



Seafarers' access to jurisdictions over labour matters

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ABSTRACT

The Maritime Labour Convention, 2006 outlines a framework for states to enforce jurisdiction over maritime labour matters, including the Flag State, Port State and Labour Supplying State. However, the Convention does not provide explicit guidance on jurisdiction determination. This article argues that seafarers should have the right to access the jurisdictions of member states, and that future amendment to the Convention should confirm this right. This paper first analyses current theories of maritime labour jurisdiction. Secondly, it conducts a comparative doctrinal analysis regarding adjudicative jurisdiction principles in common law and civil law systems. Thirdly, in three case studies involving concurrence jurisdictions of member states, this article finds that the authority of any single member state is not reliably accessible to seafarers, in particular when the state has no strong link with the seafarers. This article recommends that seafarers' rights in the Convention to choose one jurisdiction from relevant member states should be confirmed in a future amendment.

1. Introduction

The shipping industry is a highly globalised sector, connecting trade and business all over the world. In this regard, seafarers are one of the most mobile workforces [1–3]. For example, a Filipino seafarer works on board a ship that is registered in Panama and owned or operated by a Greek shipping company that navigates between Asian and American ports. In this scenario, the employment relation in the maritime industry has become fragmented: the beneficial shipowner's domicile, the site of ship operation, and the workplaces and residences of seafarers are subject to different jurisdictions [4–6]. As a consequence, once labour complaints or disputes arise, how to determine jurisdiction and the proper law becomes a complicated problem. The jurisdictional problems and Flag State responsibility have been topics of concern for this sector since the 1950s [7]. Four choices of applicable laws and jurisdictions are relevant with maritime labour disputes, namely the Flag State, Port State, Labour Supplying State and the State of Shipowners where the shipowner is domiciled or operates business.

Jurisdiction is the state power to exercise authority over all persons and entities within its territory, of which there are three dimensions: prescriptive, enforcement and adjudicative. The prescriptive jurisdiction (legislative powers) is the power to create, amend and repeal legislation. The enforcement jurisdiction is the power to enforce laws through administrative agencies. Meanwhile, the adjudicative jurisdiction is the supremacy of the courts and arbitration tribunals in hearing and resolving disputes. The 'jurisdiction' in the narrow sense usually

refers to the adjudicative jurisdiction. In this paper, both the enforcement and adjudicative jurisdictions are addressed [8,9].

Since the Maritime Labour Convention, 2006 (hereinafter referred to as MLC) came into force in 2013, seafarers' labour disputes have attained a unified international framework to shape the governing laws and jurisdictions. As Chaumette and Charbonneau point out, taking inspiration from the International Maritime Organisation's (IMO) technical standards and control mechanisms, the MLC is an innovative instrument with a cross-national inspection mechanism to ensure its effectiveness [10,11]. The enforcement of the MLC re-emphasizes the necessity to harmonise the international governance framework to avoid conflicts of jurisdictions and legislation. Many studies have focused on the administrative roles of the Flag States and the Port States regarding matters relating to maritime safety and marine pollution prevention as stipulated by the SOLAS, MARPOL, and STCW conventions [11–13]. However, little attention has been paid to the administrative roles of the Labour Supplying States, despite having responsibilities to ensure that the certification of seafarers and the operation of recruitment agencies are complied with in the MLC. In addition, to enforce adjudicative jurisdiction the infringement of seafarers' rights becomes an obligation of the Labour Supplying State. In accordance with international law, each member state shall establish sanctions, which are adequate to discourage violations of seafarers' rights.¹ To protect seafarers' rights, the member states are obliged to enforce adjudicative jurisdiction to investigate the facts and apply sanctions to discourage violations of the MLC.

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¹ Art. 5, Maritime Labour Convention, 2006.

This paper addresses two questions: what is the potential administrative role of the Labour Supplying State and how can adjudicative authority be ascertained between the Flag State, Port State, Labour Supplying State and the State of Shipowners. The first section examines the concept of maritime labour jurisdiction and identifies the jurisdictions available to seafarers. Secondly, drawing on three typical cases, the current practices of jurisdiction determination are evaluated. Finally, the third section discusses seafarers' entitlement to forum selection once jurisdictions concur over one labour dispute.

2. Maritime labour jurisdiction

Maritime labour matters occur when the working or living conditions of seafarers do not comply with international labour standards and employment agreements. Seafarers are entitled to raise complaints or disputes as per their employment agreements. Maritime labour matters usually involve various jurisdictions of different states due to the mobility of seafarers' working environment on board.

The MLC stipulates that a member state should exercise its jurisdiction over maritime labour matters; however, the MLC does not address matters of maritime labour jurisdiction comprehensively. Rather, the MLC leaves the adjudicative jurisdiction to the discretion of member states: 'the provisions (of Title 5) do not determine legal (adjudicative) jurisdiction or a legal venue (forum)'.

However, in the global governance frameworks, various jurisdictions have connections with disputes arising from seafarers' labour matters. For instance, the Flag State is primarily liable to exercise both enforcement and adjudicative jurisdictions over the ship and seafarers on board. Accordingly, seafarers are entitled to raise complaints or claims to the authorities within the jurisdiction of the Flag State. However, due to the popularity of open registries, it has become difficult for seafarers to access the jurisdictions of Flag States, such as those in Panama, Bahama or Liberia. Taking Chinese seafarers as an example, China has no diplomatic relationship with Panama, which is the Flag State with the largest national fleet size. Taking into account geographical distance and diplomatic barriers, to seek remedies through the jurisdiction of the Flag State is not convenient for Chinese seafarers. When a ship calls at a foreign port, the authority of the Port State is responsible to inspect the labour conditions according to the MLC [14,15]. However, whether the Port State permits foreign seafarers to access its judicial jurisdiction is unclear. As the country of origin, Labour Supplying States have the authority to exercise adjudicative power over the complaints of seafarers, which can make it a convenient jurisdiction for seafarers (see Fig. 1).

The MLC requires each member state to exercise its jurisdiction over seafarer recruitment services within their territory. In the European Union, the inspection and monitoring system of recruitment and placement services are established to protect seafarers' rights [16]. If the agencies infringe seafarers' rights under the MLC or local labour

laws, seafarers will have access to the enforcement or adjudicative jurisdiction of the Labour Supplying States. In some major Labour Supplying States, the domicile of recruitment agencies and seafarers are within one state. For example, in the two largest Labour Supplying States, the Philippines and China, only local licensed manning agencies or shipping companies are allowed to recruit and place the local seafarers. Therefore, in cases where seafarers' rights are infringed by manning agencies, it becomes a labour dispute within the maritime Labour Supplying State. The role of manning agencies or the jurisdiction of the state where agencies are domiciled will not be discussed separately in this paper.

In addition to the three relevant states above, the State of Shipowner should be considered as having competent jurisdiction, although the MLC has not stipulated an explicit obligation over these countries. Nevertheless, at the domicile of defendants, that is to say in the States of Shipowners, the adjudicative decision is highly enforceable. Also, subject to the MLC, it is compulsory to conclude a Seafarers' Employment Agreement (hereinafter referred to as SEA) in written form between seafarers and shipowners, which proves that there exists an employment relationship between the seafarer and shipowner. On the grounds of this relationship, a seafarer is entitled to file a lawsuit against the shipowner in a court in the state where the shipowner is domiciled. The employment relationship is a sufficient link to ascertain adjudicative jurisdiction between the State of Shipowner and the seafarer. Therefore, the State of Shipowner is responsible for exercising the jurisdiction over maritime labour matters (see Fig. 1).

Four domains are identified to adjudicate maritime labour matters: the Flag State, the Port State, the Labour Supplying State and the State of Shipowner. Theoretically, these four states are supposed to exercise their jurisdiction to correct violations of seafarers' rights. However, the MLC has failed to create any obligation to adjudicate seafarers' complaints or disputes as a conventional obligation, but rather entitles member state with discretion to decide on whether or not to entertain maritime labour disputes according to domestic laws.

It seems possible for seafarers to choose any connected jurisdiction to file a complaint or dispute. Nonetheless, different states hold different attitudes towards mobile migrant labour matters. For instance, some states are unwilling to address these disputes. To ascertain the jurisdiction over seafarers' labour matters remains a challenging issue following the entry into force of the MLC. As such, this paper will shed light on such issue through comparative legal analysis and case studies.

3. Research methods

Comparative legal doctrinal analysis and case studies are two research methods adopted by this study [17]. Firstly, based on normative sources, such as statutory texts, the current principles and practices of enforcement jurisdiction are evaluated, as are the obliga-

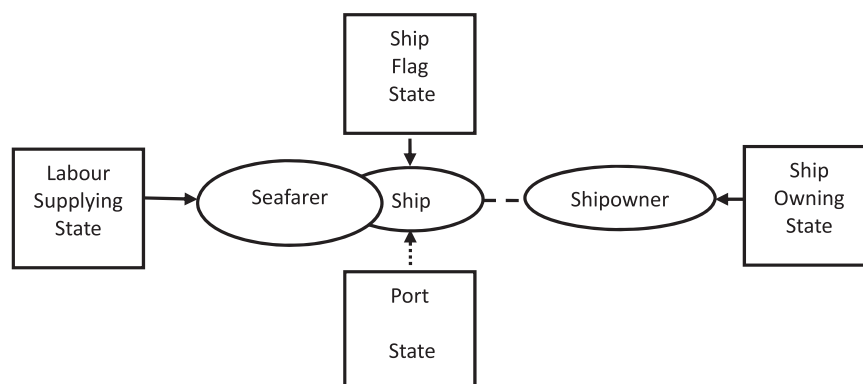


Fig. 1. Maritime labour jurisdiction.

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