyo MOU.[476] Nevertheless, the criticism against these countries still persists and the same can be said against Classification Societies and apparently even more so towards Classification Societies hired as Recognized Organization by these countries. Mansell, in his work, goes as far as referring to such Classification Societies as "class of convenience", a clear reference to the term Flag of Convenience.[477] This author believes that Classification Societies could be perceived as "class of convenience" due to the legislative loophole allowing shipowners to easily change classifications at their convenience, and the dual conflicting role often performed by them, but not necessarily due to their role as Recognized Organizations. Furthermore, it is necessary to note that as it is recognized that Classification Societies cannot be held liable for the seaworthiness of a vessel, as they cannot be assured as to its maintenance or operation, and the Classification Society can only attest their seaworthiness at the time of the issuance of the certificate, so the same can be said as regards their role as Recognized Organizations, bearing in mind the validity of the certificates issued by ROs, that usually last between two and five years, according to international and national legislation.

Due to all this criticism, which has some foundation as already discussed in this essay, the IMO drafted a Code for Recognized Organizations (RO Code), which was adopted by the Marine Environment Protection Committee, at its 65th session, by

Contemporary Issues (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, p. 134

476 See: Julia Constantino Chagas Lessa, 'How wide are the shoulders of a FOC Country', in M. Musi (ed), *New Comparative Perspectives in Maritime, Transport and International Trade Law* (Libreria Bonomo Editrice: Bologna, 2014), pp. 227-252

477 John N. K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, pp.134-135: "The statutory functions of many States will, as a result, inevitable be delegated to a Classification Society of equally dubious provenance: a "class of convenience".

means of resolution MEPC.237(65) and by the Maritime Safety Committee, at its 92nd session, by means of resolution MSC.349(92). Most importantly, by means of resolutions MEPC.238(65), MSC.350(92) and MSC.356(92), the parts 1 and 2 of the RO Code were made mandatory under MARPOL annexes I and II, SOLAS and the 1988 Load Line Protocol, coming into on 1 January 2015.[478] It is important to note that even though the Code was only adopted by these three conventions through amendments, and makes clear reference to these in Part 1 regulation 2.3, it should not be perceived as limited to only these IMO instruments, it should be perceived as guidelines to any other instrument which allows Flag States to delegate their obligations to ROs. Therefore, the Code should be perceived as guidelines also to the Maritime Labour Convention, for instance.[479] For much of IACS's discontentment, the Code clearly states that it is applicable to any RO, regardless of the size and type and many may not provide all types of statutory certificates and services and may have a limited scope of recognition; ANY Classification Society can perform as an RO if they fulfill the requirements of the Code.[480]Although, undoubtedly, IACS members would meet the requirements more easily, this does not mean that other Classification Societies cannot meet the same requirements.

The Code attempts to deal with the conflicting roles of Classification Societies by stating that its "staff shall not engage in any activities that may conflict with their independence of judgement and integrity in relation to their statutory certification and services. The RO and its staff responsible for carrying out the statutory certification and

[478] See: http://www.imo.org/en/OurWork/MSAS/Pages/RecognizedOrganizations.aspx

[479] RO Code, Part 1 Regulation 2.3: "The Code defines the functional, organizational and control requirements that apply to ROs conducting statutory certification and services performed under mandatory IMO instruments, such as, but not limited to, SOLAS, MARPOL and the Load Lines Conventions."

[480] RO Code, Part1, Regulations 2.4 and 2.5:
"2.4 All requirements of the Code are generic and applicable to all ROs, regardless of their type and size and the statutory certification and services provided.
2.5 ROs subject to this Code need not offer all types of statutory certification and services and may have a limited scope of recognition, provided that the requirements of this Code are applied in a manner that is compatible with the limited scope of recognition. Where any requirement of this Code cannot be applied due to the scope of services delivered by an RO, this shall be clearly identified by the flag State and recorded in the RO's quality management system. "

services shall not be the designer, manufacturer, supplier, installer, purchaser, owner, user or maintainer of the item subject to the statutory certification and services, nor the authorized representative of any of these parties" (emphasis added), and that "the personnel of ROs shall be free from any pressures, which might affect their judgement in performing statutory certification and services. Procedures shall be implemented to prevent persons or organizations external to the organization from influencing the results of services carried out."[481]Therefore, the Code does not allow for Classifications Societies when acting as ROs to also perform duties for the shipowner, hence eliminating the conflict of interest existent in the dual role performed by CSs.

It has been affirmed in this paper that the RO Code could be used as guidelines, hence non-mandatory in nature, for other IMO instruments, including the Maritime Labour Convention (which is in fact an ILO instrument). However, it is important to note that the latter provides in its Code standards for Recognized Organizations. Even though mention is made about the independency of the RO, nothing is mentioned about its impartiality.[482] Thus, it can be assumed that if the national legislation is silent, there is nothing preventing a Classification Society from performing its dual role (public and private) when issuing MLC certificates.

It can be said that one of the most difficult requirements for an RO to fulfill is to be able conduct work anywhere in the world. Ships do not necessarily need to be berthed in the port of the Flag State in order to be inspected. Indeed, Flag States must be able to inspect, monitor and enforce their requirements anywhere in the world. Thus, ROs need to have a worldwide system of offices and surveyors as well as technical, managerial, and research facilities to be able to competently fulfill their obligations. The surveyors should be exclusively and solely employed by the RO, as it is believed that "non-exclusive" and Part-time surveyors were lowering standards.[483]The Flag

[481] RO Code Part 2, regulations 2.3 and 2.4, respectively.
[482] See MLC Regulation 5.1.2, Standard A5.1.2 and Guideline B5. 1.2
[483] See John N. K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, p. 140

State should ensure the adequacy of the work performed by the RO through procedures for communication, reporting from the RO, additional inspections of ships by the administration, audits of the RO, and monitoring and evaluating Class related matters such as deficiencies in the ship's structure or equipment.[484]

It is interesting to note that the delegation of Flag State responsibilities to ROs is always a vexed issue. Criticism around it, as it can be seen in this paper, is often related to the countries considered to be FOCCs, as these allegedly have no intention of enforcing high standards in the vessels registered there. This paper has already expressed a different view on the subject, which suggests that countries with a less developed maritime tradition would benefit more from hiring Classification Societies which already have practice experience and specialized personnel, than starting from scratch and training their own personnel. For instance, St. Vincent and Grenadines, a country considered to be an FOC, has already established a list containing only well-known and reputable Classification Societies, mainly members of IACS (which guarantees an extra level of regulations, as already explained in the scope of this work) which are authorized to act as ROs in the conduction of MLC inspections and certifications. [485]It would be at least in theory expected that these CS, which already possess all the expertise and practice plus the required worldwide network, being able

[484] See RO Code Part 3 and MLC Standard A5.1. and Guideline B5.1.1

[485] The exhaustive list includes:

- American Bureau of Shipping (ABS)
- Bureau Veritas (BV)
- China Classification Society (CCS)
- Croatian Register of Shipping (CRS)
- Det Norske Veritas (DNV)
- Germanischer Lloyd (GL)
- Indian Register of Shipping (IRS)
- International Naval Surveys Bureau (INSB)
- Hellenic Register of Shipping (HRS)
- Korean Register of Shipping (KR)
- Lloyds Register (LR)
- Nippon Kaiji Kyokai (NKK)
- Polski Rejestr Statkow (PRS)
- Registro Italiano Navale (RINA)
- Russian Maritime Register of Shipping (RS)

St. Vincent and The Grenadines Maritime Administration, Circular N° MLC 002- Rev. 4 - Procedures For Maritime Labour Convention Certification, 4

to conduct inspections anywhere in the world, will do a better job than recently trained inspectors. It goes without saying that is also a more practical and cheaper option for the Flag State. Furthermore, the international community many times seems to be reluctant to recognize international certificates obtained from certain countries. Nevertheless, the criticism is not all without grounds; one example is the case of Cambodia in 2003, which was then and still is considered an FOC country, according to the ITF list.[486]

In 2003, as well as currently, Cambodia had one of the worst Flag State Records, as indicated by its presence on the blacklist of the Paris and Tokyo MOU and the USCG.[487] The Cambodian Government then decided to reinvent its ship register and delegate their administrative duties to a RO in North Korea[488] in order to try to change the disturbing international impression of Cambodian flagged vessels, due to the high detention rate, putting these as easy targets for Port State Control. The problem was that the North Korean Organization, the International Ship Registry of Cambodia, sub delegated its authorities to an alarming fifteen organizations, and allegedly one of these sub-delegated the right to carry surveys and issue statutory certificates to a shipowner, who then was able to issue certificates in his own behalf.[489] The Cambodian Government attitude was clear against IMO intents as it can be noted by Resolution A.739(18) and A.739(19), both non-mandatory instruments nevertheless. It is important to bear on mind that in 2003 the SOLAS, MARPOL, amendments regarding ROs were not yet in force. Moreover, a perhaps not so impartial audit carried by the Seafarers International Centre in Cardiff University concluded that:

[486] See: http://www.itfseafarers.org/foc-registries.cfm, last accessed on 08/08/2016

[487] See: http://www.tokyo-mou.org, https://www.parismou.org - Cambodia still features in the most recent blacklists of both Port Control Organizations. See also: Paper FSI 14/INF.81IMO Sub-Committee on Flag State Implementation, 14th Session, June 2006., last accessed on 08/08/2016

[488] Letter of 25 of February 2003 from the International Ship Registry of Cambodia to the director of Maritime Safety, Maritime Safety Authority of New Zealand

[489] See: N. Winchester and T. *Alderton, Flag State Audit 2003*, Seafarers International Research Centre (Cardiff University 2003) <http://www.sirc.cf.ac.uk/fsa.aspx >, last accessed on 08/08/2016 and John N. K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer-Verlag Berlin Heidelberg 2009) DOI: 10.1007/978-3-540-92933-8, pp 140- 141

> "The Cambodian administration accepts only the bare minimum of responsibilities for vessels flagged to its register. The register is run purely for profit, with limited interest being shown in issues of vessel safety or crew welfare. There are no restrictions on the ownership of any vessel registered in the Cambodian ship Registry. Any legal entity capable of owning vessels under the law of the country on which it is established or domiciled may be registered as an owner. Other than the official fees applicable to vessels, non-resident shipping companies/owners are not required to pay corporate/ personal taxes of any description. Since its reactivation in 1995 the Cambodian register has exhibited a net increase in tonnage of 3,230% (up from the 1995 level of 59,958 gross tons to 1,996,738 gross tons in 2001)"[490]

Nevertheless, one must consider if the situation of Cambodia would be different if it had not delegated its international obligations to ROs. Of course, the non-discretionary delegation of responsibilities is problematic. However, the fact is that Cambodia featured in the blacklists prior to the delegation, which was actually made as an attempted to improve its record and image, and it remains in these lists up until today and according to a study conduct in 2011, it was the Flag State with the most vessel losses in fifteen years (1997-2011). [491]Besides, as stated prior the sub-delegations that were made in the case study, nowadays it would have been considered a breach of international instruments, and not only of the intents of international institutions, such as IMO, which does not necessarily prevent cases like this from happening (as it could be seen on topic, IV.4 Flag States face very little liability for not fulfilling their international obligations) but it makes things a lot more difficult.

It needs to be noted that Classification Societies working as RO ended up facing

[490] *Ibid* and N. Winchester and T. *Alderton, Flag State Audit 2003*, Seafarers International Research Centre (Cardiff University 2003) <http://www.sirc.cf.ac.uk/fsa.aspx >, last accessed on 08/08/2016
[491] N. Butt, Prof. D. Johnson, Dr. K Pipe, N. Pryce-Roberts and N. Vigar, *15 Years of Shipping Accidents: A review for WWF*. (Southampton Solent University 2012), p. 31

another question; that of state liability. Special tort law principles often govern the liability of a certain State but once these delegate their governmental authority to a Classification Society then the liability becomes questionable. For instance, in the case of a state liable for failure of exercising sufficient supervisory control, the question between the passivity of the state and the damages incurred could become critical. If a party is unable to prove this casual connection, then success against the state based on any theory of public law or vicarious liability by the state for the wrongdoing of Classification Societies would be questionable.[492]

The fact is that Classification Societies which perform governmental duties, like any other civil servant, do so within the limits of state damages liability. Generally, this means that any delegation of governmental authority would not relieve the state from liability in damages for the actions of its civil servants, presuming that the basis of liability is otherwise established and that there are no reasons for excluding liability, such as legislative immunity.[493]

It also possible for state liability to arise in cases in which the government has knowledge of a lack of proper systems and skills in a specific Classification Society however it has not intervened. Nevertheless, even in these situations the question whether the failure to remind the Classification Society or cancel the delegation of authority to the society actually caused the damage remains. In case the delegation of governmental authority failed to relieve the state from liability, then causation and intervention issues would be diminished as the state would remain vicariously liable. Alternatively, specific national laws applicable to state and tort liability should be look at in order to determine the basis of liability. [494]

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[492] H. Honka, 'The Classification System and its problems with special reference to the Liability of Classification Societies*'* in 19 Tul. Mar. L.J. 1 1994-95, pp. 11-12

[493] *Ibid*, p. 12

[494] The Finnish Torts Act of 1974, ch.3 sec.2, refers to state liability based on fault shown in connection with the exercise of governmental (public) authority. The code is not clear if the fault should have been exercised by a civil servant. Nonetheless, state liability arises due to fault, only if the requirements reasonably to be expected in the exercise of the specific public authority have been set aside, taking into consideration the nature and aim of the situation.

IV.2 – National Approaches

As it has been seen, classification societies are far from being satisfactorily regulated and their dual conflicting roles cannot be taken for granted. Thus, it should be no surprise that their liabilities are the object of much debate especially when these are working as Recognized Organizations hence being the Flag State's representative which, as already seen, possesses a rather questionable "non-existent" liability. As Naeemullah well stated, classifications societies seems to "occupy a unique – and precarious – niche within the maritime industry because lawmakers have not carved out restrictions on liability for classification societies".[495] Due to this "legal void" courts have been left to determine the appropriate degree of exposure of such organizations. Courts around the world have shown reluctance in holding a classification society liable. Even Courts in the US, which have considered classification society liable in a few cases, are very careful when writing their decisions, tending to write narrow holdings designed to minimize the precedential effect.[496] It is important, however, to bear in mind that is not the intention of this work to analyze all types of classification societies liability; its focus is solely on third party liabilities.

IV.2.1 – England

English Courts tend to take a very traditional approach towards third party liability of classification societies. They tend to deal with cases on a case by case basis

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In The *Sundancer* (799 F. Supp. 363, 1992 AMC 2946), the owner tried to sue the Classification Society (ABS) alleging that their survey was negligent, and should have pointed out defects, specifically the ones which caused the vessel to go aground. ABS had conducted surveys for the owner of the vessel and the Flag State, Bahamas. The USA Court ruled that the Classification Society was not liable due to Contractual exemption clauses and most importantly from the perspective of this thesis due to the ABS legislative immunity. The Bahamian Merchant Shipping Act, 1976 16 Acts of the Commonwealth of the Bahamas 161 § 279, includes a legislative exemption stating that any government appointee is immunized from liability for issuing statutory certificates in good faith. See also: H. Honka, 'The Classification System and its problems with special reference to the Liability of Classification Societies' in 19 Tul. Mar. L.J. 1 1994-95, pp. 12 - 25

[495] Imran Naeemullah, 'A Decade Later, $ 1 Billion Saved: The Second Circuit Relieves a Maritime Classification Society of Unprecedented Liability for Environmental and Economic Damages in Reino de Espana v. American Bureau of Shipping, Inc.' in Tulane Maritime Law Journal, vol. 37:639, p.640

[496] *Ibid*, pp. 640-641

and with great care and attention to detail. The third party liability of classification societies in English Law is covered by the law of tort, more specifically, the tort of negligence. The courts tend to find it difficult to see the requirements of the *Caparo* Test[497] (which will be analyzed further along) being fulfilled in classification societies cases.

Negligence in English law is a tort involving a person's breach of a duty to take care imposed upon him, resulting in damage to the complainant. The assessment of a duty of care has gradually evolved in English case law. Currently, the concept of reasonable foreseeability is relevant in testing whether a duty of care exists and in considering the question of remoteness of damage, once negligence has been established. In order to determine if the duty of care arises in a particular situation, the English Courts adopt the three fold test established in *Caparo Industries plc v. Dickman*[498]. Essentially in order for the duty of care to be established the following three criteria must be fulfilled: foreseeability, proximity[499], and general principles of fairness, justice and reasonableness[500]

Therefore, in England, in order to establish whether the Classification Society acted negligently, you first need to determine if it had a duty of care to a third party by applying the *Caparo* test. Thus, in English law there is a precondition that a duty of care must first exist, in order for negligence to be ascertained. Often policy-

[497] In England, in order for the Tort of Negligence to be established, there is the need to assess if there was a duty of care in the particular case. This assessment is made by applying the three fold test established in the Case *Caparo Industry Vs Dickman* [1990] UKHL 2, [1990] 2 AC 605, known as the *Caparo* test. According to it in order for the duty of care to be established:

- It must be reasonably foreseeable that a person in the claimant's position would be injured
- There must be sufficient proximity (closeness) between the parties
- It must be fair, just and reasonable to impose liability on the defendant.

See: Marc Lunney and Kent Oliphant, *Tort Law Text and Materials*, (Oxford 2008) pp 447-450

[498] [1990] 1 AC 605

[499] As set in *Donaghue v Stevenson [1932] A.C. 562, 581. per Lord Atkin*, proximity is: "such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act."

[500] "Whether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." *Goldberg v Housing Authority of the City of Newark (1962) 186 A. 2d 291, 293*

considerations influence the assessment if a duty of care exists[501] (in Classification Society cases these tend to play a big role).[502]

The *Nicholas H* is probably the most well-known and commented-upon case of Classifications Society liability. The case was about a cargo owner, who was unable to fully recover his losses from the shipowner after the vessel sank and tried to seek the remaining damages from the Classification Society. An assumption is made that the cargo owner was aware of the existent limitations of liability of the shipowner and was aware that he would be unable to fully recover his losses hence he decided to sue both, the shipowner and the Classification Society.

The *Nicholas H* was a vessel carrying cargo loaded in Peru and Chile under bills of lading incorporating the Hague Rules. During the voyage the crew discovered a crack in the vessel's hull, leading the master to request a surveyor from the vessel's Classification Society, Nippon Kaiji Kyokai[503]. The vessel was surveyed while anchored in San Juan, Puerto Rico, and at a first instance it was recommended to proceed to port and undergo permanent repair in order to remain in class. Nevertheless, the shipowner did not want to undergo permanent repair hence it urged the surveyor to accept temporary repairs. The same NKK surveyor re-inspected the vessel and recommended that the vessel "be retained in class for her original voyage", [504]stating that it could "proceed on [its] intended voyage to [the] discharge port, Crotony, Italy. "Repairs now done to be further examined and dealt with as necessary…. At the earliest opportunity after discharging present cargo".[505]It soon became evident that temporary repair was not enough. The vessel sank one week later with all her cargo. The cargo

[501] J. Basedow and W. Wurmnest, *Third Party Liability of Classification Societies*, Hamburg Studies on Maritime Affairs 2, (Springer 2005), pp. 15-16
[502] *Marc Rich & Co. AG and others v Bishop Rock Marine Co. Ltd and others – The Nicholas H*, [1995] 3 All ER 307 (HL)
[503] Nippon Kaiji Kyokay (NKK), also known by ClassNK is one of the most reputable Classification Societies, having his foundation dating as far back as 1899 and being a founding member of the IACS. See: http://www.classnk.or.jp/hp/en/about/history/index.html, last accessed on 08/08/2016
[504] *Marc Rich & Co. AG and others v Bishop Rock Marine Co. Ltd* and others, [1995] 2 Lloyd's Rep. 299, 310 (H.L. 1995) (The Nicholas H), at 310
[505] *Ibid*, at 299

owner sued the shipowners and NKK for negligence in the Commercial Court. The cargo owners eventually settled with the shipowners for $500,000 and sought the balance of their losses, $ 5.7 million, from NKK. The Commercial Court decided in favor of the cargo owners and held that NKK owed them a duty of care[506], a decision which later was reversed by the court of Appeal. Finally, the House of Lords, applying the Caparo test, affirmed the court of Appeal decision stating that it would not be fair, just and reasonable to impose on the classification societies a duty of care owed to cargo owners. [507] The majority of the House of Lords (4 votes to 1) agreed that cargo owners' tort claims against a Classification Society would destroy the balanced system of the Hague Rules and the Hague Visby Rules to the benefit of cargo owners and their insurers.[508]

Therefore, the House of Lords applied the "settled law" that in either physical damage or economic loss cases, foreseeability; proximity; and fairness, justice, and reasonableness area all relevant considerations, adopting the court of Appeal's decision that the three considerations should not be treated as wholly separate and distinct requirements but as "convenient and helpful approaches" to the question of duty.[509] His lordships agreed that whether a duty is imposed in a case depends on the facts and circumstances of the case. Thus, the court ruled that the cargo owners were incorrect in relying upon the *Caparo* for the proposition that foreseeability was only required in this physical damages case[510], reasoning that *Caparo* merely underlines the qualitative distinction between direct physical damage and indirect economic losses, recognizing

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[506] The Commercial Court ruled that although NKK's surveyor could not prevent the shipowner from allowing the ship to continue, he could have withdrawn the vessel's class and thereby exercised actual control over the ship. Marc Rich & Co. AG and others v Bishop Rock Marine Co. Ltd and others, [1994] 3 All ER 686, 696 ff.

[507] *Ibid*, at 316-17

[508] See: Colleen E. Feehan, 'Liability of Classification Societies from the British Perspective: The Nicholas H' in Tulane Maritime Law Journal 33-Tul. Mar. L.J. 41 2008-2009, pp 163-164 and J. Basedow and W. Wurmnest, *Third Party Liability of Classification Societies*, Hamburg Studies on Maritime Affairs 2, (Springer 2005), pp. 16-18

[509] *Marc Rich & Co V Bishop Rock Marine Co*. [1995] 2 Lloyd's Rep.299 (H.L. 1995) (The Nicholas H) at 313

[510] It is important to note that *Caparo* referred to economic losses. Nevertheless, the court in the *Nicholas H* felt that the test set in the Case should be able to be applied to physical damage cases as well. Ibid

the materiality of the distinction. [511]

The House of Lords grouped the relevant factor in determining if a duty of care should be imposed into six categories:

- Did the surveyor's carelessness cause direct physical loss?
- Did the cargo-owners rely on the surveyor's recommendations?
- The impact of the contract between shipowners and cargo owners
- The impact of the contract between the Classification Society and the shipowners
- The position and the role of N.K.K
- Policy factors arguably tending to militate against the recognition of a duty of care.[512]

When accessing the first category, the court concluded that the Classification Society was not primarily responsible for the vessel's seaworthiness, as this is a non-delegable obligation of the shipowner. Thus, ruling that NKK's role was subsidiary hence the physical damage was not direct.

Regarding the second point, the court decided that it was a relevant but not a decisive factor whether the plaintiffs relied on the surveyor's recommendations. Furthermore, the court decided that there had been no contact between the cargo owners and NKK, as well as no evidence that the cargo owners were even aware that the vessel had been surveyed by NKK and hence relied on their survey. The court decided that the cargo owners had simply relied on the shipowner to keep the vessel seaworthy and to care for the cargo.

Thirdly, when considering the effect of the contract between the shipowners and

[511] *Ibid* at 312
[512] *Ibid.* See also: Colleen E. Feehan, 'Liability of Classification Societies from the British Perspective: The Nicholas H' in Tulane Maritime Law Journal 33-Tul. Mar. L.J. 41 2008-2009, pp 175-176

the cargo owners, the House of Lords noted that the court of Appeal stated that the pertinent issue was whether it would be fair, just and reasonable to demand classification societies to bear a duty that the Hague Rules primarily placed on shipowners, without the benefits and protection of those rules or other international conventions.[513]Nevertheless, their lordships concurred with the cargo owners that the mere existence of the Hague Rules was not an appropriate reason to enforce an allocation of risks between cargo owners and classification societies similar to the allocation enforced between shipowners and cargo owners. Instead, they analyzed the likely impact of the imposition of a duty of care in this case on the insurance system and on international trade, reaching the conclusion that the first is structured around the fact that a shipowner's potential liability to cargo owners is limited under the Hague Rules and tonnage limitations hence imposing a duty on classification societies would require the latter to buy liability insurance, or to bargain with shipowners for indemnity, which would put an end to "limitation of liability of shipowners to cargo owners under the Hague Rules".[514]As a consequence shipowners would have to increase their insurance coverage. Even though the court accepted that classification societies already carry liability insurance as they are not immune of all tort claims, the court urged that the imposition of duty of care would greatly increase the potential exposure of classification societies to cargo claims, most likely resulting in higher insurance premiums. Classification Societies would most likely pass this cost to, besides requiring indemnity from, shipowners, hence prejudicing the shipowners and consequently increasing the cost of trade. Finally, the court considered that this would impact the balance created by the Hague Rules and the Hague Visby Rules[515], as well as tonnage limitation provisions. [516]

[513] See *Nicholas H*, [1995] 2 Lloyds Rep. at 314-15 (citing *March Rich & Co V Bishop Rock Marine Co./* [1994] 1 Lloyds Rep. 492, 499 (C.A.1994)

[514] P.F. Crane, 'The Liability of Classification Societies' in [1994] 3 LMCLQ 375

1968 Protocol to Amend the 1924 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, opened for signature February 23, 1968, Cmnd. 6944, Reprinted in Nagendra Singh, International Maritime Law Conventions (London, Stevens 1983), Vol 4, p 3045; - Reprinted in Transport: International Transport Treaties (The Hague, Kluwer Law International, 1986)

[516] *Nicholas H* [1995] 2 Lloyd's Rep. at 315

In considering the effect of the contract between NKK and the shipowners, the court concluded that *Pacific Associates Inc v Baxter*[517] was not applicable to the case. In *Pacific Associates*, it was held that the existence of a network of contracts weighed against the imposition of a duty of care on peripheral parties. Nevertheless, the court denied an existence of a network of contracts in the case of the *Nicholas H*, hence the contract between the shipowners and NKK had much less of an effect. [518]

Fifthly, considering NKK's position and role in acting in the interests of public welfare when deciding if it would be fair, just and reasonable to impose a duty of care, the House of Lords highlighted that classification societies act in the interest of the public, occupying "a public and quasi-judicial position".[519]Lord Steyn supporting this decision emphasizing that classification societies are not-for-profit entities, created and operating for the sole purpose of promoting collective welfare, namely the safety of lives and ships at sea, thereby fulfilling a role that in their absence would be fulfilled by states. He questioned if classification societies would be able to carry out their functions effectively if they were to become a target for third parties, already entitled to claims against the shipowner. Lord Steyn further argued that imposing a duty of care in the *Nicholas H* case due to a negligent survey, after the shipowner reported a defect relating to class, would make it very difficult to deny the Classification Society's duty to take good care in cases of negligently conducted annual surveys, docking surveys, intermediate surveys or any other type of survey as it would expand the classification society's liability to an unacceptable extent. The House of Lords stated that it was willing to assume that "there was a sufficient degree of proximity in this case to fulfill that requirement for the existence of a duty of care"[520]. However, Lord Steyn concluded his argument stating that it would not be "fair, just and reasonable" to assume a duty of care and hold the Classification Society liable under tort law. [521]

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[517] [1990] 1 Q.B. 993 (C.A. 1990)
[518] *Nicholas H*, [1995] 2 Lloyds Rep. at 315-16
[519] *Ibid* (quoting *W. Angliss & Co V Penisular and Oriental Steam Naviagtion Co*. 28 Lloyds List L. Rep 202, 214 (K.B. 1927))
[520] *Ibid*
[521] *Marc Rich & Co. AG and others v Bishop Rock Marine Co. Ltd and others*, [1995] 2 Lloyd's Rep. 299, 310 (H.L. 1995) (The Nicholas H), at 330. See also Supra n. Basedow, 18

Therefore, the House of Lords decided that cargo owners were sufficiently protected by the insurance system, the Hague Rules, and the Hague-Visby Rules, notwithstanding any limitations of this protection under the Rules and tonnage limitations. Their lordships concluded that "lesser injustice is done by not recognizing a duty of care".[522]

Lord Lloyd of Berwick, in the only dissenting opinion, observed that the Hague Rules only provide for a duty of care of cargo owners and carriers, as contractual provisions usually do not affect the question whether a duty of care should be assumed. He emphasized that the connection between the parties was sufficiently close since apparently the proximity between the shipowner and the cargo owners was with respect to the ship. He further argued that although the surveyor did not have the legal right to stop the ship from sailing, it had *de facto* control, as the vessel would not have sailed if it had not changed its original recommendation. Lord Berwick observed that it is difficult to imagine a closer or more direct relationship than the one that existed between the surveyor and the crew. [523] He argued that proximity between the parties must also be assumed in regards to cargo, since under English Maritime Law the ship and the cargo are considered as taking part in a joint venture. Furthermore, his Lordship argued that policy considerations also speak in favor of the existence of a duty of care, pointing out that classification societies do generate a large amount of profits with their operation and are thus able to afford insurance coverage. Nevertheless, Lord Berwick emphasized that to impose a duty of care in the case in question, would not mean that classification societies could be held liable for all kinds of surveys they carry out; this should be decided on a case by case basis. According to his lordship, the deciding factor in the *Nicholas H* was that the cargo was on board the vessel when the survey was carried out. Thus, it was suggested, creating a close relationship between the surveyor and the cargo owner. However, as he noted, most of the time surveys are carried out

[522] *Ibid* at 317
[523] *Ibid* at 318.f

without any cargo on board.[524]

Lord Berwick's reasoning seems to be quite sensible, considering all the aspects of the case and in particular the fact that the goods were already on board the vessel when the survey was being carried out. Therefore, his lordship demonstrates that although a Classification Society cannot be held liable for negligence after the survey has been conducted, since it is not responsible for the maintenance of the vessel, in the Nicholas H case, the vessel would not have sailed if the surveyor's negligence had not occurred.

It is interesting to observe the completely divergent line of reasoning taken by both Lords. In particular that one believed that imposing such a duty would not be unreasonable as classification societies have a lot of revenue, whereas the other argued that a lot of times those were non-profitable organizations. The majority reasoning however was heavily based on the imbalance that the imposition of the duty would cause, ultimately affecting international trade itself, relying primarily on public policy reasons. It is important to note however that both sets of reasoning stressed the fact that the primary responsibility of a Classification Society is promoting safety of life at sea, with Lord Berwick pointing out that there is not a closer relationship than the one of the surveyor with the crew. Thus, one could assume that the decision reached could be different if it was a seafarers' claim.

The House of Lords remarkably held that upsetting the balance in the Hague Rules could not be the only reason to not impose a duty, since legislature could easily remedied in that situation by extending limitation of liability to classification societies. It also appropriately analysed the effects such imposition would have on the insurance system and international trade, having an especially negative affect on shipowners. Nevertheless, the court neglected to note that insurance requires a vessel to stay "in class", and as already stated numerous times throughout this work, classification

[524] *Ibid*, at 314 ff. per Lord Lloyd of Berwick

societies compete with one another for this business. Thus, in order to attract ship business from shipowners, classification societies sometimes turn a blind eye to defects, which may cause vessels and lives to be lost. [525]

English Courts up until today have shown reluctance to impose a duty of care upon classification societies to third Parties. Following the same reasoning as in *Nicholas H*, Courts in England have not held a Classification Society liable for an erroneous confirmation of class certificate issued in the context of the sale of a vessel. Thus, in the *Morning Watch*[526], the High Court dismissed an action of a ship buyer who claimed damages from Lloyd's Register of Shipping. The court reached the conclusion that the Classification Society did not owe any particular "duty of care" to a buyer in the course of routine inspections as the relationship between the parties is not sufficiently close hence there is no proximity. [527] The court rejected the general proposition that a Classification Society owes a duty of care to those foreseeably likely to suffer economic loss in consequence of their reliance on a negligent survey, because understanding otherwise would be to stretch the law of negligence. [528] Nevertheless, the decision could have been different if the Classification Society had actively worked together with the seller of a ship in the sale of the vessel, meeting the buyer and exchanging information about the condition of the ship with him. In these circumstances proximity between the buyer and the Classification Society could be assumed.[529]

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[525] Colleen E. Feehan, 'Liability of Classification Societies from the British Perspective: The Nicholas H' in Tulane Maritime Law Journal 33-Tul. Mar. L.J. 41 2008-2009, p. 185

[526] *Mariola Marine Corporation v Lloyd's Register of Shipping – The Morning Watch*, [1990] 1 LLoyd's Rep. 547, 561 ff (QBD) In the case, the owners of the vessel engaged a Classification Society to conduct a special survey prior to putting the vessel on the market. The surveyor gave the vessel a clean bill of health, provided that localized areas of corrosion were treated. The vendor used the survey to indicate that the vessel was in good condition. The purchasers of the vessel agreed to undertake the remaining repairs necessaries for certification. Nevertheless, during the repairs, additional areas of corrosion were discovered. *The Morning Watch* [1990] 1 Lloyd's Rep 547,(Q.B. 1990), at 548-552

[527] *Ibid*, at 561 ff. (QBD)

[528] *Ibid* at 560

[529] See: East, 'The Duty of Care in a Marine Context. Is there Someone to Blame?' in Rose (ed.), *Lex Mercatoria. Essays on International Commercial Law in Honour of Francis Reynolds* (Routledge 2000)129, 131 f. and 151

It is arguable that in the event of personal injury the English Courts would be more inclined to find the Classification Society liable. There is not an English case to this effect and the argument is based on the decision reached in *Perret v Collins*, regarding an aircraft and its certification society and its surveyor who acted negligently while issuing a survey. Although there are similarities between a Classification Society and a certification society, there are also fundamental differences; classification societies cannot be held responsible for the vessel's seaworthiness, the shipowner being solely responsible for it, whereas Certification societies confirm the airworthiness of the aircraft as an amateur pilot is not in a position to assess it themselves.

English Law provides that certain aircraft must get a certificate of the Popular Flying Association (PFA) to confirm their airworthiness. The absence of a certificate might prevent the aircraft from taking off. In *Perret V Collins*[530], the PFA- Inspector certified that the aircraft was fit to fly, after inspecting it in several stages of its construction, although it had a propeller which did not match its gearbox. Due to this structural defect, the plane hit the ground on a test flight, injuring a passenger on board. The court of Appeal held that PFA and its inspector owed the injured passenger a duty of care. In their reasoning the court argued that the *Nicholas H* decision does not militate against finding the certification society liable. The court argued further that the role of a PFA-inspector in the decision to commence flying operations is not an ancillary role, the passenger placing reliance on the accuracy of a certificate. Thus, the court held that it was fair, just and reasonable to assume that a duty of care exists in this case. Although the court of Appeal quoted the *Nicholas H*, it also emphasised the difference between a Classification Society and certification society. [531]

Another tort case leads one to believe that Classifications Societies could be held liable in seafarers' claims, namely: *Driver v William Willett (Contractors) Ltd [1969] 1 All E.R. 665,* when the court held that a person hired to act as a safety

[530] *Perret V Collins and others* [1998] 2 Lloyd's Rep. 255 ff
[531] *Ibid*, at 264 -270

consultant in connection with the employer's business owed a duty of care to the employees.

There might be some truth in the argument that English Courts would be more inclined to impose a duty of care in classification societies in the case of personal injuries, but this is yet to be seen. It would be prudent to be sceptical about it due to the differences in responsibilities between a classification society and a PFA certification society, the nature of contracts in shipping and existent legislation. Furthermore, due to the transnationality of maritime labour law, a lot of international policies and conventions have a significant role in the decision-making process and in this particular case it is questionable if the balance would weigh in favour of seafarers.

Indeed, it is uncertain if the courts would impose liability upon classification societies in the case of an injured seafarer. It would be likely that the courts would have the same approach adopted in the *Nicholas H*, considering that the Maritime Labour Convention provides for limitation of liability of the shipowner in case of abandonment, plus the reliance of the seafarer on the classification society survey is questionable, hence putting in question the proximity between the two. Nevertheless, it is important to highlight that classification societies' main function concerns safety of life at sea, which could contribute towards a favourable decision for seafarers. Furthermore, in the case of abandonment of seafarers and a classification society working as an RO and giving a certificate that a vessel was in compliance with the MLC, whereas it was not; this could also give rise for a possible imposition of a duty to care. There are no cases in England involving classification societies as ROs, so one can only speculate as to what the outcome would be, remembering that classification societies may rely on the Flag State's immunity at any rate. It must be taking into account that most of the time, classification societies issuing class surveys also act as ROs. And whilst it may be possible to find proximity and foreseeability in these cases, a possible imposition of liability might not be perceived as fair, just and reasonable, including for policy reasons.

Professor Tetterborn seems to share the above view, regarding with scepticism a possible imposition of liability on classification societies. When commenting on the *Nicholas H* and a possible liability of classification societies in the case of oil pollution claims, the renowned Professor stated:

> "One ground for the decision in *The Nicholas H* was the lack of any evidence that classification societies existed for the protection of cargo owners, whereas by contrast, it seems clear that such organisations undoubtedly do operate for the benefit of those whose interests depend on the integrity of the marine environment. But other points may well tell against liability. These include in particular the relative poverty of Classification Societies and their unsuitedness to act as deep-pocket compensators, and also the fact that at present with oil, and no doubt in future with other substances, there is a scheme of liability which in the event of doubt should incline courts against actually creating further peripheral liabilities."[532]

Nevertheless, it needs to be borne in mind that the case in law existent in the UK dates from before the amendments to Chapter II-1 of the SOLAS Convention[533], which requires ships to "designed, constructed and maintained in compliance with the structural, mechanical and electrical requirements of a recognized Classification Society". It also dates before Resolution A.739 (19), which set forth specifications of the survey and certification functions of the recognized classification societies. These new regulations, already discussed in detail in this work enhance the reliance of statutory rules of compliance with class rules. As already discussed, the MLC for its part also provides for Recognized Organizations and the reliance on their certificates, which ought to serve as *prima facie* evidence of compliance. Thus, some academic

[532] A. Tetterborn, "Marine Pollution: Unorthodox Suits and Unorthodox Defendants" in B. Soyer and A. Tetterborn (eds) *Pollution at Sea: Law and Liability* (Routledge 2012), p. 209
[533] The amendment came into force only in 1 July 1998. See. IMO website

commentators believe that these new provisions could expose classification societies to third party liability claims. This is, again, yet to be seen.

Considering that the reasoning of the *Nicholas H* was heavily based on the imbalance that such imposition would cause in trade, since it would impose a heavier duty on the shipowner, the decision being based solely on the Hague Rules among International Conventions, it seems difficult to believe that a different decision could be reached in terms of cargo claims, however not so much so in terms of seafarers, especially considering the fact that the Hague and Hague-Visby Rules' provision for limitation of liability and the non-delegable duty to provide a seaworthy[534] vessel of the shipowner refers solely to cargo owners.

Art III rule 1 of the Hague/Hague-Visby Rules provides:

> '1_ The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:
> a_ Make the ship seaworthy;
> b_ Properly man, equip and supply the ship;
> c_ Make the holds, refrigeration and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation'.

From the reading of the article it can be perceived that the Hague/Hague-Visby Rules impose a duty on the shipowner to exercise due diligence to make the vessel seaworthy, also specifying the elements of seaworthiness. Therefore, essentially, the ship owner has a duty to maintain the vessel as seaworthy through the entire validity period of the Class certificate.

It is noteworthy that most regulations that deal with the obligation of the owner to provide a seaworthy vessel refer to cargo owners. Even the common law classic test of seaworthiness was provided in cargo claim case; *McFadden v Blue Star Line* [1905] *1 K.B. 697,* in which it was established that:

"The vessel must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it. To that extent the ship owner, as we have seen, undertakes absolutely that she is fit and ignorance is no excuse. If the defect existed, the question to be put is, would a prudent owner have required that it should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking. "

Another definition of seaworthiness can be found in the Marine Insurance Act, which provides that "a ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured" (article 39 (1)).

Accordingly, although there seems to be a general understanding of what a seaworthy vessel will be, it seems that the concept of seaworthiness may have slight variation according to different interests involved. Therefore, in the case of seafarers, it does not seem wrong to assume that a vessel even if fit for the purpose of the intended voyage, but which does not represent a safe work environment, would also be consider unseaworthy, it being important to note that a safe work environment includes also include one that is 'mentally' safe. The Health and Safety at Work etc. Act 1974, provides that "risks arising out of or in connection with the activities of persons at work shall be treated as including risks attributable to the manner of conducting an undertaking, the plant or substances used for the purposes of an undertaking and the condition of premises so used or any part of them"(Regulation 1(3)). Therefore, a vessel although capable of undertaking a voyage can still be considered not to be a safe work

IV.2.2 – United States of America

The American Courts' approach seems to be slightly different from the English approach. American Courts seem to have been discussing the responsibility of classification societies for a long time; whether they should be liable for conducting their surveys in an unacceptable manner. For instance, in 1960, District Judge Wright, while judging a collision case in the Mississippi River involving a Danish and a Panamanian Vessel (*Navegation Castro Riva S.A., v. M/S Nordholm*[535]) could not prevent himself commenting on the surveys conducted by the classification societies, despite the fact that the case did not actually involve one. His considerations were made because although the Panamanian vessel was in class, the shipowner producing classification evidence supporting the seaworthiness of the vessel, it was considered to be unseaworthy as it was improperly manned and underpowered. [536] The Judge stated: "It has been this [c]ourt's experience that classification societies often continue vessels in class long after their highest and best use would be as scrap"[537]. Further stating: "It is time that admiralty courts protect responsible shipping against old and underpowered, shadowy-owned tramps, flying the flag of any nation, and manned by flotsam of the world". [538]

Judge Wright's considerations about classification societies undoubtedly represent the time when his words were spoken. At the time, the Panamanian Register had recently been established and indeed its attractiveness was in its lax rules. The International Maritime Organization had been established only a few years before and

environment. Accordingly, this author believes that the concept of seaworthiness as regards seafarers should be given a broader spectrum than the one fit for cargo claim purposes

[535] 178 F. Supp. 736, 741-42, 1960 AMC 1875, 1882-83 (E.D. La. 1959), aff'd, 287 F.2d 398, 1961 AMC 2135 (5th Cir. 1961)

[536] See: *Ibid* at 741-72, 1960 AMC AT 1882-83, 739, 1960 AMC AT 1878-79, 739-40, 1960 AMC AT 1882-83

[537] *Ibid* (citing United Distillers of Am. V. T/S Ionian Pioneer, 130 F Supp. 647, 1955 AMC 1338 (E.D. La. 1955))

[538] *Ibid* at 742, 1960 AMC at 1883. On Appeal, the Fifth Circuit did not comment on the role of Classification Societies. See: *Navegation Castro Riva, S.A. v M/S Nordholm*, 287 F.2d 398, 1961 AMC 2135

the International Convention relating to maritime affairs which would become the UNCLOS 1958 was barely on its feet, hence it seems correct to say that maritime law was at that time quite unregulated on an international level. Nevertheless, the transboundary element of shipping was already present, flags from other nations, as well as seafarers. Furthermore, Judge Wright's speech demonstrates that even then classification societies were considered an important part of the maritime industry, for the prevention of substandard shipping.

One of the earliest recorded cases discussing liability of a Classification Society dates to 1933, the *American Bureau of Shipping v. Allied Oil Co*.[539] In the case, the United States Court of Appeal for the Sixth Circuit held the Classification Society liable for falsely certifying a vessel as being in excellent condition. The court reasoned that the Classification Society owed damages because it had merely undertaken a cursory inspection of the vessel as opposed to its assurance of thorough diligence.[540]

In 1972, in another early case discussing the liability of classification societies, the United States District Court for the Southern District of New York noted that a Classification Society assumes a duty to exercise reasonable care in discovering and notifying client of defects when it undertakes to survey a vessel.[541]Even though the court was discussing classification societies' liability to a shipowner or charterer, and not third parties, it demonstrated an inclination towards finding classification societies

[539] *American Bureau of Shipping v. Allied Oil Co* 64 F.2d 509, 1933, AMC 1217 (6th Cir. 2003)

[540] Robert G. Clyne & James A. Saville, Jr., Classification Societies and Limitation of Liability, 81 Tul. L, Rev. 1399 (2007), pp 1405-06

[541] *Great Am. Ins. Co. v. Bureau Veritas,* 338 F. Supp.999. 1013, 1972 AMC 1455, 1472 (S.D.N.Y. 1972) - The court outlined two duties that Classification Societies owed their clients; "to survey and classify vessels in accordance with rules and standards established and promulgated by the society for that purpose" and to provide "due care" in searching for a vessel's defects in her survey and in communicating the inspection result (at 1011-12, 1972 AMC at 1472) The court suppressed the notion of liability under the first duty reasoning that is a ship owner's "non-delegable duty to maintain a seaworthy vessel" , which would prevent any recovery under this theory(at 1012, 1972 AMC at 1472). Nevertheless, the court acknowledged the possibility of liability arising out of the duty of "due care", opening the door to recovery for "failure to detected or warn" but that there was insufficient evidentiary support in this regard (at 1012-13, 1972 AMC at 1473-74).
See also: Gulf Tampa Drydock Co. v Germanischer Lloys, 634 F.2d 874, 878, 1982 AMC 1969 (5th Cir. 1981) (holding that a Classification Society owes a shipowner the duty of determining whether a ship meets the society's standards of seaworthiness)

liable in tort. Nevertheless, based on the same premise as held in UK Courts that the seaworthiness of a vessel is a non-delegable duty of the shipowner, USA Courts had shown resistance in allowing this cause of action to proceed against classification societies. The courts partially feared that imposing tort liability on classification societies would obliterate the "ancient, absolute, responsibility of an owner for the condition of his ship."[542]

Classification Societies' liability has been addressed by the United States Court of Appeals for the Second Circuit several times. In *Sundance Cruises Corp. v. American Bureau of Shipping*[543], while considering whether a classification society could be held liable for certifying a vessel as seaworthy in violation of its own rules, the court made reference to distinguishing a contractual party from a third party when assessing the liability of a classification society. The court in the *Sundance* granted a summary judgment to the defendant and explained two of the most popular arguments against imposing liability on classification societies (the fees charged by classification societies are significant less than the amount of a possible damages award, which would indicate that it was not the intent of the parties to hold the classification society liable and affirm the proposition that a shipowner has a non-delegable duty to ensure the seaworthiness of the vessel[544]) but not without stating that the case "must be distinguished from a suit brought by an injured third party who relied on the classification". [545]The court observed that if the plaintiff had been in the position of an injured third party rather than the client of the defendant, recovery would have been possible. The court's

[542] *Great Am. Ins. Co*., 338 F. Supp. At 1012, 1972 AMX at 1472. See also: Rory B.O. Halloran, 'Otto Candies, L.L.C. V Nippon Kaiji Kyokay Corp.: In a Novel Decision, the Fifth Circuit Recognizes the Tort of Negligent Misrepresentation in Connection with Maritime Classification Societies and Third Party Plaintiffs' in 78 Tul. L. Rev. 1377 2003-2004, p. 1391

[543] *Sundance Cruises Corp. V. American Bureau of Shipping* 7 F. 3d 1077, 1080, 1994 AMC 1, 3-4 (2d Cir, 1993)

[544]In the *Great American Insurance Co*. 1994 AMC at 11

[545] *Ibid* at 26

observation led to the conclusion that a classification society may be found liable in tort as against a third party,[546]particularly, perhaps, a seafarer.

A renowned US maritime law professor, who happened to also be a practising US attorney, specialising in admiralty law as well as in product liability, when analysing the *Sundance Cruises*, drew a comparison between the two areas of law and reached the conclusion that court's concern regarding the disparity between the fee charged by a Classification Society and the resultant exposure although "relevant and understandable, is perhaps overwrought".[547] The reasoning was founded in the fact that a survey typically costs several thousand dollars and during a vessel's life, the fees paid to classification societies my run into hundred thousand dollars, and US courts have never shown too much concern for the disparity between price and liability in product liability cases, for instance in the case of a lawnmower for which the price may be quite low but the damage award for severing a foot due to a design defect may be quite high. [548]It is not the intention of this thesis to produce an in-depth analysis of tort liability cases which would be similar to those of classification societies and to draw comparisons. Nevertheless, the analysis made by the distinguished US Attorney might demonstrate not only the perhaps narrow view of the US courts in relation to the disparity between classification societies' fees and a subsequent damages claim, but also the reasoning behind the probable acceptance of liability in cases of an injured party, which seems to share similarities with tortious claims arising in product liability cases.

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[546] Rory B.O. Halloran, 'Otto Candies, L.L.C. V Nippon Kaiji Kyokay Corp.: In a Novel Decision, the Fifth Circuit Recognizes the Tort of Negligent Misrepresentation in Connection with Maritime Classification Societies and Third Party Plaintiffs' in 78 Tul. L. Rev. 1377 2003-2004, p. 1391

[547] Machale A. Miller, 'Liability of Classification Societies from the perspective of United States Law' in Tulane Maritime Law Journal Vo. 22, 1997, p. 98 The author is a partner at Miller and Williamson LLC, firm based in New Orleans, who specializes in Civil Practice; Admiralty Law; Products Liability; Insurance Litigation; Commercial Litigation; Trial Practice; Arbitration, had being a maritime law professor at Tulane University for many years.

[548] *Ibid*

The reasoning of the *Sundance Cruises* seems to be in agreement with previous decisions establishing classification societies' liability to an injured third party. In *Psarianos v. Standard Marine, Ltd*.[549], a jury found a Classification Society liable to seafarers and descendants of the deceased crewmembers of a vessel that sank due to unseaworthy conditions of which the Classification Society was or should have been aware. Thus, it was determined that the Classification Society acted negligently.

The decision in *Sundance Cruises Corp.* can be considered not only more in line with previous court decisions, but also as a broader and more evolved decision (despite ruling in favour of the classification societies) than the one reached in the *Great American Insurance*[550], as the former recognized the possibility of third party liability in cases of a physically injured party. In the latter case, the court whilst analysing the non-delegable duty of seaworthiness, stated that recognition of a cause of action classification societies, as against third parties, could undermine the shipowner's traditional role in warrantying a vessel's seaworthiness, observing as follows:

> "The unstated policy underlying the decisions not to allow surveys and classifications to operate as defenses to the duty of providing a seaworthy ship is clearly to preserve the ancient, absolute responsibility of an owner for the condition of his ship. This is evidenced by the fact that, were such surveys and classifications allowed to constitute a due diligence defense, the accountability of owners for the seaworthiness of their vessel for all practical purposes would evaporate. <u>This in turn, would have the effect of leaving injured seamen and shippers with no effective effect in most cases</u>." (Emphasis added)

Therefore, in the *Great American Co*, the court wrongly concluded that attributing to the Classification Society any sort of liability would diminish the right of

[549] *728 F. Supp.438, 1990 AMC 139* (E.D. Tex. 1989)
[550] 1994 AMC at 11

recourse of injured third parties, in particular seamen and shippers, which does not seem to be an entirely correct approach in the case of seafarers considering that shipowners have a direct responsibility towards these to provide them with a safe place of work[551], i.e. a seaworthy vessel. Thus, the Classification Society's liability would only be an indirect one, not undermining the main responsibility of the shipowner. Thus, recognizing this indirect liability would merely allow the seafarer a lawful recourse to claim for his rights, if violated, against a further party. The liability of a third party in tort would not seem to eliminate a direct responsibility, in particular a contractual one.

It is important to note that many of the Classification Society third party liability cases in the US have been settled out of court. For example, a 1991 case brought against the Classification Society Germanischer Lloyd in connection with the sinking of a vessel. The cargo claimants sought to recover from Germanischer Lloyd the difference between their actual losses and the package limit. The case ended with Germanischer settling with the cargo claimants for a substantial amount.[552]

Nevertheless, it is unquestionable that US Courts have always showed a more linear approach than courts elsewhere in establishing third party liability of classification societies.[553] The courts there have ruled as weak the argument of some classification societies, namely that clauses in their rules provide that their only client is the shipowner and that they make no representations to third parties, hence not being responsible for the losses suffered by them. Indeed, even if the classification society is not bound by contractual law to a third party, nothing prevents there being liability in

[551] For instance, in the UK, a distinctive consequence of the employment relationship is the employer's extensive duty (both at common law and by Statute) to take measures to protect the health, safety and welfare of his employees, and to provide safe equipment and premises, and a safe system of working. In the UK, according to the Health and Safety at Work Act 1974 (HSWA) Section 2 (1) there is an offence (both for individual and corporations) of failing to ensure, so far as reasonably practicable, the safety and welfare at work of employees. Therefore, it can be understood that the shipowner has a duty to provide the seafarer with a seaworthy vessel.

[552] Machale A. Miller, 'Liability of Classification Societies from the perspective of United States Law' in Tulane Maritime Law Journal Vo. 22, 1997 , pp 98-99

[553] *Ibid*, pp 110-111

tort. Most importantly, the courts perceived these clauses as being against public policy[554] hence sharing a similar view to that of this author.

In *Otto Candies, L.L.C v Nippon Kaiji Kyokai Corp*[555], the American Courts, differently from the UK courts, recognized the tort of negligent misrespresentation in cases involving classification societies and third parties. The case is considered a 'turning point' in the decision of classification societiy third party liability issues in the USA.

The US case differs from the UK case mentioned above, as the purchase of the vessel was conditional upon the Classification Society surveys. The plaintiff (Otto) engaged in a Memorandum of Agreement to purchase the M/V Speeder from Diamond Ferry Co., depending on NKK (the Classification Society) restoring the ship's class, which was duly done. After NKK issued the required Class Maintenance Certificate, Otto paid the agreed sum for the purchase of the vessel.[556]

The vessel was then transported from Japan to the USA, where it was inspected by a new Classification Society, the American Bureau of Shipping (ABS) for the purpose of transferring the vessel's classification from NKK to ABS. However, upon inspection ABS's surveyor accounted for numerous and significant deficiencies requiring repair before a class certificate could be issued for the vessel. The repairs were eventually made at the plaintiff's expense and a class certificate was issued. Consequently, Otto filed a suit in the US federal district court against NKK to recover the repair costs. The court held that NKK owed a duty to Otto, hence it was liable for negligent misrepresentation. Upon Appeal, the court of Appeal held that a third party is capable of bringing a claim of negligent misrepresentation against a maritime

[554] See, e.g., *Royal Embassy of Saudi Arabia V S.S. Ionnis Martinos*, 1986 AMC 769 (E.D.N.C. 1984); See also the discussion of exculpatory clauses in Charles M. Davis, Maritime Law Deskbook 318 (1997)
[555] *Otto Candies, L.L.C. v Nippon Kaiji Kyokai Corp.*, 346 F.3d 530, 532, 2003 AMC 2409, 2410 (5th Cir. 2003)
[556] *Ibid* at 532-33, 2003 AMC at 2410-11

Classification Society based upon statements made in a classification survey conducted as a prerequisite to the sale of the vessel.[557]

In the USA, Section 552 of the Restatement (Second) of Torts provides for the Tort of Misrepresentation.[558] Accordingly, the cause of action is to "[impose] liability on suppliers of commercial information to third persons who are intended beneficiaries of the information"[559], hence limiting the potential class of plaintiffs to those the supplier of the information "intends to benefit". The Act recognizes that the flow of commercial information is a critical component of transacting business that should not be impeded by excessive tort liability.[560] Furthermore, in the case of classification societies, negligent misrepresentation can be used as a cause of action against other commercial entities[561], including accounting firms and investment banks.[562] The Fifth Circuit while judging Otto Candies undertook a straight forward application of section 552 id Restatement (Second) of Torts to the facts of the case, reaching the conclusion that NKK owed Otto a legal duty and that it had acted negligently, hence it was liable for Otto's pecuniary losses.[563]

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[557] *Ibid*

[558] Restatement (Second) of Torts § 552 (1977). Section 552 states in relevant part:
Information Negligently Supplied for the Guidance of Others

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) Through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction

[559] Billy v. Arthur Young & Co., 834 P.2d 745, 752 (Cal.1992) (en banc).

[560] Restatement (Second) of Torts § 552 cmt. a

[561] See *Scottish Heriatable Trust, PLC v. Paet Marwick Main & Co*., 81 F3d 606, 609 (5th Cir.1996) (naming Peat Marwick as a defendant in its capacity as an auditor)

[562] See Great Plaints Trust Co. v. Morgan Marwick Main & Co., 81 F.3d 606, 609 (5th Circ. 1996) (naming Morgan Stanley and two of its employees as defendants in their capacity as advisors to a merger party)

[563] *Otto Candies, L.L.C. v Nippon Kaiji Kyokay Corp*. , 346 F.3d 530, 535, 2003 AMC 24902, 2414 (5th Cir. 2003) at 2410

Nevertheless, the Fifth Circuit also observed the dangers inherent in maritime commerce imposing tort liability on classification societies and emphasized that the finding in the noted case should be "strictly and carefully limited".[564]

Therefore, the Fifth Circuit made a sensible extension of well-settled US jurisprudence, by taking into consideration the decisions *in Great Plain, First National, and Scottish Heritable Trust,* in a novel way. The court when analysing the mentioned cases found a framework, which could easily be applied to the case in hand. It wisely restricted the reach of its decision recognizing that this was a unique case that fit section 552 perfectly[565], insuring that its decision would not be understood as attributing to classification societies the role of insurers of the vessel's seaworthiness. Thus, classification society liability cases should be judged on a case by case basis, being fact specific. This suggests that the Fifth Circuit decision has not opened up a wide precedent for cases involving classification societies' alleged liability to third parties.[566]

It is important to note that even before the *Otto Candies* case, courts already recognized the applicability of the tort of negligent misrepresentation to classification societies. This should not be a surprise since general US maritime law, which governs all third party injury claims, recognized such a tort as formulated in the Restatement. For instance, in *Coastal (Bermuda) Ltd V E. W. Sabolt & Co*.[567], the United States District Court for the Eastern District of Louisiana recognized that a purchaser of fuel oil has a cause of action based upon negligent misrepresentation against an independent surveyor who issues an analysis of the purchased commodity at the request of the seller. The court based its decision on section 552 of the Restatement. The tort has also been accepted in cases of strict liability, such as in Royal *Embassy of Saudi Arabia v. S.S. Ioannis Martino[568]s*, The United States Court for the Eastern District of North Carolina,

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[564] *Ibid* , at 534-35, 2003 AMC at 2412-13
[565] *Otto Candies*, 346 F.3d. at 532, 2003 AMC at 2410
[566] Rory B.O. Halloran, 'Otto Candies, L.L.C. V Nippon Kaiji Kyokay Corp.: In a Novel Decision, the Fifth Circuit Recognizes the Tort of Negligent Misrepresentation in Connection with Maritime Classification Societies and Third Party Plaintiffs' in 78 Tul. L. Rev. 1377 2003-2004, p. 1398
[567] 826 F.2d 424, 1988 AMC 207 (5th Cir.1987)
[568] 1986 AMC 769 (E.D.N.C. 1984)

quoting section 552 of the Restatement, accorded a shipowner a cause against the cargo underwriter's surveyor who allegedly failed to use due care in the detection of defects in the surveyed vessel.

The importance of this recognition, as pointed out by Prof. Miller, and as can be noted from *Otto Candies,* is that "from a conceptual perspective, claims of injured third parties against classification societies fit the Restatement's concept of negligent misrepresentation like a glove."[569], and the author concurs with this statement of Professor Miller. The private role of classification societies can be considered at a minimum to be a pivotal element for the ensuring of seaworthiness of vessels. Although the primary and ultimate responsibility for maintaining the vessel's seaworthiness belongs to the shipowner, classification societies are the ones in charge of setting standards and rules that need to be met to ensure that the vessel is fit for its intended purpose. Moreover, classification societies are also in charge of ensuring if the shipowner is designing, constructing, maintaining and repairing its vessel in accordance with those rules and standards, acting as independent policemen of the sea. Thus, classification societies expect third parties to rely on their certificates that, undoubtedly, will be passed to them by the shipowner. And the same is true for certificates issued when CSs are performing their public role, acting as an RO – Third Parties shall rely on these certificates in determining if the vessel is in compliance with international conventions, as these certificates most of the time are considered *prima facie* evidence of compliance. Indeed, one of classification societies' primary purposes and functions is to provide assurance from an independent source to third parties. To this end, American Bureau of Shipping (ABS) declared its mission to be: "To serve the **public interest** as well as the needs of our members and clients by promoting the security of life and property, and preserving the natural environment."[570](Emphasis

[569] Machale A. Miller, 'Liability of Classification Societies from the perspective of United States Law' in Tulane Maritime Law Journal Vo. 22, 1997, p. 104

[570] ABS, *The Spirit of ABS*, (ABS Publications 2013) <http://ww2.eagle.org/content/dam/eagle/publications/2013/SpiritofABS.pdf >, last accessed on 08/08/2016 It must be noted that ABS mission also assist understanding the examples brought on this thesis and the use of a parallel with substandard shipping to determine third parties liability to cases of abandonment of seafarer.

added). Thus, it is undeniable that classification societies are aware of third party reliance on their services.

Indeed, the applicability of Sections 311 and 552 of the Restatement (Second) of torts to the question of classification societies' liability to third parties is undeniably appropriate. Section 311 expressly establishes that third parties shall have a cause of action when the party making a representation should expect to imperil a third party in case of a negligent or deficient representation.[571] Whereas section 552 confers a cause of action upon a third party for pecuniary loss when the party making the negligent misrepresentation knows that the recipient intends to supply the information to a third party[572], i.e. when a Classification Society is aware that a third party will rely on its survey, which as has been shown is nearly always the case. It is interesting to observe how the Restatement provides for torts committed against third parties. However, it is necessary to highlight that the third parties referred to by the Restatement are Third Parties in contract, not in tort.

Nevertheless, not all sections of the Restatement when applied by the U.S. courts have found a favourable decision in establishing classification societies' liability towards third parties. In the *Amoco Cadiz*[573], the court applied section 324A of the Restatement and eventually ruled in favour of ABS, the Classification Society involved in the case. [574]However, the Amoco Cadiz can be considered, to a certain extent, to be a unique case.

The Amoco Cadiz was an oil tanker that ran aground off the coast of France and spilled its cargo of crude oil, Amoco affiliates subsequently being found liable for negligent design and construction of the vessel.[575] The difference in the Amoco Cadiz

[571] Restatement (Second) of Torts § 311 (1965)
[572] *Ibid*. § 552
[573] *Amoco I*, 1984 AMC at 2188-89 and *Amoco II*, 1986 AMC at 1951
[574] *Amoco II*, 1986 AMC at 1952
[575] In Re Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978 ("Amoco I"), 1984 AMC 2123, 2124 (N.D. III) at 2191-94

case, and in this author's opinion a significant one, was that the owner of the vessel, and not an injured third party, filed a claim against ABS seeking indemnity and contribution from the latter.

When deciding on the merits of the case, the court concluded that ABS "did not contract with Amoco, impliedly or otherwise, to assume all the liability of the Amoco in the event of the ship's failure.[576]"When addressing the claimant's arguments for indemnity based on the Supreme Court's decision in *Ryan Stevedoring Co. v Atlantic Steamship Corp*[577], the court reasoned that unlike "the situation in the *Ryan*, the workmanship which caused the injuries for which Amoco has been found liable was not entrusted solely to ABS."[578] Thus, granting summary judgement to ABS, consequently rejecting Amoco's indemnity claim.

However, the most important aspect of the Amoco case was the analysis of the claim under section 324A of the Restatement (Second) Torts, where the district court stated in relation to this section:

> "a party is liable to third parties only if its failure to exercise reasonable care increases the risk of harm, if it has undertaken to perform a duty owed by the other party to the third party[,] or if the harm is suffered because the other party or the third party relied upon the undertaking"[579]

The court reasoned that risk is not increased "in the absence of some physical change to the environment or some material circumstances" and that "failure to detect already existing dangerous conditions cannot be said to increase the risk in any real or logical manner".[580] Moreover, the court reasoned that if the shipowner is aware of the

[576] *Amoco II*, 1986 AMC at 1951
[577] In the *Ryan*, the court held that the shipowner was entitled to reimbursement from the contractor for the amount of the judgment against the shipowner on a third-party complaint against the contractor. 350 U.S. 124, 1956 AMC 9 (1956)
[578] *Amoco II*, 1986 AMC at 1952
[579] *Ibid*, at 1953
[580] *Ibid*

defects or deficiencies, he does not reasonably rely on the Classification Society survey hence there is no causation or recovery on tort claim.[581] The court ruled that:

> "when the shipowner has prior knowledge of its vessel's defects, certification by a Classification Society does not establish the seaworthiness of a ship or the lack of negligence on the part of the shipowner."[582]

Nevertheless, the court declined to grant summary judgment to ABS, because it concluded that there were unresolved "questions of fact exist regarding Amoco's reliance on ABS's undertaking."[583]

Indeed, the decision seems to be the correct application of section 324A of the Restatement, however the court failed to address the issue of Classification Society's general liability towards third parties. The case makes one wonder if the decision may have been different if a third party would have filed the claim instead of the shipowner.[584] It is the view of this author that the most likely answer to that is 'yes'. The court essentially ruled that the shipowner could not avoid his responsibility in keeping the vessel seaworthy, which is a settled matter, but it recognized that there were doubts about ABS's representation.

It must be noted that section 324A of the Restatement is limited to "physical harm" to persons or their "things", and it does not allow third parties to recover economic loss. Moreover, any liability under the section requires the defendant to recognize that its undertaking is "necessary for the protection of" persons other than

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[581] For further discussion see: France, Classification Societies: their liability – an American lawyer's point of view in light of recent judgments, 1 I.J.S.L. 67(1996), at 74

[582] In the Matter of Oil Spill by the Amoco Cadis 954 F. 2d 1279 (7th Ci. 1992)

[583] *Amoco II*, 1986 AMC at 1954

[584] For further discussion on the case see: B.D. Daniel, 'Potential Liability of Marine Classification Societies to Non Contracting Parties' in 19 U.S.F. Mar. L.J. 183 2006-2007, pp. 254- 56 and Nicolai I Lagoni, *The Liability of Classification Societies,* Hamburg Studies on Maritime Affairs (Springer: 2007), pp 95-97

owners or their things. [585] The section addresses potential liability to third parties for "negligent performance of an undertaking" providing as follows:

> " One who undertakes, gratuitously or for consideration, to render services to another which he should recognise as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking:
>
> (a) His failure to exercise reasonable care increases the risk of such harm, or
> (b) He has undertaken to perform a duty owed by the other to the third person, or
> (c) The harm is suffered because of reliance of the other or the third person upon the undertaking"

Considering that classification societies do recognise the importance of their services for the safety of life at sea, the section could perhaps apply to cases of injured seafarers or ones whose lives were lost at sea. Nevertheless, due to a lack of case law on the matter, this cannot be confirmed. Furthermore, some academics and practitioners might disagree about the applicability of the section due to the shipowner's non-delegable duty to provide a seaworthy vessel and considering the decision taken in the Amoco Cadiz. [586]However, the decision of the Amoco has its particularities, as already pointed out, and the claim did not concern harm caused to others hence it leaves room for speculation regarding a different outcome in the case of a seafarer or his/hers family filing the suit. Plus, this author believes that the shipowner's absolute and non-delegable duty to provide a seaworthy vessel cannot always be used as an excuse or motivation for excluding liability of classification societies. Moreover, as already seen previously, U.S. Courts have already held that some decisions excluding third party

[585]*Ibid*, page 277
[586] *Ibid*, 276-77

liability of classification societies could have been decided differently if the claimant had been an injured third party.

Due to the American Courts' more linear position in holding classification societies liable in tort for losses caused to third parties and the prospect of punitive damages, it is not uncommon for non- U.S. citizens to bring such cases to American Courts. Therefore, it is no surprise that the American courts have applied many times the doctrine of *forum non conveniens* in order to dismiss actions. This was the case of the *Marika*[587], where Relatives and personal representatives of the deceased Greek crew members who died in the Liberian flagged vessel's demise in international waters sought compensation from the shipowner and ABS (which is an American company) in U.S. Courts under the Death of High Seas Act (DOHSA) and general maritime law. The court reasoned that all the allegedly critical events responsible for the sinking of the vessel had taken place in Greece, as they had been conducted by the Greek ABS office. Thus, the action was dismissed by the District Court on the grounds of *forum non conveniens*. Furthermore, it could be said that it was not in the best interests of the United States to allow a case brought on behalf of Greek seafarers, employed by Greek shipowners, who sailed aboard a Liberian vessel and were exclusively engaged in carrying cargos to and from non- United States ports. [588]

U.S. courts also applied foreign law to some cases, such as in the case of *Carbotrade*[589]. The case concerned the loss of the vessel Star Alexandria. The charterer brought an action on its own behalf and as assignee of a subcharterer against Bureau Veritas (BV) to recover for loss of cargo after the vessel sank, alleging that BV should have withdrawn the vessel's class due to the condition of the ship. Several instances of proceedings oversaw debate of the law applicable to the case. In the first instance, the

[587] *Ioannides et al.v Marika Maritime Corp. et. A*l., 928 F. Supp. 374 (S.D.N.Y. 1996)
[588] *Ibid.*at 377 ff. See Also Basedow, Supra n. p 26
[589] *Carbotrade v. Bureau Veritas*, 901 F. Supp. 737 (S.D.N.Y. 1995) –*Carbotrade I*
Carbotrade v Bureau Veritas, 99 F. 3d 86 (2nd Cir. 1996) – *Carbotrade II*
Carbotrate V. Bureau Veritas, 1999 WL 714126, no.92 Civ.1459 JKNG (S.D.N.Y. 1999) – Carbotrate III
Carbotrade v Bureau Veritas, 216 F. 3d 1071 (2nd Cir. 2000) – *Carbotrade IV*

District Court of the Southern District of New York held that the applicable law should be of the Flag State. Thus, since the vessel was registered in Gibraltar, the applicable law should be British law, which provides that the Classification Society is not liable to the charterer and cargo owner under tort law. However, the court of Appeals of the Second Circuit disagreed and overturned the District Court decision. After carefully analysing the case and applying the *Lauritzen* test[590], the court of Appeal decided that the law of Greece should be applied. The court took into consideration the fact that the defective certificate had been issued after inspection in Greece, carried out by Greek ABS office employees. Besides, the actual shipowners, different from the vessel's paper owners, were Greek. Thus, upon remand the District Court applied Greek Law to the case and assessed liability hence applying article 914 of the Greek Civil Code. The

[590] The *Lauritzen* test was set in the case *Lauritzen v. Larsen*, 345 US 571 (1953), where the United Supreme Court applied Danish Law utilizing a multifactor choice of law test. The court reasoned that seven factors determined the choice of law:

- The place of the wrongful act;
- The law of the flag;
- The injured party's allegiance or domicile;
- The defendant shiponwer's allegiance;
- The place of contract;
- The inaccessibility of a foreign forum; and the law of the forum

Based on these factors the court decided that the "overwhelming preponderance [of factors] in favor of Danish law" (at 592, 1953 AMC at 1226) militated against the application of U.S. Law. (The case was about a Danish seafarer working for a Danish registered and owned vessel, who had suffered a negligent injury in the Port of Havana-Cuba while on board and employed on the ship. His contract of employment also provided for the applicability of Danish Law). After the case, U.S. Courts started to apply the Lauritzen test in order to determine the applicable law hence assessing the seven factors and determining which law they weighed in favour of.

The Lauritzen test was applied in several maritime cases. In Romero v. International Terminal Operating Co., the court faced a similar situation as in Lauritzen, foreign actors and locales seeking to invoke the Jones Act. The court ended up applying Spanish law by using the Lauritzen factors, which accordingly provided an ample framework for denying the application of U.S. Law.(358 U.S. 354, 383-84, 1959 AMC 832, 855 (1959)).

Nevertheless, in a later case, the *Hellenic Lines Ltd. V Rhoditis* (398 U.S. 306, 308, 309 1970 AMC 994, 996 (1970)), the court found that the *Lauritzen* factors were not enough to solve the question of applicable law. The court clarified that the Lauritzen was not a "mechanical [test]". Thus, the court added an eighth factor to the test: the shipowner's base of operations. (at 309, 1970 AMC at 997-97) Since then lower courts have constantly applied the eight factor to determine maritime choice of law. (See: *Cooper v. Meridian Yachts*, Ltd, 575 F 3d, 1151, 1172, 2009 AMC 1652, 2677-78 (11th Cir, 2009)

See also: Imran Naeemullah, A Decade Later, $1 Billion Saved: The Second Circuit Relieves a Maritime Classification Society of Unprecedented Liability for Environmental and Economic damages in *Reino Unido de Espana v American Bureau of Shipping, Inc*., Tulane Maritime Law Review Vol. 37:639, 2013, p.64

court eventually dismissed the case on the merits since the plaintiffs failed to establish a causal link between the negligent act and the vessel's demise.[591]

The *Lauritzen* test was also applied in a more internationally famous incident; the Prestige. The Prestige[592] was an oil tanker that sank in 2002, 140 miles off the coast of Spain due to internal structural failure (a crack in its hull). The vessel's cargo, a hazardous fuel oil, spilled into the ocean, washing onto Spain's beaches and coastline. Barred by shipowner liability limitations and seeking to recover compensation for the damages caused by the sinking of vessel, which were excessive, Spain filed a suit against the American Bureau of Shipping (ABS), which had classified the vessel throughout her career on behalf of her owner.[593]

Spain claimed that ABS's classification services, among other things, provided reassurance to the Prestige's owner of the vessel's integrity, in conformity with ABS's "applicable rules and requirements"[594], formalizing it by the issuance of a classification certificate. Moreover, Spain highlighted the role of classification societies, maintaining that organizations like ABS "form crucial links in the maritime safety chain" [595]and as such owed a duty to perform classification surveys with due care. Spain acknowledged that policy considerations carried a presumption against the negligence claim hence it detailed five key action by ABS as proof of *reckless* conduct:

1. Not implementing changes to ABS's classification rules;
2. Mishandling sophisticated computer reports;
3. Proceeding with classification after a cursory review of a field of office report;
4. Ignoring a "red alert" fax from the Prestige's then master;

[591] *Carbotrade III*, approved in *Carbotrade IV*. See Basedow Supra n., pp 26-27
[592] *Reino de Espana v American Bureau of Shipping, Inc*., 691 F.3d 461, 463, 467, 2012 AMC 2113, 2116, 2122 (2d Cir, 2012)
[593] See also: Naeemullah, Supra n. , pp 639-640
[594] *Ibid* at 462, 464, 2012 AMC at 2114, 2116
[595] *Ibid* at 462-63, 2012 AMC at 2114-15

5. Operating with international management issues. [596]

The case was a particularly lengthy one, lasting almost ten years. The case's convoluted procedural history is important in this case, and was described by Naeemullah as "a tactful, yet firm, repudiation of Spain's claim.[597]Five years after the initial filing in 2003, the District Court for the Southern District of New York finally granted summary judgment for ABS due to lack of subject-matter jurisdiction. In the following year, the court of Appeal for the Second Circuit vacated by summary order the lower court's decision. In 2010, in remand, the District Court granted summary judgment for ABS once again, based on the fact that U.S. maritime law did not impose on ABS the claimed tort duty in favour of Spain. In 2012, a decade later after the sinking of the Prestige, on a second Appeal, the Second Circuit held that Spain did not "establish a genuine dispute of material fact as to whether ABS recklessly breached any duty that [it] might owe to Spain", reaffirming the lower's court's decision to grant summary judgment for ABS.[598]

The Second Circuit held that a third party, in the case a Coastal State , failed to meets its burden of proof in establishing a claim of reckless conduct hence preventing a tort recovery from a Classification Society for the environmental and economic damages caused by the sinking of the vessel classed by them.[599] First of all, the court noted that unspecified "policy interests", accepted by the plaintiff, prevented the application of the ordinary negligence standard suggested by precedent, hence the use of a recklessness standard.[600] The court proceeded to analyse the case in order to determine the applicable law by applying the *Lauritzen* test. Thus, it was established

[596] *Ibid* at 462 - 74, 212 AMC at 2120. See also: Naemullah Supra n. p 640
[597] Imran Naeemullah, 'A Decade Later, $1 Billion Saved: The Second Circuit Relieves a Maritime Classification Society of Unprecedented Liability for Environmental and Economic damages in *Reino Unido de Espana v American Bureau of Shipping, Inc*.' in Tulane Maritime Law Review Vol. 37:639, 2013, p. 640
[598] *Reino de Espana VAmerican Bureau of Shipping. Inc*, 691 F.3d 461, 476, 2012 AMC 2113, 2116 (2d Cir. 2012)
[599] *Ibid* at 463, 2012 AMC at 2115
[600] *Ibid* at 466-67, 2012 AMC at 2121

that "the *Prestige* was flagged in the Bahamas; that the injured party [was] domiciled in Spain [and] the ship operator [was] domiciled in Liberia" but operated out of Greece; and that ABS was a U.S. corporation with its principal place of business in the United States. The court noted that the *Lauritzen* test did not neatly point in a single direction but militated towards the application of U.S. law.[601] Thus, the court dismissed ABS 's contentions that the law of the flag (Bahamas) was the applicable one and held that U.S. law should govern the case. The court observed that Spain's choice of law argument, though advantageous as it would enable Spain the possibility of recovery under the more liberal U.S law rather than the law of a more restrictive jurisdiction[602], was not a "mere litigation tactic" as pledged by the defendants. [603]

After determining the applicable law, the court started to analyse the merits, specifically whether Spain had produced enough evidence to support its claims in the face of the district court's granting summary judgment for ABS. The court, in order to facilitate its analysis, assumed that a basis for recovery existed.[604] Once this assumption had been established, the court cited the Supreme Court in *Farmer v. Brennan* to define its standards of recklessness: "[Did] the defendant … disregard [] an unjustifiably high risk of harm to another caused by the defendants actions... that was obvious and thus should have been known to the defendant [?]" [605]The following discussion focused on evaluating the facts accompanying Spain's five primary contentions in the context of the recklessness standard. Remarkably, this particular discussion neglected an analysis of the facts, opting for using Classification Society precedents.[606]

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[601] *Ibid* at 467-68, 2012 AMC at 2122-23

[602] Spanish law protects Classification Societies to an even greater extent than the United State does, hence a judgement in favour of Spain would be less likely under its law. However, the court when determining choice of law attempted to protect Spanish relation and establish important choice of law precedent. The court although acknowledging ABS's claim that the U.S. law was a "mere litigation tactic, it undertook the *Lauritzen* analysis however disregarding numerous conclusive factors in order to determine that U.S. law would apply. (*Reino de Espana v American Bureau of Shipping*, 691 F.3d at 467-68, 2012 AMC at 2121 -23)

[603] *Ibid* at 468, 2012 AMC at 2124

[604] *Ibid* at 468-69, 2012 AC at 2124

[605] *Ibid* at 468, 2012 AMC at 2124

[606] See Imran Naeemullah, 'A Decade Later, $1 Billion Saved: The Second Circuit Relieves a Maritime Classification Society of Unprecedented Liability for Environmental and Economic damages in *Reino*

Initially, the court reviewed the charge that ABS had failed to implement proposed changes to its classification rules, examining three issues in particular: requiring annual inspections of ballast tanks, requiring two surveyors at special surveys, and mandating use of "SafeHull" computer technology. [607]All three assertions were dismissed by the court, which reasoned that no reasonable jury could find recklessness or wrongful conduct, besides, insufficient evidence existed to support a jury's finding on the point of recklessness. Furthermore, with regards to the last issue, the court noted that ABS's failure to use SafeHull was standard industry practice. This finding of the court weighed heavily against Spain.[608]

The court followed by analysing Spain's second key allegation that ABS recklessly handled results obtained from SafeHull analyses on similar vessels. The court reached the conclusion that Spain did not demonstrate sufficient similarity between the other ships and the Prestige to oblige the use of those particular analyses in relation to the handling of their vessel. [609]

Furthermore, the court decided that it was insufficient evidence that ABS reviewed a summary of the gauging report (which concerns the thickness of the steel in the vessel's structure) from its field office in Hong Kong, instead of looking at the full detail of the report, to conclude that ABS's conduct was reckless. The court found the three pieces of evidence Spain used in support of its assertions insufficient to prove anything other than mere negligence, whilst the test was 'recklessness'.[610]

When analysing the fourth core allegation, i.e. the fax sent by the Prestige's then master to ABS warning about the vessel's mechanical and structural issues, the court

Unido de Espana v American Bureau of Shipping, Inc.' in Tulane Maritime Law Review Vol. 37:639, 2013, pp 645-646

[607] *Ibid* at 469-71, 2012 AMC at 2125-28

[608] *Ibid* . See Also Naeemullah, Supra n. p. 646

[609] *Ibid* at 470-72, 2012 AMC at 2126-29

[610] *Ibid* at 472-73, 2012 AMC at 2129-30

focused on the master sending the fax to an ABS subsidiary, rather than directly to its executives. The court dismissed Spain's argument that the subsidiary's knowledge should be imputed [to ABS]" based on the lack of evidence that the fax had been forward to the society's appropriate management. The court reasoned, quite oddly, that even if it were assumed that the subsidiary was an ABS agent, there was no evidence that the fax fell within the scope of its responsibilities. Moreover, the court reasoned that even if it assumed otherwise, a jury would lack evidence to determine that the fax could "form the basis of any liability of ABS to Spain".[611]

Finally, the court examined Spain's contention of putative evidence of internal management disarray constituting reckless conduct. In order to reach a decision the court considered: the presence of the Prestige on an internal watch list; ABS's failure to heed one of its surveyor's recommendations; and a situation in one of ABS's field offices where management did not support a surveyor in a dispute with the vessel's operators over her condition.[612] The court succinctly concluded that once again the evidence was insufficient to create a genuine issue of material fact on recklessness, either separate or in aggregate. [613]

In conclusion, the court diplomatically acknowledged the injuries suffered by Spain, while ruling that there was not enough evidence to satisfy the standard for reckless conduct. Thus, by applying the *Farmer* recklessness standard, the court affirmed the district court's grant of summary judgment in favour of ABS. Nevertheless, the court carefully stated that it had not established a test for a third party, coastal nation, tort claim against a Classification Society, nor had it determined the viability of such a claim.[614]

[611] *Ibid*, 2012 AMC at 2133-34
[612] *Ibid*, 2012 AMC at 2134
[613] *Ibid* at 474-75, 2012 AMC at 2134
[614] *Ibid* at 475-76, 2012 AMC at 2136

The Second Circuit's decision is consistent with the traditionally protective approach towards classification societies, and it seemed to take into consideration the fact that the price charged by a classification does not permit the imposition of disproportionate liability on classification societies. Nevertheless, the decision in the *Prestige* strongly deviates from the court's recent decisions and reasoning in favour of permitting third-part claims against them. It appears that the value of the damage pledged in classification society liability cases has a heavy weight in the court's decision making process. The decision of the *Prestige* contrasts greatly with the decision taken in the *Erika*[615]. One of the relevant factors explaining this difference may be that the judgment in the Erika case took place in France, also being the place where the accident took place.[616]

Criticism regarding the *Prestige* decision contains various grounds. The fact that the court decided that U.S. law was the applicable law, disregarding numerous factors in a debatable diplomatic overture, might create a precedent for plaintiffs in similar cases trying to seek the advantages of U.S. law. Furthermore, the court's reasoning was unorthodox, as it did not make use of the extensive case law on the subject, relying almost exclusively on a single Supreme Court case, giving the Second Circuit the option of employing a different method of analysis, hence leading to different results in future cases. For instance, the court neglected using benchmark cases such as *Sundance Cruises* and *Otto Candies*. The latter could have been particularly helpful as it examined the *Great American* duty of due care; thus the Fifth's Circuit reasoning in this particular case could have been extremely helpful.[617]

Nevertheless, commentators believe that the decision in the *Prestige* is unlikely to have a permanent impact on classification societies' third part liability in cases of

[615] The *Erika* will be analyzed further along this work
[616] See: : Imran Naeemullah, 'A Decade Later, $1 Billion Saved: The Second Circuit Relieves a Maritime Classification Society of Unprecedented Liability for Environmental and Economic damages in *Reino Unido de Espana v American Bureau of Shipping, Inc*.' in Tulane Maritime Law Review Vol. 37:639, 2013, p.648
[617] *Ibid*, pp. 646-648

case against a Coastal State. Naeemullah pointed out three reasons why this is likely to be the case: "first, choice of law considerations played a significant role in the court's analysis; second, the court employed an unusual methodology in deciding this case by applying minimum precedent; and third, the court's reasoning, examined in the context of precedent, suggests a different result in a future third party coastal nation due care claim".

Indeed, the Second Circuit has in previous cases demonstrated its willingness to expand classification society liability in a third-party context. As already discussed in this paper, in *Sundance* the court implied that a third party reliance claim might be viable. In *Carbotrade*, the Second Circuit sufficiently broadened the scope of classification societies' liability to the extent that the Fifth Circuit was able to apply its reasoning in *Otto Candies*, holding a classification society liable to a third party claim. These courts decisions suggest that the Second Circuit could have ruled differently in the case of the *Prestige*, if Spain had produced more factual and evidential support. [618]

Naeemullah suggests that the *Prestige* decision left the position of classification societies' liability to third parties unclear in the U.S., as the court at the same time as it "continues a tradition protecting maritime classification societies from liability, adding some degree of stability", also "upends its typical approach to deciding classification society cases, omitting a discussion of precedent that could have, for example, provided context for the court's determination that a jury could not ascertain whether ABS acted recklessly in its handling of SafeHull analyses performed on vessels similar to the *Prestige.*"[619]

Regardless of the far from satisfactory decision reached in the Prestige case, from the above analysis, it can be perceived that the United States courts' decisions are more flexible, while still giving significant consideration to similar concerns raised by

[618] *Ibid* p. 653
[619] *Ibid*

the UK Courts' (i.e. reasonableness- specially considering cost and lack of insurance) approach to imposing third party liability on classification societies, especially regarding an injured third party, which an abandoned seafarer often will be.

IV.2.3 – France

The position of the French courts does not seem to differ much from the position of the two already analysed jurisdictions, with French commentators having expressed strong concerns regarding the imposition of third party liability on classification societies. Their concerns seem to follow a similar but perhaps more disorganized path of reasoning to the concerns expressed by the UK and US Courts. Indeed, French commentators believe that the imposition of such liability could turn classification societies in a form of secondary insurer (*assureur bis*) of the shipping industry, and that basing classification society liability towards third parties on the general clause of the French Civil Code[620] would be too severe, considering that the limitation of liability clauses negotiated by classification societies with their contracting parties may not be enforced vis-a-vis third parties. [621] Following this reasoning, some commentators suggest for classification societies to be placed under a quasi-contractual regime by relying on the doctrine of *essemble contractualles*, which provides that the duties towards a third party may be assessed in the light of a preceding contract even though the injured third party was not a party to the contract. [622]

A second stream of French commentary seems to suggest, sometimes with reference to German law, that since contracting parties may also have obligations towards particular third parties, they are entitled to damages when these are breached. However, since liability in this case would be based on a breach of a classification

[620] Almost the entirety of French Tort Law rests on five articles of the French Civil Code, the most important being the general clause contained in article 1382, complemented by article 1383. The first article requires that the harm caused must be attributable to a *faute*, culpable behaviour on the part of the defendant.
[621] Boisson, 'Responsibilite des societies de classification. Fault-it remettre en cause les principles du droit matime?'in [1995] DMF, pp. 109 -130
[622] *Ibid*

society's agreement, this would in principle entitle it to raise limitation of liability clauses agreed therein as defences against an action for damages brought by third parties.[623] In order to fully understand this argument it would be necessary to conduct a more thorough analysis of French Contractual law, which due to time constraints is not possible to be achieved in this thesis. At first, it is not clear how limitation of liability in the contract could apply to a third party, unless this was expressly provided in the contract. Indeed, it is difficult to make any type of assumption without a more detailed analysis of French law, however it seems to be a fragile attempt to avoid the argument that imposition of third party liability on a Classification Society would create an imbalance within the shipping industry.

It is important to note, however, that French Courts have already held *obiter* that classification societies cannot invoke contractual limitation of liability clauses vis-à-vis third parties.[624] Therefore, French Courts seem to not concur with the above lines of reasoning.

There seem to be some suggestions that French courts agree that classification societies have a legitimate interest in invoking limitation of liability against third parties as contained in their rules. Nevertheless, French Courts have emphasised that an exclusion or limitation of liability is not possible in cases of gross negligence or wilful intent in advance.[625]

Concurring to a great extent with US Courts, in 1923, the French Supreme Court (*Cour de Cassation*) held in the *Armor* case that a classification society might be liable towards the buyers of the vessel.[626] The case concerned the negligent issue of a class certificate by Bureau Veritas confirming the class of a vessel regardless of its clear non-

[623] Delebecque, 'Noute sous CA Versailles, 21.3.1996' [1996] DMF 721, 731
[624] CA Versailles 21 March 1996, [1996] *DMF* 223 – *Energo* with a case note by Le Clere.
[625] Rodiere/ du Pontavice, Droit Maritime (12th ed. Dalloz-Sirey 1997), no.46; ; Boisson, "The liability of Classification Societies in the Maritime Industry Context" in J. Lux (ed), *Classification Societies* (LLP Professional Publishing 1993), 1, 15f.
[626] Cass. Req. 15 May 1923, (1923) 3 *DOR* 384,386 ff. - *Amor*

conformity with the class rules, the surveyor having been aware of the vessel's pending sale, hence also aware of the buyer's reliance on the class certificate. The court awarded FF 60,000 as damages ruling that the surveyor had acted with gross negligence.[627] The judgement was later confirmed by the *Cour de Cassation*, which held that classification societies cannot exclude liability in advance in relation to their negligence or that of their agents when dealing with cases of gross negligence and wilful intent (*faute lourde* and *dol*). Such limitation is "illegal and contrary to public order" (*illicite et contraire a l'ordre public*).[628] The decision was confirmed in following cases, such as the *Tunis.*[629]

Therefore, under French law, classification societies may be found liable to third parties if it is proven that their surveyors have acted with grossly negligence or wilful intent. Furthermore, French criminal courts have condemned classification societies and their employees respectively to indemnify seafarers' families whose lives were lost at sea whilst aboard substandard vessels.[630]

Indeed, French courts seem to be inclined to hold classification societies liable to third parties in cases of substandard shipping. In the Wellborn case, the court of Appeal held NKK liable to third parties (in this case the cargo insurers) for omission, as it failed to revoke the vessel's class timely despite its degree of corrosion, which was far above the classification society's rules. The court characterized the omission of the classification society as *faute lourde*, reasoning that if the class had been revoked in due time the ship would not have sailed and consequently not sank. The court also held that the negligence of the shipowner could not exonerate the classification society for

[627] CA Paris 11 February 1922, (1923) 3 *DOR* 384 ff. - *Amor*
[628] Supra. Cass
[629] CA tunis 23 February 1955, [1956] *DMF* 87, 93 – *Chalutier C.T.2*
[630] In the *Cape-de –la-Hague* CA Douai 6 July 1978, [1981] *DMF* 153 ff., a manager employed by Bureau Veritas was ordered to indemnify the family of a crew member who died in the sinking of the vessel. Following the same line the court of the *Number One* impose similar sanctions to NKK Classification Society – Tribunnal Correctionel de Saint Nazaire 18 March 2003, [2003] *DMF* 1068 – Number One with case note by Proutier-Maulion.

its wrongdoing.[631] The decision taken in the Erika case reaffirms this position of the French Courts.

The Erika incident has already been discussed in this chapter, and has been quoted numerous times, as it raises several different issues. The vessel was a nearly 25 year old tanker, registered in Malta and controlled by two Liberian companies, being technically managed by an Italian company. The vessel's class certificate had last been renewed on November 24, 1999. At the time of the accident, the vessel was time-chartered by a Bahamian company to an intermediary subsidiary of a large French based oil company. Due to unfavourable weather conditions, the tanker broke apart on December 12th, 1999, just one day after leaving the Port of Dunkirk. The incident polluted over 400 kilometres of coastline. [632]

The incident is to this date one of the most commented upon substandard shipping cases. Due to its magnitude it should not be surprising that the Erika litigation took a mammoth eight years and four months to conclude its trial involving scores of witnesses, voluminous documentary evidence, and testimony from individual experts as well as detailed submissions from judge appointed boards of enquiry, with the judgment finally being rendered on 16 January 2008, nearly 10 years after the incident took place. [633]

After thoroughly analysing all the aspects of the case, including the vessel's ownership history, operation, management and inspections, the court found culpable conduct from not only the shipowner, but also from the Classification Society and the oil charterer. Thus, the court held the shipowner and the Classification Society criminally and civilly liable for the accident, ruling that they had deliberately acted

[631] CA Versailles 9 December 2004, [2005] DMF 313 – *Wellborn* with case not by Delebecque
[632] *The Erika*, No. 9983895010 at 86, Erika Judgment at 86
[633] *Ibid* a 1,3, *Erika Judgment* at 1,3

together to reduce the amount of steel used for structural repairs in order to save costs, putting in jeopardy the safety of the vessel, her crew and the marine environment. [634]

The court concluded that the shipowner could not have been unaware that the minimal steel repairs jeopardized the safety of the ship, creating the severe risk of an accident at sea, with the same being true for the Classification Society's inspector, who had directly participated in approving the thickness measurements and retained the sole contractual power to grant a temporary Classification Society certificate. Therefore, the court ruled that both had acted negligently in securing the vessel's safety and structural integrity.[635]

The Erika judgment exposed the unscrupulous practice of manipulating steel thickness measurements to reduce structural repairs and save costs on shipyards bills, a critical process that should have been closely supervised and controlled by the Classification Society. Thus, without the Classification Society's complicity, the Erika would never have secured a class certificate, which was issued notwithstanding "serious anomalies".[636]

Commentators believe the Erika to be a ground-breaking case due to its non-reliance upon well-entrenched principles that have limited exposure for pollution liabilities to be placed upon shipowners and their insurers.[637] This author believes that this is not necessarily the case, as the Erika ruling did not go against any well recognized maritime law principles, it merely kept the French courts' approach that classification societies could not escape liability in cases of omissions or gross negligence.

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[634] *Ibid*, at 190, *Erika Judgment* at 205 -14
[635] *Ibid*
[636] *Ibid* at 213, Erika Judgment at 213
[637] See: See: V. Foley and C. Nolan, 'The Erika Judgment – Environmental Liability and Places of Refuge: A Sea Change in Civil Criminal Responsibility that the Maritime Community Must Heed' in Tulane Maritime Law Journal, 2008, Vol.33:41, p. 45

Nevertheless, it is an undeniable truth, as can be seen from the analysis of the UK, American and even French cases, that courts have shown a reluctance to hold classification societies liable for rendering certificates to vessels which were later considered to be unseaworthy, mainly due to shipowners' non-delegable duty to provide a seaworthy vessel. [638]Therefore, due to the notoriety of the Erika case and its meticulous assessment made by the French courts, and the decision to hold classification societies, shipowners and others equally liable for the disaster, it is understandable why the case may be perceived as a warning to the shipping industry as a whole about the need to comply with the existing safety shipping measures, due to the risk of facing criminal charges and potentially limitless civil liability for endangering seafarers and harming the environment. [639]However, this seems to be a very optimistic perception, as the Prestige decision which followed the Erika proved that courts are still reluctant to hold classification societies liable, and much more so to impose upon them limitless civil liability.

The court in the Erika case assessed four types of criminal offences: unintentional fault for failure to comply with an obligation of prudence or safety provided for by law or regulation, endangerment to others or directly exposing others to immediate risk of death or injury, wilfully omitting or failing to fight a disaster, and complicity in endangerment of others. Every offence, with the exception of the third (which was a case of omission), involved unintentional negligent conduct by the persons or entities that either caused the oil spill or "did not take the necessary actions to avoid it". In its judgment, the court rejected the argument that the French criminal laws for pollution offences did not extend to other members of the maritime safety chain.[640]

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[638] See: H. Honka, 'The Classification Societies System and its Problems with Special Reference to the Liability of Classification Societies' in 19 Tul. Mar. L.J. 1, 13-30 (1994)

[639] See: V. Foley and C. Nolan, 'The Erika Judgment – Environmental Liability and Places of Refuge: A Sea Change in Civil Criminal Responsibility that the Maritime Community Must Heed' in Tulane Maritime Law Journal, 2008, Vol.33:41, p. 46

[640] Tribunal de Grande instance [T.G.I] [ordinary court of original jurisdiction] Paris, 11eme ch., Jan. 16, 2008, No.9934895010, slip op. at 90 (Erika) translated in the Language Works, Inc., Erika Judgment 90 (Apr. 22, 2008), at 89-90

Regarding the civil aspect of the claim, the court recognized that the 1992 CLC created a legal regime for oil pollution victims, expressly ruling that the Convention did not deprive the French Courts of its jurisdiction in claims for damages usually open to civil parties, since none of the parties to the claim was immune under the Convention. [641] The decision differs from the American Court decision in the *Reino Unido de Espana v. American Bureau of Shipping* (Prestige) where it was ruled that the CLC deprived jurisdiction to adjudicate Spain's claims against ABS[642]. However, as discussed in the previous section, this was a rather controversial decision especially since it was inconsistent with the case of In Re Amoco Cadiz, where the CLC was first taken into consideration, where the court recognized that the CLC did not bind the law of the USA, since the country is not a member state signatory, hence the convention could not deprive the federal court of jurisdiction over U.S. based companies.[643]

When analysing the Erika, the court considered that the shipowner's liquidity problems should have been perceived as a clear warning to the Classification Society (RINA) that the shipowner would not be able to meet the maintenance expenses required to keep the vessel in the required condition for the issuance of class certificates. Regardless of this, the Classification Society continued issuing classification certificates hence certifying that the vessel was still suitable to carry petroleum based cargos, despite her substandard repairs.[644]Therefore, the court held that the Classification Society, together with the shipowner and the technical manager was jointly liable for endangering the safety of the vessel, exposing the crew, the ship and the environment to a particularly severe risk, confirmed by the sinking of the vessel and the oil pollution that followed.[645]

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[641] *Ibid* at 100, Erika Judgment at 100
[642] *Reino de Espana v. Am. Bureau of Shipping Inc*., 528 F. Supp. 2d 455, 459-60, 2008 AMC 83, 89 (S.D.N.Y. 2008)
[643] In re *Amoco Cadiz Off the Coast of Fr*. On Mar. 16, 1978, MDL Docket No. 376, 1984 U.S. Dist. Lexis 17480, at 129, 1984 AMC 2123, 2190 (N.D. Ill. Apr. 18, 1984)
[644] *Ibid*, at 207, 213, Erika Judgment at 207, 213
[645] *Ibid*

The court noted several failures of classification while conducting its surveys, perhaps the major confirmation of the Classification Society's negligence being the fact that only days before Erika's final voyage, a second Classification Society inspector had identified serious corrosion issues and "suspicious" repair work that should not have existed, which was sixteen months after the survey of the repairs that the vessel had to undergo in order to remain in class had been issued. Notwithstanding this, RINA allowed an extension of the required period of examination of this serious corrosion, allowing the vessel to remain in class and carry on its habitual trade. The court considered the classification a neglectful act and a "fault of imprudence" that caused the accident at sea.[646]

The court concluded that without the due repairs the Erika's class certificate could never have been renewed. The renewal of the class certificate was considered by the court to have been a wilful violation of several safety obligations imposed by the International Convention for the Safety of Life at Sea (SOLAS) and the International Safety Management Code (ISM Code), hence the Classification Society was held to have directly exposed the crew members to an immediate risk of death by "shipwreck or drowning" and committed the offense of endangerment. [647]

Furthermore, the court rejected Flag State immunity as defence grounds for the Classification Society.[648]Also denying the Classification Society any protection under article III (4) (b) of the 1992 CLC because it did not participate in the navigational or nautical operation of the Erika's voyage.[649]

The Erika case's judgment can easily be considered the most important judgment dealing with a classification society's third party liability, due partly to its notoriety, but also because of the court's careful and meticulous analysis in the case.

[646] *Ibid*, at 203-217
[647] *Erika*, No. 9934895010 at 228, Erika Judgment at 228
[648] *Ibid*, at 176
[649] *Ibid* at 235

Nevertheless, it is not clear if the decision will have the desired impact as some would hope[650] for in holding classification societies liable to third parties, as evidence suggest that the Erika was based on previous court precedent, and that courts worldwide still have a strong reluctance towards finding Classification Societies liable. In particular, the United Kingdom courts, which until today, have never held a Classification Society liable to third parties. It is unfortunate, however, that in the case of the Erika, no claim against the Classification Society was made concerning the affected crew members, which might be due to the international aspect of its crew, making it difficult (and expensive) for them to file a law suit in a French Court. Nonetheless, the decision is a clear precedent for possible seafarers' claims against Classification Societies.

IV.4 – Concluding Remarks

As this chapter has sought to demonstrate, Classification Societies are one of the most important stakeholders in the shipping industry, even setting up rules and standards to be followed. Their existence dates from before international regulations, and even the IMO, were established, and it can be said that they were the first institutions setting rules and standards to be followed in a harmonized manner within the shipping industry. Their role developed throughout time, and with the advent of international regulations, they also became responsible for certifying vessel compliance. Currently, they can still be considered to be exercising a regulatory role, with the ICAS having a consultative status within the IMO, and an inspectional role, since they are in charge of certifying vessel compliance with rules and regulations, including international conventions. As such renowned shipping industry stakeholders, it would be difficult to imagine that they would not play a role in preventing 'abandonment of seafarers' from happening.

[650] Some American scholars believe that the Erika decision "provides compelling and persuasive authority for U.S. courts to continue to build upon existing precedent to hold classification societies liable for damages caused to third parties due to negligent and reckless conduct in in condoning substandard repair practices and issuing classification certificates to substandard ships" - V. Foley and C. Nolan, 'The Erika Judgment – Environmental Liability and Places of Refuge: A Sea Change in Civil Criminal Responsibility that the Maritime Community Must Heed' in Tulane Maritime Law Journal, 2008, Vol.33:41, p. 71

Indeed, Classification Societies through their inspection system can certify that a vessel is not substandard, and therefore is a safe place for the seafarer to work. It is well noted that these institutions cannot certify the vessel's seaworthiness through the entire validity of their certificate, but they can (and should) point out deficiencies and assess the condition of the vessel at the time of the issuance of the certificate; a certificate negligently issued cannot be taken lightly. Furthermore, Classification Societies acting as ROs also certify the vessel's compliance with the MLC, hence certifying that seafarers are having their minimum rights respected. Thus, an act of negligence by a classification society may (and in most cases will) amount or lead to abandonment of seafarers. [651]

Nevertheless, despite the Classification Societies' vital role, as the Chapter showed, their liability is often not something easily established by courts around the world. Every court seems to concur that seaworthiness is a non-delegable duty of the shipowner, and hence a Classification Society cannot be held liable for the unseaworthiness of the vessel. However, it is important to note that this reasoning has so far only being obtained in cargo claims, covered by international instruments which provide for the non-delegable duty of the shipowner to provide a seaworthy vessel. Taking under consideration that there is no universal concept for seaworthiness, it is unclear if courts would sustain the same reasoning for claims other than cargo claims. Furthermore, this author believes that the shipowner duty of providing a seaworthy vessel should be interpreted as a duty to exercise due diligence in keeping the vessel

[651] Paris MoU and Tokyo MoU acknowledging the intrinsic connection between classification societies and Flag States for several years have presented a submission to the IMO addressing the correlation between flags and ROs working on their behalf. This is also reflected in their annual Reports. See: Paris MoU, Press Release- 'Launch of Concentrated Inspection Campaign on MLC,2006' (Paris MoU, 28th July 2016) <https://www.parismou.org/launch-concentrated-inspection-campaign-mlc2006> last accessed on 08/08/2016;
Paris MoU, 'Press Release – 2015 Annual Report Paris MoU on PSC' (Paris MoU, 1st July 2016) < https://www.parismou.org/2015-annual-report-paris-mou-psc>, last accessed on 08/08/2016; and Paris MoU Reports available on the Paris MoU website.

seaworthy during the entire validity of the classification society certificate and accordingly classification societies' liability should be assessed in a case by case basis.

Accordingly, for Classification Societies' liability to third parties to be recognized, it is necessary for causality to be established between the Classification Society's act and the damage, it being also necessary for a duty of care to be established between it and the third party. Furthermore, policy considerations can weigh heavily against the imposition of a duty to care upon Classification Societies, and as the chapter demonstrated, the advent of the MLC amendments may make this imposition particularly difficult for some 'abandonment' circumstances.

English courts seem to have greater difficulty establishing a duty of care for CSs, indeed England is perhaps the most reluctant jurisdiction to establish Classification Society liability towards third parties. The analysis of France and the US, however, demonstrated that liability can be established if negligence is proven.

It is important to note, as the above analysis showed, that currently there is no case law regarding a seafarer's case against a Classification Society. Nevertheless, through the *obiter dicta* of Classification Society cases, or analogous cases, the courts have demonstrated that they may be more inclined to determine liability in the case of an injured third party. Therefore, it can be presumed that this would apply to seafarers. Furthermore, although Classification Societies can hardly be considered to be directors of a company, the recognition of states of the need to establish responsibilities and liabilities to ensure the health and safety of work environments cannot be taken lightly, considering the role that Classification Societies play in certifying vessel compliance with rules and regulations and therefore their safety. Accordingly, it is difficult to imagine that no liability could be imposed upon a Classification Society that acted negligently in the issuance of a certificate, and hence assisted 'abandonment' to occur.

Chapter V - Insurance – Financial Funds/ Provisions

It is a fact that an insurer's responsibility mostly arises after an incident that triggers an insurance pay-out. However, as this chapter will demonstrate P&I Clubs have a much more important role within the shipping industry than merely compensating beneficiaries of insurance.

As shall be demonstrated by the analysis of the origins of P&I Cubs and their history, similarly to Classification Societies, P&I Clubs existed before the IMO and any international maritime convention, and although they might not have the same regulatory role as Classification Societies, which set rules and standards, they do possess a consultative status within the IMO, and their opinions do possess significant weight in the decision making process. For instance, the delay in setting the Financial Security system for abandonment of seafarer cases as provided by the MLC can be to some extent attributed to P&I Clubs' scepticism towards it.[652]

As this Chapter will demonstrate, P&I Clubs' importance is widely recognized among the shipping industry and they are often more reliable and easy to be located than shipowners. Therefore, it makes sense for vessels to only be allowed to sail if properly insured, so requiring the establishment of insurance funds by international conventions. Insurance seems to have been the solution found to ensure that victims of an irresponsible shipowner will be compensated, even if the latter cannot be located or has gone bankrupt.

As previously discussed in this thesis,[653] one of the major causes of abandonment of seafarer is the shipowner's insolvency or financial hardship, situations

[652] See pp.272-273
[653] See pp.57-59 and 105

which will often affect insurance, since the payments of the insurance premium will likely cease. Thus, insurances schemes such as compulsory insurance and the Financial Security system provided by the MLC provide for insurance to be in place, also and specifically in cases of insolvency. As this chapter will show, P&I Clubs might be the best way to establish this sort of insurance, as they work through memberships, it therefore being easy to establish a pooling system of insurance.

However, compulsory insurance and most importantly the Financial Security system established by the MLC are limited to very specific situations, not covering the full gamut of abandonment situations a seafarer can be exposed to. Therefore, this chapter shall analyse P&I Clubs' third party liability, as well as the 'pay to be paid rule' and its exceptions.

Although P&I shall represent a great part of this chapter due to its importance in the shipping industry, other forms of insurance relating to seafarers, especially since the MLC Financial Security system does not require to be provided by P&I Clubs, shall also be analysed whenever relevant.

Finally, a comparison between the MLC Financial Security Scheme and compulsory insurance in maritime law shall be drawn. The reason for this is, as this chapter will show, both types of insurance possess similarities of purpose and procedure. Therefore, an analysis of compulsory insurance shall show possible problems that the Financial Security Scheme may face, considering that it is not yet in force, and especially considering that in practice both type of insurance can be said to impose liability caps.

V. 1 - P&I Clubs – their inception

Unseaworthy/substandard vessels have always been a major concern of the shipping industry in general. However, perhaps more so than the loss of lives caused

by the practice, it is financial losses that have caused concern. This can be clearly perceived by the *Westhope*[654], which sank in 1870 and would prove to be another milestone in the history of P&I insurance. The vessel was carrying cargo bound to Cape Town, but instead of proceeding to its destination after loading, it deviated and loaded some additional cargo, and was later lost en route to Cape Town. If it were not for the deviation, the shipowners would have avoided any liability for the cargo, by virtue of the extensive exclusion clauses in the contract of carriage. The court held that due to the deviation the shipowners could not rely on the exclusion clauses hence being liable for the loss of the cargo. At the time, cargo liability was not covered by the protecting societies, as shipowners were normally able to escape responsibility for any cargo loss or damage by relying on exclusion clauses. However, the *Westhope* demonstrated that this defence was not infallible. As a response to the case, in 1874, the first indemnity Club was formed to provide cover liability for loss of/damage to cargo, then known as indemnity risk. Thus, the protecting societies amended their rules to provide indemnity cover henceforth becoming protection and indemnity (P&I) Clubs.[655]

A P&I Club, in its current form, can be briefly explained as:

> *"(…) an independent, non-profit making mutual insurance association, providing cover for its shipowner and charterer members against third*

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[654] *The Westenhope* (1870) Unreported. Cited in Mustill, Jonathan Gilman, QC; Professor Robert M Merkin; Claire Blanchard, QC; and Mark Templeman, QC (eds), *Arnould: Law of Marine Insurance and Average*, (18th edition, Vol. I, Sweet & Maxweel 2016) ISBN: 9780414034938, p.130

[655] The need for insurance for cargo liability was further reinforced in 1893 with the US Harter Act, forbidding the use of exclusion clauses in the Bill of Ladings, gaining international reinforcement - , Edgar Gold, *Gard Handbook on P&I Insurance* (5th Edition, Gard 2002), p.67.
It is worth noting that most P&I Clubs offer a small summary of their history and this will often include partial history of marine insurance. They often stress their importance in the shipping industry; "(…)during the Second World War all government instructions to Shipowners were sent in secret communications via the Club" & "The Club has an influential and authoritative position in maritime affairs, taking part in consultations with IMO, BIMCO and other organisations working in the maritime field, and playing a major role in the International Group of P&I Clubs" – The London P&I Club, at: http://www.londonpandi.com/about/history/ See also: The Budd Group, at http://www.budd-pni.com/pi-Club-history-the-budd-group.asp and The shipowners' Group at http://www.shipownersClub.com/160-years/, last accessed on 08/08/2016

party liabilities relating to the use and operation of ships. Each Club is controlled by its members through a board of directors or committee elected from the membership.

Clubs cover a wide range of liabilities including personal injury to crew, passengers and others on board, cargo loss and damage, oil pollution, wreck removal and dock damage. Clubs also provide a wide range of services to their members on claims, legal issues and loss prevention, and often play a leading role in the management of casualties."[656]

According to Hazelhood Practical Guide on P&I Club, a typical Club provides indemnity insurance in respect of a member's liabilities triggered by events such as:

- *Collisions and non contact damage*
- *Damage to fixed and floating objects*
- *Cargo claims*
- *Property on board*
- *Loss of life, personal injury and illness*
- *Passengers*
- *Crew liabilities*
- *Supernumeraries and others on board*
- *Fines*
- *Inquiries and criminal proceedings*
- *Quarantine expenses*
- *Stowaways, etc.*
- *Diversion expenses*
- *Life salvage*
- *Unrecoverable general average*
- *Ship's proportion of general average*
- *Liabilities relating to the wreck of the entered vessel*

[656] G P&I website, online at: www.igpandi.org/., last accessed on 08/08/2016

- *Pollution*
- *Towage contracts*
- *Expenses incurred pursuant to directions of the Club*
- *The "omnibus rules"* [657]

P&I Clubs are a undeniably a good solution for shipowners to get insurance at low prices, since the Clubs work on a mutual and non-profit basis, characteristics which are similar to those of a Classification Society. Furthermore, the Clubs established a reinsurance system to deal with unexpected large claims and supplementary calls.[658] The first Club pooling agreement between six British Clubs was concluded on the 10th of April 1899, and they became known as the London Group, subsequently changing its name to International Group once it started allowing non-British Clubs to enter the agreement.[659] The reinsurance system works by way of a pooling agreement, which means that the Clubs agree to pool claims in excess of a specified figure (an Excess Loss Pool). In summary, the members of a P&I Club (primary insurer) will pay up to a specified figure, and in case the claim exceeds this, the reinsurance will enter into action, with all the members of all the Clubs in the pool agreement sharing the risk and contributing up to a fixed (more generous) amount.[660]

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[657] Steven J Hazelwood and David Semark, *P&I Clubs: Law and Practice*, (4th ed., Lloyd´s List Press 2010), p.124

[658] *Ibid*, p 365.

[659]There are thirteen separate and independent principal Clubs in the International Group:

- American Steamshipowners Mutual Protection and Indemnity Association, Inc
- Assuranceforeningen Skuld
- Gard P&I (Bermuda) Ltd.
- The Britannia Steam Ship Insurance Association Limited
- The Japan Shipowners' Mutual Protection & Indemnity Association
- The London Steam-Shipowners' Mutual Insurance Association Limited
- The North of England Protecting & Indemnity Association Limited
- The Shipowners' Mutual Protection & Indemnity Association (Luxembourg)
- The Standard Steamshipowners' Protection & Indemnity Association (Bermuda) Limited
- The Steamship Mutual Underwriting Association (Bermuda) Limited
- The Swedish Club
- United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited
- The West of England Shipowners Mutual Insurance Association (Luxembourg)

For more information see: http://www.ukpandi.com/about-us/international-group-of-pi-Clubs/pooling-reinsurance/

[660] Steven J Hazelwood and David Semark, *P&I Clubs: Law and Practice*, (4th ed., Lloyd´s List Press

Therefore, members of the International Group Clubs (IG P&I Clubs), due to their share of claims through the Pooling system have a common interest in loss prevention and control, and in the maintenance of quality standards throughout the group. This follows parameters similar to the International Association of Classification Societies (ICAS), as seen in the previous section. The same is true of the fact that the IG P&I Clubs acknowledge that Clubs (as do Classification Societies) compete for business, and that the pooling system however makes it more attractive to shipowners to contract with the group's members due to the larger cover potential of a broader 'insurance safety net'.[661] Although the principal function of the IG P&I Clubs is to provide the insurance pool and arrange market reinsurance, as they represent 90 percent of the world´s ocean tonnage (again in a similar mould to the ICAS), the members of the IG P&I Clubs use their position to defend their interests in international conventions and legislation that can affect shipowner liabilities. Moreover, the IG P&I Clubs, like the ICAS, can also be said to have consultative status within the IMO and even ILO. The group participated in the April meeting of the Maritime Labour Convention Special Tripartite Committee (STC) held at the International Labour Organisation that discussed the amendments of the MLC regarding contractual claims for death and injury and abandonment of seafarers, including payment of back wages and other

2010), p.325

The International Pool Agreement:

- *Regulates how Clubs accept entries from owners who wish to move their fleet from one Club to another*
- *Sets out how Clubs are to quote rates on renewal and what information the Clubs are allowed and obliged to share with each other*
- *Imposes sanction in case of a member do not follow the rules stipulated in the IGA*
- *Requires to the Clubs to disclose the ratio of their operating cost to their premium and investment income*.

The most recent version of the agreement is from 20 of February 2013, and can be download at: http://static.igpandi.org/igpi_website/media/article_attachments/International_Group_Agreement_2013.pdf, last accessed on 08/08/2016

[661] "Although the Group Clubs compete with each other for business, it is to the benefit of all shipowners insured by Group Clubs for the Clubs to pool their larger risks." See: http://www.igpandi.org/group-agreements

entitlements, being a part of the International Shipping Federation delegation.[662]The IG P&I Clubs can be said to carry out this "consultative" function in relation to:

- inter-governmental bodies such as IMO, UNCITRAL and OECD
- national governments and the EU [663]
- other industry organisations such as Intertanko, BIMCO, OCIMF etc. [664]

V. 2 - P&I Clubs and Seafarers

As seen in Chapter I, until the advent of the Maritime Labour Convention, there were not any international conventions (or at least there were not any that did not have pending ratifications waiting to be enforced) directly governing liability in respect of illness, injury or death of seafarers. This is not to say that seafarers were left completely unprotected, since other International Instruments and national legislations already provided for their rights. Prior to the MLC, and the many International Instruments of which it comprised, the three principal sources of liability in respect of seafarers were found in contract, statute and common law.[665]

Shipowners, directly or through manning agents or shipowners' associations or trade unions, generally entered into contractual arrangements with seafarers. The agreements covered not only direct terms of employment, such as pay and leave entitlement, but also compensation and assistance in case of illness, injury or death. Some of these arrangements (that can be classified as articles of agreements, individual contracts of employment and collective bargaining agreements - CBAs) provide that the shipowner must also arrange for insurance that would provide cover for such

662 See: http://www.igpandi.org/article/international-labour-organisation-agree-amendments-to-the-2006-maritime-labour-convention, last accessed on 08/08/2016
663 IG P&I Clubs website, online at: www.igpandi.org/About, last accessed on 08/08/2016
664 See: http://www.igpandi.org/article/international-labour-organisation-agree-amendments-to-the-2006-maritime-labour-convention, last accessed on 08/08/2016
665 Edgar Gold, *Gard Handbook on P&I Insurance* (5th Edition, Gard 2002), p.238

compensation obligations, which most of the time, unless additional insurance is required, P&I cover will suffice. [666]

Furthermore, certain fundamental labour rights are protected in international conventions,[667] in the constitution, or other legislation of states. Thus, following this thesis's premise that seafaring is a transnational form of employment hence being covered by both national and international legislation, even if not directly aimed at the maritime sector, these fundamental labour rights will definitely apply to seafaring. Therefore, even if not directly, every State will regulate seafaring, and the rights and benefits of these workers, but as is often the case, States recognize the particularity of such professions and dedicate specific regulations for the benefit of these workers, mostly based on international instruments provided by IMO and ILO. These legislations may be in the form of health and safety acts, workers' compensation legislation, or compulsory social security schemes. [668] The latter often obliges employers to take out compulsory insurance to cover such obligations, P&I cover being the appropriate form of insurance in this respect. [669]

In countries such the USA and the UK, a common law system operates alongside any statutory obligations. For instance, in cases of negligence, common law liability can override the shipowner's obligations to the seafarer under the individual contract or CBA. Therefore, a shipowner who has paid contractual compensation to a seafarer may also be liable to pay common law compensation in such jurisdictions, this being particularly true in the USA, where seafarers have a remedy in tort against the shipowner in respect of illness, injury or death caused by any unseaworthy condition of the ship. Thus, some cases can give rise to high compensation claims making insurance

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[666] See: D. Fitizpatrick and M. Anderson, *Seafarers' Rights* (Oxford University Press, 2005), pp.3-34
[667] See for example: ILO Convention concerning Freedom of Association and Protection of the Right to Organise (1948); ILO Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (1951); and ILO Convention concerning Discrimination in Respect to Employment and Occupation (1958)
[668] D. Fitizpatrick and M. Anderson, *Seafarers' Rights* (Oxford University Press, 2005), pp.3-34
[669] Edgar Gold, *Gard Handbook on P&I Insurance* (5th Edition, Gard 2002) pp.240 -241

essential. [670]

It is important to note however that P&I Clubs do not provide injury or illness insurance to the seafarers themselves, but to their members[671], most often shipowners, in respect of the liabilities that arise out of the contractual employment relation between themselves and the seafarers. Furthermore, P&I Clubs will normally expand their definition of seafarer[672] in order to include families of the crew who visit on board or travel with them, as members may incur in liabilities to them in respect of loss of life, illness, personal injury, loss of effects, etc. Normal practice requires crew members and their families to have written permission of the member being approved by the Club prior to the voyage. [673]

As an example, according to GARD Rule 18 covering Liabilities in respect of crew, the association shall cover:

> "a) liability to pay hospital, medical, maintenance, funeral and other costs and expenses incurred in relation to the injury to, or illness or death of, a member of the Crew, including costs and expenses of repatriating the member of the Crew and his personal effects, or sending home an urn of ashes or coffin and personal effects in the case of death, and costs and expenses necessarily incurred in sending a substitute to replace the repatriated or dead man; b**) liability to repatriate and compensate a member of the Crew for the loss of his employment caused in consequence of the actual or constructive total loss of the Vessel or of a major casualty rendering the Vessel unseaworthy and necessitating**

[670] *Ibid*
[671] Gard provides insurance to crew managers, as well as shipowners. See: http://www.gard.no/Content/19464395/Crew%20Cover%202013.pdf, last accessed on 08/08/2016
[672] "Seaman" is defined in the rules-book of Britannia as: • *A person (including the Master) engaged under articles of agreement or otherwise contractually obliged to serve on board an Entered Ship (except persons engaged only for nominal pay) including a substitute for such person and also including such persons while proceeding to or from such Ship"*- Definition from Britannia Class 3 Rule book 2011.
[673] Steven Hazelwood, *P&I Clubs: Law and Practice*, (3rd Ed. Lloyd's Press 2000), p.167

the signing off of the Crew; c) liability to pay compensation or damages in relation to the injury to, or illness or death of, a member of the Crew; d) liability for costs and expenses of travelling incurred by a member of the Crew when the travelling is occasioned by a close relative having died or become seriously ill after the Crew member signed on, and costs and expenses necessarily incurred in sending a substitute to replace that Crew member; e) liability for wages payable to an injured or sick member of the Crew or on death to his estate; f) liability in respect of loss of or damage to the personal effects of a Crew member, provided that under this Rule 18.1:

i) where the liability arises under the terms of a crew agreement or other contract of service or employment, and would not have arisen but for those terms, the liability is not covered by the Association unless those terms have been previously approved by the Association; ii) references to personal effects shall exclude valuables and any other article which in the opinion of the Association is not an essential requirement of a Crew member. iii) the cover shall not include liabilities, costs or expenses arising out of the carriage of specie, bullion, precious or rare metals or stones, plate or other objects of a rare or precious nature, bank notes or other forms of currency, bonds or other negotiable instruments, whether the value is declared or not, unless the Association has been notified prior to any such carriage, and any directions made by the Association have been complied with; iv) there shall be no recovery in relation to liability which arises under a contract of indemnity or guarantee between the Member and a third party."[674](Emphasis added)

As may be noted from the above rules, liability to a seafarer which arises from

[674] See Gard Rule 18.1, available at: http://www.gard.no/web/publications/document/chapter?p_subdoc_id=1268489&p_document_id=781871, last accessed on 08/08/2016

contractual clauses is not normally covered by the relevant P&I Club unless those particular terms have previously been approved by the Club. [675] In order to make a cover assessment, a copy of the contract will often not suffice and the Club may require additional information such as the nationality and number of crew members on board, and the trading pattern of the ship. [676]

Furthermore, according to the individual Association, when additional insurance is required, it may, as agent, arrange for such cover, and may even offer non-poolable Extended Cover. The Association will not itself, however, insure levels of insurance that are additional to the cover provided under the losses, costs or expenses covered under the additional insurance required under social security schemes, or the applicable law governing the contract, or collective bargain agreements. Nevertheless, it is important to note that the Association offers to reimburse a member for any expenses incurred in respect of "liabilities, losses, costs and expenses provided that the claims are reduced by whatever compensation is or should have been available under the applicable public or private insurance scheme."[677]

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[675] See also Gard Rule 27 (i)

[676] Edgar Gold, *Gard Handbook on P&I Insurance* (5th Edition, Gard 2002) p.240

[677] See Gard Rule 71.1

"*…a person performing work in the service of the Ship covered by social insurance… (Rule 71.1.c)*
For the purposes of Rule 71.1.c, the term 'social insurance' means a national or state insurance scheme that entitles the claimant to claim benefits in the event of death, injury or illness. Cover is not available for liabilities, losses, costs or expenses that are covered by such insurance schemes, or which could have been covered by such social insurance if it had been put into effect.
Cover is excluded under Rule 71.1.c for claims that are brought by any persons that are performing work in the service of the Ship, regardless of whether such persons are employed by the Member. Such persons include Crew members, stevedores, longshoremen, surveyors, pilots, repair workers and other independent contractors, and the purpose and aim of the Rule is to ensure that such persons make claims to the maximum extent that is possible under the appropriate social insurance scheme and not against the Member or the Association. However, the Association will usually reimburse a Member for claims that he has paid in respect of such liabilities, losses, costs and expenses provided that the claims are reduced by whatever compensation that is, or should have been available, under the applicable social insurance schemes.
(I) …public or private insurance required by the legislation or collective wages agreement… (Rule 71.1.c)
The terms of an employment contract, or a collective bargaining agreement, or the applicable law that governs such contracts or agreements, may require a shipowner or charterer to take out public or private insurance to cover their liability for the death, injury or illness of Crew members or other persons that are working on board the ship. Cover is not available for liabilities, losses, costs or expenses that are covered by such insurance schemes, or which would have been covered by such insurance schemes if the Member had complied with his obligations to take out such insurance. However, the Association will

Following similar lines, Britannia Rules provides that the Association for cases of illness, injury and death shall cover:

> "Medical, hospital, funeral and other expenses necessarily incurred and wages, maintenance, compensation and damages payable by reason of the illness or death of, or injury to, a Seaman. Notwithstanding the proviso to Rule 5(1), where a Member has **failed to discharge or pay a liability for wages, maintenance, compensation or damages for the illness or death of, or injury to,** a Seaman, the Association shall discharge or pay such liability on the Member's behalf directly to such Seaman or dependent thereof.
>
> *Provided always* that
>
> (i) the Seaman or dependent has no enforceable right of recovery from any other party and otherwise would be uncompensated; (ii) subject to (iii) below, the Association shall in no circumstances be liable for any sum in excess of the amount which the Member would have been able to recover from the Association under these Rules and the Member's terms and conditions of entry;
>
> (iii) where the Association is under no liability in respect of the claim by virtue of Rules 33(1) and 35(1),[678] the Association shall nevertheless

usually reimburse a Member for claims that he has paid in respect of such liabilities, losses, costs and expenses provided that the claims are reduced by whatever compensation is or should have been available under the applicable public or private insurance scheme." Available at: http://www.gard.no/web/publications/document/chapter?p_subdoc_id=20748044&p_document_id=20747880, last accessed on 08/08/2016

[678] Both Rules deal with the cesser of the insurance. Rule 33 (1) deals with failure of payment :"having failed to pay when due and demanded by the Managers any sum due from him to the Association, he is served with a notice by or on behalf of the Managers or the Association requiring him to pay such sum and he fails to pay such sum in full on, or before, the date specified in such notice." And Rule 35 (1) with the effect of the cesser: "If the cesser of insurance shall have occurred by virtue of Rule 33(1) (failure to pay) the Association shall not be liable for any claims under these Rules in respect of any ship which has been entered by the Member, whether the incident giving rise to such claim occurred before or after the cesser of insurance, unless the incident giving rise to such claim occurred during a Policy Year which had been closed at the time of the cesser of insurance." Britannia Class 3 Rule book 2016.

discharge or pay the claim to the extent that it arises from an event occurring prior to the cesser of the insurance, but only as agent of the Member and the Member shall reimburse the Association in full."[679](Emphasis added)

Therefore, it is clear from the reading of the two P&I Club Rules chosen as examples, in particular the emphasised/highlighted parts, that these Associations offer insurance in cases where the seafarer is deemed to have been abandoned by the shipowner, when the latter fails to fulfill its obligations towards the former. Moreover, Gard Rule 18.b unequivocally demonstrates that an unseaworthy vessel will give rise to abandonment and the subsequent repatriation of the seafarer and compensation, the Club being liable for these expenses, confirming once again the direct connection between substandard shipping and abandonment of seafarers. It is important to note, however, that the Rules are clear as to the fact that the Association is only required to pay up to the extent that the member has paid for the relevant insurance cover.[680]Thus, in cases of a member going insolvent and failing to fulfil their insurance payment obligations, it is easy to imagine that seafarers may not be fully compensated for their losses.

V.2.1 – Repatriation

It is the opinion of this author, already expressed within this thesis, that repatriation is the most important liability that can arise from the abandonment of seafarers, due to the hardship that this imposes and due to it being one of the few risks exclusive to this type of employment. Therefore, the issue of repatriation would seem to merit particular discussion.

Repatriation is covered by Rules 19.1(G), 19.7 and more specifically 19(3) of

[679] Britannia Class 3 Rule book 2016, Rule 19.1. Available at: http://www.britanniapandi.com/assets/Uploads/documents/Britannia-Rules-2016-PI.pdf, last accessed on 08/08/2016

[680] Britannia Rule book 2016, Rule 19.1 (iii),

the Britannia Rule Book 2016, according to these:

> "19.1 Repatriation (G)
> Repatriation expenses associated with liabilities covered under this Rule which are payable in accordance with Rule 19(7).
> 19.7 The cost to a Member of maintaining, repatriating or deporting persons in circumstances which would entitle the Member to recover under Rule 19(1), Rule 19(2), Rule 19(3), Rule 19(4) or Rule 19(5)."

The Britannia Rules regarding repatriation are rather generic, referring to all sorts of repatriations, involving passengers, third parties … In fact only Rule 19 (3) mentioned in the Rule 19 (7) deals with seafarer repatriation specifically, in a very limited manner nonetheless. In summary, Rule 19 (3) states that the Association will cover repatriation cases provided in the MLC 2006.[681]

The Gard Rules do not seem to differ much from Britannia's, but can be considered more comprehensive. Accordingly, Gard Rules 27.1 (b) and 18.2 provide that:

> "b) liability to repatriate and compensate a member of the Crew for the loss of his employment caused in consequence of the actual or constructive total loss of the Ship or of a major casualty rendering the Ship unseaworthy and necessitating the signing off of the Crew;"[682]
>
> and
>
> "The Association shall cover liability to repatriate a member of the Crew

[681] Rule 19 (3), Britannia Rule Book 2016 -"The cover afforded to Members in respect of their liabilities under the 2006 Maritime Labour Convention (MLC 2006) or domestic legislation by a State implementing MLC 2006 are detailed in the relevant Certificate of Entry of the Entered Ship."
[682] Gard Rule Book 2016, Rule 27.1 (b)

pursuant to any statutory enactment giving effect to the Maritime Labour Convention 2006 or any materially similar enactment, provided always that there shall be no recovery in respect of liabilities arising out of the termination of any agreement, or the sale of the Vessel, or any other act of the Member in respect of the Vessel, save and to the extent permitted by this Rule 18.2 in respect of the Member's liability for such expense under the Maritime Labour Convention 2006."[683]

As illustrated in the above provision of the Gard Rules, P&I Clubs do not cover normal repatriation at the end of a seafarer's employment, upon the sale of the vessel, and when a seafarer is dismissed for misconduct. [684] In the latter case, the shipowner is also not liable to cover a seafarer's repatriation expenses as the seafarer is the one responsible for the contractual breach.[685]

[683] Gard Rule Book 2016, Rule 18.2

[684] Steven J Hazelwood and David Semark, *P&I Clubs: Law and Practice*, (4th ed., Lloyd´s List Press 2010) , p 166..

[685] The international position regarding repatriation seems to be a uniform one, placing the responsibility on the shipowner to cover the seafarers' repatriation at the "unfair" termination of his employment contract, or in case of shipwreck. Prior to the MLC, there were two ILO conventions dealing exclusively with the subject, Convention 23 1926 and 166 1987.
The ILO C23 1926 was ratified by forty-six countries, including the United Kingdom, Ukraine, Panama, China, Russia and Philippines among others, being fully in force. The Convention provides in its article 3 (1) that: "Any seaman who is landed during the term of his engagement or on its expiration shall be entitled to be taken back to his own country, or to the port at which he was engaged, or to the port at which the voyage commenced, as shall be determined by national law, which shall contain the provisions necessary for dealing with the matter, including provisions to determine who shall bear the charge of repatriation". Nevertheless, article 4 of the convention states that the repatriation shall not be a charge on the seafarer left behind in situations such: injury sustained in the service of the vessel, shipwreck, illness not due to his own wilful act or default, or discharge for any cause for which he cannot be held responsible. The list seems to be an exhaustive one. Therefore it would not be wrong to assume that in cases when the seafarer is fairly dismissed, the shipowner has no obligation to pay the seafarers' repatriation expenses according to the convention since the convention is clear that the shipowner is responsible for the repatriations only in cases where the termination of the contract was not caused by the seafarer.
Nevertheless, some Member States of the convention opted for a more broad approach, such as the UK. In the UK, the Merchant Shipping Repatriation Regulations 1979 article 2(a) provides that the shipowner is obliged to repatriate the seafarer "as soon as the seamen is available to return", which makes fair to say that it does not matter what caused the contract to terminate, the shipowner carries in any case a repatriation obligation. The Regulation does provide in its article 3 for situations that would end the shipowner's obligation to repatriate the seafarer. However, these situations are only able to happen after the termination of the contract and the repatriations arrangements made or if the seafarer gives up the right in writing.(Merchant Shipping Repatriation Regulations 1979 Article 3(c))

The Philippines on the other hand opted to release the shipowner from his obligation to repatriate the seafarer in case the termination of contract was due to fair dismissal. Accordingly, section 19 (E) of the Standard terms and Conditions governing the employment of Filipino Seafarers on Board of ocean going vessels, the shipowner is entitle to deduct from the seafarer' wages or other earnings the costs of repatriation when he/she was fairly dismissed.

Panama took the same approach of the Philippines regarding repatriation by providing in Article 37 (b) of the Law Decree 8/98 that the shipowner is only responsible for the repatriation expensed in case the seafarer has been dismissed without a just cause, which means to say in cases of an unfair or wrongful dismissal.

Russia is very specific in relation to when shipowners are responsible for seafarers' repatriation expenses. According to the Russian Merchant Shipping Code, Article 58 s. 1 provides that seafarers are entitled to repatriation expenses when the employment contract is terminated upon initiative of the shipowner or a crew member in case of expiry of the term specified in the notice delivered in conformity with the contract; shipwreck, illness or injury requiring medical treatment outside the ship; shipowners inability to perform his legal responsibilities towards the seafarer as provided by law or by other acts of the Russian Federation or by the employment contract itself due to bankruptcy, sale of the ship or change of flag; allocation of the vessel to a military zone or zone of epidemiological hazard without crew members' consent; or expiry of the maximum term of employment of a crew member established by the employment agreement. Since the list seems to be an exhaustive one, it is fair to say that the shipowner is not responsible for the seafarer's repatriation in cases of fair dismissal.

China and Ukraine (Olena Bokareva and other, *Transport Law in Ukraine*, (Kluwer Law International 2011), page 24) do not have any domestic law provisions regarding the repatriation of seafarers. Therefore, we may assume that once again, a shipowner will not be responsible for seafarers' repatriation in cases of fair dismissal. Furthermore, a typical supplemental clause in a seafarer's employment contract in China is that if he/she has to be repatriated twice during the course of his employment for his/hers own reasons, the shipowner is entitle to terminate the contract. (D. Fitizpatrick and M. Anderson, *Seafarers' Rights* (Oxford University Press, 2005), page 269)

The ILO Convention 166 from 1986, in its turn was ratified by only thirteen countries, including Brazil and Turkey. None of the above countries ratified the convention. The convention provides in its Article 2(1) the situations entitling a seafarer to be repatriated. They are as follows:

"(a) if an engagement for a specific period or for a specific voyage expires abroad;

(b) upon the expiry of the period of notice given in accordance with the provisions of the articles of agreement or the seafarer's contract of employment;

(c) in the event of illness or injury or other medical condition which requires his or her repatriation when found medically fit to travel;

(d) in the event of shipwreck;

(e) in the event of the shipowner not being able to continue to fulfil his or her legal or contractual obligations as an employer of the seafarer by reason of bankruptcy, sale of ship, change of ship's registration or any other similar reason;

(f) in the event of a ship being bound for a war zone, as defined by national laws or regulations or collective agreements, to which the seafarer does not consent to go;

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

The list is clearly an exhaustive one. Once again it seems that the drafter abstained to impose upon the shipowner the responsibility to repatriate the seafarer in cases of fair dismissal.

Brazil implemented the Convention by Decree 2670/1988. Nevertheless, the Brazilian Commercial Code in its session concerning exclusively maritime labour is very vague in its provision dealing with repatriation. Thus, article 547 of the Code states only that if the voyage is interrupted due to orders of the owner of the vessel, Master, or other member of the crew, or by decree, the seafarer is entitled to repatriation regardless of the terms of their employment contract, being silent however with regard to the person or entity responsible for the repatriation costs. This provision leaves room for debate since a fair dismissal of seafarers could be regarded as an order of the shipowner or the master. Also, an interruption of the voyage caused by the proper seafarer (crew member) could also be perceived as a case of fair dismissal. The provision basically states that the seafarer is entitled to repatriation in any circumstance,

It is important to note that even though Repatriation is dealt with rather generally by both Associations, these already provided for repatriation of seafarers prior to the MLC, in cases of:

- *Illness, injury* - P&I cover provided (and provides) for costs and expenses of necessary medical repatriation, in cases where the seafarer falls ill or injures himself/herself in the course of employment. However, the costs of repatriation will not be covered in case the medical condition does not require alteration of the original travel plans, as these will be considered operating costs.
- *Death* – P&I Cover will provide for the basic funeral and burial expenses together with the return of the body or ashes and personal effects of the deceased, but not for wreaths and flower arrangements.
- *Major casualty* – Clubs will cover the costs of repatriation when an incident occurs that results in actual and constructive loss of the vessel, or where there is a major casualty rendering the vessel unseaworthy, requiring the crew to be signed off, the costs of the repatriation of the crew shall be covered. Nevertheless, if at the time of such repatriation the seafarer's period of service

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but fails to say who has the responsibility over the repatriation. The application of this rather controversial provision will rely on the interpretation given to it by each particular court, as until now there is no settled jurisprudence regarding it.

Furthermore, the USA did not ratify any of the two mentioned ILO Conventions, neither does it possess an express provision under general maritime law providing for repatriation. The doctrine of maintenance and cure is interpreted broadly to include transportation back home at the expense of the shipowner in cases of illness and injury of the seafarer. (*Brunent v Taber. F Cas No 2054 (1854, DC Mass*) However, it is well established that in cases of misconduct, desertion, mutual consent between the seafarer and the shipowner, even in the event of shipwreck, repatriation will be denied to the seafarer. (MJ Norris, Law of the Seamen, (4th ed, 19850, Ch 18, ' Transportation and Repatriation' and U.S. Department of Foreigner Affairs Mannual Volume 7 – Consular Affairs, 7 FAM 750, Repatriation of Seamen)

The MLC repatriation provision seems to be in agreement with the previous national and international provisions stated above. Regulation 2.5 of the Convention provides that seafarers have the right to be repatriated at no cost to themselves, except when the seafarer in found to be in serious default of their obligations according to national laws and collective bargaining agreements. (MLC Regulation 2.5 and Standard A2.5 paragraph 3)

In conclusion, it seems that in the international and national arena (judging by the random selected jurisdictions above as examples), the shipowner is not responsible for covering the expenses relating to a seafarer's repatriation in cases of fair dismissal.

under the employment contract had ceased, there will be no cover. Moreover, in case the seafarer is required to remain with the vessel to carry out repairs or for some other reason, the additional costs incurred and the ultimate repatriation may be recoverable under the vessel's hull policies, in which case P&I is not available. Furthermore, and most importantly, in major casualty cases resulting in the early termination of the employment contract, the liability to pay compensation to the seafarer for loss of employment will be covered, such liability normally being provided for in the contract of employment, either by express or imply terms[686], often providing for compensation equal to one month basic wage. [687] Therefore, in the cases of the *Erika* and *Prestige*, widely discussed in this thesis, the P&I would cover the costs of the seafarers' repatriations and adequate compensation, to the extent of the insurance cover.

V.3 -Direct actions against P&I Clubs according to English Law

Although P&I Clubs cover the liability of shipowners regarding third parties, in particular crew members, these associations' aim is to protect their members and indemnify them for possible losses that may occur out of their contractual breach with seafarers, hence not being an insurance policy directly concerned with the seafarer, but rather with the losses which its members may fall liable for. In summary, the P&I cover is a contractual arrangement between the Member and the Club, the seafarer being a third party external to this contractual relationship, even though the latter can be considered to be an indirect beneficiary of the policy. This raises the question of what will happen in extreme cases of abandonment of seafarers, when the shipowner cannot be located, and/or has fallen into bankruptcy.[688] Indeed, the most common proximate

[686] Section 21 in the Norwegian Seaman's Act provides, inter alia, that the seaman is entitled to all of his contract wages if the duration of the voyage turns out to be shorter than that contemplated in the contract of employment.

[687] See Britannia Class 3 Rule book 2011 and Gold, Edgar, *Gard Handbook on P&I Insurance* 5th Edition , Gard (Norway:2002) p.256-257

[688] This was the case of the Adriatic Tankers – The company went bankrupt leaving several seafarers not only without payment, as left to starve in different ports around the world for over two years in some cases. classification societies and P&I Clubs started to evade as the vessels started to be arrested, and

cause of seafarer abandonment is a shipowner's hardship or insolvency.[689] In these cases how will the seafarer be able to claim the cover, will the seafarer be able to subrogate the position of the member and take direct action against the P&I Club?

In England[690], situations like these are covered by The Third Parties (Rights against

soon the company's vessels were deslisted from class and had their insurance cover cancelled. See: Denis Nifontov, "Seafarer Abandonment insurance: a system of financial security for seafarers", in Jennifer Lavelle (ed), *The Maritime Labour Convention 2006 International Law redefined*, (Routledge 2014), pp.118-119

[689] This can be clearly perceived by the fact that in 2009, the number of abandonments (as understood by ILO) reached a peak, with 50 vessels being abandoned, and over 600 seafarers: http://www.ilo.org/dyn/seafarers/seafarersbrowse.details?p_lang=en&p_abandonment_id=179&p_search_id=130110200706., last accessed on 08/08/2016

See Also: Denis Nifontov, "Seafarer Abandonment insurance: a system of financial security for seafarers", in Jennifer Lavelle (ed), *The Maritime Labour Convention 2006 International Law redefined*, (Routledge 2014), p. 123

[690] England is not the only country possessing domestic legislation regulating direct actions against insurers. Other countries also regulate the rights of third parties to claim directly from the insurer and sometimes in an even more comprehensive matter. For instance:

- Sweden - Swedish Insurance Contracts Act (2005:104) ("ICA") (i) (ii), a third party may claim indemnification directly from the insurer if the insured has a statutory obligation to have third party liability insurance covering the loss and if the insured has been declared bankrupt or an order has been issued for public composition;
- Israel -Section 68 of the Israeli Insurance Contracts Law - 1981 (Insurance Contracts Law) allows a third party to bring a direct action against the liability insurer of the tortfeasor and to claim full compensation;
- Poland - Article 822 § 4 of the Polish Civil Code provides that a person entitled to indemnity in connection with an event covered by a contract of third party civil liability insurance may vindicate claims directly from the insurer (action directa), being the provision applicable to of any liability insurance contract.
- Taiwan - Article 94 Section 2 of the Taiwanese Insurance Act 2001 provides that:
  "Where the insured has been determined liable to indemnify a third party for loss, the third party may claim for payment of indemnification, within the scope of the insured amount and based on the ratio to which the third party is entitled, directly from the insurer."
- Turkey - Article 1478 of the Turkish Commercial Code which regulates the right of direct actions provides that:
  "The third party who incurred a loss, is entitled to claim its loss directly from the insurer subject to the insurance sum and the time limitation period applicable to the insurance contract.

It is interesting that some countries, when regulating direct actions against insurers by third parties, specifically exclude marine insurance contracts. This is the case with Belgium, which regulates such a right in Article 86 of the Non-Marine Insurance Contracts Act of 25 June 1992 (Act). Unfortunately, a more comprehensive analysis of different domestic legislations regulating direct action against insurers by third parties is not within the scope of this research. Nevertheless, such analysis could prove to be extremely valuable. For instance, a more in depth analysis of Belgian law could demonstrate that insurance covering liabilities relating to seafarers would not be considered a marine insurance contract,

Insurers) Act 2010, which came into force on 1 August 2016. [691]However, before the 2010 Act came into force, such cases were provided for by the Third Parties (Rights Against Insurers) Act 1930. Before the 1930 Act, the insurance coverage protected only the one who paid for it, who was a part of the contract of insurance. The purpose of the 1930 Act was exactly to provide for situations like the ones described above, it is an Act "*to confer on third parties rights against insurers of third-party risks in the event of the insured becoming insolvent, and in certain other events."*[692] The Act provides for the insurer to be under the same liability to the third party as he would have been to the insured. [693]

The initial response of the P&I Clubs to The Third Parties (Rights Against Insurers) Act 1930 was that they were not under the scope of the Act, since the Act only applied to "contracts of insurance", which according to the Clubs differs from the relationship between members and Clubs.[694] After some years, however, it became

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but an employment insurance contract, hence seafarers would be allowed to claim directly against the insurer. (For a more detailed, but still limited, discussion on Direct Action Rights see: IBA Insurance Committee Substantive Project 2012, *Direct Third-Party Access To Liability Insurance*, International Bar Association, available at: http://www.ibanet.org., last accessed on 08/08/2016

[691]http://www.lawcom.gov.uk/insurance-bill-becomes-law/. In the 25th of March 2016, the UK minister of Justice, Lord Faulks released a written statement indicating his intention of commencing the Act "reasonably soon" as amended. According to the written statement: "the draft Regulations have to be approved by a resolution of each House of Parliament before they can be made. Subject to that approval being given, I intend to make the Regulations without delay. I will announce the commencement date of the Third Parties (Rights against Insurers) Act 2010 ("the 2010 Act") as amended by both the Insurance Act 2015 and the Regulations in due course but the date will not be earlier than three months after the regulations have been made." See: See: : Lord Faulks, 'Third Parties (Rights against Insurers) Act 2010 – regulations and commencement: Written statement' – (HLWS542, 25/02//2016 <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2016-02-25/HLWS542/>, last accessed on 08/08/2016 See also: http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news-parliament-20151/third-parties-act-chairs-statement-15-16//-, last accessed on 08/08/2016

[692] The Third Parties (Rights Against Insurers) Act 1930 – Introductory text

[693] *Ibid*, Section 1(4)

[694] As with other insurance contracts, a marine insurance contract is set in the form of a marine insurance policy, which establishes an agreement between the insurer and insured and is construed by ordinary means of contract law. Nevertheless, a marine insurance policy has distinctive features from regular commercial insurance policies. Marine insurance is divided into two categories, the first being dedicated to the insurance of cargo wholly or in part by sea and in the second, the subject of insurance is the ship itself. P&I insurance falls within the latter category. Moreover, P&I Club, notably, are exposed to liabilities and losses arising out of many incidents and subject to a wide range of jurisdictions (For instance, in cases of crew insurance, the insurer may be exposed to the law of the flag state, that of the

clear that the P&I Clubs fell under the scope of the Act. Nevertheless, as stated in section 1(4) of the Act, insurers have the same defences whether against the third party or against the insured. Thus, P&I Clubs can rely on the Club Rules in refusing to cover a third party claim.[695] Accordingly, the third party shall be treated by the Club as if he were the member, hence if the claim´s origin was an act of wilful misconduct by the member the Club will not be liable. The 2010 Act retains this scheme, but introduces three new exceptions where claimants are not prevented from enforcing their rights. The first exception refers to the transfer of rights to the third party; if this satisfies a requirement under the insurance policy to meet a particular condition imposed on the insured, the insurer will not be able to rely on the non-performance of the policy condition. The second covers situations when the insured has been dissolved and is therefore unable to fulfil a condition requiring the insured to provide the insurer with information and/or assistance, in which case the insurer cannot rely on that breach. The third exception relates to 'pay to be paid' clauses.[696]

The 2010 Act is expected to bring some very welcome changes to third parties in insurance contracts. For instance, under the 1930 Act, a third party was only allowed to issue proceedings against an insurer after obtaining a judgment against the insured, which can involve lengthy delays and unnecessary expenses whilst those proceedings take place (for seafarers these procedures can be extremely costly, not to mention complicated, considering that the UK may not be a seafarer's place of domicile. hence he could see himself being forced to enforce a foreign judgment or award in the UK). The 2010 Act removes this requirement, allowing a third party claimant to issue proceedings directly against the insurer. The liability of the insured to the claimant and

country of nationality of the seafarer, the law governing the employment contract, the law where the casualty occurred, …). Another special feature is that the insurance industry plays an important role in the development of maritime law, being a major part of the business of underwriting, through the four top markets based in the UK, Japan, France, and the Scandinavian countries, especially Norway. Finally, due to its distinguishing characteristics, marine insurance is normally subject to special legislation. For instance, in England, it is regulated by the Marine Insurance Act 1906, which has recently been amended by the Insurance Act 2015. See: Edgar Gold, *Gard Handbook on P&I Insurance* 5th Edition , Gard (Norway:2002), pp. 73-76

695 Steven Hazelwood, *P&I Clubs: Law and Practice*, (3rd Ed. Lloyd's Press 2000), pp.292-294

696 Third Parties (Rights against Insurers) Act 2010, Sec. 9

the extent of the cover afforded will be decided in the same proceedings, minimizing costs and number and duration of proceedings. [697]Moreover, the Act also allows a third party to bring proceedings against insurers without first establishing the fact and amount of the insured's liability. In such cases the third party may bring proceedings against the insurer for a declaration:

- that the insured was liable to him;
- that the insurers are therefore liable to him.[698]

Another important feature of the 2010 Act is that it gives the claimant rights to information about the insurance policy, allowing him to make an informed decision at an early stage about the rights which are transferred to him and therefore decide whether to commence or continue litigation.

Furthermore, the 2010 Act reflects the changes in insolvency law in England since 1930. [699]Thus, a provision is included in the 2010 Act providing for rights to be transferred to a claimant where an insured is facing financial difficulties and enters into certain voluntary procedures and makes an agreement/composition with his or her creditors.[700] This provision can be particularly useful for seafarers, whose abandonment, as seen previously, is often due to the shipowner's financial hardship or insolvency, which leads to the ceasing of the P&I premiums paid, hence resulting in the insurance and membership of the group being cancelled. Moreover, by the time that a vessel (and subsequently the crew) is abandoned, the shipowner is no longer insured

[697] Third Parties (Rights against Insurers) Act 2010, Sec. 1(2) (3)
[698] Third Parties (Rights against Insurers) Act 2010, Sec. 2 (2)
[699] It is interesting to note that whereas the UK only allows direct actions in cases where the insurer is insolvent, Germany only allows these types of actions where the insurance was compulsory, whereas France allows third party actions in all cases (Johanna Hjalmarsson, "Crewing Insurance under the Maritime Labour Convention 2006", in ", Jennifer Lavelle (ed) *the Maritime Labour Convention 2006 International Law redefined*, (Routledge 2014), p. 106)
[700] Third Parties (Rights against Insurers) Act 2010, Sec. 11

by the group hence not being able to receive the benefit of the insurance. [701] Consequently, the provision is likely to be useful for seafarers, as it will allow them the possibility of knowing about any possible hardships faced by insured shipowners prior to engaging with a voyage. Pragmatically, it is not entirely certain how the provision will work as seafarers are often from countries other than the UK, and claims tend to be costly, added to the fact that communications with and from seafarers are not as easy as communication with land based workers due to obvious logistical reasons.

V.4 - Identifying the insurer

As previously mentioned in this thesis, shipowners are sometimes not easily identifiable[702], and similar difficulties may be encountered in locating the insurer. Seafarers may struggle to identify which insurer provides cover for the duration of their employment contract.

In the United Kingdom, the creation of the employer's liability insurance register might assist seafarers facing these types of situations. Since 2011, employers' liability insurers[703] in the UK are obliged to keep a register of the employers they insure

[701] Denis Nifontov, "Seafarer Abandonment insurance: a system of financial security for seafarers", in Jennifer Lavelle (ed), *The Maritime Labour Convention 2006 International Law redefined*, (Routledge 2014), p. 123

[702] For more information on how is possible for the ship owner to keep his/hers anonymity, see the study carried out by The Maritime Transport Committee, *Ownership and Control of Ships*, OECD, Directorate for Science, Technology and Industry, March 2003, <www.oecd.org/dataoecd/53/9/17846120.pdf>

[703] The Employers' Liability (Compulsory Insurance) Act 1969 requires employers carrying on business in the UK to insure their liability to the employees for bodily injury or disease sustained in the course of their employment in the UK. (A separate scheme applies in Northern Ireland.) Although, the Act came into effect only 1 January 1972, not being compulsory prior to that, to have Employers' Liability insurance, many employers arranged cover. This would seem to be the case with shipowners since third party liability and crew cover seem to have appeared many years before. It is important to note that the Employers' Liability (Compulsory Insurance) Act 1969 is applicable to seafarers working on board of UK flagged vessels. Nonetheless, recognising that sometimes seafarers were already insured with a mutual insurance association of shipowners, sometimes known as Protection and Indemnity Clubs (P & I Clubs), the Act exempts the need of a specific Employer's Liability Cover, recognising the first as an alternative to insurance under the Act. (FSA Consultation Paper 10/13, 'Tracing Liability Insurers', (FSA June 2010) <http://www.fca.org.uk/static/pubs/cp/cp10_13.pdf>, last accessed on 08/08/2016 and Department of Trade, Merchant Shipping Notice No. M.757, (Department of Trade, London August 1976)

under the Financial Services Authority's Employers' Liability Insurance: Disclose by Insurers Instrument 2010.[704]

The Insurance Conduct of Business Sourcebook (ICOBS), which is a part of the Financial Conduct Authority Handbook, setting out standards by which insures must conduct their business, provides in R.8.4 for Employers' Liability Insurance, and in guideline 8.4.3 states that the purpose of this particular Rule is to:

> "assist individuals with claims arising out of their course of employment in the *United Kingdom* for employers carrying on, or who carried on, business in the *United Kingdom*, to identify an *insurer* or *insurers* that provided *employers' liability insurance* (other than certain co-insurance and excess cover arrangements) by requiring *insurers* to produce an employers' liability register and to conduct effective searches for historical *policies*. In particular it aims to assist ex-employees whose employers no longer exist or who cannot be located."

Therefore, it is clear that the intention of the rules is to not leave the employee unassisted in case his/her employer cannot be located for any reason. By allowing the employee/ seafarer to locate the insurer, it enables him/her to file a direct claim against them. Nevertheless, being able to locate the insurer might not assist seafarers in every abandonment situation. The Financial Services Authority's Employers' Liability Insurance: Disclose by Insurers Instrument 2010 is a consequence of the Employers' Liability (Compulsory Insurance) Act 1969, which only makes provides insurance cover in the case of personal injuries and death, which seems to also to be the only exceptions to defences available to P&I Clubs, as it will be seen in the next topic.

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/282077/msn757.pdf>, last accessed on 08/08/2016

[703] Amended by the Employer's Liability Insurance: Disclosure by Insurers (no.2) Instrument (2012)

[704] Amended by the Employer's Liability Insurance: Disclosure by Insurers (no.2) Instrument (2012)

Even so, this UK policy might still assist seafarers in search of due compensation in the event of abandonment (even if only in specific cases), since P&I Clubs in the UK[705] are part of the scheme, and given the major role these have in the shipping industry providing most insurance cover, seafarers on board non-UK registered vessels will also be able to benefit from the information of these registries and possibly, depending on the regulation and the governing law applicable to the insurance policy[706], be able to file a direct claim against the insurer.[707]Furthermore, policies issued by UK insurers carry great importance within the shipping industry, hence this development can be said to be of "incomparable potential importance to seafarers with claims under past policies"[708]. It is important to note, moreover, that even

[705] The Employer's liability Register of the Britannia P&I Club encompasses as many as 2785 pages, and a considerable number of vessels and policy years, whereas Steamship Mutual has taken the approach of issuing Employer's Liability Registers on an annual basis (Registers available at: http://www.britanniapandi.com/employers-liability-register-elr/, last accessed on 08/08/2016 and https://www.steamshipmutual.com/Liabilities-and-Claims/EmployersLiabilityRegister.htm. North P& I Club also makes its annual Employer's liability Register available at , last accessed on 08/08/2016http://www.nepia.com/policy-pages/employers-liability-insurance-register/ - Information about P&I Clubs Employer's liability Register may also be obtained through the Employer's Liability Tracing Office (ETLO) at http://www.elto.org.uk, last accessed on 08/08/2016)

[706]Insurers are known to occasionally provide insurance on a policy without any reference to applicable law, and upon the assumption that the "law of the insured" will be applied in the event of a dispute. It is suggested that it would be advisable for insurers to choose the best applicable law to the policy, especially considering that many countries usually possess stringent mandatory requirements governing the insurance contract in order to protect insurance consumers and 'weaker parties', with seafarers falling into the latter category. (Johanna Hjalmarsson, "Crewing Insurance under the Maritime Labour Convention 2006", in ", Jennifer Lavelle (ed) *the Maritime Labour Convention 2006 International Law redefined*, (Routledge 2014), p. 100). Nevertheless, insurance contracts, like employment contracts, at least in Europe, possess a 'limited autonomy to determine the courts having jurisdiction'. (Council Regulation (EC) 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1, Preamble Recital 14) – For a more detailed discussion on jurisdiction matters related to insurance see Johanna Hjalmarsson, "Crewing Insurance under the Maritime Labour Convention 2006", in ", Jennifer Lavelle (ed) *the Maritime Labour Convention 2006 International Law redefined*, (Routledge 2014), p. 100, pp.105-108

[707] Unfortunately, as previously mentioned, a comparative analysis of different national legislations is outside the scope of this thesis. It is important however to bear in mind that according to the UK courts, there is jurisdiction to cover claims of seafarers who can show they are peripatetic employees based in the UK, following decisions concerning aircrew. *Diggins v. Condor Marine Crewing Services Ltd [2009] EWCA Civ 1133*, [2010] ICR 213

[708] Johanna Hjalmarsson, "Crewing Insurance under the Maritime Labour Convention 2006", in ", Jennifer Lavelle (ed) *the Maritime Labour Convention 2006 International Law redefined*, (Routledge 2014), p. 100, pp. 96-97

prior to the Financial Services Authority's (FSA) policy, the Association of British Insurers (ABI) and the Lloyd's Market Association since 1999 had a voluntary Code of Practice for tracing Employment liability insurance policies but this was deemed to be unsatisfactory.[709]

V.5 - Pay to be paid rule

As mentioned, one of the defences available to P&I Clubs, and that deserves special analysis, is the "pay to be paid rule". This rule means that the member must pay and settle the claim before asking for the indemnification to the Club. This rule is stipulated in the Britannia rulebook as follows:

> *"If a Member shall become liable as hereinafter set out in Rule 19, in damages or otherwise, or shall incur any costs or expenses in respect of a Ship which was entered in the Association at the time of the casualty or event giving rise to such liability, costs or expenses, such Member shall be entitled to recover out of the funds of this Class of the Association the amount of such liability, costs or expenses to the extent and upon the terms, conditions and exceptions provided by these Rules and by the Certificate of Entry. (...)* ***Provided always that****, unless the Committee in its discretion otherwise determines,* ***it shall be a condition precedent of a Member's right to recover from the funds of the Association in respect of any liability, costs or expenses that the Member shall first have discharged or paid them."***[710]

The "pay to be paid" defence was used in The *Fanti"* and The *Padre Island [1990] 2Lloyd's Rep 191. HL*[711], which was an appeal made by two independent third

[709] FSA Consultation Paper 10/13, 'Tracing Liability Insurers', (FSA June 2010) <http://www.fca.org.uk/static/pubs/cp/cp10_13.pdf>, last accessed on 08/08/2016

[710] Britannia Class 3 Rule Book, rule 5.1.

[711] *Firma C-Trade SA v Newcastle Protection and Indemnity Association (London) Ltd (The Fanti)*; *Socony Mobil Oil Inc v West of England Shipowners Mutual Insurance Association (The Padre Island)*

party claimants seeking redress against P&I Clubs, posing the question whether the rights of a third party as against an insurer were still strictly subject to an original term in the policy, namely the 'pay to be paid' rule. Thus, the cases started as independent claims that due to their similarities were heard together in court. "*The Fanti"* was a claim brought by salvors against a P&I Club under the Third Parties (Rights Against Insurers) Act 1930 to recover the costs of the salvage of a vessel and cargo that had been abandoned by the shipowner, whereas *The Padre Island* concerned claimed cargo where the claimants had successfully pressed against the owners of the vessel, and on non-payment had an order made for winding up, later filing a claim against the P&I Club, also based on the 1930 Act. In both cases the insurers refused payment based on the "pay to be paid" rule. In a decision considered surprising to some[712], the House of Lords decided in favour of the P&I Clubs on the basis that the 'pay to be paid' rule was a term of the contract of insurance that had not been adhered to, hence it was not reasonable to confer on a third party to that policy of insurance, terms which were more favourable than the original contract intended. Nevertheless, Lord Justice Goff warned the Clubs not to use this defence in cases of loss of life or personal injury. [713]

Therefore, one may conclude that in cases of abandonment of seafarer involving personal injury or even loss of life, P&I Clubs will not be able to rely on the "pay to be paid" rule, however this does not actually seem to be the case. In an arbitration claim concerning over 2000 US seafarers who fell ill during the course of their employment, the arbitrator ruled for the applicability of the 'pay to be paid' rule finding support for his decision in the speech of Lord Brandon (with whom the other four Lords Agreed) in *the Fanti* and *the Padre Island* in favour of the enforceability of such a clause, ruling that such clauses were not affected by section 1(3) of the 1930 act, as the rights of the insured were not altered by the insolvency event at all, only the ability of the member

[1991] 2 AC 1.

[712] See: Lindsay East, 'What the Fanti/Padre Island didn't decide', (Maritime Risk International, June 2000)

[713] See also*:* Susan Hodges, *Cases and Materials on Marine Insurance Law,* (Routledge-Cavendish, 1999), pp.548-550 and *Shipowners' Mutual Protection And Indemnity Association (Luxembourg) V Containerships Denizcilik Nakliyat Ve Ticaret As (The "Yusuf Cepnioglu")* [2015] Ewhc 258 (Comm)

to exercise those rights being affected by the event, with the rights of the insured remaining the same before and after the event of insolvency, and so far as concerns entitlement to recover from the Club, the member never had more than a contingent right which depended on the prior discharge of any qualifying liability by the member himself.[714]

Nevertheless, the above legal discernment comes to an end with the advent of the Third Parties (Rights against Insurers) Act 2010. The Act makes such clauses invalid, preserving the decision in *The Fanti* and the *Padre Island* for marine insurance cases but expressly excluding claims in relation to loss of life and personal injury.[715]

As a result, it can be concluded that under the 2010 Act, seafarers in some specific case of abandonment, i.e. personal injury and loss of life (neither contained in the MLC provisions, but included within the broad definition of abandonment) will be able to claim directly from insurers, especially in insolvency cases, ensuring that the seafarer will be duly compensated. The system can hardly be called ideal for seafarers, as it still mostly involves claims in a jurisdiction other than the seafarers' place of residence (especially considering the location of most P&I Clubs and the nationalities of most seafarers), hence seafarers may still be forced to spend time and money in order to be adequately compensated for their losses.

Nevertheless, hopes are that seafarers will never have to rely on these rights in order to get compensated for such claims. This is because the International Group of P&I Clubs have waived the "pay-to-be-paid" requirement together with the rule concerning retrospective withdrawal coverage for the non-payment of premiums in relation to claims for death and personal injury brought by seafarers, since 20 February 2009. [716]

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[714] *Ibid*

[715] Third Parties (Rights against Insurers) Act 2010, Sections 9(5) and (6)

[716] ILO-IMO-WGPS-FR-[2008-07-0117-1]-En.doc/v2, 'Final Report - Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation Regarding Claims for Death, Personal Injury and Abandonment of Seafarers' (ILO Geneva, 21–24 July 2008), p.12

V.6 – P&I Clubs and the MLC

The MLC does not possess a comprehensive insurance obligation, and does not expressly require insurance, but insurance cover is a convenient way to fulfill some of the convention's requirements.[717] Essentially, the MLC, as currently in force, only requires, in regulations 2.5 and 4.2, for Financial Security to be provided, failing to specify a particular form for it. Although insurance is not the only form of Financial Security, it is usually a convenient method of fulfilling the requirement.[718]

Differently from the 1992 CLC and 2001 Bunker Convention, the MLC does not require "blue cards" as evidence of the Financial Security, and does not impose a right of direct action against the provider of Financial Security. It leaves to each Member State to not only determine the form of Financial Security it will adopt, but also to determine the form of evidence (such as proof that adequate insurance is in place) required to satisfy the requirement of Financial Security. Regarding the latter, member States seem to have accepted P&I Clubs' certificates of entry as evidence.[719]

V.6.1 – Repatriation

Repatriation of seafarers, as seen in Chapter I is covered by MLC Regulation 2.5 which provides for seafarers to be repatriated at no cost to themselves, except when he/she has unilaterally breached his employment contract, by being in serious default of its obligations according to national laws and collective bargaining agreements.[720]

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[717] Johanna Hjalmarsson, "Crewing Insurance under the Maritime Labour Convention 2006", in ", Jennifer Lavelle (ed) *the Maritime Labour Convention 2006 International Law redefined*, (Routledge 2014), p. 95

[718] It is suggested that the Financial Security may be in the form of a social security scheme or insurance or fund or other similar arrangements. (International Labour Standards Department, *Maritime Labour Convention, 2006* (MLC, 2006), *Frequently Asked Questions (FAQ)*, (Fourth Edition 2015, ILO)), p.54

[719] Gard, Entry into force of the Maritime Labour Convention, 2006 (MLC), Member Circular No. 4/2013, March 2013

[720] See MLC Regulation 2.5 and Standard A2.5 paragraph 3

As already also seen in chapter I, the MLC is based on past ILO/ IMO instruments and undoubtedly this part of the Convention took into consideration the provisions contained in the ILO C166 - Repatriation of Seafarers Convention 1987. The convention was only ratified by 14 countries and is currently only in force in seven of them.[721] However, the ILO C166 is itself nothing if not a revision of the ILO C023 - Repatriation of Seamen Convention, 1926[722] which received forty-seven ratifications. The ILO conventions provide, in more detail, for the same repatriation rights as in the MLC, with the same conditions for seafarers, even placing the burden of it on the Flag State in case the shipowner fails to honor his/her obligations. The novel provision contained in the MLC is the fact that it provides for Flag States, members of the Convention, to provide evidence of Financial Security to ensure that seafarers are duly repatriated if the shipowner fails to fulfill his or her obligations.[723]

The placing of the obligation on the Flag State to repatriate the seafarer in the event that the shipowner fails to do so can hardly be considered to be a 'novelty', as this was perceived as an 'implied' obligation considering the responsibilities attributed to Flag States according to international instruments. Indeed, in most cases of abandonment of seafarer requiring repatriation, the Flag State is called upon to repatriate the stranded seafarer once the shipowner fails to do so. For instance, in an abandonment case from 2013, a short while prior to the MLC's entry into force, the Flag State Liberia was contacted in order to provide assistance to the crew of the *A Whale* stranded in Suez, by ensuring the shipowner's fulfilment of his/her obligations. According to reports, Liberia not only assisted by applying pressure on the shipowner to provide for the crew, but was willing to "step in to help the men get home if necessary". [724]Nonetheless, Flag States are not always keen to 'step in' and take the

[721]http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312311, last accessed on 08/08/2016 Gard, Entry into force of the Maritime Labour Convention, 2006 (MLC), Member Circular No. 4/2013, March 2013

[722] See the Preamble of the ILO C22 Convention

[723] Regulation 2.5 paragraph 2

[724] Debbie, 'Flag-State Liberia Helps Out Stranded 'A Whale' Crew', (Intermanager, 12 July 2013) <http://www.intermanager.org/2013/07/flag-state-liberia-helps-out-stranded-a-whale-crew/>, last accessed on 08/08/2016. The cause of the abandonment once again seems to have been the company

responsibility of affording the seafarers' repatriation expenses regardless of having ratified the previous ILO Repatriation Conventions or not. This can be seen in the case of *the Ladybug*, a vessel owed by the same 'bankrupted' company as the *A Whale*, which had its crew stranded in the Port of Malta for eight months. The Flag State in the case of the Ladybug, Panama, did not seem to be as helpful as Liberia, leaving the crew on their own, having to rely on and wait for the sale of the vessel in order to receive their due wages and be repatriated.[725]

The MLC, however, unquestionably makes Flag States responsible for repatriation costs in case the shipowner fails to do so; Standard A2.5.5 of the convention provides that:

> "If a shipowner fails to make arrangements for or to meet the cost of repatriation of seafarers who are entitled to be repatriated:
> (a) the competent authority of the Member whose flag the ship flies shall arrange for repatriation of the seafarers concerned; if it fails to do so, the State from which the seafarers are to be repatriated or the State of which they are a national may arrange for their repatriation and recover the cost from the Member whose flag the ship flies;
> (b) costs incurred in repatriating seafarers shall be recoverable from the shipowner by the Member whose flag the ship flies;
> (c) the expenses of repatriation shall in no case be a charge upon the seafarers, except as provided for in paragraph 3 of this Standard"

insolvency, having the company even filed for bankruptcy protection in US courts in order to avoid fulfilling with their legal obligations towards the seafarers. Nonetheless, US courts eventually released sufficient funds to the crew of the A Whale to cover their unpaid wages and repatriation. (Tom Leander, 'A Whale crew will bank their wages and head home', (23 July 2013, Lloyd's list

[725] ITF, 'C Ladybug crew finally paid, but not by shipowner', (4 september 2013 ITF) <http://www.itfseafarers.org/maritime_news.cfm/newsdetail/9452>, last accessed on 08/08/2016, and World Maritime News Staff, 'Abandoned Filipino sailors, members of the MV B Ladybug Finally Home' (29 April 2014, Worldmaritimenews) <http://worldmaritimenews.com/archives/122328/abandoned-filipino-sailors-from-mv-b-ladybug-finally-home/>, last accessed on 08/08/2016

Due to this undeniable 'secondary' Flag State responsibility to repatriate the seafarer, an insurer has launched a new product called Flag Liability Insurance against Exposure for Repatriation, or Flier. The insurance offers full coverage for legal liabilities relating to repatriation and medical costs following an abandonment (due to insolvency), which Flag States inherit as a result of the MLC. It is offered in association with fixed premium mutual provider Lodestar Marine, with market capacity of around $5m-$10m, provided by Liberty Mutual Insurance Europe.[726] The problem with this insurance as highlighted, is that it is conditional. It only covers expenses in case of the shipowner's insolvency. It is true that most cases of abandonment are due to shipowners' insolvency/bankruptcy, however this is not always the case.[727]

In the same way that placing an 'auxiliary' responsibility on Flag States in repatriation cases is not necessarily new, P&I Clubs' cover, prior to the MLC, in general already encompassed repatriation costs linked to death, injury or illness, or due to shipwreck.[728] The difference in the MLC provisions is that they provide for the Financial Security to cover repatriation costs also:

> "(iii) in the event of the shipowner not being able to continue to fulfil their legal or contractual obligations as an employer of the seafarers by reason of insolvency, sale of ship, change of ship's registration or any other similar reason;
> (iv) in the event of a ship being bound for a war zone, as defined by national laws or regulations or seafarers' employment agreements, to which the seafarer does not consent to go, and

[726] Insurance Journal, 'Willis Launches New Policy to Cover Repatriation Costs for Stranded Seafarers', (10 September 2013, Insurance Law Journal) <http://www.insurancejournal.com/news/international/2013/09/10/304702.htm>, last accessed on 08/08/2016
[727] See: IMO abandonment database
[728] MLC Guideline B2.5.1(b) (i) (ii). See: See: UK P&I Club, 'MLC Club FAQs', (16 August 2013, UK P&I Club) <http://www.ukpandi.com/knowledge/article/mlc-club-faqs-6133/>, last accessed on 08/08/2016 and Gard, Entry into force of the Maritime Labour Convention, 2006 (MLC), Member Circular No. 4/2013, March 2013

(v) in the event of termination or interruption of employment in accordance with an industrial award or collective agreement or termination of employment for any other similar reason."[729]

Therefore, the Financial Security for repatriation provided by the MLC shall hopefully give the seafarer a broader sense of security that he or she will be repatriated in all circumstances. P&I Clubs, which are often those responsible for fulfilling such a requirement, have extended their cover to encompass all situations provided for by the MLC[730].

The question with this Financial Security is that the seafarer is not the insured *per se*, hence he/she will still have to rely on the goodwill of the shipowner to have his/her repatriation expanses paid promptly, as the right of direct action against the insurer is not guaranteed under the convention, and it might also not be guaranteed under national laws. The second question relies on the fact that the insurance only covers repatriation costs and seafarers will often refuse to be repatriated without being afforded their wages.[731]

V.6.2 – Health Protection

Considering that this thesis contemplates the concept of "abandonment of seafarers", not limited to the concepts provided by the MLC or IMO Resolution A.930 (22), it should not be difficult to perceive how the lack of provision for medical

[729] MLC Guideline B2.5.1(b)(iii) (iv) (v)

[730] UK P&I Club, 'MLC Club FAQs', (16 August 2013, UK P&I Club) <http://www.ukpandi.com/knowledge/article/mlc-club-faqs-6133/> and Gard, Entry into force of the Maritime Labour Convention, 2006 (MLC), Member Circular No. 4/2013, March 2013
Skuld Rule 7.1.7 now provides for repatriation under MLC as a covered risk. However, provision is also made that if repatriation costs relate solely to a claim under the Convention, which would not otherwise be covered under the Rules, the member will be liable to reimburse the Association. Thus, although the costs of repatriation following a casualty or one which relates to illness or injury will continue to be covered by the Association, if the Association is required to pay costs of repatriation following termination of employment or abandonment of the vessel, the member will be obliged to reimburse the Association. Skuld Rules, available at http://www.skuld.com, last accessed on 08/08/2016

[731] ITF Abandonment cases documents

assistance/care, which is a moral duty, apart from being a contractual breach, can constitute abandonment.[732] Moreover, even disregarding the concept adopted in this thesis, it is a fact that in many abandonment of seafarers' cases, medical care is required, since seafarers get stranded in ports for long periods of time. Thus, the need for the provision of medical care is often a consequence of abandonment itself. [733]

The other MLC provision requiring Financial Security to be provided is found in Title 4, which covers 'Health protection, medical care, welfare and social security protection'. Regulation 4.2 entitled 'Shipowners' liability' requires Flag States to ensure that seafarers on board their ships have the "right of material assistance and support from the shipowner with respect to the financial consequences of sickness, injury or death occurring while they are serving under a seafarer's employment agreement or arising from their employment under such agreement."[734]

Regulations 2.5, 4.2 are nothing if not revisions to an old ILO Convention. The MLC provision mirrors ILO Sickness Insurance (Sea) Convention, 1936 (No.56), which was only ratified by twenty countries, hardly a significant number, entering in to force in 1949[735], and similarly with ILO Convention No 23, which can also be

[732] Before any "abandonment of seafarer" definition had been set in place, in 1990/ 91, ITF reported the case of a Cape Verde', involving a seafarer who suffered being injured during work and had been left uncared for in Rotterdam, having to rely on the mercy of the Dutch police and government who placed him a hospital. After a legal dispute, where the owners claimed that the accident was the seafarer's fault, it was settled that the owners would pay the seafarer U$ 195,523, and pay for his repatriation and medical costs in full. Attention should be given to the title given to ITF while reporting the case: "Severely injured and abandoned by owners, Evangelino gets Justice at last". The title of the article in itself is a clear demonstration how the refusal of health care constitutes abandonment of seafarer. ITF, 'Severely injured and abandoned by owners, Evangelino gets Justice at last', ITF Sefarers' Bulletin No 6, 1991, page 22.

[733] In the middle of 2016, a seafarers' charity (Apostleship of the sea) reportedly had to provide medical assistance to seafarers who had been abandoned following the shipowner's bankruptcy and the consequent seizing of the vessel by banks. –International Shipping News, 'Seafarers' charity steps in to help abandoned Russian crew', (Hellenic Shipping News, 26/07/2017)< http://www.hellenicshippingnews.com/seafarers-charity-steps-in-to-help-abandoned-russian-crews/>, last accessed on 08/08/2016

[734] MLC Regulation 4.2.1. The term Financial Security is only mentioned in Standard A4.2(b).

[735] Following the MLC, the convention has been up to May 2016 denounced by fourteen countries. http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312201, last accessed on 08/08/2016

considered more stringent than the MLC, since many of the rights assured in the former are mere guidelines in the latter.

ILO Convention No. 56's provisions read fairly similarly to the ones contained in Regulation 4.5, containing a few, but what some may consider significant, differences. In contrast to the MLC, ILO Convention No. 56 is very specific about the form of Financial Security to be provided, providing that this shall be under a "compulsory sickness insurance scheme"[736], which shall be "administered by self-governing institutions, which shall be under the administrative and financial supervision of the public authorities and shall not be carried on with a view to profit".[737]

It is important to highlight that the MLC provides for possible exclusions of liability in Standards A4.2.5 and A4.2.6:

> "5. National laws or regulations may exclude the shipowner from liability in respect of:
> (a) injury incurred otherwise than in the service of the ship;
> (b) injury or sickness due to the wilful misconduct of the sick, injured or deceased seafarer; and
> (c) sickness or infirmity intentionally concealed when the engagement is entered into.
> 6. National laws or regulations may exempt the shipowner from liability to defray the expense of medical care and board and lodging and burial expenses in so far as such liability is assumed by the public authorities."

In truth what the convention does is to recognize that national laws and regulations might provide for exclusions of liability since most employment legislations already recognize the situations listed in the Convention as exclusions of

[736] ILO Convention No 56, Article 1
[737] *Ibid*, Article 9

liability in analogous situations.[738]

The fact is that Regulation 2.5 did not cause a major change in the industry, since prior to the MLC standard P&I covers already provided for compensation in the event of death or long term disability due to an occupational injury, illness or hazard[739], with the only difference appearing to be that Clubs will now require evidence of these matters having occurred.

V.6.3 – Abandonment of seafarer provisions

Undoubtedly, the MLC's provisions regarding abandonment have their roots in IMO Resolution A.930 (22) "Guidelines on Provision of Financial Security in Cases of Abandonment of Seafarers". The Resolution not only defines abandonment of seafarers, but also provides for a Financial Security fund. According to the Resolution, the Financial Security system should be in the form of "*inter alia*, social security schemes, insurance, a national fund, or other forms of Financial Security".[740] The problem with the Resolution is that it only constitutes guidelines, there thus being no obligation to enforce or comply with it.

The MLC clearly followed the parameters of the above Resolution. According to the proposal for amendment of the Convention, the Financial Security system shall be sufficient to cover:

(a) Outstanding wages and other entitlements due from the shipowner to the seafarer under their employment agreement, the relevant collective bargaining agreement on the national law of the Flag State, limited to

[738] See Chapter III
[739] UK P&I Club, 'MLC Club FAQs', (16 August 2013, UK P&I Club) <http://www.ukpandi.com/knowledge/article/mlc-club-faqs-6133/>, last accessed on 08/08/2016 and Gard, Entry into force of the Maritime Labour Convention, 2006 (MLC), Member Circular No. 4/2013, March 2013
[740] IMO Resolution A.930 (22)"Guidelines on Provision of Financial Security in Cases of Abandonment of Seafarers", session 6.1

four months of any such outstanding wages and four months of any such outstanding entitlements;

(b) All expenses reasonably incurred by the seafarer, including the cost of repatriation in accordance with paragraph 11; and

(c) The cost of necessary maintenance and support from the act or omission constituting abandonment until the seafarers' arrival at home[741]

Therefore, the security system that will be provided by the MLC does not differ much from the Financial Security system provided for by IMO Resolution A.930 (2). The acclaimed (especially by trade unions) difference lies in the fact that the amendment to the MLC provides for seafarers to have direct access to this fund.[742] Therefore, essentially, shipowners will have to provide for their seafarers a 'trust fund', placing the seafarers as direct beneficiaries of it. In the author's view this seems practicable.

Nevertheless, since even before the adoption of IMO Resolution A.930 (22) in November 2001, P&I Clubs shared the view that it was impossible to provide cover insuring against the risk of abandonment, and that this was also unnecessary. At the time of IMO Resolution, P&I Clubs considered it to be not only of "doubtful utility", but also of "doubtful practicality". Representatives of the International Group of P&I Clubs claimed "they would be unable to issue notifications to individual seafarers. In addition, the International Group P&I Clubs have pointed out that claims for liabilities to seafarers are always subject to Club Rules and Terms of Entry (including deductibles) and that payments could not therefore be guaranteed to individual seafarers."[743] Furthermore, P&I Groups argued that:

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[741] Amendments to the Code implementing Regulation 2.5 – Repatriation of the MLC, 2006 (and appendices) adopted by the Special Tripartite Committee on 11 April 2014, adopted by the Special Tripartite Committee on 11 April 2014, *Standard A2.5.2*

[742] *Ibid*

[743] See: Swedish Club P&I Circulars, 'International Maritime Organisation (IMO) and International Labour Organisation (ILO) Joint Guidelines to Seafarers', (Swidish Club, Göteborg: February 1st 2002), <http://www.swedishclub.com/main.php?mcid=1&mid=106&pid=17307&newsid=282 >, last accessed on 08/08/2016 and West of England, 'Notice to Members No. 9 2001/2002 - IMO/ILO - Resolutions and

- A dispassionate assessment of seafarers' claims for death and personal injury, based on statistics provided by Group Clubs, clearly indicated that such claims do not give rise to significant problems.
- Group Clubs handle seafarers' claims fairly, efficiently and expeditiously.
- IMO Resolution A.898 (21) and the accompanying Guidelines providing that vessels should carry evidence of liability insurance extended to seafarers' claims.
- There was therefore no need to develop additional Resolutions or Guidelines in relation to this issue.[744]

Due to this sceptical position regarding the necessity and practicability of such insurance and the fact that abandonment provisions for years were nothing but guidelines, there was little commotion from P&I Clubs until the advent of MLC in finding ways to provide for such cover. Unfortunately, this skeptical feeling still seems to exist among P&I Clubs. In 2013, the year of the entrfinany into force of the MLC, insurance brokers from Seacurus enumerated and explained the difficulties for P&I Clubs in providing Financial Security to cover abandonment. Apart from the normal difficulties of any crew cover, the 'pay-to-be-paid' rule and the right to take direct action, the brokers also pointed out that:

1. Considering that the main cause of seafarer abandonment is a shipowner's financial hardship and insolvency, which also leads them to stop paying their P&I premiums resulting in the cancelation of their insurance and membership of the Club, by the time a seafarer is abandoned the shipowner

Guidelines' (December 2001, West of England Club) <http://www.westpandi.com/Publications/Notice-to-Members/Archive/Notice-to-Members-No-9-20012002/>, last accessed on 08/08/2016

[744] West of England, 'Notice to Members No. 9 2001/2002 - IMO/ILO - Resolutions and Guidelines' (December 2001, West of England Club) <http://www.westpandi.com/Publications/Notice-to-Members/Archive/Notice-to-Members-No-9-20012002/>, last accessed on 08/08/2016

may no longer be insured henceforth being unable to receive the benefit of the insurance.

2. P&I Clubs offer third party liability insurance that covers seafarers' repatriation in the event of illness or injury or as a consequence of a total loss or major casualty, provided that a shipowner has a legal liability and their premiums have been paid. However, P&I Clubs do not cover repatriation liabilities arising out of a breach of a contract of employment and abandonment after such a breach. It is suggested that losses arising from a breach of contract could be classed as 'credit default', "i.e. the failure through insolvency or otherwise to meet the costs of contractual commitments with respect to a crewmember's repatriation and/or payment of salary", and since P&I are not Financial Security systems they would be unable to provide cover for their member's failure to meet the costs of contractual commitments as a result of their insolvency or otherwise, which ordinarily represents a barrier to the Clubs covering costs arising from crewmembers' repatriation or payment of wages.

3. There is the possibility of a conflict of interest, since the cover is provided on behalf of the shipowner member, hence, considering how P&I operates,[745]it cannot be expected from a Club for it to be an "impartial arbiter of the relationship between crew and employer". Thus, a Club might be reluctant to act against a member in defence of seafarers, which could delay the seafarer's repatriation, prolonging his/her stay on board the vessel or at the port where he is stranded, increasing the possibility of the shipowner becoming unable to pay its calls with the subsequent cancelation of cover. [746]

[745] P&I Clubs are controlled and operated by members and representatives are elected by their members.
[746] Seacurus, 'Joint IMO/ILO Ad Hoc Expert Working Group On Liability And Compensation Regarding Claims For Death, Personal Injury And Abandonment of seafarers - Seafarer Abandonment – An Insurance Solution Proposals by Seacurus Ltd',(19-21 September 2005, Seacurus Ltd), p.6 and Denis Nifontov, "Seafarer Abandonment insurance: a system of financial security for seafarers", in

In 2014, when specifically commenting on the Amendment of the MLC designed to protect abandoned seafarers, Thomas Brown, managing director of Seacurus, while mentioning and at times explaining some of the difficulties listed above, devoted particular remarks to the difficulty of having insolvency risk mutualized, which would be a possible (if not the sole) way to comply with the requisites of Financial Security provided by the MLC, since insolvency of shipowner was seen in most cases to lead to abandonment. Indeed, according to Brown "if the Clubs are to intervene in the case of seafarer abandonment, they must be willing to use the mutual funds of their solvent members to enable them to act as financial guarantors to cover the debts of their insolvent members." However, the hurdle lies in the fact that by "mutualising the risk of financial insolvency, the industry risks tilting the playing field against well-founded, financially solvent shipowners who, at significant financial cost, employ best practice throughout their operations." [747]Thus, especially considering that abandonment of seafarers as provided by the MLC can hardly be perceived as a 'common practice' among shipowners, and such cases might be considered exceptions[748], a possible mutualisation of the risk of insolvency could represent the bad subsiding the good. This concern seems to be shared by other P&I' representatives, such as Jonathan Hare, Chairman of the Compulsory Insurance subcommittee, who when reviewing the amendments of the MLC, stated that:

> "A transfer of what has historically been a financiers' risk to the marine insurer, particularly where a mutual Club is involved, raises difficult issues of principle quite apart from practical concerns such as cover limits and

Jennifer Lavelle (ed), *The Maritime Labour Convention 2006 International Law redefined*, (Routledge 2014), pp. 123-124

[747]Thomas Brown, 'Should Insolvency Risk be Mutualised' (Tradewinds Opinion Piece - 30 January 2014) <http://crewseacure.com>, last accessed on 08/08/2016

[748] International Chamber of Shipping Press Release, *Agreement Reached for Amendments to the Maritime Labour Convention, 2006 to Address Abandonment of Seafarers and Crew Claims*, 11 April 2014, available at: http://www.ics-shipping.org/news/press-releases/view-article/2014/04/11/agreement-reached-for-amendments-to-the-maritime-labour-convention-2006-to-address-abandonment-of-seafarers-and-crew-claims, last accessed on 08/08/2016

pooling."[749]

Nevertheless, P&I Clubs have already demonstrated their willingness to extend the Financial Security cover they already provide to meet the extended MLC requirements. Currently, the Boards of the International Group of P&I Clubs are considering the available options.[750] So far, the majority have voted that the pooling agreement should not be amended to support cover of all MLC liabilities to the extent of those that exceed the scope of current Club cover and retentions. Thus, it can be understood that Clubs in the International Group are in the process of exploring reinsurance options which will likely take the form of USD 90 million excess of the Club's $US 10 million retention per fleet, with Clubs with very large fleets, or cruise Clubs, likely to require some additional reinsurance on top of the initial USD 100 million, being currently in the process of working with their members and brokers to calculate their maximum exposures for these fleets.[751]

Despite P&I Clubs' scepticism regarding how to extend the current cover to accommodate the MLC amendments regarding Financial Security in the case of abandonment, this is not impossible to be provided. Indeed, proof of this is the fact that in 2013 itself, Seacurus launched what it called an insurance solution; the CrewSEACURE.[752]

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[749] Jonathan Hare, 'Maritime Labour Convention' (IG Annual Review 2014-2015) <http://www.skuld.com/Documents/Library/Annual%20Reviews%20IG/Annual%20Review%20IG%202014-15.pdf>, last accessed on 08/08/2016

[750] Skuld, 'Insight: Maritime Labour Convention (MLC) 2006 – Future Amendments' (Skuld, 2 October 2015) <http://www.skuld.com/topics/people/mlc-2006/insight/insight---mlc-2006/future-amendments/>, last last accessed on 08/08/2016

[751] Aon Risk Solutions, 'P&I One- Q1 bulletin, 2016 P&I Review', (Aon Risk Solutions, 2016) <http://www.aon.com/unitedkingdom/products-and-services/industry-expertise/attachments/marine/Aon-PandI-Q1%20Bulletin.pdf>, p.7, last accessed on 08/08/2016See also: Tysers & Co Limited, 'Tysers P&I Report 2015' (Tysers & Co, 2015) <http://www.tysers.com/publications/index.html >, p.16

[752] Seacurus, 'UK: Seacurus Hails Lloyd's Inclusion of Insurance Covering Seafarer Abandonment' (World Maritime News, 8 May 2013) <http://worldmaritimenews.com/archives/83489/uk-seacurus-hails-lloyds-inclusion-of-insurance-covering-seafarer-abandonment/>, last accessed on 08/08/2016 For further information on the CrewSeacure see: http://crewseacure.com

The definition of abandonment contained in the CrewSEACURE policy can be considered consistent with the definition contained in the MLC and the 2001 IMO resolution. According to the policy abandonment will have occured when:

(a) The shipowner fails to fulfill its legal obligations as an employer and leaves the ship without the financial means to continue the ship's operations; and
(b) The seafarer's remuneration is overdue; or
(c) The shipowner fails to provide the crew with basic needs such as food, water, accommodation or medical care; or
(d) The shipowner fails to repatriate seafarers within 30 days (or earlier if their employment contract so provides) of a right to repatriation arising.[753]

When attempting to explain that requirements (b), (c) and (d) merely assist in defining a case of abandonment, even though they seem to narrow the scope of the policy, a broker of Seacurus stated that only contractual breaches relating "to wages, provision of basic needs and the right to repatriation in specified circumstances will, subject to requirement (a), signal abandonment." [754]Oddly, the broker's explanation seems to emphasize the somewhat narrow scope of the policy. The explanation seems to make sure to explain that despite the wording of the first part of requirement (a), not every shipowner's employment contract breach will give rise to abandonment, just the specific ones listed in requirements (b), (c) and (d) and it emphasizes that abandonment is conditional upon the ship being left "without the financial means to continue the ship's operation". This "condition" at first glance seems not only to be limiting but problematic as it is not clear what is deemed necessary for it to be fulfilled, specially since the ship may still operate without the shipowner having fulfilled its contractual

[753] Cl.1.1 CrewSEACURE policy wording
[754] Denis Nifontov, "Seafarer Abandonment insurance: a system of financial security for seafarers", in Jennifer Lavelle (ed), *The Maritime Labour Convention 2006 International Law redefined*, (Routledge 2014), p.130

obligations with the seafarers. It seems that the policy was designed specifically to cover abandonment in cases of shipowner insolvency, which is indeed the most common cause of abandonment. It seems simplistic, however, to reduce abandonment only to cases where the shipowner has gone insolvent, as many times small owners running substandard vessels are very likely to abandon their crew. It is questionable if such wording is not in fact too limiting.

Additionally, it does not seem wrong to assume that the cover was drafted for the purposes of covering abandonment only following a shipowner's insolvency, since Lloyd's of London when including such an insurance under the exceptions within the Financial Guarantee insurance scheme[755], which is forbidden by the Club[756], stated:

> "From 1st January 2014, a new risk code SA was created for Seafarer Abandonment. This provides cover in the event of the shipowner not being able to continue to fulfil their legal obligations as an employer of the seafarers **by reason of insolvency**."[757](Emphasis added)

Nevertheless, the losses covered by the policy in case of abandonment seem to go beyond the requirements of the Financial Security fund provided by the MLC. For instance, the policy covers:

- Medical expenses incurred from the date of abandonment of the seafarer

[755] Seafarers' Abandonment Insurance fits perfectly within the definition of Financial Guarantee Insurance, as seen in Lloyd's Market Bulletin Y4821 dated 14 September 2014.
[756] Lloyd's Market Bulletin Y4396 dated 7 May 2010. Due to the practice been forbidden by Lloyds since 1924, Seacurus sought the approval of LLoyd's Performance Directorate of the insurance prior of making it available to members (Seacurus, 'UK: Seacurus Hails Lloyd's Inclusion of Insurance Covering Seafarer Abandonment' (World Maritime News, 8 May 2013) <http://worldmaritimenews.com/archives/83489/uk-seacurus-hails-lloyds-inclusion-of-insurance-covering-seafarer-abandonment/>, last accessed on 08/08/2016) Although, the SA risk code is now exempt from the rules governing Finance Guarantees, its application is still restricted; "individual syndicates will need to obtain express approval from Lloyd's Performance Management Directorate (PMD) to write this business" (Lloyd's Market Bulletin Y4694, dated April 2013, para 1.2
[757] Lloyd's Market Bulletin Y886, dated 2 April 2015

for up to 90 days after he has been repatriated (cl.2.1)

- Personal accident cover for crew occurring within 30 days of abandonment (cl 2.2)
- Unpaid remuneration up to six months (cl.2.3)
- Subsistence and repatriation costs, covering adequate food, water, accommodation, medical care and repatriation itself. The repatriation will be by 'the most appropriate and expeditious means (normally by air)' and will include 'additional transportation costs of 30kg of personal effects' (cl 2.4)
- Emergency subsistence and evacuation costs (cl.2.5)
- Claims handling, legal fees and expenses, which are unlimited (cl.2.6)[758]

This insurance solution of making the seafarers the insureds (although it is the shipowner who takes out and pays for the policy), resolved the problem of direct access to insurance funds, as it allows seafarers the direct right of action against the insurer. Nevertheless, the insurance policy provides for all disputes arising out of or under it to be subject to the laws of England and Wales, with the courts of England and Wales having exclusive jurisdiction. The jurisdiction clause can represent an obstacle to seafarers, since most seafarers are non-residents of England and Wales. Filing claims in others jurisdictions is usually troublesome and costly, even if these costs are recoverable later on[759]. The rationale behind the choice of law and jurisdiction is the fact that the CrewSEACURE product has assets in England, making easier the enforcement of judgments, England also being the home of international organizations that seek to enforce seafarers' rights such as ITF.[760] It is important to note nonetheless, that a notice of abandonment can be given by the seafarer himself or by an interested third party, such as seafarers' welfare organizations and unions, as well as immigration

[758] CrewSEACURE Policy
[759] *Ibid,* cl.2.6
[760] Denis Nifontov, "Seafarer Abandonment insurance: a system of financial security for seafarers", in Jennifer Lavelle (ed), *The Maritime Labour Convention 2006 International Law redefined*, (Routledge 2014), pp. 129- 130

and port officials[761], with the possibility of the notice being given online through the CrewSEACURE website.[762]

Furthermore, there are limits and sub-limits under the heads of claims. Thus, abandonment cases are limited to USD 10 million, and a seafarer's claim to unpaid wages is limited to USD 75,000 and USD 5,000 for repatriation and subsistence, with personal accident and medical expenses having higher sub-limits of USD 500,000 and USD 1 million per seafarer respectively.[763] The policy also contains various exclusions seeking to limit the insurer's liability in certain circumstances, such as when there is cover provided by another type of insurance.[764]

The CrewSEACURE policy might be able to satisfy the obligations provided by the MLC, and IMO Resolution A.930 (22), regarding abandonment of seafarer cases, providing a 'Certificate of Seafarer's Abandonment Insurance' and in some respects, as mentioned, covering beyond the strict requirements of the Convention. [765]The policy also takes into consideration the broad definition of shipowners given by the Convention,[766] hence allowing Shipowners, Crew Management Companies and

[761] *Ibid*, p. 132
[762] See: http://crewseacure.com/seafarers/, last accessed on 08/08/2016
[763] Denis Nifontov, "Seafarer Abandonment insurance: a system of financial security for seafarers", in Jennifer Lavelle (ed), *The Maritime Labour Convention 2006 International Law redefined*, (Routledge 2014), p. 131
[764] For instance, clauses 4.1 and 4.3 of the policy wording exclude losses occurring prior to abandonment and situations involving piracy. These situations are already covered by standard P&I insurance. See: Denis Nifontov, "Seafarer Abandonment insurance: a system of financial security for seafarers", in Jennifer Lavelle (ed), *The Maritime Labour Convention 2006 International Law redefined*, (Routledge 2014), p. 131
[765] *Ibid*, p.132
[766] The MLC's broad definition of shipowner, intends to cover not only the 'traditional shipowners' but also manning agencies, charterers (…), anyone that would had assumed the responsibility of the operation of the ship from the owner. According to the MLC a shipowner is:
"(…)the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities imposed on shipowners in accordance with this Convention, regardless of whether any other organization or persons fulfill certain of the duties or responsibilities on behalf of the shipowner."(MLC, Article II. 1 (a))
The definition has raised a lot of debate, as some believed that it did not make it very clear who the shipowner should be, since apparently according to it a shipowner could be a third-party manager even if another entity carries out certain MLC shipowner duties and responsibilities. However, this confusion, according to Dr Cleopatra Doumbia-Henry (ILO department of standards director) seems to be due to a

Seafarer Recruitment and Placement Services to buy the insurance policy.[767]

Nevertheless, the cover is not immune to the most common difficulty/problem faced by 'crew insurances' in general, namely cost. As previously discussed, shipowners are more inclined to 'abandon' their crew when facing financial hardship, and in such times they cannot increase the costs of their operations. Especially considering that the premium of such insurance is payable in one installment, in order to avoid the policy being cancelled by non-payment of premiums, requiring the shipowner to have a considerable amount of financial resources at the time of hiring the policy. This can prove problematic in times of financial hardship. Moreover, the product is also priced by reference to various factors that indicate the 'health' of the shipowner's business, hence a shipowner facing financial hardship or with a fleet in a deteriorating condition may have to pay more. [768]Thus, it is most likely that shipowners with a substandard fleet would not be able to afford such cover, which is sensible, and

misunderstanding when reading the 'regardless' part of the definition. According to Dr. Doumbia-Henry the "regardless ..." phrase simply clarifies that the entity identified as an MLC shipowner, whether the owner of the ship, shipmanager or other entity, may indeed not be the one fulfilling all the duties and responsibilities of the shipowner under the MLC (Liz MacMahon, 'ILO stands by labour convention's shipowner' (lloydslist, August 2013)

According to the IMO Maritime Labour Convention, 2006 (MLC, 2006) Frequently Asked Questions (FAQ) document; "this comprehensive definition was adopted to reflect the idea that irrespective of the particular commercial or other arrangements regarding a ship's operations, there must be a single entity, ―the shipowner, that is responsible for seafarers' living and working conditions. This idea is also reflected in the requirement that all seafarers' employment agreements must be signed by the shipowner or a representative of the shipowner".(IMO, *Maritime Labour Convention, 2006 (MLC, 2006) Frequently Asked Questions (FAQ)* (Online revised Edition, 2012) < www.ilo.org/mlc>)

This definition could indeed represent a significant change for seafarers attempting to have their rights enforced, since sometimes the owner of the ship might not be as easily located as the charterer or the manning agency. Nonetheless, shipmanagers could not disagree more with the understanding that they might be considered to be shipowners for the purposes of the MLC as the Director of V.Ships group Mr. Matt Dunlop stated: "We fail to understand how anybody can consider how a service provider, such as a third-party manager, can come under the definition of MLC shipowner. There is no ambiguity in the definition". (Liz MacMahon, 'MLC 2006: Who is the shipowner and why does it matter?' (lloydslist, August 2013). It is up to Member States of the MLC to clarify the definition of the shipowner when implementing the convention.

[767] Seacurus, CrewSECURE Product Development Update, February 2014, available at: http://www.seacurus.com/newsletter/product-development-update.pdf and http://crewseacure.com/products, last accessed on 08/08/2016

[768] Denis Nifontov, "Seafarer Abandonment insurance: a system of financial security for seafarers", in Jennifer Lavelle (ed), *The Maritime Labour Convention 2006 International Law redefined*, (Routledge 2014), p. 132

would be yet another form of combatting substandard shipping.

Yachtowners[769], an Offshore Syndicate of the Shipowners' Club[770], have launched somewhat similar cover to CrewSEACURE. The 'Yachtowners Insurance for Seafarers' Unpaid Wages Following Abandonment' however can be considered an extension of current P&I covers, since it only provides for the unpaid wages required by the MLC amendment. Similarly to CrewSEACURE, the Yachtowners policy provides for the seafarer to have direct rights to the cover and this has a limit: US$ 50,000 for an 8-week period or US$ 100,000 for a 16-week period. Differently from the former however, the latter policy does not allow crew manning agents to contract the policy, only allowing yacht owners to do so. [771]Furthermore and most interestingly, the Yachtowners' policy is clear that for its purposes, abandonment is conditional upon the shipowners' insolvency:

> "For the purposes of this unpaid wages insurance cover, abandonment occurs when the Club has determined that our Member has no realistic prospect of continuing to meet their obligations towards their seafarers, due to their insolvency."[772]

Accordingly, it is clear that although there is a willingness of the industry in providing the form of insurance and Financial Security required by the MLC in cases

[769] Yachtowners also fall within the scope of the MLC. For more on the subject see Matheuz Bek, "Yachting and the Maritime Labour Convention 2006", in Jennifer Lavelle (ed) *the Maritime Labour Convention 2006 International Law redefined* (Routledge 2014) , "Yachting and the Maritime Labour Convention 2006", in *the Maritime Labour Convention 2006 International Law redefined*, Edited by Jennifer Lavelle, London: 2014, Routledge, pp.69-94

[770] Shipowners' Club, 'The Shipowners' Club launches dedicated yacht syndicate' (22 September 2014, Shipowners Club) <http://www.shipownersclub.com/shipowners-club-launches-dedicated-yacht-syndicate/>, last accessed on 08/08/2016

[771] Yachtowners, 'Insurance For Seafarers' Unpaid Wages Following Abandonment As A Result Of A Members' Insolvency - Know Your Cover' (November 2015, Shipowners Club) <http://www.shipownersclub.com/media/2015/11/Yachtowners-Insurance-for-Seafarers-Unpaid-Wages-Following-Abandonment-Know-Your-Cover.pdf>, last accessed on 08/08/2016

[772] Yachtowners, 'Insurance For Seafarers' Unpaid Wages Following Abandonment As A Result Of A Members' Insolvency - Know Your Cover' (November 2015, Shipowners Club) <http://www.shipownersclub.com/media/2015/11/Yachtowners-Insurance-for-Seafarers-Unpaid-Wages-Following-Abandonment-Know-Your-Cover.pdf>, last accessed on 08/08/2016

of abandonment of seafarers, cover is generally deemed to be limited to cases where the shipowner has become insolvent.[773]

The position of P&I Clubs regarding how this new form of insurance can be provided is still not clear, as their rules are yet to be amended, nor are the Member States of the Convention's positions regarding the chosen method of providing for the Financial Security in cases of abandonment clear, since the Convention does not require this to be necessarily in the form of insurance, [774]however, insurance is considered to be the most suitable solution by industry experts.

It is important to note however that the International Group of P&I Clubs already expressed its opinion that the word 'due' contained in the Convention requirement for "outstanding wages and other entitlements due from the shipowner"[775], means wages and entitlements that have already been accrued but not been paid, hence excluding future earnings provided by the remaining contractual period. [776]

Consequently, it is clear that even when P&I Clubs extend their cover to accommodate the MLC amendments regarding Financial Security in cases of abandonment, this will guarantee that the seafarer will be duly compensated, considering that his/her employment contract was unilaterally breached by the shipowner. Furthermore, the Convention itself provides for a limitation of liability since

[773] Nevertheless, Yan Ferns, Business Development Manager of the Club, stated that the policy "Rather than being triggered by insolvency, which is the norm used by other products, as soon as the crew detect that their employer may be failing in its duty to meet their agreed wage payments, the Club can be called upon to act. The declaration of the employer's insolvency may, of course follow long after the crew has been abandoned. Their need is for immediate help." (MarineLink, 'Shipowners' Club P&I Offers MLC 2006 Wage Insurance', (24 February 2014, Marinelink) http://www.marinelink.com/news/shipowners-offers-club364611.aspx, last accessed on 08/08/2016) It is unclear however how this would actually work in practice.

[774] The MLC amendments provide that the Finance Security "may be in the form of a social security scheme or insurance or a national fund or other similar arrangements." MLC Amendments relating to Standard A2.5.3

[775] MLC Amendments relating to Standard A2.5.9

[776] Aon Risk Solutions, 'P&I One- Q1 bulletin', (2016 P&I Review, Aon) <http://www.aon.com/unitedkingdom/products-and-services/industry-expertise/attachments/marine/Aon-PandI-Q1%20Bulletin.pdf>, p.6, last accessed on 08/08/2016

it limits the Financial Security to covering the payment of outstanding wages for a maximum period of four months.[777] Therefore, although this new Financial Security system will undoubtedly heighten the protection given to seafarers, it is still doubtful whether they will get all the compensation actually owed to them.

V. 7 –Comparative analysis between Compulsory Insurance in Maritime Law and MLC's Financial Security

The Financial Security required by the MLC possesses similar characteristics to other forms of Financial Security/insurance provided for by International Maritime Conventions which have been in force for around two years. Indeed, the International Convention on Civil Liability for Oil Pollution Damage (CLC) 1992, Art 7; the International Convention on Civil Liability for Bunker oil Pollution Damage 2001, Art 7; International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention) 2010, Art 12; and The Nairobi Convention on the Removal of Wrecks 2007, Art. 12 have similar provisions. For illustration purposes, Art. 7 (1) and (2) of the CLC reads:

> "1. The owner of a ship registered in a Contracting State and carrying more than 2,000 tons of oil in bulk as cargo shall be required to maintain insurance or other Financial Security, such as the guarantee of a bank or a certificate delivered by an international compensation fund, in the sums fixed by applying the limits of liability prescribed in Article V, paragraph 1 to cover his liability for pollution damage under this Convention.
>
> 2. A certificate attesting that insurance or other Financial Security is in force in accordance with the provisions of this Convention shall be issued to each ship after the appropriate authority of a Contracting State has determined that the requirements of paragraph 1 have been complied with. With respect to a

[777] MLC Amendments relating to Standard A2.5.9

ship registered in a Contracting State such certificate shall be issued or certified by the appropriate authority of the State of the ship's registry; with respect to a ship not registered in a Contracting State it may be issued or certified by the appropriate authority of any Contracting State. This certificate shall be in the form of the annexed model and shall contain the following particulars:

(a) name of ship and port of registration;
(b) name and principal place of business of owner;
(c) type of security;
(d) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established; (e) period of validity of certificate which shall not be longer than the period of validity of the insurance or other security."

The CLC provisions are very similar to the MLC Amendments Standard A2.5.2 (1) (3) (4) (7) and Appendix A2-I. The difference between the Conventions' provisions can be said to be a matter of wording. While the first provides for "insurance or other type of Financial Security" the latter provides that the Financial Security may be in the form of insurance. Thus, essentially both Conventions provide that the Financial Security can be achieved through insurance. Furthermore, in both conventions the affected third party is to have direct access to the financial security.

All the above named Conventions have had their Financial Security requirement fulfilled by way of 'compulsory insurance' provided by P&I Clubs. Thus, considering that compulsory insurance in the maritime industry has been in existence since 1969 at the time of the CLC[778], and has been used since that time to fulfil similar requirements of other conventions, this was most likely the form of Financial Security that the MLC

[778] For more on the history of P&I 'compulsory insurance' see: Ling Zhu, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, (Springer 2007) ISBN 978-3-540-45900-2, pp.49-80

drafters had in mind. This conclusion can also be drawn by reference to the joint IMO/ILO ad hoc expert working group on liability and compensation regarding claims for death, personal injury and abandonment of seafarers discussions, during which not only seafarers but also the State delegations held the view that compulsory insurance would be the most appropriate mechanism to offer seafarers adequate protection in such circumstances.[779]Indeed, the use of compulsory insurance to fulfill the MLC requirement of Financial Security seems in line with what is considered to be "a new regulatory approach in international unification of liability law", as Professor Eric Rosaeg notably stated:

> "The increasing interest in compulsory insurance coincides with a new regulatory approach in the international unification of liability law. While the conventions in the first half of the century really only aimed at unification, public interests have become more and more dominant. Interests of third parties, the environment and governments themselves have become the focus of the international lawmakers. In particular this is so in the International Maritime Organization. The Comité Maritime International has ceased to play its previously so important role there. In this way, compulsory insurance is a reflection of government involvement and government interests."[780]

Professor Rosaeg also pointed out some rationales that make compulsory insurance so attractive:

1. Concerns that claimants will not obtain the compensation due to them after maritime casualties due to the shipowner's insolvency.
2. Accessibility – Claimants, especially weaker parties or small claimants

[779] ILO, *Joint IMO/ILO ad hoc expert working group on liability and compensation regarding claims for death, personal injury and abandonment of seafarers*. (Report JMC/29/2001/4, International Labour Office, 2001)

[780] Erik Rosaeg, 'Compulsory Maritime Insurance' in Scandinavian Institute of Maritime Law Yearbook 2000 <http://folk.uio.no/erikro/WWW/corrgr/insurance/ simply.pdf> , p. 2

as in seafarers' cases, must be helped to overcome the problems of pursuing a claim against a paper company in a remote jurisdiction. It has been proven that sometimes it can be difficult to assess who the beneficial owner of the vessel is, and consequently where its funds are allocated, hence making it nearly impossible or at least impractical to enforce a judgment in these conditions. Giving claimants direct action against the insurer under a compulsory insurance regime can overcome these hurdles.

3. It is believed that third party providers of Financial Security generally will contribute to higher standards on board vessels (in order to keep their own costs down), hence compulsory insurance will assist in increasing standards within the shipping industry generally since ideally a substandard vessel would not get insured, and, compulsory insurance being a requirement, such a vessel would be prevented from sailing.
4. Without an international compulsory insurance regime, national legislations may create a number of different schemes for evidence of financial responsibility, putting at risk the relatively high degree of uniformity of maritime law. This would probably be problematic in relation to Port Control, which would be obliged to deal with different documentation certifying the existence of insurance.
5. It avoids unfettered competition, since irresponsible shipowners will be unable to avoid the costs associated with providing insurance [781]

The above rationales not only justify the attractiveness of compulsory insurance, but these considerations are likely what the MLC drafters, more specifically the MLC tripartite committee, had in mind when drafting the Financial Security requirement, and they affirm most of the discussion raised in this chapter and more broadly in this thesis.

[781] *Ibid*, pp.3-4

Differently from the MLC, the above mentioned Conventions provide for a 'blue card' system to evidence the existence of the required compulsory insurance. The 'blue cards' are certificates of insurance confirming that necessary cover is in place, which are handed to Flag state authorities to issue certificates of compliance.[782]This is apparently the reason why some P&I Clubs claim that the Financial Security required by the MLC is not compulsory insurance.[783]

The 'blue card' system explained above can even be said to perhaps have been ITF's source of inspiration when designing the 'ITF blue/green cards' certificates. These certificates are issued by trade unions to vessels covered by an ITF approved agreement, which requires among other things for the shipowner to "ensure there is appropriate insurance to cover the company against all liabilities in the relevant ITF agreement".[784] These certificates attest compliance with ITF conditions and as such they avoid unnecessary delays at Port caused by inspections.

Taking into account everything discussed in this section, it is difficult to understand why P&I Clubs still seem reluctant in providing the Financial Security required by the MLC since it has been offering compulsory insurance for nearly three decades.[785] Particularly considering that despite the fact that the MLC does not limit

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[782] Petar Kragic, 'Compulsory insurance for shipowner's cargo liability- A heresy or logical step?', (UKPANDI,6 August 2009) <http://www.ukpandi.com/knowledge/article/compulsory-insurance-for-shipowners-cargo-liability-845/>, last accessed on 08/08/2016 and UK P&I Club, 'Circular 24/10: (January 2011): Compulsory Insurance – "Blue Cards"' (UK P&I Club, 01 January 2011)

[783] Alexander McCooke, 'An Introduction to the Maritime Labour Convention 2006' (UK Chamber of Shipping, 1 February 2016) <https://www.ukchamberofshipping.com/>, last accessed on 08/08/2016 See also: ITF Seafarers' bulletin 1986, page 3

[784]ITF Agreements, available at http://www.itfseafarers.org/itf_agreements.cfm. See also: ITF Glossary of terms, http://www.itfseafarers.org/glossary.cfm,; Turner & Willian S.A., 'ITF Blue Card' (Turner & Willian, 2013) <http://www.turner-williams.com/itf.html>, last accessed on 08/08/2016; Shipping Inspection, ITF (International Transport Workers' Federation), http://www.shipinspection.eu/index.php/chartering-terms/75-i/4737-itf-international-transport-workers-federation; Petar Kragic, 'Compulsory insurance for shipowner's cargo liability- A heresy or logical step?', (UKPANDI,6 August 2009) <http://www.ukpandi.com/knowledge/article/compulsory-insurance-for-shipowners-cargo-liability-845/>, last accessed on 08/08/2016 and ITF, Flags of convenience - Avoiding the rules by flying a convenient flag, (ITF) http://www.itfglobal.org/en/transport-sectors/seafarers/in-focus/flags-of-convenience-campaign/, last accessed on 08/08/2016

[785] Compulsory insurance however has not been free of criticism since its inception. See C.M.I.

the security to a specific value, it provides other limits, i.e. payment of up to 4 months wages, and these will very unlikely reach the limits established by the other mentioned conventions. Furthermore, Clubs do not seem to have a problem pooling in those cases, mutualizing the risks, which in the case of the MLC has been pointed out as a problem, even though the justification of such mutualisation finds support in relation to the other conventions (as substandard vessels and irresponsible shipowners are more likely to not only abandon their crew, but also to cause pollution).

V.7.1 - A critical analysis of the CLC 1969 and the IOPC Fund

As seen in the previous section, the Financial Security required by the MLC has similar characteristics to the Financial Security required by the CLC 1969. Taking into account these similarities and the fact that the Financial Security requirement provided by the MLC is not yet in force[786], whereas the CLC requirement has been in force for a few decades, an analysis of the latter might prove fruitful not only to demonstrate the efficiency of Financial Security, but also its 'flaws'. Indeed, the Financial Security provided by both conventions provides for limitations of liability, and there shall be unfortunate cases (even if rare) where such limitation might lead to victims of incidents not being adequately compensated. The forthcoming analysis shall demonstrate the difficulties in 'bending' this limitation of liability. Moreover, this more in depth analysis of the CLC 69 (together with the IOPC Fund) will also demonstrate that its origins and inceptions are in a number of ways similar to those of the MLC.

The *Torrey Canyon*[787] incident in 1967 led to creation of the International

Documentation 1968-I and Petar Kragic, 'Compulsory insurance for shipowner's cargo liability- A heresy or logical step?', (UKPANDI,6 August 2009) <http://www.ukpandi.com/knowledge/article/compulsory-insurance-for-shipowners-cargo-liability-845/>, last accessed on 08/08/2016

[786] The Amendments are set to come into force on 18 January 2017

[787] The Torrey Canyon was a crude-oil tanker, which ran aground on March 18, 1967 on the Seven Stones Reef at the western entrance to the English Channel—eighteen miles west of Land's End and eight miles south of the Scilly Isles. The vessel was manned by an Italian crew, owned by the Barracuda Tanker Corporation, a Liberian-based subsidiary of the Union Oil Company of California, and was en route from Mena al-Ahmadi, Kuwait, to Milford Haven, England, under charter to the British Petroleum Company.

Convention for Oil Pollution Damage ("CLC 1969") under which shipowners are strictly liable for defined pollution damage. The case involved a large crude oil tanker carrying some 117,000 tons of oil that sank causing devastating consequences to the Scilly Isles and the south-west of England as well as the Brittany coast of France. At the time of the accident, there was little technical knowledge available on how best to deal with the clean-up of such a large volume of oil, hence, regardless of the government's best efforts, significant pollution and damage occurred.[788] Moreover, there was no effective compensation available for the victims, third parties, who suffered damages and economic loss as a result of the oil spill. The case demonstrated the need for the international community to realize the necessity of establishing a consolidated liability regime to compensate victims of oil pollution incidents.[789]

Furthermore, in the same year that the MARPOL protocol was drafted, 1978, the International Convention on Establishment of an International Fund for

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The master of the vessel was considered by the investigators the sole person responsible for the accident since he had kept the ship on automatic steering and steaming at its top speed of nearly sixteen knots, failing to change course when advised to do so both by his third officer and by signals from the Seven Stones lightship.

After only three day after the incident, an estimated 37 million gallons of the tanker's 118,000-ton cargo of oil had spilled. Despite all the containment and clean up attempts, the oil spread across 120 miles of southern England and 55 miles of the coast of Brittany in northwest France.

Furthermore, at the time of the accident, only the UK was a party to the 1957 Convention on the Limitation of Liability. Thus, its claimants (including the government) could have sought to recover costs against limitation amounts set by this convention, viz approximately US$4.75 million (£1.72 million) against more than £14 million of quantifiable claims in the UK and France. France, like the USA and Japan, had a much more restrictive national legislation hence French claimants had only the possibility of recovery from the total value of the remains of the ship and its cargo after the incident, bearing in mind that the only property salvaged from the Torrey Canyon was one lifeboat, it can easily been concluded that the claimants had no chance to be compensated by the damage sought.

The *Torrey Canyon* is considered to be the world's first major disaster involving one of the new breed of supertankers, having a devastating effect on the environment. - Torrey Canyon. (1997). In L. Paine, *Ships of the world, Houghton Mifflin*. (Houghton Mifflin, 1997) and John Wren, 'Overview of the Compensation and Liability Regimes Under the International Oil Pollution Compensation Fund (IOPC)' in Spill Science & Technology Bulletin, Vol. 6, No. 1, 2000 , p.46 See also: Patrick Griggs, '"Torrey Canyon", 45 Years on: Have we Solved All the Problems?' in Baris Soyer and Andrew Tetterborn (eds) *Pollution at Sea: Law and Liability*, (1st Edition, Routledge, 2012), p.227

[788] John Wren, 'Overview of the Compensation and Liability Regimes Under the International Oil Pollution Compensation Fund (IOPC)' in Spill Science & Technology Bulletin, Vol. 6, No. 1, 2000 , p.46

[789] See also: IMO, Liability and Compensation, Available at: http://www.imo.org/en/OurWork/Legal/Pages/LiabilityAndCompensation.aspx

compensation for Oil Pollution Damage, 1971 ("1971 Fund Convention") came into force. The convention together with the CLC 1969 accomplished the very innovative two-tier-liability and compensation system for tanker oil pollution damage.

The Fund, unlike the Civil Liability Convention, which places the onus on shipowners, is made up of contributions from oil importers. The rationale behind the Fund is that if an accident at sea results in pollution damage exceeding the compensation available under the Civil Liability Convention, the Fund will be available to pay an additional amount, while spreading more evenly the burden of compensation between shipowner and cargo interest. The cap on the fund in the two conventions was further raised through amendments adopted by a conference held in 1992, and again during the Legal Committee's 82nd session held from 16-20 October 2000. Furthermore, in May 2003, a Diplomatic Conference adopted the 2003 Protocol on the Establishment of a Supplementary Fund for Oil Pollution Damage. The Protocol establishes an International Oil Pollution Compensation Supplementary Fund, intending to provide an additional, third tier of compensation for oil pollution damage. Nevertheless, participation in the Supplementary Fund is optional and is open to all Contracting States to the 1992 Fund Convention. [790] The establishment of the Fund is very much acclaimed as it removed the risk of liability being restricted to the value of property of the owner which is situated within the jurisdiction, plus it eliminated the prospectus of sharing with other non-pollution claimants, a general limitation fund set up under the 1976 Limitation Convention. [791]

V.7.2 – The limitations of liability provided by the CLC and IOPC Funds, similarly to the MLC

During the 1950s and 60s, in order to avoid or "get around" inconvenient limitation provisions, claimants began suing individuals who were somehow involved

[790] *Ibid*

[791] Patrick Griggs, '"Torrey Canyon", 45 Years on: Have we Solved All the Problems?' in Baris Soyer and Andrew Tetterborn (eds) *Pollution at Sea: Law and Liability*, (1st Edition, Routledge, 2012), p.227

in the relevant accident but who were not covered by limitation provisions, as could be seen in the *Himalaya* case[792]. Following the case, it became customary when drafting international instruments involving rights of limitation to widen the definition of those entitled to benefit from limitation of liability. Therefore, in the 1957 Limitation Convention the right to limit was extended from the shipowner to include the charterer, manager and operator of the vessel, together with the master, members of the crew and other servants of the owner, charterer, manager and operator. Nevertheless, attempts to get around the limitation persisted, as in the case of *Annie Hay*[793], where the claimant argued without success that the negligence of the master of the vessel and the owner's subsequent vicarious liability had forfeited the right to limit liability.

The CLC and the Fund, other than giving a wide definition of those who can limit their liability, adopted a different method of ensuring that rights of limitation extended to all persons involved with the ship, called "channeling". This method provides for all the claims under the Conventions to be made against the registered owner of the vessel, and by article III (4) of the CLC claims were prohibited against the

[792] *Adler V Dixon* (The Himalaya) [1954] 2 Lloyd's Rep 267, [1955] 1 QB. The *Himalaya* case, a case of carriage of passenger by sea, established the possibility of suing someone outside the contractual relationship in 1955. Mrs Adler, a passenger on the Himalaya was injured falling from the gangway, which can be considered to be an expected incident under the circumstances. The importance of the case is found in the fact that Mrs Adler sued the master and the boatswain of the vessel, instead of the company, in order to escape limitation and exemption clauses in the contract with the cruise ship.
The court of Appeal held that the master and the boatswain could not rely upon the defences available to their employer, the carrier, under the contract of carriage. The decision created tension in the ship industry, with carriers' employees and subcontractors demanding to have an indemnity from the carrier in order to protect themselves against this extra burden. Furthermore, it must be noted that allowing claimants to sue these parties, in order to avoid the shipowners limitation of liability, would only create an overburden of lawsuits, considering that the employee could go after his employer for indemnity, who according to employment law should be held vicariously liable for his employee's action while in the course of his/her employment. Thus, if looked at from a technical perspective, lawsuits like the Himalaya would only serve as tools to overturn the statutory limitations of liability, since at the end the same result would be obtained. Indeed, in the Himalaya case, the carrier was "commercially obliged" to grant indemnity for a burden he was not directly responsible for.
The commotion around the case gave origin to what is known as the Himalaya Clause, a clause inserted in the bill of lading essentially extending the carrier's limitation of liability to the carrier`s employees and subcontractors, therefore including in the contract itself provisions regarding Third Parties. (For a more detailed discussion on the case, please see: Robert Merkin, *Privity of Contract, The Impact of the Contracts (Rights of Third Party Acts)* (Lloyd's Commercial Law Library), (Informa Law from Routledge, 2000), pp. 68-72

[793] [1968] P.341, [1968] 1 Lloyd's Rep. 141

servants or agents of the owner including crew members, pilots, people performing services for the ship, charterers, managers and salvors together with their respective agents. [794] The channeling method provided the shipowners confidence that as long as they played according to the rules, although such increased their own potential liability, this remained limited to acts caused by them, and did not include those of their agents.

Nevertheless, as the Erika case showed, even a more generous liability regime might not be enough. The claims which arose from the Erika exceeded the maximum amount of compensation payable under the CLC and the Fund Conventions. The French government decided to allow private claimants to have priority in the fund. However, as the clean-up expenses started to pile up, the government decided to explore alternative ways of recovering in excess of the fund available in these conventions, and since in civil claims they would find themselves limited by the funds, they decided to resort to criminal law. Therefore, fifteen defendants involved in the accident were charged with imprudence contributing to the incident and the resulting pollution, with four of them eventually being found guilty, i.e. Mr. Savarese, the beneficial owner of Tevere Shipping Co (which owned the vessel); Mr Pollara, the president of Panship Management & Services SrL (the technical managers of the vessel); Total SA (owners of the cargo and charterers of the ship); and RINA Spa, the vessel's Classification Society. Moreover, the court ruled that the four did not fall with the Article II (4) list, thus not being able to take advantage of the CLC channeling provision to avoid civil liability.[795]

The court of Appeal in Paris held in the context of the Article III (4) defence, that the owner acted recklessly and imprudently when he decided to minimize repairs to the vessel, amounting to inexcusable conduct, depriving him the right to rely on Article III (4). In relation to Mr Pollara, the court upheld the guilty finding and

[794] Patrick Griggs, '"Torrey Canyon", 45 Years on: Have we Solved All the Problems?' in Baris Soyer and Andrew Tetterborn (eds) *Pollution at Sea: Law and Liability*, (1st Edition, Routledge, 2012), p.229
[795] The Erika, Trinunal de Grande Instance, Paris, judgments of 16 January 2008

concluded that he, as the person in charge of Panships[796], was outside the protection of the Article. This is a decision which has been highly criticized considering that Article III (4) clearly states that no claim shall be made against a "manager or operator of the ship", also extending protection to all his "servants and agents" hence the article undoubtedly includes Mr Pollara in the group of people who can benefit from the limitation of liability provided by the fund.[797] The court held the defendants liable to pay € 200.6 million to the civil parties over and above compensation made available under the CLC/ Fund. [798]

The *Erika* clearly demonstrates that there are still ways to get around the Fund provisions, and that this might not be enough to cover all types of casualties dealing with pollution, regardless of how generous it might be. The Fund was also not enough to cover all the claims caused by the *Prestige* accident, leading Spain to follow France's footsteps in attempting get around potential limitations on liability.

The recent Spanish judgment in the *Prestige* incident can be considered in many ways more controversial than the French courts' decisions in the *Erika*. First and foremost, the Spanish Supreme Court held the Master of the vessel criminally liable for the incident, giving him a two year prison sentence, as ordering him to pay a twelve month fine at a daily rate of 10 euros, as well as ordering an 18-month disqualification from the exercise of his profession as a ship's captain, plus payment of one twelfth part of the costs of the trial at first instance, and making him also civilly liable to pay compensation. As if the master's sentencing was not controversial enough, the Spanish Supreme Court also held the insurance company, London Steamshipowners Mutual Insurance Association (the London P&I Club) directly liable for the incident and the Mare Shipping Inc. (the beneficial owner) subsidiary liable for it also. [799]

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[796] Cour d'Appel, Paris, Judgment of 30 March 2010

[797] See: Patrick Griggs, '"Torrey Canyon", 45 Years on: Have we Solved All the Problems?' in Baris Soyer and Andrew Tetterborn (eds) *Pollution at Sea: Law and Liability*, (1st Edition, Routledge, 2012), p.227

[798] Cour d'Appel, Paris, Judgment of 30 March 2010

[799] Cassation Appeal No.:1167/2014, Judgment No.: 865/2015, *Incidents Involving The IOPC Funds – 1992 Fund – Prestige*, Available At: Http://Www.Iopcfunds.Org, last accessed on 08/08/2016

Apparently dissatisfied with the American Courts' decision of not holding ABS liable for the incident, the Spanish Court decided to attribute liability to the remaining "actors". In the case of the P&I Club, the Spanish Court ignored the non-existence of an insurance policy and the pay-to-be-paid rule, as well as the 2013 decision held by the English Court,[800] which enforced the arbitration awards declaring the Club not liable to pay compensation either to France nor Spain, and recognizing the applicability of English Law and English jurisdiction to the insurance contract that the Club had with the shipowner.[801] Therefore, the Spanish Supreme Court, questionably, declared the insurer civilly liable to pay for the clean-up costs that exceeded the two-tier liability system offered by the CLC 69 and the IOPC Fund. The decision gives an entirely new perspective to P&I Clubs' liability, and should currently be considered a leading authority on the issue.[802]

Nevertheless, cases like the Erika and the Prestige should be perceived as exceptions and not the rule for when the multi-tier liability scheme created by the CLC/IOPC is not sufficient to cover all losses. These developments, which increase the amount of compensation available to claimants in the event of a pollution accident, were intensively discussed and agreed over a period of years between owners and their liability underwriters, being the consequence of pressure from governments and the international community (including the MLC). Likewise, abandonment of seafarers as defined by the MLC is, as discussed previously, considered to be exceptional. Thus, extreme cases of abandonment surpassing the limitations imposed by the MLC Financial Security should be even rarer. Nonetheless, as the two quoted cases point out, compensation in cases of seafarers' claims exceeding the amount available under the Financial Security Fund might be sought through third parties involved in the incident.

[800] *The London Steam-Shipowners' Mutual Insurance Association Ltd v The Kingdom of Spain, The French State [2013] EWHC 3188 (Comm).*.

[801] The obiter dicta of the case is extremely interesting as it is diametrically contrary to the Spanish Court's reasoning.

[802] Patrick Griggs, '"Torrey Canyon", 45 Years on: Have we Solved All the Problems?' in Baris Soyer and Andrew Tetterborn (eds) *Pollution at Sea: Law and Liability*, (1st Edition, Routledge, 2012), p.227

These Third Parties shall be defined on a case by case basis, since the causes of abandonment and its consequences differ from one case to another.

Despite the CLC/Fund conventions' clear limitations, the multi-tier liability system proposed by both can be considered to have been extremely successful. Therefore, little doubt should exist about the future success of the MLC Financial Security.

V.8 – Concluding Remarks

This Chapter demonstrated the role of P&I Clubs in ensuring that seafarers have their rights protected. Although P&I Clubs cannot generally be considered as bearing any responsibility for preventing abandonment of seafarers from occurring, they have a responsibility to ensure that seafarers have their rights enforced through insurance schemes.

Despite P&I Clubs' scepticism regarding the necessity and implementation of the Financial Security Scheme provided by the MLC in cases of abandonment of seafarers, as discussed in this chapter, Clubs are already finding ways to set the scheme in place. Furthermore, it may be observed that such scepticism seemed to be misplaced, considering that the Scheme bears a lot of similarities with compulsory insurance, the IOPC/ CLC funds, already offered by Clubs for the past decades, the necessity of which is evident, considering that most cases of abandonment of seafarers are a consequence of the shipowners' insolvency, so, in many cases, abandoned seafarers could find themselves (except in cases involving personal injuries) prevented from payment due to the "pay to be paid" rule. Therefore, regardless of the criticism surrounding the MLC Financial Security Scheme (of being the "bad subsiding the good"), the necessity of it in order to provide seafarers with a further guarantee of their rights being enforced is clear, especially since it is not guaranteed that national legislations will have such

guarantees for employees in cases of employer insolvency.[803]

One of the main criticisms that one might have regarding the Financial Security Scheme is that in essence it represents a limitation cap, which might prevent abandoned seafarers from receiving compensation for their losses. Even in the case of seafarers going around the cap and suing possible third parties involved, such as Classification Societies, assuming that at least one of the causes of abandonment was the lack of proper accommodation, the limitation cap might make Courts believe that it would not be fair, just or reasonable to impose such liability onto a third party.

Accordingly, this chapter has shown that P&I Clubs are essential private actors in abandonment of seafarer cases. Although not having a role in preventing abandonment from occurring, by ensuring that abandoned seafarers receive (at least part) of what is owed to them, they insure that seafarers have their rights enforced.

[803] Council Directive 80/987/EEC of 20 October 1980 provides for Member States to ensure that a security scheme is set up to cover employees' claims in case of the employer's insolvency. It is important to note that article 5 of the Directive reads:

> "Member States shall lay down detailed rules for the organization, financing and operation of the guarantee institutions, complying with the following principles in particular: (a) the assets of the institutions shall be independent of the employers' operating capital and be inaccessible to proceedings for insolvency;
> (b) employers shall contribute to financing, unless it is fully covered by the public authorities;
> (c) the institutions' liabilities shall not depend on whether or not obligations to contribute to financing have been fulfilled."

Therefore, as confirmed in C 292/ 14, *Elliniko Dimosio v Stefanos Stroumpoulis* and others, "there does not have to be any link between the employer's obligation to contribute and mobilization of the guarantee fund" (at paragraph 68).
Taking the European Directive as an example, it can be concluded that some national legislations might include, within their legislative provisions, Financial Security schemes similar to the one provided for by the MLC.

Conclusion

This thesis demonstrated that the terminology 'abandonment of seafarer' is not something new, with its origins preceding IMO/ILO Regulation A.930 (22) and the MLC, and which was used to raise awareness of the importance of seafarers' work conditions. Indeed, as has been shown, the word 'abandonment' has been used to refer to seafarers long before they had their work regulated, due to the harsh and peculiar conditions imposed by a seafaring career. In truth, the terminology "abandonment of seafarers" itself implies a lot more situations than merely the ones described in the MLC. Nevertheless, a reading of the terminology used to describe some situations that seafarers may face, as provided by IMO/ILO Regulation A.930 (22) and the Convention, makes clear that abandonment is not only a contractual breach, but also a breach of responsibilities and obligations, which can be cleared perceived by the use of the expression "severance of ties" by the Resolution.[804]

Chapter I demonstrated the transnationality of seafaring, and more specifically of abandonment of seafarers. The chapter showed how the profession changed from an unregulated career, to one regulated by national laws followed by international laws, and the importance of Private Actors in assisting in its regulation. It was proved that seafarers' rights are constituted by national and international law, as well as by the intervention of Private Actors/ Stakeholders, that usually play a vital role in developing policies and regulations that will directly impact seafarers. Most importantly, the chapter showed that stakeholders are indispensable in assuring that seafarers have their rights respected and enforced. In fact, the importance of Private Actors preventing "abandonment of seafarer" from occurring has been demonstrated throughout this thesis.

The link between substandard shipping and abandonment of seafarers has also been confirmed throughout this thesis. Although abandonment of seafarer is not

[804] See pp. 12/13

conditional upon the presence of substandard shipping, a seafarer on board a substandard ship is deemed to have been abandoned, since the vessel cannot be considered a safe working place. Furthermore, the main cause of abandonment, as it has been demonstrated, is the shipowner's financial hardship, and a shipowner with a substandard fleet is more likely to be subject to such hardship.[805]

The importance of members of the maritime safety chain in preventing substandard shipping has also been confirmed throughout this thesis. Most importantly, it has been demonstrated that they are primordial stakeholders within the ship industry in enforcing regulations and providing standards, especially for safety at sea, and that they have an undeniable role in "abandonment of seafarer" cases, hence confirming this thesis' hypothesis. This thesis has shown that the network of cooperation which exists between the selected stakeholders not only helps prevent substandard shipping, but also abandonment of seafarers.[806]

This thesis showed that although Flag States bear more responsibilities and obligations than Port and Coastal States, the latter two stakeholders assist in assuring that International Conventions are enforced. They play a vital role certifying that vessels comply with the conventions through inspections, which may be followed by detentions. Their importance has been recognized even by the MLC, which provided for a system of compliance involving Port and Flag States. [807]

Although Flag States have always received more focus when dealing with maritime law, including maritime labour law, carrying more obligations and responsibilities, it was demonstrated that the assistance provided by the Port and Coastal States in assuring compliance with international conventions has been proven essential in improving conditions at sea. Accordingly, this network of responsibilities within States, in different roles, is in indispensable in preventing abandonment of

[805] Chapter II.2
[806] Chapter II
[807] Chapter III

seafarer from occurring. Port and Coastal States through inspections have means to assure the safety of vessels, and according with the criteria set out in International Instruments, they also need to assure that seafarers receive adequate treatment. Therefore, even if a Flag State has failed in complying with its responsibilities in verifying a vessel's compliance with international instruments, Port and Coastal States can ensure through inspections followed by detentions that the situation of the vessel is regulated, including the payment of seafarers and adequate provision for them.[808]

Furthermore, as shown in this thesis, international law leaves very little space for direct claims against States, it being up to States to raise complaints and actions against each other. Indeed, it is unlikely that a seafarer will ever even consider filing a lawsuit against a State since generally this represents a lengthy and costly process. Therefore, most acts of non-compliance among States is dealt with in a diplomatic manner. Although Flag States' responsibilities regarding abandonment of seafarers has been accepted and recognized for a long time, non-compliance is often dealt with on a diplomatic basis rather than a legal one. Thus, Port and Coastal States have a better chance of insuring that Flag States adhere to their responsibilities towards seafarers, than seafarers themselves. [809]

The analysis made in this thesis also demonstrated that courts might not recognize the exclusive jurisdiction over a vessel attributed to Flag States by virtue of UNCLOS and customary law, when dealing with seafarers' claims. Therefore, when dealing with claims concerning seafarers, especially their rights, national courts may use other criteria in determining the applicability of a legislation to seafarers other than that of the Flag State. [810]

The thesis also proved that classification societies might have some responsibilities and liabilities regarding abandonment of seafarers. Classification

[808] Chapter III.2 and III.3
[809] Chapter III.1.4
[810] Chapter III.1.3

Societies' role and therefore their responsibilities and possible liabilities need to be assessed on a case by case basis. As this work has shown, not every "abandonment of seafarer" case will trigger a classification society's liability, as their responsibilities and obligations are limited to certain cases. For instance, an abandonment case merely dealing with seafarers' owed wages, will not raise any classification society liability. Nevertheless, it is important to bear in mind that the focus of the research is abandonment of seafarers in its broader sense, focusing in particular on abandonment cases where the seafarer's life was put at risk.[811]

Classification Societies play a vital role in developing standards, in particular safety standards, to be followed by the shipping industry. Accordingly, they became essential in the development of policies in the shipping industry, having even obtained a consultative status within the IMO, being perceived as essential members of the maritime safety chain. The fulfilment of their responsibilities has a direct impact on seafarers, as they ensure that vessels meet the required standards, and often they are the ones conducting inspections on behalf of the Flag State, hence insuring that the vessel complies with international and national legislations. [812]

Although, classification societies cannot guarantee that the vessel is kept up to standard until the end of the validity of its classification certificate, it is questionable if a certificate issued negligently will not give rise to successful tort claim, especially in cases involving personal injury. [813]

Undeniably, as shown in this thesis, the establishment of a duty of care as well as a chain of causation between the classification society's action and the abandonment of seafarer, is not something easily achieved. As shown in Chapter IV, courts seem to take different approaches in assessing classification societies' liabilities; there is no exact formula for doing so. Perhaps the only thing that the UK, USA and French courts

[811] Chapter IV
[812] Chapter IV.1
[813] Chapter IV.2

seemed to have in common was that they all concurred that seaworthiness was a non-delegable duty of the shipowner. However, through reading the *obiter dicta* in the cases analyzed, this fact in itself should not be sufficient to relinquish a classification society of any liability in cases of negligence. In fact, courts seem to take a lot more into consideration, such as how fair, just and reasonable it would be to impose a duty of care on the classification society, especially considering that many times the shipowner himself can benefit from a limitation of liability provided by international conventions, including the Maritime Labour Convention, which can be perceived as providing a limitation of liability in cases of abandonment of seafarers. [814]

Unfortunately, as explained in the thesis, currently there are no cases of seafarer claims against classification societies, hence making impossible a more specific analysis, forcing conclusions to be drawn based on reasoning conducted in similar tort claims. Therefore, although the jurisdictions analysed might have shown some reluctance in holding a classification society liable in the tort of negligence, it is not certain that the same approach would be true in dealing with certain "abandonment of seafarers"' claims, as already mentioned, especially with claims involving personal injury. Furthermore, it needs to be borne in mind that the cases analysed in this work involved a classification society performing its private role, i.e. on behalf of a shipowner, and not performing its public or dual role. Considering that a classification society's public role has a great impact on abandonment of seafarers, it is unclear whether this public aspect may also have an effect on the decision of potential seafarer claims. As was shown, classification societies performing their public role may benefit from Flag State immunity, however this may be gotten around by the courts, similarly to how the exclusive jurisdiction of Flag States has been considered not to necessarily be conclusive as to applicable law when dealing with seafarers' claims.

The research carried out in this thesis confirms that although P&I Clubs differ from other stakeholders analysed, as they bear no responsibility in preventing

[814] Chapter V

abandonment of seafarers from occurring, they are essential in assuring that protection mechanisms are put in place to ensure that seafarers have their rights respected and enforced in case abandonment does occur. It was shown that like Classification Societies, P&I Clubs have a consultative status within IMO, hence assisting in developing policies to enhance seafarers' protection. They are such important players in assuring seafarers' protection, as the research has shown, that it does not seem wrong to consider their scepticism the reason for the delay in the acceptance of the MLC provisions regarding the Financial Security Scheme in cases of abandonment of seafarers.

P&I Clubs are the stakeholders who ensure that abandoned seafarers will receive their due compensation and be duly repatriated through insurance scheme mechanisms. As this research shows, even prior to the MLC, P&I Clubs already offered insurance to seafarers, in particularly for repatriation and health. Nevertheless, 'pay to be paid' rules would prevent P&I Clubs from paying in cases of a shipowner's insolvency and the consequent non-payment of the insurance premium. Thus, in order to guarantee that abandoned seafarers would still receive adequate protection, it was necessary to put in practice a scheme covering insolvency cases, considering that most cases of abandonment of seafarers are a consequence of shipowners' financial hardship. This was duly the coverage to be provided by the MLC's Financial Security Scheme. Nevertheless, it is important to highlight that this research has also shown that some national legislations already provided for similar types of insurance schemes. [815]

Accordingly, P&I Clubs in most situations will be the ones providing for seafarers' rights when abandonment has occurred. As this research highlighted, there may be cases where the abandoned seafarers might face difficulties filing direct claims against P&I Clubs. However, at least according to English Law, it seems that in most abandonment cases, seafarers will be able to file direct claims against the P&I Club, hence expediting the process.

[815] Chapter V.6.3

By showing the need for the selected stakeholders to assist in preventing abandonment of seafarers from happening, and to establish mechanisms to ensure that abandoned seafarers will have their rights preserved, this thesis has validated its hypothesis that seafarers are transnational employees, and that accordingly abandonment of seafarers should be considered a transnational phenomenon.

Suggestions for further research

Further research into the role of seafarers' states of origin or nationality, in relation to abandonment of seafarer issues, would also be beneficial not only in supporting this thesis's hypothesis, but also to consider further whether and to what extent seafarers are duly protected by their countries of origin. Such research would entail the further consideration of national legislative provisions, and accordingly a comparative analysis between different national legislations would also prove to be useful in evaluating current abandonment of seafarer provisions and how this issue is dealt with on a country by country basis. Further research is also recommended into the role of international organisations such as IMO, ILO and ITF in abandonment of seafarers.

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