MARITIME LEGAL LABOUR: EMPOWERING WORKERS AT SEA

BY

ERIC K. OKUMU OGOLA

MASTER OF LAWS

SUPERVISOR: PROFESSOR J E HARE

"Research Dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in approved courses and minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses"

Cape Town, December 1995

We Cannot Discover the Oceans unless We have Courage to loose Site of the Shore.

Anon.

DEDICATION

To the Memory of Alfred Kramer, and to the University of Cape Town. They have, for me, made this goal attainable.

To my parents: Yuanita & Patrick Ogola

AND, Most importantly, to God. Indeed it is to you, the Lord, that we are obliged to dedicate not only our material possessions, but our whole being. To you be the glory for ever and ever. Genesis 1:1

ACKNOWLEDGMENT

Special thanks are due to Professor John Hare through whose supervision, guidance, and encouragement; and through whose accessibility both in terms of opinions and source materials this thesis has been produced.

Special thanks are also due to Rev. Lange of the Missions to Seamen in Cape Town; and to Mr. Harold Harvey of the Transport and General Workers Union of South Africa for their valuable time, information and cooperation during the research.

I wish to thank the following people who have, in one way or another made my life at the University of Cape Town much more easier, AND, memorable: Prof. John Hare and the Shipping Law Class of 1995; Florence Auma; Pugh Lewis; Osei Samuel; Samuel Yirenkyi, Paolo; Kaone Malebiemang, Doreen Saka, Doreen Masebolelo, Jabulani, the UCT SDA company; the Woolsach SDA Cell Group, Dr. Chuma and Chipego; and many other colleagues and friends.

TABLE OF CONTENTS

TABLE OF CASES

South African Cases

United States Cases

International Stevedoring co. v. Harverty, 272 US. 50, 47 s. CT. 19, 71 l. ED. 157 (1926).
Kyriakos v. Goulandris, 157 F 2D 132, 1945 AMC 1041 (CA2 NY Wis 1891).
Keller v. United States, 273 F supp 945, 1967 AMC 2368 (DC. Va 1967).
Lauritzen v. Larsen 345 US 571, 73 S ct. 921, 97 L. Ed. 1254 (1953).
Laura Masden 112 F 72 (DC Wash 1901).

Marine Drilling Co. v. Austin, 363 F2d 579 1966 AMC 2013 (CA5 La (1922).
Offshore co. v. Robinson 266 F2D 769, 75 alr 2d, 1965 AMC 2049 (CA5 La 1959).
Robertson v. Baldwin (165 US 276, 283 41 L Ed 715, 17 S Ct 320 (1897).
Rousse v. American Ins co. 1965 AMC 2629 (JUD D Ct La 1964).

The Lusitania, 25, F 728 (DC NY 1918).

The Condor, 196 F 71 (DC NY 1912).

The Shawnee, 45 F 269 (DC Wis 1891).

The Boston F (Cas No. 1669 (DC NY 1832).

The Theodore Perry F Cas No. 13880 (DC Mich 1862)

The Buena Ventura, 243 F 797 (DC, NY 1916).

The Tashmoo, 48 F2d 366, 1931 AMC 48 (DC NY 1930).

United States v. Sandrey, 48 F 550 (CC 1A 1891).

Uravic v. F. Jarkaco, (282, US 234, 75 l ed 312, 51 S Ct 111, 1931 AMC 239 (931).
Wiliam v. The Sirius, 65 1= 226 (DC Call 1895).

English Case

Luke v. Lyde (1759) 2 Burr 882 887, 97 ER 614 617.

Linon v. Chapman, HCA 24/130 (1730).

Pett v. British South African co. (1911) ad. 194.

Re The Minera 1 Hogg Adm. 367, 166 Eng Reprint 123 (1825).

Permanent Court of International Justice Cases

The Lotus, PCIJ. 1927.

_TABLE OF ACTS AND STATUTES

Kenya

Merchant Shipping Act (Chapter 389 of the laws of Kenya)

United Nations Conventions and Documents

I.L.O. Conventions

I.T.F Standard Collective Agreement 1 January 1994

I.M.O. Conventions

Marine Pollution Convention (MARPOL)

The International Convention on Maritime Liens and Mortgages, 1993

The Law of the Sea Convention 1982

The 1977 Collision Avoidance Rules

ABBREVIATION

D.C	Washington DC
E.E.Z.	Exclusive Economic Zone
FOC	Flags of Convenience
I.T.F.	International Transport Workers Federation
I.M.O.	International Maritime Organization
IBID	Cited immediately above
L.R.A.	Labour Relations Act
M.L.R.	Main Law Reports
MARPOL	Marine Pollution Convention
M.S.A.	Merchant Shipping Act
N.Y.	New York
N.L.R.	Natal Law Report
N.I.S.	Norwegian International Shipping Register
P.C.I.J.	Permanent Court of International Justice
S.A.	South Africa

SUPRA	Already cited above
T.P.D.	Transvaal Provincial Division
TUL. L.R.	Tulane Law Report
T.G.W.U.	Transport and General Workers' Union
U.S.	United States of America
U.S.C.	United States Constitution
U.K.	United Kingdom
U.N.	United Nations Organization

CHAPTER ONE

INTRODUCTION

1.1 The Research Problem

Background to the problem studied

In the popular mind the principle of equality before the law is sometimes confused with the idea that the law applies to every one in the same way. But there are certain groups of workers who are excluded for one reason or another from many of the benefits or burdens of legislation passed by Parliament to regulate or improve behaviour in certain areas of life, or to whom such legislation applies in a peculiar way.[1] In the field of employment and labour law, those who work on the seas as seamen belong to such groups.

This thesis inquires into the problems encountered in the Maritime Legal Labour field; it researches into the regime applicable to seamen employed on both South African ships and ships of other nations; it looks closely at the ways in which labour law applies to a multiplicity of legal regimes in a dynamic industry where, marine law as it affects seamen is indeed rapidly changing, with the result that different concepts and directions inevitably emerge. The seaman today works on the high seas on board sometimes very poorly maintained vessels, with very poor living conditions. Sometimes these workers are the victims of small-time -shipowners who, for various reasons, suffer impecuniosity, and whose vessels are arrested in foreign ports.

[1]. Jonathan Kitchen, Labour Law And Off-Shore Oil (London,1977) p.11.

Such seafarers may go for months without wages, proper food or accommodation, and without funds to return home. At the same time poorly maintained vessels do occasionally suffer high incidence of perils at sea and this results to loss of many mariners' lives.

This happens at a time when maritime law as it relates, for example, to jurisdiction, liens, casualty, general average, insurance, liability for lost or damaged cargo, salvage, etc. are so remarkably advanced. There is obviously a missing link: the need to secure as adequately the interests of seamen as those of the shipowner, cargo owner or their underwriter, in line with the advancement in the field of international maritime trade and commerce.

From the earliest times, maritime law was sharpened by the practical needs of those engaged in maritime commerce. The unique character of the sea and its hazards created the need for legal solutions and doctrines that, in some cases, had no application on land. [2] This alone makes seafarers special breed of workers. Their practical needs must indeed shape the direction of maritime commerce.

The pathetic situation in which most seamen live would be declaratory if mariners would be observed in their dingy cabins. This study emphasizes the mariner's life at sea-in the damp, dark hold of the vessel, on the decks, aloft among the sails, and only secondarily a life in the "dingy cabin" in port. It seeks to locate the place of seamen in the imperial scheme of things, in a rapidly unfolding system of international capitalism. It attempts to draw a line of interest between shipowners, merchants and captains from those of the seamen, and shows how this divide, which has been used to oppress seafarers may in the future be used to restore the dignity of the profession.

---

[2]. Thomas J Schoenbaum, Admiralty and Maritime Law (West Publishing Co. St. Paul, Minn. 1987) p. p.1.

I have determined the nature and the scope of the different legal regimes regulating the contract of employment at sea. The suggestion is that if this category of workers is to remain pivotal to the international maritime trade and commerce, much remains to be done to legally empower them, and to improve the terms and conditions under which they work. Those seafarers who work on board flags of convenience vessels continue to be victims of ruthless exploitation, and endless casualties at sea.

Special attention is paid to the efforts made by seafaring workers to free themselves from harsh conditions and exploitation, and to this effect, the labour process at sea, including collective bargaining, are highlighted.

The seaman's international life and labour has challenged me to adopt his almost nomadic mobility, and to follow him from port to port around the globe. His international existence beckons us to transcend the often artificial barriers of regional-national history. With this in mind, however, I have made special case study of the South African seamen conditions and their trade union representation. I have also highlighted the important role of the International Transport Workers Federation (ITF) in its efforts to promote the awareness of seafarers rights. The special nature of the maritime industry, which is not under the authority of any single national government, makes violation of trade union rights by employers a common occurrence, and the presence of the ITF is a big relief to all those who seek to see justice prevail in the industry.

Why the specific problem is worth investigating

The seaman occupies a pivotal position in the creation of international markets and a waged working class, as well as in the worldwide concentration and organization of capital and labour. International trade and commerce today owes its success largely to the sea as a medium of transportation, at the centre

of which is the seaman. At the same time the terms and conditions of employment under which the seaman works are not only subject to a multiplicity of legal regimes, but remain largely deplorable, and at the whims of exploitative shipowners.

Further, the thesis has explored the interface of labour law and shipping law as it applies to maritime labour. Apart from its academic and legislative imports, this interface may be of interest to policy makers as a source of information on seamen's relationship *vis-a -vis, inter- alia,* the shipping law issues; the access of seamen to the protection afforded by labour law; the meaningful participation by seamen in the international economic order, in the creation of which they remain instrumental.

Given that seafaring is an international occupation, I have concluded the research by making parallel comparison with other fields of international concern where international regulations have been very successful; for instance in the control of Pollution; in the control of Collision at sea; or in the treatment of Maritime Liens and Mortgages; and I have recommended that in order to ultimately secure acceptable employment conditions for seafarers, the same approach may be necessary.

I have concluded by suggesting a framework for an international approach: "Flags of Convenience Convention: Minimum Employment Conditions" as the convention which may be enacted with a view to empowering workers at sea.

It has been my intention to investigate the position of seafarers as international workers, and to highlight their plight. It is my hope that this work will contribute to a motivation of labour activism in the industry.

1.2 Terminology and Definitions

1.2.1 Seafarers' Social and Economic Origin.

Like in all professional callings, seafarers have historically been driven onto the seas as a result of economic needs which, for them, could not be adequately satisfied by reliance on land resources. Admittedly, some seamen have sought employment on the seas due to their special need for adventure, travel, and a desire to meet peoples of different origin. However, underneath every reason lies the truth that there has always been greater economic promise on the seas .

Due to great mobility in a sailor's life it has not been easy to adequately document the life history of seafarers, or to trace accurately their social origin, and thus less is known of the many sailors who traversed the great waters of the world before the Eighteenth century. Indeed, even the Eighteenth century deep sea sailor is still by and large an unknown man. Gary Nash has noted, for example, that all of the early American northern seaports had hundreds of free unskilled workers, including seafarers, but that such men,

> "are perhaps the most elusive social group in early American history because they moved from port to port with greater frequency than other urban dwellers, shifted occupations, died young, and, as the poorest members of the free white community, least often left behind traces of their lives on the tax lists or in land or probate records."[3]

Nevertheless, to ignore this group of struggling, disease-prone, ill-paid labouring men is to dismiss from consideration those without whose lives the wheels of maritime commerce could not have turned.

---

[3]. Gary B. Nash, The Urban Crucible: Social Change, Political Consciousness, and the Origin of the American Revolution (Cambridge, Mass., 1979), 16.

Nash's comments are equally appropriate for the Eighteenth century England, where seafarers played a major role, but in whose history they have been largely invisible.[4] In that country , as is the practice the world over, most seamen had gone to sea in their late teens or early twenties. The average tar in the first half of the Eighteenth century was twenty seven years old, while the ship's lesser officers tended to be in their late twenties, and captains and mates in their thirties.[5] These men would have called any one of the major ports "home", though many had been born elsewhere. Possibly, some were younger sons of yeomen and poor farmers, men who had migrated to the cities in search of work and finally found it on the docks. Some, perhaps, had been dispossessed of land by disclosure, while others may have been picked up by press gangs, and once forced to acquire the skills of maritime labour in the Royal Navy, decided to work as merchant seamen. Still others must have been rural folk who had been drawn to the sea by the lure of high wages during wartime.[6]

Economic necessity strongly emerges as a factor which pushed many to the water's edge. Seafarers' proverbs often suggested a lack of choice in their occupation. "Those who would go to sea for pleasure would go to hell for pastime", one maxim had it. Or, inveighed another, "whoever putteth his child to get his living at sea had better a great deal bind him prentice to a hangman" [7]. Evidently, the sea was

[4]. Two recent works, Robert W. Malcolmson, Life and Labour in England 1700-1780 (New York,1981) and John Rule, The Experience of Labour in Eighteenth Century English Industry (New York, 1981), illustrate the foregoing argument by saying very little about seamen.

[5]. Redikker, Supra, introduction.

[6]. Very little is known about the social origin of seamen. See Ralph Davis, The Rise of the English Shipping Industry in the Seventeenth and the Eighteenth centuries (London, 1962),153. For data on the ages of seamen, see Appendix A.

[7]. See, for example, Charles Napier Robinson, The British Tar in Fact and Fiction (London, 1911) 353; Barlow's Journal, 90: The Life and Adventures of Mathew Bishop (London 1744) 61.

historically taken to be fit only for those who could not get bread by land. The rigors of a seafarer's life, likened to hell and measured against popular hatred of the hangman, appear to have been widely known and not often freely chosen.

Yet there were brighter motivations that co-existed with the darker. The reason men sailed the waves in the early modern period were best summed up by Ralph Davis: "to see the world, to get a good rate of pay, to get a good job of some sort at any price, to do what father did..."[8].

In England, a completely different perspective on sea faring developed, one concerned not with the sailor's need for sustenance or the quality of the life itself, but rather with the place of the seaman in the imperial scheme of things, in the rapidly unfolding system of international capitalism. William Petty was a key figure in the development of (the so called) political arithmetic, the Seventeenth and the Eighteenth centuries forebear of political economy and statistics[9]. Political arithmetic was an early effort to analyse capitalism as a system, to calculate the direction and magnitude of social and economic forces, and to plot a course for the accumulation of capital and the extension of national power in a turbulent, expanding economic universe[10]. Political arithmetic had two main preoccupation: "the wealth of the kingdom", especially its social distribution, and the balance of terms of trade, especially foreign trade.[11] In the words of Joyce Apphby, the expounders of this view,

[8]. Redikker, supra.

[9]. Sir William Petty, "Political Arithmetic", The Economic Writings of Sir William Petty, ed. Charles Henry Hull (Cambridge, 1899) 250-60.

[10]. Ibid.

[11]. Joyce Appheby, Economic Thought and Ideology in Seventeenth Century England (Princeton, N.J., 1979) 83, 144.

> "apparently did not grasp, or did not care to grasp, the connection between the increasing wealth of the few and the increasing poverty of the many, but to some extent they understood that commercial supremacy helped to produce predominance in manufacturing and industry".[12]

In Petty's grand and abstract view, seafarers were "the very pillars" of the English nation and empire, and not only in their role as naval defenders. "The Labour of Seamen, and the Freight of Ships", Petty explained, "is always of the nature of an Exported Commodity, the overplus whereof, above what is imported, brings home money."[13] Sailors, in this early formulation of the labour theory of value, were the source of an "overplus", a surplus value central to the international accumulation of capital. Thus, a seaman's lack of money and desire to see the world were transformed, through maritime labour, into Petty's accumulation of capital and imperial dominion of the world. Petty elaborated in theory what a seaman experienced in practice: the seaman's labour was a commodity to be sold on an open market like any other.[14]

Beneath the seemingly neutral and impersonal language of Petty's political arithmetic lay the harsh realities that attended England's long, slow, uneven, and bloody transition from feudalism to capitalism. Since the capitalism mode of production ultimately requires the sale and purchase of labour power in a market the medium of the wage, a major imperative of early modern capitalism development was the simultaneous dispossession of large numbers of small property holders and the consolidation and centralization of newly available property in the hands of a minority. This was the process of "primitive accumulation". The many suddenly and forcibly torn from their means of subsistence, were hurled on the labour market "as free, unprotected, and

---

12. Ibid.

13. Sir William Petty, Supra.

14. Ibid, pp 259-260,276,280-283,292,304.

right-less proletarians". There they had no alternative but to sell their labour power to make a living.[15]

In England the major forces of dispossession were the disbanding of feudal retainers, the dissolution of feudal monasteries, changes in agricultural methods, foreclosure by debt, and probably best known of all, enclosure. Wealthy landowners enclosed their lands and extinguished the common rights that lessened dependence on wage labour. The tenants and labourers, freed from the lord of the minor, rambled about as masterless men and women, and they symbolized the radical changes wrought by capital. The integument of rural culture had been gashed, and new independent actors, free to find a job and free to starve if they could not, traipsed the country side trying to keep body and soul together.[16]

Thus "primitive accumulation", the process by which producers lost their ties to the land, was central to the creation of maritime working class.

However, free market and demographic forces did not produce free wage labourers at a pace fast enough to meet the challenges of an expanding capitalist system as defined by English rulers, who therefore resorted to impressment to stock the maritime labour market with mind and muscle. They then often relied upon economic pressure and a general lack of employment opportunity to move these naval conscripts into the merchant shipping industry. Violence, or the application of extra-economic force, was thus crucial to the formative stage of capitalist development.[17]

[15]. Karlmarx, Capital: A Critique of Political Economy, trans. Ben Fowkes (New York, 1977) 876, Dobb, studies 7.

[16]. Christopher Hill, The World Turned Upside Down: Radical Ideas in the English Revolution (New York, 1972) 44.

[17]. Peter Clark, "Migration in England during the late Seventeenth and early Eighteenth Centuries" p 83 (1979), 57-90. The summary offered here of the transition from feudalism to capitalism is necessarily oversimplified.

Today, however, calling to the sea must be seen against the background of a combination of factors namely, population pressure on land resources, high increase in the international trade and commerce, increase in human mobility providing opportunity for employment at sea, increase in technology which has made seagoing vessels much more safer than in the past. Other people are today attracted to the sea because of their need for adventure, and for more attractive wages.

The frequency with which people of a particular location seek employment on sea may also depend on the particular situation and dependence of that country to the seas. For instance in South Africa, one of the oldest business has been ship supply [18] This was the whole reason for the Netherlands East India Company establishing Jan Van Riebeeck and his party at the Cape in 1652, to supply the company's ships on the long route to and from India. In those days the supply was essentially fresh provisions, for without refrigeration or other proper storage method supplies quickly deteriorated.[19] When a country is so well established in a particular line of business, its people tend to be attracted to that line of profession. It is little wonder, therefore, that along the African coast South Africa and Liberia supply the bulk of the continent's seafarers. South Africa has since the centuries after 1652, been like an oasis on the routes to and from the East to Europe or other atlantic areas, as well as the more recent southern continents east and west of the United States of America.

Likewise countries with shoreline, for instance Kenya, Mozambique and Namibia also have nationals with peculiar affinity for seamanship.

[18]. Tony Person, "Ship Supply one of South Africa's oldest business," South Africa Shipping news and Fishing Industry Review, (Nov./ Dec. 1994) p. 9.

[19]. Ibid.

On the other hand evidence show that there is a negative motivation for employment in the sea. Research in South Africa indicate high drop outs from the institutions which train seamen. Indications are that in the minds of school leavers the marine industry has a declining profile. Staff from eastern Europe are occasionally engaged on six month contracts by South African companies.[20] It is significant that even in a time of serious unemployment for school leavers in western countries, relatively few appear attracted to the maritime profession. This trend, if continues, will inevitably result in high training costs, and the supply of qualified mariners may be threatened. Further, changes in the structures of the world fleet by type, size and age also influence manning requirements, and as they do occur occasionally, there is no guarantee that trained manpower will be available to suit these changes. Loss of manpower through retirement, ill health and death may also be a factor affecting the supply of seamen.

It is expected, however, that continued growth in the world trade will give rise to a substantial increase in the number of vessels in service, resulting in an increased demand for seafarers.

1.2.2 The Role of Seamen in Traditional and Modern Economy

In this section, the expression "seamen" includes all persons employed or engaged in any capacity on board any ship.[21]

While the period before the Eighteenth century was much less known for world trade and commerce, the major world ports were discovered by the sailors of those days and, today, the international trade owes much to those brave men who, in spite

[20]. "The Worldwide demand for and supply of seafarers", SKUD no. 3 October 1994 p. 11.

[21]. This is the definition given to the term "seaman" under South African Labour Relations Act 1965 (as amended to date) at section 355 (5).

of greater risks and uncertainties of life at sea, were able to sail the waves in the determined effort to discover new lands and new sources of food and raw materials for infant industries. It is now common knowledge that seafarers of the early centuries were responsible for the turning of the wheels of maritime commerce.

In the Seventeenth and the Eighteenth centuries seamen were " the very pillars" of the English nation and empire, and not only in their role as naval defenders. The labour of seamen, as we have seen, was always "of the nature of an exported commodity, the surplus whereof ,above what is imported, brings home money."[22] This surplus value was central to the international accumulation of capital.

With the discovery of new worlds and trade routes seamen developed linkages with other professionals, and this has made the seaman's function more complete.

Today there is no doubt that seafarers contribution to the international economy through the international maritime commerce and trade is magnificent. The shipping industry is responsible for the transportation of billions of tons of agricultural and industrial goods annually. The shipping passenger business is equally lucrative. The seaman is at all times the worker whose services move the shipping industry.
They also contribute to the economies of their countries of origin through taxation.

Continued growth in the world trade is likely to give rise to additional roles played in the international economy by seamen.

[22]. Sir William Petty, Supra.

1.2.3 Issue of Law and the Problem of Definition

The need for Definition

Definition of legal concepts has, throughout legal history, presented persistent questions and problems. Jurisprudential scientists are yet to provide a lasting answer to the question "what is law?"[23] Different schools of legal thought[24] have been advanced in an attempt to reach a suitable definition of the concept of law. Although the positivist jurisprudence has largely emerged as the leading contender,[25] other legal schools of thought are equally relevant for an adequate understanding of what law is.

Definition of the term "seaman", like all legal concepts, must be made in the knowledge that law (and the legal concepts it defines) is an organic and functional concept, itself subject to respond to the changes in, and the conditions of society[26].

Seafaring as a tradition grew out of the society's need for recreation and for food. In the early ages there was no distinction between those who went to sea for fish or for pleasure. The society knew them as seamen. However, over a period of time during which international maritime commerce and trade has gained prominence, it has become necessary to make a distinction between "seamen and other shore based maritime workers, such as longshoremen, fishermen, dock workers and

---

[23]. H.L.A. Hart, The Concept of Law, (Clarendon press. Oxford, 1961) p. 1.

[24]. These include the Natural school of legal thought, the positivist jurisprudence, the Sociological school of legal thought, Historical materialism, to mention a few. For further reading see generally, HLA Hart, ibid.

[25]. We are all familiar with the strength of the written constitutions, statutes, conventions and codified law.

[26] .Eric Okumu Ogola, Judicial Activism: Kenya's Post Independence Experience, LL.B. Dissertation, Nairobi, 1990. p. 3.

workers offshore. This necessity for distinction may vary from one jurisdiction to another, but it primarily recognises that persons who may claim the status of "seaman" under the law of admiralty have access to special remedies not accorded other workers.[27] The reason for this in my view, is a blend of historical tradition, and the realization that seamen are required to endure special perils and hardships.

Thus definition, taken as primarily a matter of drawing lines, or distinguishing between one kind of term and another, which ordinary language marks off by a separate word, overcomes the problem. The difficulty however, is that the need for such drawing of lines is often felt by those who are perfectly at home with the day-to-day use of the word in question, but can not state or explain the distinction which, they sense, divide one kind of thing from another.

The modern jurisprudence has largely resolved this predicament. The positivist jurisprudence affords us the privilege of picking up our statute books, and looking up a ready made definition in apparent complete disregard to the sociological factors which may surround the growth of a concept.

Hence, depending on the particular jurisdiction the definition of "seaman" is sometimes very expansive, while at other times it appears to be severely restrictive. The legislative objective, I believe, is not only to make the concept as functional as possible, but also to retain the organic nature of the concept in order to take into account the Nineteenth and Twentieth centuries technological developments which have not only expanded the province of maritime activity, but have also created new areas of concern, the latest of which is in the field of offshore

[27]. Thomas J Schoenbaum, Admiralty and Maritime Law (West Publishing Co. St.Paul, Minn. 1987) p. 158.

work (oil drilling, construction of radar outpost towers, etc.) where the concept of "seaman" has received what sometimes appears to be a startling interpretation.[28]

1.2.4 Seamen as distinguished from other Maritime Workers

Statutory Seamen

The word "seaman" is a flexible one, the strict meaning of which depends upon the context of the particular statute under which the term is sought to be applied. In this section I will examine the statutory provisions and, where possible, the judicial practices of selected jurisdictions.

South Africa.

The law is contained in the Merchant Shipping Act 57 of 1951 as amended to date. Section 2 defines the term "seaman" as meaning "any person (except a master, pilot or apprentice officer) employed or engaged in any capacity as a member of the crew of a ship" This definition is obviously very expansive, and can bring within its ambit varied circumstances. To begin with, there are three different possible interpretation of the term "member of the crew of a ship". Essentially, whether one is a seaman or a member of a crew, is a question of fact and evidence. There is no uniform rule, and case law is bound to conflict. For instance, what is the position of a person who works on a vessel out of navigation and who expects to be employed on her in the future? Obviously, he is a member of a crew, but as to whether he is a seaman is in my opinion highly doubtful.

[28]. More about this will be considered in the later chapters.

This wide definition would resolve the doubt raised in **Dallas v. Kersler**, and **Thorpe v. Tullock** as to whether the term includes a mate.[29]

In South Africa, the law as contained in the above Act largely supersedes the common law regarding seamen.

The position in Kenya

The law relating to seamen is contained in the Merchant Shipping Act, chapter 389 of the laws of Kenya. Section 2 defines "seaman" as "including every person (except a master, pilot or apprentice dully contracted or indentured and registered) employed or engaged in any capacity on board a ship". "Ship" "includes every description of vessel used in navigation not propelled by Oars".

In my view the above definition is very expansive, and would admit very diverse circumstances. It is instructive to note that the Kenyan law employs the word "includes", and not "means", used under the South African law. Under Kenyan law every plaintiff appears to be at liberty to "include himself" into the meaning if he so can. The flexibility of this definition appears to be in line with the expectation that the developments in the maritime industry may occasionally present situations which may not be accommodated by too rigid a definition.

Position in the U.S.

The principal law on "seamen" is contained in the United States Code,[30] and under the Jones Act.[31] Section 713 of **Title 46 USC** gives an all embracing definition of the word "seaman". Under

[29]. (1891) 12 NLR, 269., (1896) 17 NLR 272 at 474.

[30]. Title 46 USC at sec.713.

[31]. Tittle 46 sec.688.

this statute it is declared that every person having command of any vessel belonging to any citizen of the United States shall be deemed to be the "master" and every person (apprentices exempted) employed or engaged to serve in any capacity on board shall be deemed and taken to be a "seaman". A vessel includes every description of vessel navigating on any sea or channel, lake or river. The "owner" is understood to mean all the several persons, if more than one, to whom the vessel belongs. Commenting on this definition, M J Norris[32] has stated that,

> "under this statute, it would seem clear that any person who performs navigational duties aboard a vessel in navigation- apprentices only being exempted... would be called a "seaman".

Under the Jones Act,[33] the term "seaman" has been given an even broader and more liberal reading. The Act creates a course of action in favour of "any seaman" who suffers personal injury or death in the course of his employment. The benefits of the Act, however, are available only to a "seaman". Thus, to be admitted into the charmed circle of seamen is of special importance to a plaintiff. Seamen status determines access not only to the Jones Act remedy but also to the maintenance and cure.[34] If the application of the Jones Act, which was passed in 1920, is still unclear, the blame must be placed on the congress for failing to provide any definition of "seaman" or criteria for eligibility. In the United States however, the federal courts were compelled to wrestle with the definition of seamen on a case by case basis. The first efforts at providing a definition were very expansive, taking in virtually all maritime workers injured in the course of their employment.[35] Then Congress passed the Longshore and

[32]. Martin J Norris, The Law Of Seamen, V.1. 3rd. ed. (Rochester, N.Y., 1970) P 27.

[33]. Supra, (note 31).

[34]. See for instance Hall V. Diamond M Co., 732 F.2d 1246,1248 (5th. cir. 1984).

[35]. See International Stevedoring co. V. Haverty, 272 US. 50, 47 S Ct. 19, 71 L. Ed. 157 (1926).

Harbour Workers Compensation Act,[36] which provides for the payment of compensation to injured maritime workers, except those who qualify as "a master or member of a crew of any vessel".[37] Through judicial interpretation the phrase "member of crew of any vessel" became legally synonymous with the word "seaman", so that the coverage of the Jones Act and the Longshore Act became mutually exclusive.[38]

Thus the federal courts have expanded the scope of the word "seaman" which, undoubtedly once meant a person who could "hand, reef and steer" a mariner in the true sense of the word. The reason for such generous interpretation of so simple a word as "seaman", in the opinion of judge Hough, is that,

> "every one is entitled to the privilege of a seaman who, like seaman, at all times contribute to and labour about the operation and welfare of the ship when she is upon a voyage. When mariners in the old sense of the term were the only persons who enabled the ship to go in safely, then they were the only seamen; when firemen contributed quite as much as the deck hands to that end, they became seamen in the eyes of the law".[39]

Hence, any list of those who qualify as seamen in not definite by any means. I would adopt Justice Holmes view when he commented on **Title 46 USC** section 713. He observed that "it is directed to extension not to restriction in interpreting the word "seaman" ".[40] There are many employees aboard vessels in navigation whose status have not been judicially defined by the courts. Modern passenger liners carry elevator operators, beauticians, cruise directors, printers, entertainers, etc., who do share in keeping

[36]. 33.USC & 903 at et seq. (Longshore Act)

[37]. 33 USC & 902 (3).

[38]. T J Schoenbaum, supra, at p.86.

[39]. The Buena Ventura, 243 F 797 (DC NY 1916).

[40]. Uravic V. F Jarka co., (282 US 234, 75 L ED312, 51 S Ct 111, 1931 AMC 239 (1931)).

the business of a large vessel going, and who are undoubtedly engaged in commerce. It is suggested that the test of whether one is a seaman lies in the answer to the questions whether the vessel is in navigation, whether there is a more or less permanent connection with the vessel, as distinguished from a visitor or passenger,and whether the services rendered are maritime in character.[41]

The field of offshore work presents a slightly different position. But basically, the three elements, as indicated above, must be present in each case.[42] As to the character of services being in aid to navigation in these border cases, Judge Wisdom in a well reasoned opinion in **Offshore co. V. Robison**[43] stated as follows:

> "They had absolutely nothing to do with the operations or welfare of a vessel in the sense that a vessel is a means of transport by water, and were not members of a ship's company in the sense that ship's cook or carpenter are necessary or appropriate members of a ship's compliment. But in the light of the function or mission of the special structure to which they were attached, they served in a capacity that contributed to the accomplishment of its mission in the same way that a surgeon serves as a member of the crew of a floating hospital".

The United State's law applicable to maritime oil workers has developed to the point where it is proper in the appropriate case for the district judge to direct a verdict on the status of an offshore worker as a Jones Act "seaman".[44]

[41]. Ibid.

[42]. Rousse V American Ins. co. 1965 AMC 2629 (Jud D Ct La 1964).

[43]. 266 F2d 769, 75 ALR2d,1965 AMC 2049 (CA5 La 1959).

[44]. See Marine Drilling co. V. Austin, 363 F2d 579, 1966 AMC 2013 (CA5 La (1922).

Some Categories of "seamen"

The American law has developed furthest the concept of "seamen", and in the process has made certain distinctions between a "seaman properly so called and a seaman improperly so called". I will briefly explore these distinctions.

Unsigned Articles

The United States law has held that where a person is engaged as an "able bodied man," he is a seaman if, in the course of his employment he suffers injuries, although he had not yet signed the articles. This was so provided the plaintiff proved he was a member of the crew, and that he had been invited.[45]

Workaway

A workaway is a stranded or a repatriated individual, who signs the articles, and agrees to perform some services in exchange for his transportation.[46] By signing the articles, he becomes a member of the "ship's company", and being engaged on a vessel in navigation and doing work of a maritime nature, he is a seaman.[47]

Master and Officers

Both South African and Kenyan laws expressly exclude a master of a ship from the definition "seaman". In the United States, however, for certain purposes, the master of a ship has been held to be a seaman, but under particular statutes he has been excluded from relief. In **Burns Bros**, the Supreme court pointed

[45]. Falco V. Brega, 20 F2d 362,1927 AMC 1474 (CA2 NY 1927).

[46]. The Tashmoo, 48 F2d 366, 1931 AMC 48 (DC NY 1930).

[47]. Ibid.

out that while the general maritime law traditionally made ordinary seaman a "ward of the admiralty" and thereby an impecunious individual unable to safeguard his rights, the master however was in a position to drive a bargain for himself and to protect his privileges and therefore was not given wage rights accorded seamen (such as, for example, a lien against the vessel or an extra month's wages in case of improper discharge). But the court was not willing to extend this doctrine to bodily wounds since at such times the master and common seaman are almost equal.[48] For the purposes of the Jones Act , the master was declared to be a seaman. Kenya, South Africa and the United States law are in agreement that subordinate officers including Chief mate are seamen.

Stowaway

A stowaway is one who conceals himself on board a vessel about to leave port in order to obtain a free passage.[49] He is not one of the ship's company and is not a seaman. He is, in fact, one who imposes himself upon the vessel by his wrongful act. The only duty the vessel owes him is to afford him humane treatment while he necessarily remains on board. In the event of illness or injury while on board the vessel, he is not entitled to maintenance or cure. In the **Laura Masden**,[50] the fact that the stowaway was signed on the articles did not alter this fact. However, under the United States Immigration Act, a stowaway subsequently signed on the articles aboard a ship would be a seaman. The relevant section reads: "The term "seaman" shall include every person signed on the ship's articles and employed in any capacity on board any vessel arriving in the United States from any foreign port or place". Likewise an alien entering the United States, and signed on the ship's articles would be a seaman.

[48]. No. 31 29 F2d 855 (DC NY 1928).

[49]. United States v. Sandrey 48 F 550 (CC 1A, 1891).

[50]. 112 F 72 (DC Wash 1901)

Miscellaneous

Shore employees, guests on pleasure boats, and volunteers would not, under the United States law, qualify as seamen. But a watchman may or may not be a seaman depending on whether or not he is employed on a vessel in "commerce and transportation" and in navigation, or in one out of commission and probably in winter quarters, and withdrawn from navigation.[51] Normally on large passenger vessels, watchmen or fire wardens are carried on the articles and are considered part of the ship's company.

What is a Vessel?

Like "seaman", the word "vessel" has a variable meaning in law applicable to the particular statute to which the legislature applied it. In Kenya, for instance, " "vessel" includes any ship or boat, or any other description of vessel used or designed to be used in navigation".[52] A ship is defined under the same section as including "any description of vessel used in navigation not propelled by oars". In South Africa, section 2 of the Merchant Shipping Act 57 of 1951 attributes virtually the same meaning to a vessel as to a ship.

In the United States, Congress declared for the purposes of admiralty jurisdiction that,

> "The word "vessel" includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[53]

[51]. See William V. The Sirius, 65 1= 226 (DC Cal 1895).

[52]. Section 2 of the Merchant Shipping Act, Chapter 389 of the laws of Kenya.

[53]. 1 USC section 3.

Vessel must be in navigation

A person who works aboard a vessel can not be a "seaman" if the vessel is not in navigation. "In navigation" has been said to mean that the vessel is engaged as an instrument of commerce and transportation on navigable waters.[54] Therefore a vessel is in navigation although moored to pier.

With respect to dredging and offshore oil drilling operations where the crafts used are either anchored to shore or resting firmly on the bottom of the water, it would be of significance to note that the "vessels" are not conventional vessels but special purpose structures that in some cases could be on the bottom of the sea.

It is thus clear that in order to define a "seaman", it is necessary to inquire into the vessel upon which he serves so as to determine if it is really a vessel in navigation. However, it is also clear that attempts to fix unvarying meanings that have a firm legal significance to such terms as "seaman," "vessel" "member of a crew", must finally come to grief on the facts.

[54]. Cope V. Vallette Dry Dock co. 119 US 625, 30 L ED 501, 7 S Ct 336 (1887).

CHAPTER TWO

RELEVANT CONCEPTS

2.1 **PART ONE: Admiralty and Maritime Law**

Maritime Law

Broadly defined, maritime law is the set of legal rules, concepts, and processes that relate to navigation and commerce by water. The traditional focus of this body of law is the ship and the legal incidents that result from its operations.[55] From the focus of maritime law comes its distinctive and remarkable character. From the earliest times, maritime law was shaped by the practical needs of those engaged in maritime commerce. the unique character of the sea and its hazards created the need for legal solutions and doctrines that, in some cases, had no application on land. Many of those are still with us today, in the laws relating to jurisdiction, liens, casualty, general average, insurance, liability for lost or damaged cargo, salvage, and the rights of seamen and harbour workers.[56]

Another distinctive feature of maritime law is its international character. Although its rules are a part of the national legal order of each country, and consequently important national differences persist, essential concepts and institutions of maritime law are remarkably similar all over the world. It is suggested that specialists in maritime law tend to speak the same language, whether the underlying legal order is the civil law,

[55]. Thomas J Schoenbaum, supra, p.1.

[56]. Ibid.

common law, socialist law, or islamic law. Without at least broad agreement among nations as to basic principles of maritime law, maritime commerce would be difficult or impossible.[57]

The general maritime law,-comprised of the ancient codes and the customs of seafaring nations, as received into various countries-affords redress for injuries and damage caused by the negligence and intentional misconduct, and in certain cases, without regard to negligence or even fault in the traditional sense. Thus, passengers and guests aboard a vessel may have claims for injuries sustained as a result of the negligence of the shipowner or of persons for whom the shipowner is responsible.[58] Property owners may have claims for damages caused by the negligent discharge of pollutants from a vessel; and citizens may have a claim against the government or its agencies for the negligent breach of certain governmental duties. Injured persons may also have claims grounded on intentional wrong, such as interference with contractual relations, wrongful discharge, assault and battery, conversion, or false imprisonment. Seamen may have claims grounded on unseaworthiness, a kind of liability without negligence, and any person may have a claim grounded on product liability, another kind of liability without negligence. When wrongful conduct results in the death of a person, the general maritime law affords a survival action and a wrongful death action.[59]

The general maritime law is not a complete or all inclusive system in itself. Every country is at liberty to develop and direct the growth of the general maritime law. In most cases the general maritime law is characterized by the expansive and dominant role played by a country's courts in fashioning and

[57] Ibid, p. 2.

[58]. Ibid, p.122

[59]. See, for instance the United States case of Azzopardi V. Ocean Drilling & Exploration co., 742 F 2d 5th cir (1984).

applying its precepts to new situations, especially when new situations arise that are not directly governed by legislation or admiralty precedent. In the context of this study, the general maritime law is instrumental in the fashioning of the rights of the seamen.

Admiralty Jurisdiction

Admiralty law is a specie of the ancient customs and rules of shipping. Together with the codes of the middle ages, they form what is commonly referred to as the general maritime law or "the law of the sea"[60]. The maritime customs of the Mediterranean area remained a body of unwritten usages with which seafaring men were familiar both during the middle ages and for centuries later. Shipping activities which resulted from the crusades played a major part in extending the scope and influence of these customs.[61]

The term admiralty has its derivation from the Arabic word "amir" or "emir" for ruler. From "amir-al bahr"came the word admiral, the meaning of which is "commander of the sea", a figure with which Western Europe became familiar during the time of crusades.[62] The obscure origin of admiralty jurisdiction began in the fourteenth century, when the Lord high admiral, later assisted by his admiral judges, exercised disciplinary jurisdiction over the crews of the ships under his command, criminal jurisdiction in respect of crimes (in particular piracy) committed on the high seas, and spoils and prize jurisdiction. The court of admiralty in England originated in the authority of the Admiral, and the title was first used officially in England

---

[60]. Martin J. Norris, supra, p.1.

[61]. Ibid.

[62]. These are the times when Great Britain conquered the countries of Western Europe, through land and seas and established itself as a world power.

in 1286.[63] The Admiral was a naval officer of the highest rank holding his authority directly from the sovereign and subordinate to him.[64] The original jurisdiction of the Admiral was of a disciplinary nature over the crews of the vessels under his command; but during the reign of Edward III the Admiral apparently acquired civil jurisdiction over torts and offenses on the high seas and in ports within the ebb and flow of the tide, as well as over matters of prize and over contracts within the laws of Olerion.[65] When he was busy in naval warfare, the jurisdiction was given to the Vice-Admiral, who was usually a man learned in the civil law, as admiral is closer to the civil law than to the common law. Later, the admiral's court increasingly exercised civil jurisdiction in shipping and commercial matters of an international nature and this resulted in an encroachment on the powers of the common law courts and the courts of support towns which exercised jurisdiction in maritime matters. Out of this practice grew the vice-admiralty courts such as were found in many British colonial jurisdictions.[66]

A distinguishing feature of the admiralty court is the relatively unrestricted and international character of its jurisdiction:

> "Jurisdiction means the power or competence of a court to hear and determine an issue between parties, and limitations may be put upon such power in relation to territory, subject mater, amount in dispute, parties etc".[67]

[63]. See Spraque and Heally, Cases on Admiralty, p.3.

[64]. Benedict on Admiralty, 6th ed. (1940) p.7.

[65]. Reprinted in 30 Fed Cas 1171 (1897). See in general Runyan, "The Rolls of Oleron and the Admiralty Court in the Fourteenth century England" 1975 American Journal of History 95.

[66]. Note that Vice- admiralty courts were abolished in 1891 for most purposes, and were replaced by colonial courts of admiralty.

[67]. Per Watermeyer CJ in Graaff Reinet Mun V. Van Ryneveld's Pass Irrigation Board 1950(2) SA 420 at 424.

The law of admiralty has evolved over many centuries, designed and moulded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they can not go. The law deals with navigational rules,-rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure.

Whether or not a case comes within the admiralty jurisdiction has important consequences for litigants. If the case is within the admiralty jurisdiction, then, depending on the statutory provisions of the particular jurisdiction, courts may have subject matter jurisdiction without regard to diversity of citizenship and the amount in controversy or any other basis of subject matter jurisdiction. In the vast majority of contract and tort cases, the claim may be the basis of a maritime lien, a special security interest recognised only in admiralty. Maritime lien may attach to vessels, cargo, and other maritime property and are enforced by a special in rem process, which permits seizer without a hearing and before judgement by an ex-parte order of the court.[68]

Admiralty courts differ in various respects from ordinary municipal courts. Firstly they apply admiralty law while the ordinary courts apply common (in case of South Africa Roman Dutch) law. Admiralty law, being the law applied in admiralty

[68]. Taking the United States practice as an example, please see Federal Rules of Civil Procedure, Rules C and E, supplemental Rules for Certain Admiralty & Maritime Claims.

For further reading about maritime liens and in rem processes, please see John E. Hare, Arrest of Ships, Lloyd's of London Press Ltd., (London 1987). See also C Dillon & J P Van Niekerk, South African Maritime Law and Marine Insurance: Selected Topics,(Butterworth Durban / Pretoria, 1983) 4-6.

courts, may in a certain sense be regarded as a distinct and separate body of law. It forms part of the general less mercatoria and is characterized historically by its international nature and uniformity. Thus, in one sense it may be said that maritime law is not the law of a particular country, but the general law of nations.[69]

The law of admiralty affords a seaman the admiralty jurisdiction for an action against his employer for injuries sustained either at sea or on land in the cause of employment as such seaman. as we have seen earlier, a worker is a "seaman" if he is permanently attached to and a member of the crew of a vessel in navigation. This definition ordinarily excludes longshoremen and other shore-based workers, and admiralty jurisdiction can not properly be invoked by such a worker based upon evidence that he was doing work traditionally performed by seamen at the time of the injury. Particular countries have enacted special statutes which further afford seamen remedies under admiralty jurisdiction . Under the general maritime law, a seaman who is injured in the service of the ship has an additional claim for "maintenance and cure", consisting generally of lost wages, medical care and subsistence. Further, he is also protected by a warranty of seaworthiness of the vessel on which he serves.[70]

In South Africa the admiralty jurisdiction owes its legacy to the Dutch and British regimes to which the country was subject at various stages of its history. The Dutch legacy was more profound, so that the roots of South African common law are found in the commercial laws of Holland as developed by the Dutch

[69]. Luke V.Lyde (1759) 2 Burr 882 887,97 ER 614 617 per Lord Mansfield.

[70]. See generally Martin J. Norris, supra.

jurists of the sixteenth and seventeenth centuries and known as the "Roman-Dutch law."[71] Although concerted attempts have been made (statutorily and/or otherwise) to preserve this law, Professor Hare has observed that,

> "the Roman- Dutch law has been overtaken in most fields by the modern internationalised law maritime... so that South African law has to a very large extent aligned itself with the movement towards uniformity of maritime law that the English law maritime and international conventions have fostered."[72]

Thus, since 1806 when British rule was finally established in South Africa, the colonial courts looked to the British Admiralty statutes for their jurisdiction; and the law to be applied in those courts was the law of England at the time. This situation was changed by the enactment and coming into effect of the Admiralty Jurisdiction Regulation Act of 1983, which

> "swept away the mostly outdated English admiralty Acts and broadened the admiralty jurisdiction to a level at least on a par with most other maritime states."[73]

The Act at section 2 empowers the Supreme Court in its various divisions to hear any maritime claims irrespective of where it arose, or of the flag of the ship concerned, or of the residence, domicile, or nationality of her owner to the limit of the territorial waters. The Act does not exclude altogether the traditional sources of law like the Roman-Dutch, common law, the South African judicial decisions, or the English law imported by it.

[71]. John Hare, Arrest of Ships, supra p 58.

[72]. Ibid, .

[73]. Ibid, 59.

To a seaman admiralty jurisdiction is important as it will, in most cases, determine whether a seaman has a contractual tortious or any other cause of action against the owners of the vessel, depending on the very varied circumstances in which a seaman's rights may attach.

Navigable Waters

The traditional domain of admiralty jurisdiction is, of course, the sea, including waters within the ebb and flow of the tide. However, for the seaman, the doctrine of "navigability" is important since, as we have seen, the definition of a seaman is complete only if a seaman operates in a "vessel in navigation."

The waters in which the vessel sails must then be navigable. Thus a state may designate certain waters to be navigable, and others non navigable. Workers who operate in non navigable waters would appear not to met the necessary qualification for seamanship. The determination of navigability would appear to be a question of fact, and the burden of proof would accordingly rests with the party invoking admiralty jurisdiction.

2.2 PART TWO: The Seaman as a Worker: The Contract of Employment

Ned Ward, an early eighteenth century Grug Street Writer had an eye for the telling details that revealed a world of change. He observed that the common seaman considered his hands to be "his Bosom- Friends."The tar "generally carries them stopped within his Breast, or Pockets; not so much to keep his Heart or his Money close within Board, but out of pure Moral Principle of not exposing his best Friends, they being the only two he has to trust to."[74] Barnaby Slush, a "sea cook," expressed similar

[74]. Ned Ward, The Wooden World Dissected: In The Charter of a Ship of War (1708; reprinted London, 1756) p.734.

sentiment, and described the same social reality for those bereft of hand, tools and property. What, he wondered, was a man to expect when he had "but a pair of good Hands, and a stout heart to recommend him?[75] Such was the condition of the seafaring proletarian. Slush's passionate question represented the working class response; a necessary counter to the detached, impersonal discourse of Sir William Petty about the labour of seamen as a commodity (see chapter one). Moral economy and political economy came face to face. They spoke in different voices about different and conflicting concerns.

Today, the employment relationship is perceived in purely economic terms, and the principles of free market are applied to it in much the same manner as it is applied to ordinary commercial transactions. In the upshot, beyond a mere entitlement to wages, employees are denied any other interest in their employment.[76] The manner in which damages are calculated in the event of wrongful dismissal provides a clear illustration of the fact.[77] In a few cases, South African courts have acknowledged that an employee's interest in employment may extend beyond purely pecuniary benefits.[78] These cases are, however, limited in application. The special interests found to have been established in them were connected to the particular jobs the employees held, that is, the interest formed part of the express or tacit terms of their contracts of employment. What was held to be of importance in these cases were "the express words of the contract,...the character of the employment, and the amount and

[75].Slush, The Navy Royal: Or a Sea cook Thrn'd Projector (London, 1709) 16.

[76]. H. Forest, "Political values in Individual Employment Law," 1980 MLR 361 at 336-7.

[77]. Myers v. Abrgahamson (1952) 3 S.A. 121.

[78]. For instance Smith v. Cycle Motor Trade Supply Co. 1922 TPD 324; Pett V. British South Africa Co. 1911 a d 194.

nature of remuneration. Despite the fact that the courts tend to take a conservative view of such matters, changing social norms may yet compel them to take account of employee's non- pecuniary interests.

In the field of labour law and employment, seafarers have traditionally been treated as if they had absolutely no interest in the non-pecuniary aspects of their employment. Save for the provision of food, shelter, medical care and probably leave, a seaman had no other interests in the vessel in which he sailed. Thus, since he had established himself a life at seas, he could shift from vessel to vessel in search of a more lucrative employment. This trend has not changed in the modern times. The lack of interest by the employer in a seaman's terms of employment is normally evidenced, in some cases, by the number of months seamen could go without wages, especially when their vessel is under arrest; the stuffy cabins in which they live in the seas and/or at port, and the fact that often, in order to secure their livelihood, the seamen have to resort to attaching their employers vessel.

If the world today finds that the services provided by seamen are as important as they evidently are, then the meaning and value of work in the industrialised society generally, and in the shipping industry in particular, requires to be re-examined, with a view to empowering workers at sea. The living conditions of seamen at port sometimes appear to be parts of a system that has broken apart; discarded rags of a healthy past, and what one wonders is whether these workers have any stake in their employment, and if any provision of the same would not very dramatically reverse the trend and create a future to these mariners worth looking towards.

Engagement of Seamen

As has been stated in the preceding discussions in this work, a seafarer's life was, traditionally, a hard life. Poor employment conditions, casual employment and exploitation were rife. The risk inherent in the navigation of the seas, the difficulty of ensuring the safe arrival at their proper time destinations of both passenger and cargo, are not reduced if the work is carried out by a poorly organised and ill-looked after body of men. This point was taken, and there have been some legal control of the employment of mariners, of the skills they must posses and of the conditions in which they must work.[79] States have therefore made exhaustive legal provisions, which virtually regulate employment at sea.

The engagement of seafarers takes place at two levels. Firstly, there is the contract of employment signed by a representative of the shipowner and the seafarer before he sets out to join the ship. This contract should largely correspond with the details of the ship's articles which the seafarer signs, at the second level. Because many seafarers, due to ignorance would easily be subject to manipulation by unscrupulous shipowners intent in maximising profits, the practice of states has been to statutorily lay down the conditions under which a seaman would be employed, and the special provisions as to agreements with crew, whether of foreign going ships or not.

The South African practise

Chapter Four of the Merchant Shipping Act 57 of 1951 detail provisions regarding engagement, discharge, repatriation, payment, discipline and general treatment of seamen and related officers of a ship.

[79]. Robert Crime, Shipping Law 2nd Ed. (London, Sweet & Maxwell 1991) p.78.

Certificate

Section 101 (1) stipulates that a master may not engage a seaman unless he has a certificate stating that the seaman has been examined, that he is physically fit to serve in the capacity in which it is proposed to employ him, and that he is not suffering from any disease likely to be aggravated by, or to render him unfit for, service at sea, or likely to endanger the health of other persons on board. Subsection (5) however, empowers the proper officer, on the ground of urgency to authorise the engagement of a seaman for a single voyage without a certificate. A certificate is not required in respect of (1) a vessel belonging to the Railway Administration and used by it in connection with the working of its harbours, or of (2) a vessel of less than 100 gross register tons. Section 101 (3) stipulates that a certificate is valid for six months from the date on which it was granted.

Section 102 stipulates that:

> "The master of every South African ship of more than one hundred gross register tons shall, and the master of every other South African ship may, enter into an agreement... with every seaman whom he engages to serve in that ship..."

This provision is however subject to two exemptions, and "the proper officer may refuse to allow the engagement of a seaman:

> "(a) who has not completed any period of pre-sea training that may be prescribed; or
>
> (b) who does not posses a knowledge of one of the official languages of the Republic sufficient to enable him understand fully any necessary orders.... in the performance of his duties".

It is a further requirement under subsection 2 that the agreement with the crew shall be in the prescribed form, dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs it. Sub section 3 stipulates specific

particulars as to the term of that agreement, and inter-alia, requires that the nature, the duration, and the destination of the intended voyage be specified; the particulars as to the position of the deck line and load lines specified in any loadline certificates issued in respect of the ship and are still in force; the number and description of the crew; the time at which each seaman is to be on board or to start work, the capacity in which each seaman is to serve, wages, etc. In subsection 4, it is provided that where a master of a South African ship engages single seamen and there is already in existence in respect of that ship an agreement with the crew made in due form, those seamen may sign that agreement, and the master need not enter into a separate agreement with them.

Section 103 makes special provisions as to agreements with crew of foreign going ships. It requires *inter-alia* such agreements to be explained to the crew in a language he understands, and to be signed by each seaman in the presence of a witness; requires separate agreements to be made for each single voyage (or a running agreement of not longer than one year may be made to extend over two or more voyages). Detailed provisions are made for how to treat changes in crew, rating of seamen, discharge of seamen, repatriation, desertion, etc.

The practice in Kenya

The Kenyan law with respect to the engagement. discharge, repatriation, payment, discipline and general treatment of seamen and related officers, is similar to the South African law as stated. The law is contained in part 3 of The Merchant Shipping Act, chapter 389 of the Laws Of Kenya.

Employment of Children

Section 110 prohibits the employment aboard a ship registered in South Africa, or a ship which is not registered in the Republic and is wholly engaged in plying between ports in the Republic, of any person under the age of 15 under any circumstances. However, the owner or master of a South African ship may employ a person under 18 years of age only on delivery of a certificate signed by a medical practitioner approved by a proper officer to the effect that the person is fit to be employed in the capacity contemplated (s.111).

On the issue of age Kenyan law states that "no person under the age of fourteen years shall be employed in any vessel" except upon work approved and supervised by the minister on board a ship, or upon such reasons as the minister shall approve of, having regard to the health and physical condition of the person and to the prospective and immediate benefit to him of the employment.[80]

The United States law also requires that before the articles are signed, the seaman may be asked by the shipowner to submit to a physical examination to determine his fitness to sail. There is however, no legal duty on the part of the shipowner to have seamen undertake a physical examination before embarking. There is no statute or judicial decision requiring a pre-sign on medical examination, and the authorities suggest that the employer is entitled to believe every seaman he hires to be in proper physical condition for the job the seaman is to fulfil during the trip.[81]

[80]. Section 96 of The Merchant Shipping Act, Chapter 389 of the Laws of Kenya.

[81]. See Keller v. United States, 273 F Supp 945, 1967 AMC 2368 (DC. Va 1967).

In the United Kingdom, the law requires the employment of seamen in ships registered in that country to be in writing, and in such form as may be approved by the Department of Transport.[82]The traditional law governing the hiring and discharge of seamen is to be found in regulations made under the Merchant Shipping Act of 1970-the Merchant Shipping (Crew Agreements, Lists of Crew and Discharge of Seamen) Regulations, 1972 (S. 1. 1972 No.918).

_The Shipping Article

The Shipping Article is the contract of employment between the master and the seaman. The master acts as the agent of the owner, but in accordance with the general maritime law the seaman has a three fold remedy for his wages, that is, an action in personam against the master and against the owner, and an action in rem against the vessel. The shipping articles is signed by the seaman immediately on arrival at the vessel to take up a job. It is the seafarer's responsibility to make sure that the details contained in the articles correspond with the contract of employment entered into earlier on.

The services of a seaman are largely of a contractual nature. Lord Stowell in Re The Minerva described a shipping contract as "an ancient instrument with but two particular obligations incorporated therein. The shipowner's obligation was to describe the voyage; that of the seaman to engage for the rate of wages which he was content to accept for his services on that voyage."[83] With these basic concepts, the agreement was further described by the jurists as"a simple and intelligible contract" Any other duties and obligations which the parties owed to each other in the course of the ship's voyage depended not upon the contract but upon the rules of the general maritime law. In most

[82]. Merchant Shipping Act, 1970 s. 1(1)(3)

[83]. 1 Hogg Adm. 347, 166 Eng. Reprint 123 (1825).

countries including the United States, these obligations have been enlarged, by statute, which also provides for greater detail and particulars to be set forth in the shipping contract.

Articles must be in writing

As early as 1729, the statutes of England required under penalty that no master bound on a foreign voyage could carry any seaman or mariner to sea, without first coming to an agreement with such seaman or mariner for his wages, time of service and other particulars, which agreement had to be in writing and signed by the seaman.[84] In the United States the first Congress enacted laws which provided that every master of a ship bound from a port in the United States to any foreign port, or of any ship over 50 tons bound from a port in one state to a port in any other than an adjoining state, shall make an agreement in writing with every seaman on board (apprentices excepted) and upon failure to do so, penalties were provided.[85] These requirements were carried forward in the Shipping Commissioner's Act of 1872, (Act of June 7,1872), and are now contained in **Title 46 USC** section 564.

But, even independent of statutes, shipping articles were required to be in writing under the general maritime law. **Title Fourth of the Maritime Ordinancy of Louis XIV** provided as follows:

> "All agreements between masters and their seamen, shall be reduced into writing, which shall contain all the conditions, whether they engage themselves by the mouth, or for the voyage; whether by the profit or freight; if otherwise, the seaman's oath shall be believed."

[84]. Act 2 Geo 11 Ch 36 ss. 1,2.

[85]. Act of July 20, 1790, 1 stat 131.

Articles signed at sea.

Admiralty looks with disfavour on a contract of employment entered into while the ship is at sea. Most states expressly state in their statutes that the agreement must be entered into between the seaman and the master before the seaman proceeds on such a voyage.[86] There must be a noble reason behind this requirement. It would appear that to authorise a master to withhold the signing of the articles until the vessel has put to sea would enable him to impose upon the seaman as great a duress as if his signature were coerced by actual physical violence. From the time the vessel breaks ground the seaman is absolutely at the disposal of the master, and no redress can be had against him until the arrival of the vessel at the next port. To permit the master, under these circumstances to show that the articles were signed voluntarily and understandingly, and without undue influence, would be putting in his hands a weapon against which the sailor would be powerless to defend himself. There is, in fact, an authority that "whenever a seaman is shipped, he is entitled to know at once the terms of his engagement, that he may exercise his option of leaving the vessel before she weighs anchor."[87] Thus, it is reasonable to expect that articles signed at sea will be disregarded by a court of admiralty when made by a seaman, who will be treated by the court as "under its peculiar protection", particularly when made by him on shipboard, while under the control of the officers of the vessel.

Equally in disfavour are new or special contracts entered into after commencement of the voyage. The master may very easily miss use the crewmen, who are sometimes ignorant, improvident, feckless men.

[86]. See for instance section 564 of Title 46, USC.

[87]. The Theodore Perry F cas no. 13880 (DC Mich 1862).

Duties and Obligations of parties

As under the general law of employment, a seaman's rights and duties as an employee depends, firstly, upon the terms of his contract of employment. The terms of this contract may be found either in the contract of employment itself, in the articles, in the Crew Agreements, Company service articles, in the arrangement with crewing agencies, or in the relevant domestic statutes. Many of the terms will, of course, have been negotiated collectively, through representatives, and have been documented and hence easily ascertainable.[88] Ship's articles would specify any regulations for conduct on board. Generally, the articles would require seamen to conduct themselves in an orderly, faithful, honest and sober manner, and to diligently observe duty, look after the interest of the employer, and obey the master of a ship.[89] From a contractual point of view, rights and duties which cannot be found in the document of the contract may be derived by a process of implication. If this is done, then a seaman's duties emerges as follows:

- He is obliged to serve his employer as per the terms of the contract
- He is to look after the interests of the employer including the safety of the vessel and the cargo.
- He has a right to wages as agreed under the contract of employment, and this includes "pay periods" and the method of payment, including overtime and bonuses.
- A right to safety, accommodation and welfare, a right to equal pay and to anti discrimination legislations, and the right to be disciplined, among others.[90]

[88]. Robert Crime, supra, at p.90.

[89]. Ibid, p.91.

[90]. Ibid.

Desertion

Desertion is the abandonment of duty by a seaman by quitting the ship before the end of the engagement without consent, without justification and with the intention of not returning to the ship's service. From the earliest historical period the contract of the sailor has always been treated as an exceptional one, and involving, to a certain degree, the surrender of his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be carried on without some guarantee, beyond the ordinary civil remedies upon contract, that the sailor will not dessert the ship at a critical moment, or leave her at some place where seamen are impossible to be obtained, to waste away in neglect. Such desertion might involve a long delay of the vessel while the master is seeking another crew, an abandonment of the voyage, and in some cases, the safety of the ship itself.

Historical Background

A survey of the historic background of desertion under the general maritime law shows that as far back as the law of the ancient Rhodians [91], if the master or crew remained away from the vessel at night, and the vessel was lost or damaged, they were bound to respond in the amount of the loss.

In the **Consulato del Mer**[92], a seaman going ashore without permission was obliged to pay any damage occasioned by his absence and, in default of his being able to respond, was thrust in prison until he had paid all such damage.[93]

[91]. Which is supposed to antedate the birth of Christ by about 900 years according to **Pardessus (Lois Maritime, vol. 1 p. 250)**

[92]. Chs 121, 124.

[93]. See **Pardessus** 146, 147, 148.

By the laws of Oleron, Art. V forbade seamen from leaving the ship without the master's consent. "If they do and by that means she happens to be lost or damnified, they shall be answerable for the damage.[94]

The laws of Wisbry cruelly provided that a deserting seaman was liable to punishment by death (Art. 62), while the **Hanseatic Ordinance** provided that a deserter be branded on each cheek with the first letter of the name of the town to which he belonged (Art. 43).

Thus, the desertion by a seaman of his vessel has always been regarded in maritime law as a very serious offence.

The US position

As late as 1915, American statutes punished deserters by imprisonment for a term of not more than three months.[95] While seamen are no longer imprisoned for deserting ship, it is a mistaken notion, entertained by many seafarers, that a man can "jump" ship with impunity and escape punishment for his action.

The present day United States law makes desertion punishable by "forfeiture of all or any part of the clothes he leaves on board and of all or any part of the wages or emoluments which he has then earned." The seaman, today, is perhaps the only working person in the United States who can be lawfully punished by forfeiture of his earned wages for quitting his job before the expiration of his contract.[96]

[94]. 1 Pet Adm XI.

[95]. Section 4596 (1872) Rev. stats.

[96]. This observation was made by the Supreme Court in Robertson V. Baldwin, (165 US 275, 283 41 L Ed 715, 17 S Ct 320 (1897) per Mr. Justice Brown. While there has been much new legislation in favour of the seaman since 1896 and the courts have generally tended to liberalise their treatment of seamen, this concept of a seaman's contract is still true today. See J Noriss, The Law of Seamen.

Section 7 of the **US July 20 1970 Act** provided for the apprehension of deserters and their delivery on board the vessel but made no provision for imprisonment as a punishment for desertion. The **Shipping Commissions Act** of 1972 (ch 322 17 Stat 243, 273 Sec 51) added to forfeiture of wages for desertion, imprisonment for a period of not more than three months, and for absence without leave imprisonment for not more than one month. Desertion by absence of a duration of more than 48 hours was abolished. The **La Follette Seaman's Act of 1915** repealed imprisonment as punishment for desertion or for absence without leave. Forfeiture of earned wages and of clothes and effects is the present means of deterring or preventing deserting seamen.

By USC Section 10313(d), a seaman is not entitled to wages for a period during which the seaman:-

- unlawfully failed to work when required, after the time fixed by the agreement for the seaman to begin work, or
- lawfully was imprisoned for an offence, unless a court hearing the case otherwise directs.

If a seaman deserts an American ship abroad, the master is obliged, on sale of the vessel abroad, to deposit the deserter's wages with the relevant US department.[97] There is no obligation on the owner of a vessel from which an American seaman has deserted while the vessel was at a foreign port to transport the seaman back to the US, the responsibility shifting to the US government.[98]

The US law makes sure that deserter's wages do not revert by way of windfall to the shipowner, but is directed rather to the benefit of all seafaring men. By a legal procedure, the

[97]. See Benedict on Admiralty 7th Ed. 1 B Seamen's Actions App. B p. 27.

[98]. Ibid App. B p. 38.

deserter's wages are turned over to a Fund. The deserter is allowed to prove before a court that he is not a deserter. If he succeeds he is given back his wages. If he fails, a finding that he was a deserter results in the wages being declared forfeited to the Fund for the Benefit of Sick Disabled and Destitute Seamen.[99]

The British position

The British law as it was in the 1894 MSA. Section 221(a) was the same as the U.S law. However, the British law has since been changed and the act of desertion has been de-criminalised, and a deserter does not have to loose his wages.[100]

In Kenya, desertion is a crime punishable by three month's imprisonment, and the deserter shall "also be liable to forfeit all or any part of the effects he leaves on board and the wages which he has then earned...and... the seaman's certificate of discharge shall be withheld...."[101]

In South Africa, desertion is also prohibited by law. Section 175 of the Merchant Shipping Act states:
"...no seaman... engaged on or belonging to a treaty ship shall without reasonable cause" absent himself from his ship with the intention of not returning thereto. Any person who contravenes this provision is guilty of desertion, and is liable to having his certificate of discharge being withheld.

The South African law is thus quite inadequate in addressing desertion. Whether SA should punish deserters by making them forfeit their wages as well as sanctioning criminal punishment like in the US, or whether SA should punish deserters by denying

[99]. Martin J Norris The Law of Seamen, 3rd Ed. chap. 8.

[100]. See the MSA 1975.

[101]. The Merchant Shipping Act, supra, sections 147-160.

them right to the normal priority in the ranking of maritime claims on sale of a ship on the other hand will depend on how SA views the act of desertion. One point is clear, however: making criminal the act of desertion and the denial of wages is a more effective deterrent because it will affect every deserter, while on the other hand, if deserters are simply denied priority in the ranking of maritime claims upon a sale of a ship, then only those deserters whose ship happen to have been sold would be victimised while other deserters would go free.

There are specific defences to desertion, and these include a situation where the ship is unseaworthy (Sec. 178 SA MSA).

_Labour Strikes

Because of the peculiar nature of a seaman's calling, his obligations under the articles is to remain with the ship until the voyage is ended unless the contract be abrogated by mutual consent or by operation of law. This duty that the law imposes upon seamen is for the purpose of safeguarding maritime property, so that the mariners do not needlessly a desert valuable ship and cargo thus subjecting them to destruction or pilfering. Seamen, unlike shore workers, cannot leave their vessel on a strike protest or in sympathy with a strike without subjecting themselves to serious difficulties. A strike at sea is mutiny and criminal prosecution may ensue.[102] When a vessel comes into port while a strike ashore is in progress, the members of the crew can not strike and walk off the ship (unless they have been signed off) without incurring forfeiture of their earned wages and loss of their clothes and personal effects.

[102]. US USC s. 2192-3.

Seamen Remedies

Various states have provided various remedies for seamen, in addition to those under the general maritime tort law.

Maintenance and Cure

This is the obligation on the part of a shipowner who employs seamen to care for them if they are injured or become ill. It is of ancient vintage, and appears in the medieval sea codes, and undoubtedly of earlier origin.[103] In the United States, maintenance and cure is a right created under the general maritime law, and may be asserted by any person who is a "seaman." The right entitles a seaman to food and lodging if he falls ill or becomes injured while in the service of the ship. It also includes the right to necessary medical services. Both extend to the point of "maximum recovery". The seaman also has a right to be paid unearned wages for the period from the onset of the injury or illness to the end of the voyage.[104] In addition to the right of recovery in personam, the ship is liable in rem, and the right creates a maritime lien of the highest priority.[105]

An action for maintenance and cure under the general maritime law may be maintained even if the illness occurs in land.[106]

---

[103]. See Shields, "Seaman's Rights to Recover Maintenance and Cure Benefits", 55 Tul. L. Rev. 1046 (1981).

[104]. Gardiner v. Sea-land Service, Inc., 786 F. 2D 943, 1986 amc 1521 (9th cir.1986).

[105]. Usually the shipowner and the employer will be the same. However, in some cases a seaman may be employed by a person or company other than the shipowner. In such a case, the ship is liable in rem.

[106]. Schoenbaum, supra, p 160.

Unseaworthiness

Seaworthiness is a warranty of fitness for duty. A concept of the general maritime law, this doctrine imposes on a vessel owner or operator an absolute and non-delegable duty to provide a vessel that is fit for its intended purposes,-the voyage. The policy fostered by this concept is broadly social: the ship is a place to work and, although the sea is inherently dangerous, the ship itself should be as free from hazards as is reasonably possible. This duty is totally divorced from negligence claims under the various domestic statutes. The fact that the vessel operator used due care is no defence to an unseaworthiness claim.

Damages

The items of damages recoverable by an injured person under the general maritime law of unseaworthiness and negligence are quite similar to those found under domestic relevant statutes, and they include:-

- The prejudgment loss of wages sustained by the injured party
- Future loss of wage earning capacity
- Past and future costs of medical and hospital care, and any other economic loss incurred
- Physical pain and suffering, including physical disability, impairment, inconvenience, and the effect of plaintiff's injuries upon the normal pursuits and pleasures of life, and,
- Mental anguish and anxiety, including humiliation, worry, embarrassment, and concern about economic insecurity caused by disability.[107]

---

[107]. Schoenbaum, supra, at p 186.

In calculating damages for loss of future earnings, the role of inflation should be considered, and if a lump sum to compensate for future losses is granted to the plaintiff, the amount should be discounted to present value.

Foreign Seamen

Most countries have provided in statutes how to deal with suits brought by foreign seamen. Where subject matter jurisdiction is established to exist, the court will have to make a choice of law analysis, the purpose of which is to foster international harmony and comity by examining relevant contacts to determine which state has the greater interest in a case where there is presumably concurrent jurisdiction with the courts of another nation. In doing this, the court will consider the place of the wrongful act, the law of the flag, the allegiance or domicile of the seaman and of the defendant shipowner, the place of the execution of the employment contract, the inaccessibility of the foreign forum, and the law of the forum.[108] If the court decides that the law of its country applies, it ordinarily keeps the case. If it decides otherwise, it may apply the doctrine of forum non conveniens to determine whether to dismiss the case, remitting the plaintiff to a "more convenient forum".

These, then, are some of the concepts and doctrines which have been developed around the seafaring tradition. These concepts work together to define and determine the living and working conditions for seafarers.

[108]. This was the procedure the court adopted in the US case of Lauritzen v. Larsen 345 US 571, 73 S Ct 921, 97 L. Ed. 1254 (1953).

CHAPTER THREE

THE ORGANIZATION OF MARITIME LABOUR AND SOME OF THE CHALLENGES TO IT

3.1 Examination of the Ship as a Work Environment

3.1.1. Ownership, Registration and Classification of Ships

While the international maritime community is generally interested in the mode of ownership, registration and classification of ships the rules regulating ownership and registration of ship is basically municipal. States have provided in their statutes the procedures to be followed, though these are again basically the same.

In Kenya, the following persons may qualify to be registered as owner of a Kenyan ship: a person who is resident in Kenya, a body corporate incorporated under the laws of Kenya, which has its principle place of business in Kenya, the Government of Kenya; or a body corporate which is incorporated, registered or established in Kenya, and which is subject to the jurisdiction of Kenya.[109]

In South Africa, citizens or local corporations having their principle place of business in the country enjoy the privilege to register their vessels on their state flag, coupled with the obligation that they have to do so if the ship is wholly "indigenous".[110]

[109]. Merchant Shipping Act (Kenya), Chapter 389 of the Laws of Kenya, s.3(2)(a).

[110]. MSA. s.11. Read also ss.12 and 13 to get the full impact of the privilege and obligation referred to above. It may be noted here that studies are under way aimed at introducing a

The British Merchant Shipping Act of 1988 allows a "mixed" ownership. If the majority of the sixty- four shares are British owned the ship is registrable. It is no longer mandatory for a British owned ship to be on the British register, and a British ship is now defined simply as one on the British register. A British shipowner is no longer required to register at home, and he is free to delete from the register at will. Registration may, however, be refused on safety or unseaworthiness grounds.[111]

In all the above countries, the laws provide that the property in a ship shall be divided into sixty- four shares, and that not more than sixty-four individuals shall be entitled as owners of any one ship. However, the whole ship as a single collection of sixty- four shares may be co-owned.[112]

The Obligation to Register

The obligation to register a ship is regulated by governmental authority more than most other assets. Merchant ships and fishing vessels have great strategic importance. In peacetime this importance is primarily economic and social, and it is obviously in the interest of a country competing for foreign exchange to attempt to keep vessels owned and operated by its nationals on its own register and subject to its control as far as possible. Thus most maritime states by law require merchant ships wholly owned by their nationals to be placed on a register maintained in that country. This, inter alia, allows the registering state to lay down requirements for safety and for the manning of that vessel as determined by its own maritime authorities or in accordance with international conventions.

separate act for Ship Registration, under which foreign shipowners may find more easier to register their ships in the country.

[111]. MSA. 1988 S.7.

[112]. The Merchant Shipping Acts (Kenya s.7; South Africa ss. 5 & 6; UK. ss.7, 30.)

In war time, this practice has more practical significance, as the ships on the register may be requisitioned for state service.

On the other hand, flying a country's flag, like carrying a passport, entitles the vessel to certain privileges and protection from it. Registering states, and most other states are therefore particular about what vessels they allow onto their registries. Although registration is a virtual statutory compulsion, it still remains a privilege, and, like a passport, it can be taken away.[113]

The Nationality of Ships

The reality of jurisdiction over a ship flying the particular flag of a country is that the ship happens to be property situated in a place where no other jurisdiction exist.[114] Nevertheless, a fiction has developed that the ship is an extension of the flag state: floating portions of the country to which they belong. This was the principle described as "a repertory of bad law" that the permanent court of justice reached in **The Lotus**,[115] but it goes against the "great and fundamental principle of British maritime jurisprudence... that ships upon the high seas compose no part of the territory of a state.[116]

[113]. Ibid. Note that under South African constitution, having a passport is a right, while the kenyan constitution the same is a privilege which the state may withdraw at its pleasure.

[114]. Colombos, International Law of the Sea, chapter 8.

[115]. The Lotus, PCIJ, (1927)

[116]. Lord Stowell in 1804.

The most venerable and universal rule of maritime law is that it gives cardinal importance to the law of the flag. Thus the registering state may impose conditions for registering, and conditions and laws governing the conduct of the ships on its register and of those on board.[117]

The Flag

Like the passport, the key to nationality is the flag. The ship's certificate of registry evidenced by her national flag entitles the ship to privileges and subjects it to strictures and obligations. A ship may only fly one flag.[118] South Africa protects the use of its flag by requiring in certain situations the flying of the flag, and restraining the unauthorised use of the flag by non- South African ships.

Main-stream flag states have tried to impose controls on the use and abuse of ships on the high seas in satisfaction of Article 94 of the 1980 UNCLOS. These international responsibilities, together with the fact that maritime states often have high taxes payable on the earning of shipping ventures, have proved very costly to shipowners, and many have moved their vessels onto less onerous registers, commonly called "Flags of Convenience"[119]

Flags of Convenience

Where beneficial ownership and control of a vessel is found to lie elsewhere than in the country of the flag the vessel is flying, the vessel is considered as sailing under a flag of

[117]. Art. 91, the Law of the Sea Convention 1982.

[118]. Ibid.

[119]. This subject will be the concern of the following chapter.

convenience (hereinafter referred to as Foc).[120] The registration of a ship in a country other than the country from which it is beneficially owned, managed and controlled is not a new practice. The basis, however, was political expediency.[121] While the practice is evidently not knew, the motivation has however widened: Foc shipowners are people who, for a variety of reasons, all connected with making money, have chosen to give their ships a false nationality. Ships flying the flags of countries like Panama, Liberia, the Bahamas or Vanuatu, to name a few have no real connection with those countries. The owner has simply chosen the flag from a wide selection on offer, and then chosen the nationality of the crew in the same way. The main reasons for this practice include:

- Desire to avoid fiscal duties: imposition of heavy taxes on the earning of ships by country of register
- Safety requirements in the building or equipping of vessels which are too costly for marginal operators to meet.
- The desire to avoid labour controls, especially minimum wage and leave conditions.
- Political reasons: to enable a ship to trade into hostile countries, and also to avoid requisition by the flag state in times of war.
- General instability of flag state governments resulting in long term operational planning problems for shipowners' wanting to run liner services to countries which may at a latter date become hostile.[122]

---

[120]. This is the 1974 ITF definition of an Foc.

[121]. The basis of foreign registrations of the two forfeiture cases involving The Sceptor and The Annadale in 1876 and 77 was political expediency.

[122]. See Flags of Convenience- The ITF's Campaign, p.7

The Foc countries do not enforce minimum social standards or trade union rights for seafarers. If they did, shipowners would soon lose interest in them. The countries from which the crews are recruited can do little to protect them, even if they wanted to, because the rules which apply on board are those of the country of registration. The result is that most Foc seafarers are not members of a trade union, and for those who are the union is often powerless to influence what goes on board the ship.

Many seafarers working on Foc ships receive shockingly low wages, live on very poor on- board conditions, and work long periods of overtime without proper rest. They get little shore leave, inadequate medical attention, and often safety procedures and vessel maintenance are neglected. Mostly the vessels are unseaworthy, and in some cases seafarers are virtually prisoners on the ship, unable to earn enough for repatriation home which the company demands they must pay.[123]

Second Registries

A new development on the scene are the so called Second Registries, in countries like Norway (NIS), Denmark (DIS) and Germany (GIS).[124] Ships sailing under the Norwegian NIS flag can employ third world crews. These crews are paid through local agreements in their home countries. The operation of second register ships is often similar to Foc registers. It an attempt by traditional maritime nations to provide many of the "benefits" of Flag of Convenience (Foc) register to their ship owner without having to change the flag of the ship, and thus to be able to "attract back" national shipowners from Foc registers. The immediate success of NIS in attracting Norwegian shipowners led other countries to follow its example.

[123]. Ibid.

[124]. Ibid, p.21. Second registers emerged in june 1987 with the establishment of the Norwegian International Ship register (NIS).

Most (but not all) second register shipowners do have a genuine link with the registry country. But they no longer have to observe the flag nation's labour laws or working conditions.[125] In most cases the "second registers" permit a large proportion, sometimes even all of the crew to be made up of non-domiciled seafarers whose wages and conditions are considerably worse than those of seafarers of the flag state.[126] They have the advantage for the shipowner of exploiting cheap labour without the stigma of being an Foc.

Finally, there is the system of bareboat charterparty, where a ship is flagged out for a fixed period. The terms and conditions under which the crew work are most subject to the whims of the charterer. Through this system shipowners may avoid payment of taxes, and also pay lower wages to crew.

Certificates Required for Registration and Operation of Ships

That ships could meet instant diaster was brought home when in 1628 the Swedish flag ship, **The Vasa**, went down in Stockholm harbour, the victim of a sudden squall, forcing her to heel over, so that water entered through the lower gun ports and prevented her from righting herself.[127] From that time through to the Eighteenth century attempts were made to make sure the ship construction was up to the required standards of safety. However, not until the Nineteenth century was the knowledge gained in the Eighteenth century applied in practice. In 1855, Lloyd's Register published rules for steel shipbuilding, and, in 1860, the Royal Institute of Naval Architect was formed.

[125]. Ibid, p.44.

[126]. In the case of German International Shipping Register (GIS) ships, the German Transport Workers' Union (OTV) recommends non-German crew to join the union, which will then demand national rates for the member seafarer.

[127]. Chorley & Giles, Shipping Law, 8th.ed. p.82.

During this time also the effects of humanitarian considerations were witnessed, when people began to realise the shocking conditions under which passengers and crew lived on board ships.[128]

In modern times, Merchant Shipping Acts or their equivalents, and rules made under them have laid down safety provisions which today are the fruit of international conventions, through which maritime nations have made this branch of the law more or less uniform, prompted by humanitarian motives and the realization that without international standards real safety could not be achieved.[129]

The current international rules are those under the International Convention for the Safety of Life at Sea (SOLAS) 1974, which have been adopted by most maritime state whose supervision extend to ships generally, and passenger ships and oil tankers in particular, to which, more recently, have been added submersible craft, known popularly as midget submarines; and to care for the crews. Unfortunately, history has shown that the international community tends to react on safety matters after distress, such as those to the Titanic in 1912 and the **Amoco Cadiz** in 1978.[130]

---

[128]. See for instance Robert Louis Stevenson, "The Wrecker"

[129]. The International movement gathered strength after the 1939- 1945 war. In 1948, the London Conference for Safety of Life at Sea agreed on a convention-Safety Convention 1948. The Safety provisions were revised at the conferences of 1960 and 1974 convened the Inter- governmental Maritime Consultative Organization (IMCO- now known as International Maritime Organization-IMO). IMO coordinates all the international maritime safety legislation.

[130]. After the former incident watertight compartments were made compulsory. After the later went aground because of steering failure, an IMO International Conference on Tanker Safety and Pollution Prevention Agreed, in 1978, on a protocol to SOLAS 1974 requiring improved steering gear on tankers.

A Builder's Certificate

The effective way of ensuring seaworthiness is to provide in great detail what should be done and, after appropriate inspection and survey, to prove by internationally acceptable certificates that what is require has been done.[131] The process of supervision begins at the construction stage. Hull, machinery and equipment must comply with the requirements as adopted in a state's statutes. The cargo- ship construction and survey regulations provide for such matters as structural strength; watertight bulkhead and doors; boilers and steering gear; fuel specifications and installations; control monitoring and alarm systems; electrical installations for lighting systems and emergency power; means of escape; surveys, etc,.[132] On completion there is a full survey, as a result of which the relevant department (usually the Department of Transport) issues a cargo-ship construction certificate.

A Carving and Marking Note

This certificate records the official number of Tonnage.

A Tonnage Certificate

This is issued in accordance with the International Convention for Tonnage Measurement (1969).[133]

[131]. Chorley & Giles, supra, p.85.

[132]. See the Safety Convention as enacted under the various Merchant Shipping Acts, and the regulations made thereunder.

[133]. The certificate records GRT (the enclosed moulded volume of the ship);and NRT (the enclosed moulded parts of the ship used for carriage of cargo or passengers, both in cubic meters, and the fact that these marks have been cut into the main beam);and Dead Weight Tonnage (DWT) expressed in tonnes in the displacement of a ship went down to her marks. It equates to what can be put on board in metric tonnes to sink her down to her loadline marks.

Once a ship satisfies all the requirements, it is then issued with a multitude of certificates called "Safety certificates". These certificates are in two categories: Flag and Class certificates. Flag certificates are many.[134] Class certificates are issued by classification societies. All vessels, to qualify for insurance and to be allowed port entry in most maritime states, are required to be classified by a recognised Classification Society. "Class", as it is called, is supposed to survey each vessel according to internationally laid down standards, and to ensure that she is maintained in a manner which entitles her to have her class renewed from time to time. From the classification society, one may obtain full date on the building, survey and maintenance of the ship. Although not internationally mandatory, class certificates are a prerequisite for insurance, most charterparty fixtures, and many port state inspectorates. Most charterers require a vessel to be classed equivalent "A1 at Lloyd's".

From the safety measure discussed above, it is clear that the international maritime authority has laid down adequate safety procedures and, within the framework it is safe to conclude that the vessels that traverse the world waters are safe, and that seafarers' work environment is secure.

In practice, however, the said safety procedures have not deterred marine accidents, and seamen have continued to work and live in very precarious conditions with loss of, or threat to, life. The continuing toll of the bulk carriers for example, is appalling. The loss of the British registered oilbulk carrier **The MV Derbyshire** in typhoon Orchid in 1980, was due to massive structural failure and not, as the U.K. government contended,

---

[134]. These include Certificate of Registry, recording the details on her Bill (Deed) of Sale or her Builder's certificate and Carving and Marking Note, International Loadline, Safety Construction, Safety Equipment, etc,.

"forces of nature".[135] Nearer home, the 131000 ton Panamian registered bulk carrier **Apollo Sea** sank with all hands on board hours after leaving Saldanha Bay in June 1994. The tragedy was blamed on fatigue and age: the twenty one year old bulk carrier may have developed weaknesses in its bows.[136] Three months later, another old bulk carrier, with a cargo of metal, cracked and sank in the south Atlantic 1700 seamiles from Cape Town with loss of all twenty four seamen on board after developing a large crack and started taking in water.[137] These large carriers present serious problems of hull stress. It is unfortunate that these oil and dry bulk vessels dominate the navigable waters, and they present constant danger to the lives of seamen. In the first nine months of 1994, on bulk carriers alone, 100 seafarers lost their lives. It has been estimated that the continuing toll of bulk carriers and other large ships has resulted in the loss of life for about seven hundred seafarers between 1988 and 1994.[138]

But deaths at sea are not restricted to ships. Over the past few years, thousands of lives have been lost as a result of ferry tragedies. The sinking of the Estonia[139] and the death of more than 900 of its crew and passengers, has focused attention on the safety of the Ro-Ro ferry. Notable ferry disasters over the last eleven years include the sinking of the ferry **Dona Paz** off the Philipines in 1987 when 4386 lost their lives, and the loss of about 2000 lives in 1993 when the small coastal ferry Neptune

[135]. ITF Seafarers' Bulletin No. 9 of 1994. Fresh allegations that construction was faulty on the ill- fated Derbyshire have emerged. It is alleged that the standards of workmanship was not particularly good, with extensive misalignment of steel components, and an insufficiently large survey staff to properly supervise the work.(Lloyed's List Wednesday March 8 1995).

[136]. The Argus 28/6/1994.

[137]. Cape Times, 5/9/1994.

[138]. Ibid

[139]. Read the story of the tragedy in the Seafarers Bulletin No. 9 of 1994.

sank off Haiti.[140] In April 1994 more than 300 passengers and crew lost their lives when a ferry, the **MV Mtongwe 1** sunk in the port of Mombasa in Kenya,[141] while nearly 900 passengers and crew of the ill- fated **Achille Lauro** narrowly missed death when the ship caught fire on the high seas.[142]

The foregoing is a very minute fraction of ship casualties which occur on the seas. However it is an eye opener to the reality of injury and death at sea, and the conditions under which the crew work. If the seas would yield up their "hostages" hundreds of thousands of ship wrecks would float. Also, we know from Lloyed's "Register of World Fleet Statistics"[143] that there are 80,655 vessels in the world with a capacity of over 100 gross tonnes (grt)[144]. This number obviously include fairly small vessels. These ships in total carry 458 million gross tonnes(grt), and are on average over eighteen years old. In 1973 only 36% of the world's fleet was over ten years old. On average, the world's ships are therefore getting older. This has further implications for the safety of seafarers.

At this stage, one may ask what has become of the several safety regulations contained in the international conventions or in the domestic statutes? While the rules regarding ownership, registration and classification of ships, and the international safety regulations have made the seas much more safer than they used to be, safety at seas as an objective has not been achieved. The international maritime community must muscle up resources to research towards maritime safety. In the meantime, domestic laws and United Nations Convention on the Law of the Sea (UNCLOS) 1982

[140]. Ibid.

[141]. The Daily Nation (Kenya), 30/4/1994.

[142]. Cape Times 1/12/1994.

[143]. Published in December 1993.

[144].(Of which cargo vessels- which account for half the total number of world vessels- account for 95%).

must be applied with complete thoroughness and certainty. Despite considerable advances in the field of shipboard safety, seafaring is still a perilous occupation.

3.2 Division of Labour in Ship, and the Nature of Social Relations among Sailors

Like employment in any organization, a hierarchy of command is more necessary in the maintenance of labour or social relations at sea. This is so because mariners' engagements are often for voyages to distant ports, in the course of which they are exposed to special hazards. The necessity to toke a critical decision may arise and, like in the military tradition, maritime tradition has evolved a chain of command to be followed when such necessity arises.

_Master Crew and Officers

The master of a ship is the agent and representative of the shipowner. As such, his relationship with the owner is not only that of an agent and principle, but also that of a fiduciary.[145]The master is entrusted with the care and management of the vessel and the maritime law grants him great authority in his management of the ship business. As agent and representative of the shipowner, the master is the ultimate source of authority in a ship, and because his legitimate actions bind the shipowner the master must act with extreme good faith, with loyalty and with the utmost fidelity and attention in all of his dealings affecting the subject matter of his agency.

[145]. See Hansen v. Barnard, 270 F163 (CA2 NY 1920).

The master has absolute responsibility in navigating the vessel. In so doing he has discretion in delegating and directing the crew in a manner he deems fitting. Regarding the judgement of the master in times of emergency, the court stated in **The Lusitania:**

> The fundamental principle in navigating a merchantman, whether in times of peace or war, is that the overriding officer must be left free to exercise his own judgment. Safe navigation denies the proposition that the judgement and sound discretion of the captain of a vessel must be confined in a mental strait-jacket..."[146]

Thus, the master must not only navigate the ship, but he must also maintain the discipline aboard the ship. In **The Condor,** the American court observed that,

> "Discipline on the sea is not like that on land in ordinary industrial employments. The relations between master and man require an authority which is not necessary when both parties have immediate recourse to constituted authority. No doubt countless misery and brutality has arisen from the exercise of master's authority, but the absence of that authority still remains in civilised countries, and must remain, if men are to sea for weeks, out of reach of the usual methods of keeping order."[147]

In this light we are able to understand why maritime law has vested so much authority on the master.

_Duty for the care and safety of the crew

Standing in loco parentis to the crew the master has the duty of looking out for the safety of the crew. In case of illness while at sea he must give the seaman whatever care the ship's medicine

[146].251 F728 (DC NY 1918).

[147]. 196 F 71 (DC NY 1912).

chest can afford him.[148] In serious incidents, the master may decide to port.[149] It is also the duty of the master to protect the crew from violence and brutal treatment, and where the master or his officers knew or ought to have known, or with ordinary diligence should have known, of the brutal or vicious tendencies of a member of the crew or of one who is a source of peril to those who sail with him, and are negligent in protecting the crew, the master or shipowner will be held liable for negligence in failing to accord the assaulted seaman the protection to which he is entitled.[150]
But the protecting care of the master does not include the duty of warning his seamen of hazards ashore which they might reasonably be expected to perceive for themselves.

As the ship's top officer the master is also responsible for the safety of the passengers, in addition to that of the ship and the crew. In time of distress and peril the master can order passengers to aid in attempting to save stricken vessel.[151]

Duty of crew to stand by ship

The crew's obligation to the vessel is summarised in part in the following statement which appears on the face of all shipping articles:

> "And the said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said master, or of any person who shall lawfully succeed him, and of their superior officers, in anything

[148]. Martin Norris, supra (note 30) 621-4.

[149]. Ibid.

[150]. Kyriakos v. Goulandris, 151 F 2d 132, 1945 AMC 1041 (CA2 NY 1945).

[151]. Martin Norris, supra. P.635.

relating to the vessel, and to the stores and clothing thereof whether on board, in ports, or on shore,..."

Hence a crew is obliged by its articles to stand by the ship and obey the Master until the voyage is done, unless she come to such a pass as to be dangerous to human life.[152] The primary and paramount duty of the sailor is implicit obedience to every lawful command of the master and officers. The crew is to perform their duties with reasonable skill and diligence, and to stand by the ship until the voyage is completed or until they have been discharged by the master.[153] They can not be permitted to debate the propriety of the master's orders, and courts of admiralty will not tolerate any hesitation in prompt and active obedience. It is only the extreme of danger that will justify resistance to even the rash and improper exercise of the master's authority.[154]

Upon the disability of the master by death or otherwise, wherein he is unable to command the vessel, he is succeeded by the chief mate, the officer next in command in the navigation of the ship and in its overall management. The command devolves upon him by law, and with this comes the powers, authority, privileges, duties, responsibilities and liabilities of the master.[155]

Apart from the above divisions, there is also a basic division of labour on each merchant ship, consisting, in addition to the above heads, of a carpenter, a boatsman, a gunner, a quartermaster, perhaps a cook, and four or five able or ordinary seamen. A large or more heavily manned ship included a second

[152]. See The Condor, supra.

[153]. The Shawnee, 45 F 269 (DC Wis 1891).

[154]. Ibid.

[155]. The Boston F (Cas No. 1669 (DC NY 1832).

mate, a carpenter's mate, and four or five more common tars.[156] This division of labour allocated responsibilities and structured working relations among the crew, forming a hierarchy of labouring roles and a corresponding scale of wages.

[156]. William Falconer, An Universal Dictionary of the Marina (1769: reprint New York, 1970).

CHAPTER FOUR

THE SEAMAN AS A COLLECTIVE WORKER

4.1 Early Maritime Labour Practises

Collectivism of Necessity.

Seamen were one of the largest and most important groups of free wage labourers in the international market economy of the Eighteenth century. As Eric Hobsbawn has noted, "The creation of a large and expanding market for goods and a large available free labour-force go together, two aspects of the same process".[157] Hobsbawn calls attention to the relationship between the growth of commercial markets and the growth of a working class, and implicitly to the ways in which labour processes, markets, and experiences were transformed or created during the drive of early capitalist development.

The seaman occupied a pivotal position in the creation of international markets and a waged working class, as well as in the worldwide concentration and organization of capital and labour. During the early modern period, merchant capitalists were organizing themselves, markets, and a working class in increasing transatlantic and international ways.[158] The more capital succeeds in organizing itself, the more it is forced to organize the working class. Redikker has stated that as capital came to be concentrated in merchant shipping, masses of workers, numbering 25000 to 40000 at any one time between 1700 and 1750,

[157]. Eric Hobsbawn, The general Crisis of the European Economy in the 17th century p. 5 (1954) 40.

[158]. C L R James, Grace C Lee, and Pirre Chaulieu, Facing Reality (Detroit, 1974)

were in turn concentrated in this vibrant branch of industry. The huge numbers of workers mobilized for shipboard labour were placed in relatively new relationships to capital- as free and fully waged labourers- and to each other: seamen were, by their experiences in the maritime labour market and labour process, among the first collective labourers.[159] In historical terms, the new collective worker did not posses traditional craft skill, did not own any means of production such as land or tools (and therefore depended completely upon a wage), and laboured among a large number of like-situated people. The collective worker, exemplified by the seaman, was the proletarian of the period of "manufacture", and would, of course, become a dominant formal type of labourer with the advent of industrial capitalism.

The maritime labour market took place amid the buzz and hustle of the seaports that handled the commerce of the North Atlantic. The labour market was international in character.[160] The global deployment of thousands of seamen in the early Eighteenth century was predicated upon the broad and uneven process of proletarianization, through which these men or their forbearers were forcibly torn from the land and made to sell their labour power on an open market to keep body and soul together. The major

[159]. Marcus Redikker, supra, p.78.

[160]. Labour market is defined as "those institutions which mediate, or determine the purchase and sale of labour power" and here, our understanding of maritime labour is, as I stated earlier, deficient, for the actual practices of labour market entrepreneurs in the Eighteenth century have not been carefully studied. However, it is clear that crimps-" agents who traded in recruits when men were in great demand either for the armed forces or to man merchant vessels on the point of sailing"- were crucial to the maritime labour market, certainly in England if not in the New World until the late Eighteenth century.see An J. Stevenson, "The London "Crimp' Riots of 1794" International Review of Social History 16 (1971) 41- 2. An equally important if shadowy figure was the "spirit", described as "one of those who used to entice any who they think are country people or strangers, or who they think are out of place and cannot get work, and are walking idly about the streets. Spirits promised great wages and often gave advances in money. Those who accepted their offers often found themselves apprenticed as sailors or sold as indentured servants bound to America.

sources for stocking the labour market with "hands" were dispossession and population growth (see chapter one), which forced the offspring of agrarian labourers or wage workers themselves to sell their mind and muscle for money. Population growth and dispossession, each with its own oscillating rhythm, combined to swell the number of those who in some way worked for a wage to some 60% of Britain's people by the beginning of the Eighteenth century.

Maritime labour in most American and English ports was seasonal and casual. The rhythms of climate dictated employment opportunities by icing harbours, by fixing the growing seasons of commodities such as sugar and tobacco, or by making parts of the world dangerous with disease or hurricane. Seafaring jobs were most easily found in spring, summer, and fall, though the demand for labour in each port varied according to the commodities shipped, their destinations, and the length of the shipping season. Many mariners were unable to find year round employment. Numerous landed occupations, however, were equally seasonal, and some people, "sailoring" was normally a casual employment, into and out of which they drifted as they found employment harder to come by on sea or on land.[161]

Apart from navy related sailoring, seafaring labour consisted mainly of loading, sailing, and unloading the merchant vessel. The essence of the labour process was, quite simply, the movement of cargo. The ship, prefiguring the factory, demanded a cooperative labour process.[162] Waged workers, the preponderant majority of whom did not own the instruments of their production, were confined within an enclosed setting to perform, with sophisticated machinery and under intense supervision, a unified and collective set of tasks. Large parts of this labour were performed at sea in isolation from the rest of the population.

[161]. Redikker, supra, p.82.

[162]. Labour process is here defined as the process by which raw materials, other inputs, and labour are transformed into products and by services having value.

The character of seafaring work and its lonely setting contributed to the formation of a strong labouring identity among seamen.

By 1700 seafaring labour had been fully standardized. Sailors circulated from ship to ship, even from merchant vessels to the Royal Navy, into privateering or piracy and back again, and found that the tasks performed and the skills required by each were essentially the same.[163] they anticipated a basic division of labour (as discussed in chapter three) on each merchant ship. This division of labour allocated responsibilities and structured working relations among the crew, forming a hierarchy of labouring roles and a corresponding scale of wages.

During times of peace, maritime workers were so abundant that they could not exert much pressure without fear of dismissal. Those who made up the reserve navy of the unemployed, those put out of work by the demobilization of the Royal Navy, waited anxiously for any vacant berth. During war times, as men of war and privateers scouted the seas, labour was so scarce that captains often had no alternative but to sail with smaller crews. Seamen usually gained their advantage in the form of higher wages. From this rudimentary labour practice developed various concepts through which the mariners exercised concerted efforts to compel better terms- hence precipitating collective action. These included work stoppage and desertion.

Work stoppage was used to press for rest on sundays, better wages, the coalescence of support around individual resistance, the struggle over the control of work, the negotiation of authority, the efforts of the crew to set standards of safety, the omnipresence of danger, etc. However, the law placed limits

[163]. Lloyed, British Seamen, 12, 53.

upon the use of work stoppages at sea. Richard Morris has noted; "A strike which might have been treated at common law would, if committed by mariners, be deemed as mutiny.[164]

If seamen were unable to limit their exploitation by controlling the labour process, they could at least escape it by using their fast feat: Desertion was one of the most chronic and severe problems faced by the merchant capitalists of the shipping industry. Merchants bought the seaman's labour power in a contractual exchange. Monthly wages were paid for work on a specified voyage. Vast bodies of legislation and legal opinions were produced in an effort to guarantee that exchange. In signing a set of articles, the legal agreement among owner and captain and crew, seamen were usually required to affirm that they would not "go away from, quit or leave the said ship... in any port abroad, or go on board of any other ship whatsoever", unless impressed or required to do so by force.[165]

But seamen always reserved the right to terminate that contract, to take their chances with the law, and to demonstrate that labour power was a commodity unlike any other. What merchant capitalists and their lackeys saw as "the natural unsteadiness of seamen" was in fact the use of autonomous mobility to set the conditions of work.[166]

Desertion was used mostly as a tool of wage bargain, and such bargains drastically reduced the exploitation of maritime labour; as a threat to wrest from a captain an advantage for the crew. Some seamen threatened to dessert during hash weather, and others swore they would leave if drunken and abusive mate continued in service;[167] to escape the grasp of a brutal master or mate; to

[164]. Richard B Morris, Government and Labour in Early America (New York 1946) 225.

[165]. See Linon v. Chapman, H CA 24/130 (1730)

[166]. Richard B. Morris, supra, 247.

[167]. Young and Higgins, H C A 24/128 (1704).

avoid sailing to disease ridden ports; to stay out of areas where they were likely to be pressed into the Royal Navy, etc. Desertion was, in all, an essential component of seafaring labour.

These are some of the many ways in which the relationships initiated by the concentration of labour on the ship were soon transformed by seamen into a new basis for the organization of community. Sharing a total life situation as a "community apart", separated from family and church, seafarers forged new social relations. The dangers of their work and their collective need for safety intensified their solidarity. Their new ties were sometimes undercut by the diversity of the men who made their living by the sea, as well as by the mobility and dispersion that were essential features of their work. Yet for all these men, self protection- from harsh conditions, excessive work, and oppressive authority- was necessary for survival. Too often, when under command, "all the men in a ship except the master" were "little better than slaves. Social bonds among sailors arose from the very conditions and relations of their work. These men possessed a concrete and situational outlook forged within the power relations that guided their lives.[168] Theirs was a collectivism of necessity.

The experience of the early Eighteenth century seaman illuminates a vital movement in the transition of a free wage labour system. Seamen occupied a pivotal position in the movement from paternalistic forms of labour control to the contested negotiation of waged work. The completely contractual and waged labour of maritime work represented a capital- labour relation quite distinct from landlord- tenant, master- servant or master-apprentice. The sailor was both a free wage labourer located among unprecedented number of men much like himself. Like others, including those wage labourers in agriculture manufacture who had

[168]. Redikker, supra, p.111.

no alternative incomes from the land, the seaman found that he had only "a pair of good Hands, and a stout Heart to recommend him". Such was the central reality of proletarian life.

4.2 Modern Law and Labour Practices

In my view labour law may be defined to include that body of rules and regulations (whether arising from customs, legislation or case law) which regulate the workplace relationships. More than any other aspect of, law labour law touches the daily lives of people in South Africa and most other countries. Most working peoples are parties to contracts of employment throughout most of their lives. The terms and conditions under which they work, or which they must offer to their employees, are often laid down in industrial awards or statutes. The content of these terms and conditions will have been influenced by trade unions, of which many working people are members. With the exception of the law relating to the provision and acquisition of goods and services, it is hard to think of an area of law with greater everyday effect than labour law.[169]

In South Africa the last three decades have witnessed a dramatic development and positive changes in labour law. The changes may be traced, in part, to a growing realisation of the importance of the employment relationship, the process of political emancipation and economic and social transformation currently under way in the Southern African region. Employees now look to their jobs for benefits other than just regular pay packets. Demands of training, career path, retirement benefits and "industrial democracy" have increased. Employers have also recognised more the need for a well trained, experienced, contented and forward-looking workforce, while at the same time becoming more concerned about the costs of providing these benefits and about the level of return for these costs.

---

[169]. See generally Australian Labour Law: Cases and Materials (Butterworth, Sidney, 1990).

It is not always true that all sectors of employees benefit from labour changes, and so it is that in the field of off- shore labour practices, these changes are yet to take a proper hold. In South Africa the way labour law is changing is almost fascinating. But there is a strong likelihood that change will continue. In recent times, political attitudes to the respective social responsibilities of labour and capital in South Africa have diverged. Statutory changes are occurring already, and may well continue, with the possibility of quite large swings, until new, broadly accepted direction is achieved. Hopefully, this will fully encompass seafarers.

The study of labour law is essentially about the legal regulation of the relationship between workers and employers. This relationship is not, of course, simply a legal one. It is also an economic relationship- workers exchange their labour in return for wages or salary and the product of the employees' labour will normally yield the employer profits.[170] The employment relationship is also a significant social relationship, not simply because workers and employers have to cooperate harmoniously in the production process, but because the work environment is itself central to the culture and quality of life.

While it is true that all law ultimately reflects the economy and society which it operates, it is also true that few area of law do so more than labour law. Judicial notice may be taken that decisions of industrial tribunals tread a fine line, balancing the interests of the disputants and the interests of the national economy. Labour law is littered with jargon reflecting economic, social and political interests and values. The "public interest", the "ability of the economy to pay", the "right to strike", the "closed union shop", and "conscientious objection to union membership" are typical examples of such jargon. Even where the law seems to be dealing with industrial legal relationships and

---

[170]. Ibid, p.1.

rights, notions of "collective responsibility" arise from time to time. I will therefore briefly consider some of the most celebrated principles of modern labour law.

4.2.1 Collective Bargaining

Like in any other relationship conflicts of interest is inherent to the relationship between employer and employee.[171] The sources of that conflict are many and varied, and include conflict over control of the enterprise, decision making within it, and distribution of the fruits of production.[172] This conflict of interest may be dealt with in different ways, ie through governmental regulation; bilateral control by management; unilateral control by labour; bilateral control by both management and labour, or a combination of these.[173] Bilateral control by management and labour can, for its part, also be achieved in different ways, for example through systems of worker participation.[174] Collective Bargaining,[175] however, remains the primary instrument through which most democratic societies establish bilateral control.[176]

[171]. Kahn Freund Labour and the Law (1983) 66.

[172]. See M Anstey Negotiating Conflict (1991) 13 ff.

[173]. See P. Weiler, Governing the Workplace: The Future of Labour and Employment Law (1990) ch. 4.

[174]. For an introduction to the topic of worker participation, see C O' Regan "Possibilities for Worker Participation in Corporate Decision- Making" 1990 Acta Juridica 113.

[175]. The term was coined by Beatrice Webb in her work Industrial Democracy 173 nl.

[176]. See International Labour Office, Collective Bargaining in Industrialized Market Economies (Geneva 1973).

Collective Bargaining may be defined as voluntary process for reconciling the conflicting interests and aspiration of management and labour through the joint regulation of terms and conditions of employment.[177] From the definition we may conclude thus:

- that collective bargaining as a concept accepts that economic conflict is inherent in the relationship between management and labour, yet it is postulated at the same time that such conflict can be resolved, a t least temporarily, through collective bargaining.[178]
- the calcination of negotiations in an agreement is not considered to be essential.
- the emphasis on the voluntary nature of the process also suggests, first, that conflict between management and labour is not to be regarded as so fundamental as to be incapable of resolution or compromise; and, secondly, that those who participate in the process subscribe to "the rules of the game".[179]

Functions of Collective Bargaining

It fulfils an economic function in that it serves as a device for the regulation of individual and collective workplace relations, and institutionalization of industrial conflict.[180] By bargaining collectively with organised labour, management

[177]. R Lewis (ed) Labour Law in Britain (1986) 110. This is just one of the several definitions which may be available.

[178]. See Allan Rycroft and Barney Jordan, A Guide to South African Labour Law 2nd. ed. (Juta & co. ltd, Cape Town 1992) p. 116.

[179]. See A Fox, Beyond Contract: Work, Power and Trust Relations (1974) 263-4.

[180]. D. Davis, "The Function of Labour Law" (1980) CILSA 212 at 216- 17.

seeks to give effect to its legitimate expectations that the planning of production, distribution, etc., should not be frustrated through interruption of work. By bargaining collectively with management, organised labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence as to be compatible with the physical integrity and moral dignity of the individual, and also that jobs should be reasonably secure.... The principal interest of management in collective bargaining has always been the maintenance of industrial peace...and...the principle interest of labour has always been the creation and maintenance of certain standards..., standards of distribution of work, of rewards/ and of stability of employment.[181]

Secondly, collective bargaining fulfils a social function in that it establishes a system of industrial justice which protects employees from arbitrary action by management, and which recognises their right to human dignity, thus subjecting the employment relationship and the work environment to the rule of law.[182]

Finally, collective bargaining serves a political function by introducing a measure of democracy to industrial life, giving employees a say in matters which affect their working lives.[183]

To be properly understood, collective bargaining must be viewed against the backdrop of industrial relations theory, and to that end the main theoretical perspectives will be outlined here.

[181]. Lewis, supra. See also P. Weiler, Reconcilable Differences (1980) 25- 30.

[182]. Weiler, supra, at 31.

[183]. This was one of the submissions by The Royal Commission on Trade Unions and Employers' Association (1965-8) (The Donovan Commission) quoted by Lewis at 117.

The Unitary Perspective

The essence of unitary view of industrial relation is its assumption that employers and employees share common objectives and interests in relation to the operation and success of the enterprise. The employer is regarded as being vested with unquestionable prerogative and authority and any challenge to that authority by individual or organised employees is therefore regarded as illegitimate. The employers' disciplinary powers are seen as being largely unbridled, and the enforcement of authority by coercive power is regarded as justified.[184] In short, there is a common goal and interest in production, profits and pay. Because of the emphasis on a commonality of interests, there is very little room for unionism within the unitary perspective, at least not for any form of "competitive trade unionism. By the same token, collective bargaining with employees or collective action on their part is anathema to it.[185]

In my view, this perspective has no practical or conceptual validity. It postulates a work environment characterized by harmony, cooperation and trust which attributes are utopian in the substance of labour law relation. In the offshore labour relations, it is hard to imagine a situation where the Owners of a ship may be said to share common interests with the crew, especially as concerns the profits. In today's capitalistic society the unitary perspective contributes little to our understanding of industrial relations. The unitary philosophy is embedded in the philosophy of the common law contract of employment, and its clearest expression is to be found in the employees' implied duty of obedience to the employer's lawful commands.[186]

---

[184]. See generally A Fox, supra, chapter 6.

[185]. Rycroft and Jordan, supra, at 118.

[186]. See H Forest, "Political Values in Industrial Law" (1980) 43 MLR 361 at 161- 7.

The Class Conflict Perspective

This perspective regards industrial conflict as synonymous with political and class conflict: the capitalist structure of industry and its system of wage labours are viewed as being closely connected with class divisions in society. Class conflict permeates the whole of capitalist society, including the industrial sphere, and is a permanent, inevitable and unrelenting feature of the capitalist mode of production.[187]

This perspective also regards trade unionism as a symptom of the class conflict inherent in the capitalist society: because workers individually are vulnerable to exploitation they are compelled to establish collectives to protect their own class interests. However, collective bargaining is regarded as being incapable of resolving the conflicts and problems of industrial relations in capitalist society,- it can merely accommodate them temporarily.[188]

The Pluralist Perspective

The pluralist approach to industrial relations emerged in response to the failure of the unitary perspective to provide a convincing explanation and justification for the existence and operation of employer prerogatives.[189] Basically, this school of thought accepts that a divergence of interest exist between management of labour and that conflict is inherent in their relationship. Yet it postulates that management and labour have

---

[187]. Ibid.

[188]. Rycroft and Jordaan, supra, at 119.

[189]. Ibid, p.120.

at least one interest in common, namely that inevitable and necessary conflicts should be regulated from time to time by reasonably predictable procedures.[190]

The political theory of pluralism, from which industrial pluralism is derived, developed as a theory of state, democracy and social relations in response to the earlier theories of the supremacy and organic unity of the state. It maintains that the state sovereignty is qualified by the varying and distinct interests of groups and associations in society upon whose cooperation and consent the government ultimately depends. These groups and associations are autonomous and fulfil a mediatory function between the state and the individual. The state has no absolute right to command obedience from the individual as the latter's loyalty to the state is dependent on the state performing its function as a public servant in the interest of the individual.[191] Pluralists would argue that the work place functions as a mini democracy, wherein management and labour exercise joint sovereignty through regulation of work rules by means of collective bargaining.

Characteristics and Assumptions of Pluralist view

It regards as cardinal value the dispersion of power, toleration and consent. It regards the separation of power between the state on the one hand, and management and labour on the other, as essential. It also accepts the legitimacy of trade unionism and recognises that conflict between capital and labour is inherent in industrial society and in the employment relationship. For the pluralist, collective bargaining is the right way of dealing with industrial conflict.

[190]. Davis & Freedland, Kahn- Freund's Labour and the Law p. 27.

[191]. For a full account see R Hyman, "Pluralism, Procedural Consensus and Collective Bargaining" (1978) 10 BJIR 16 at 16- 20.

One of the most fundamental assumptions of pluralist thinking is that there exists a rough equilibrium of power between the parties to collective bargaining. Labour and management come to the bargaining table not only in an adversarial position, but also out of mutual need and with comparable power. The equilibrium is established not through equality in the economic position of the parties, but rather in the fact that the parties are subject to the same rules, and that their economic powers, although disparate, are subject to the same, or at least comparable constraints. This would in effect hold the essence of bargaining, which lies in one's ability to withhold something of value from another. That ability is, of course, volatile and may be influenced by a horst of factors, many of which are entirely outside of one's control.[192]

The South African Labour Relations Act attempts to establish equality between management and labour for the purposes of collective bargaining, and the courts are duty bound to intervene whenever it can be shown that the conduct of the one party created an unfair advantage for it over the other.[193]

Principles of Unfair Labour Practice

The concept "unfair labour practice" is suggested to be the most single important innovation introduced into the South African labour relations system in the last 30 years.[194] The initiative was taken by the legislature when it amended the Labour Relations Act.[195] The concept has also taken root in the non-statutory

[192]. Rycroft and Jordaan, supra. p.124.

[193]. P Weiler, "Striking a New Balance" (1984) 98 HLR at 387.

[194]. Theodorus Poolman, Principles of Unfair Labour Practice (Juta & co.ltd, Cape Town 1985) p.10.

[195]. 28 of 1965, as amended.

system. Some employers and trade unions have formulated guidelines for, and adopted manpower policies regarding unfair labour practice.

The concept "unfair labour practice" is an expression of the consciousness of the modern society of the value for the rights, welfare, security and dignity of the individual and groups of individuals in labour practice.

In South Africa, The Wiehahn Commission [196] in regard to the concept "unfair labour practice" has recommended *inter- alia* that:

- The principle of fair employment practices legislation be based on the central themes of non-discrimination, equity, and modern employment practices be acceptable and implemented.
- That legislation be applied to all persons in the employer-employee relationship.
- That the six basic elements, that is, the right to work, to associate, to bargain collectively, to withhold labour, to protection and to development be accepted as the basis on which the legislation could be developed.

The Position in South Africa

Several statutes protect the right of employees to form, join and participate in activities of trade unions.[197] Chapter 3 of the Constitution[198] has several provisions that specifically regulate

[196]. See The Complete Weihahn Report, (Johannesburg, Lex Patria Publishers, 1982).

[197]. See s. 66 of Labour Relations Act 28 of 1956; s. 25 of the Wage Act 5 of 1957 and s.18 of the Basic Conditions of Employment Act 3 of 1983.

[198]. Act 200 of 1993.

labour relations.[199] Of these the most important is section 27. It gives every person the right to fair labour practices, and protects the right of workers to form and join trade unions, to organise collectively, to bargain collectively and to strike for purposes of collective bargaining. This constitutional provision bolsters the right, making it substantially impervious to repeal.

South Africa has also recently joined the United Nations Organization and it has acceded to some of the most important labour standards of the International Labour Organization (ILO). I will mention some of these standards in the following sections.

The above then is the domestic legal environment against which the plight of the South African Seamen is determined. Theoretically the feeling is that the law is adequately structured to secure the interests of seafarers. In practice, however, the provisions of the law rarely applies equally to all categories of labour- force, and occasionally, special reinforcement is resorted to. The institution of Flags of Convenience doctrine may be such an occasion requiring special reinforcement.

4.3 Examination of ILO/IMO Labour Standards

The International Labour Organisation (ILO)

International Labour Organization was founded in 1919 to bring governments, employees and trade union representatives together for united action in the cause of social justice and higher living standards every where. In 1944 an international Labour

[199]. Labour relations may be defined as the process by which human beings and their organizations interact at the workplace and, more probably, in society as a whole, to establish the terms and conditions of employment. The major actors are... three: management and management organizations, employees and their organizations, and the government. See also Mills, D Q, Labour Management Relations (Mc Graw- Hill, New York (1978) 16.

Conference adopted the so called "Declaration of Philadelphia", which is now an annexa to the ILO Constitution. The declaration proclaims the right of all human beings, irrespective of race, creed or sex, "to pursue their material well- being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.

The ILO has as its aims the formulation of international policies and programmes to help improve working and living conditions, enhance employment opportunities and promote basic human rights; the creation of international labour standards to serve as targets for achievement for national authorities in putting these policies into action; the undertaking of international cooperation to help governments in making these policies effective in practice; and to undertake research and publication activities to help advance all these efforts.

ILO and Shipping Industry

The special nature of conditions of work and life at sea has led the International Labour Conference to adopt an extensive range of over 50 Conventions and Recommendations applying specifically to such workers. The maritime industry accounts for the single largest group of ILO conventions.

The ILO recommended minimum wage.[200]

Although Recommendations give rise to no binding obligation, they do, however, provide guidelines for national policies and action. The significance of recommendation on wages, hours of work and manning is self evident. It is used to avoid exploitation of seafarers particularly in countries where no collective

---

[200]. (Recommendation No.109 on "Wages, hours of work and manning (sea), 1958 which stipulates a minimum wage for the Able Seaman which is presently US$ 356.

bargaining mechanism exists. The ITF has made use of this recommendation by insisting that no seafarer, whatever the flag, should be paid less than the ILO recommended minimum wage.

Port State Control [201]

It establishes the right of coastal states to intervene (and enforce repairs etc.) against foreign flag ships whether or not the respective flag has ratified the convention.

_ILO Conventions

The ILO has laid down several conventions which apply specifically to the maritime labour. These conventions cover wide range of maritime labour concern, from safety at sea to the certification of ship cooks. Some of these are acknowledged here for references.[202]

[201]. ILO Convention No. 147 on Minimum Standards in Merchant Shipping.

[202]. Some may be mentioned here: No. 7. The 1920 Minimum Age (Sea) Convention came into force on September 27, 1921. It lays down that children under the age of 15 (as amended) shall not be employed on a vessel.
No. 9. Placing of Seamen Convention provides inter- alia for the abolition of finding employment for seamen as a commercial enterprise conducted for pecuniary gain.
No. 22. The 1926 Seamen's Articles of Agreement Convention came into force on April 4, 1928. It lays down exact procedures for drawing up articles of agreement between shipowners and seamen, as well as their scope, in terms of the applicable national laws.
No. 23. The 1926 Repatriation of Seamen Convention came into force on April 4, 1928. It defines the Seaman's right to repatriation after being landed during the term of his engagement or on its expiry.
No. 53. The 1936 Certificate of Competency Convention lays down the minimum conditions for the granting of certificates to masters and officers on board merchant ships.
No. 55. The 1936 Shipowner's Liability (Sick and injured seamen) Convention defines shipowner's liability in the event of injury, sickness and resultant death of persons employed on board a vessel.
No. 56. The 1936 Sickness Insurance (Sea) Convention provides

General Conventions

Seafarers are also covered by non- Maritime general Conventions. The two most important- which are also the most commonly violated- cover collective and trade union rights.

The Freedom of Association and Protection of the Right to Organise Convention[203] preserves the right of workers to form and join their own organizations free from administrative or outside control. Governments who refuse to allow their nationals to join or form such unions violate this convention. It is also illegal to prevent unions from affiliating to international federations (such as the ITF).

compulsory sickness insurance to all persons employed in the service of the ship, and lays down the details and scope of such insurance.
No. 68. The 1946 Food and Catering (Ship's crew) lays down conditions for the preparation of crew meals.
No. 69. The 1946 Certification of Ship's Cooks Convention lays down conditions for the granting of certificates to ships cooks.
No. 71. The 1946 Seafarers Pensions Convention establishes the pensions fund for the crew and lays down its administration.
No. 91. The 1949 Paid Vacations (Seafarer's) Convention provides for the paid leave benefits to seafarers.
No. 92. The 1949 Accommodation of Crew Convention lays down detailed accommodation requirements with due regard to the safety of the crew.
No. 109. The 1958 Wages, Hours of Work and Manning (Sea) Convention provides for minimum wages for different categories of work, and for Maximum Hours of work.
No. 134. The 1970 Prevention of Accidents (Seafarers) Convention came into force on February 17 1983. It requires all occupational accidents to be adequately and investigated, statistics of such accidents to be kept, and provisions to be made for the prevention of accidents.
No. 146. The 1976 Seafarers' Annual Leave With Pay Convention came into force on June 13, 1979. It lays down that seafarers shall be entitled to annual leave with pay of specific length (of not less than 30 calender days for one year's service). This Convention revises the Convention No. 91 of 1949.

[203]. No.87. The 1948 Convention came into force on July 4 1950.

The Right to Organise and Collective Bargaining Convention[204] guarantees freedom for workers from anti-union discrimination, such as being sacked or being blacklisted for union membership. It also prohibits employers from making non- union membership a condition of employment. It requires national administrators to protect the "Right to Organise" in national law, and specifically opposes state interference in union organizations.

The Discrimination (Employment and Occupation) Convention[205] commits governments to ensuring "equality of opportunity and treatment in respect of employment... with a view to eliminating any discrimination". Discrimination is therein defined to include any "distinction, exclusion or preference made on the basis of sex, religion, political opinion, national extraction or social origin". It follows that paying different rates to different people who do the same job on the basis of their race or sex is a violation of this convention. This convention has direct application to crews employed on Flags of Convenience vessels.

These conventions, along with the ILO conventions set out basic rights of seafarers.

The International Maritime Organisation (IMO)

The International Maritime Organization was set up in 1958- as the Inter-governmental Maritime Consultative Organization (IMCO). It adopted its new name in 1982 as a permanent international maritime body and specialised agency of the United Nations dealing with technical matters affecting shipping. By the time IMO came into existence a number of important maritime conventions had already been developed. Thus the IMO's chief task has been to ensure that existing international instruments kept

[204]. No. 98. The 1948 Convention came into force on 18 July 1951.

[205]. No. 111. The 1958 Convention came into force on 15 June 1960.

pace with changes in shipping technology, while at the same time developing a comprehensive body of international conventions, codes and recommendations which could be implemented by all its member governments.[206]

The IMO deals with two main areas: the promotion of maritime safety and the prevention of pollution from ships, priorities that are summed up in its slogan "safer shipping and cleaner seas".

IMO Conventions

These include the International Convention for the Safety of Life at Sea 1960 and 1964 (SOLAS).[207]Of all the international conventions dealing with maritime safety this is the most important. The Convention is all embracing, covering a number of modifications and provisions for everything from construction and stability of vessels, to life saving appliances and fire protection, carriage of grain and dangerous goods.

The Convention on the International Regulation for Prevention of Collisions at sea, 1972 (COLREG) (amended 1981),- as the sea-going highway code- provides the "rules of the road".

The International Convention on Standards of Training, Certification and Watch- keeping for Seafarers, 1978 (STCW) provides minimum standards of training, certification of sea-going personnel and minimum provisions for watch- keeping.

[206]. This international approach is essential, for the effectiveness of IMO measures depends on how widely they are accepted and implemented. The fact that the key IMO conventions are now accepted by countries whose combined merchant fleet represents 97% of the world total indicates how successful this policy has been. See for instance the statistics given Flags of Convenience: The ITF's Campaign booklet, p.29.

[207].Plus the SOLAS Protocol 1978 and amendments of 1981, 1983 and 1988.

The International Convention for the Prevention of Pollution from ships, 1973 and Protocol 1978 (MARPOL 73/78) is one of the several conventions relating to marine pollution and damping at sea. However, this is probably the most important. MARPOL stipulates operational procedures to be followed when carrying, discharging and loading cargo, and damping rubbish at sea.

Codes

In addition to the conventions ILO has developed a body of codes, which it recommends to governments, administrators, shipowners, shippers and masters as a guide on standards that must be applied when dealing with certain cargoes. The most important of these is the International Maritime Dangerous Goods Code, which has become the standard international guide to the transport of dangerous goods by sea.

From the foregoing analysis it is clear that the international community has done a lot and continues to do research and promulgate laws whose total effect is the preservation of life at sea and the improvement of the terms and conditions of work for seafarers. Most of these international convention and recommendations have been adopted into municipal laws and, arguing from the strength of these legal provisions, the seas should be safe, and those who work on sea-going vessels should be adequately remunerated. In practice, however, these conventions and recommendations are ignored by merchant shipowners, either through some fraudulent means or by the operation of flags of convenience.

4.4 Case Study One: Examination of the International Transport Workers Federation's (ITF) Collective Agreement

The ITF was founded by the European seafarers' and dockers' union in 1896. Rotterdam dock workers were on strike, and British maritime union leaders answered their call for support by organizing an international trade union body that co-ordinated practical solidarity with the strike.[208]

The ITF came into existence as a body designed to encourage practical support between transport workers- this remains the central principle of the federation. Soon after its foundation, the ITF grew from its seafarer and docker roots to embrace railway and road transport workers. Since 1948 one of the most important things for the ITF has been the campaign against flags of convenience (Foc) shipping. The fact that the campaign has been under way for nearly half a century demonstrates its importance to maritime trade and unionists and the fact that the IFT is determined to succeed.

The ITF's long term objective is the total elimination of the Foc system, and a return to a situation where a genuine link exists between the nationality of the flag a ship flies and the country of its owner

Right from the beginning, however, the ITF seafarer and docker affiliates have also sought to eliminate the abuses of the present system by organizing crews of Foc ships and fighting against substandard shipping that pays starvation wages to crews and keep them in unsafe, unhealthy and inhuman working conditions. For the ITF, ships flying an Foc have a special status different from those flying a genuine "national" flag, and its policy lays down that much higher minimum standards should

---

[208]. ITF, supra, p.17.

apply to them. The ITF collective agreement lays down a very detailed set of working conditions standards as well as a wage scale for Foc vessels.

As regards the second registers, the ITF's policy is summarised thus:

- Such registers will be treated by the ITF as Focs for any ships not beneficially owned in the country of registration.
- The ITF is opposed to second registers, but recognises that in some situations unions may have no option other than to accept such registers due to national government policy. In these case:

    a. ITF affiliates in countries operating second registers should sign agreements which do not fall below the established benchmark for Total Crew Cost Agreements on Foc vessels.
    b. ITF affiliated seafarers' unions in the flag state, if they are dissatisfied with a second register, may call upon the ITF to designate the entire register as a Flag of Convenience and to treat it accordingly.

- Social security benefits should be retained.
- Safety standards should not be reduced.
- Trade union and negotiating rights should be maintained.
- Discriminatory employment conditions should be avoided.

This procedure makes it incumbent upon the seafarer to find out the nationality of his shipowner.

The existence of the ITF campaign has a powerful indirect influence even on the ships which are not covered by an ITF agreement. Without the campaign, there would be no hope whatsoever of protection or justice for a large proportion of the world's seafarers.

ITF Approved Agreement

The ITF Flag of Convenience campaign is designed to secure ITF acceptable agreements for seafarers serving on Foc ships. Inevitably, of course not all shipowners sign such agreements and some who do sign try to cheat the crew members of their entitlements in many different ways.

ITF Agreements apply only to vessels flying Flags of convenience. Genuine national flag vessels are different. The ITF believes that they should be covered by national agreements negotiated between the unions and owners concerned. Second register ships should be covered by agreements approved by the flag state union which are at a similar level to the ITF's Total Crew Cost (TCC) agreements.

For a ship to have the ITF's stamp of approval, the crew must be covered by an ITF acceptable agreement which has been presented to the ITF for specific approval in that particular ship. Ships with acceptable agreements are not necessarily approved unless the agreement has been submitted to the ITF for appropriate clearance.[209] In order for a ship to be sure of avoiding difficulties with ITF port unions, it must be covered by an agreement that has been approved by the ITF.
The agreement must be one of the following three basic types:

[209]. There are many organizations that claim to offer "ITF" Agreements that do not fulfil these criteria. Being an ITF-affiliated union, or a body linked to an ITF affiliate, is not enough- ITF membership does not confer the right to automatically sign ITF acceptable agreements- all Agreements must be approved in principle and specifically for application to a specific ship.

ITF Standard Collective Agreement

The basic ITF collective agreement (hereinafter called "the Agreement") currently provides a basic monthly rate of $821 for an Able seaman.[210] It is normally the only agreement applied where ships are subject to industrial action by ITF affiliates in support of the Foc campaign. It also establishes a set of benchmarks against which all other ITF acceptable agreements are measured.

Application

Articles 1 and 2 set out the coverage of the agreement, and provides inter- alia that the terms and conditions contained in the agreement shall apply to all seafarers serving in any ship in respect of which there is in existence a Special Agreement made between the ITF and the owners of that ship, irrespective of whether or nor the owners have entered into individual contacts of employment with any seafarer.

The Special Agreement requires the owners (inter- alia) to employ the seafarers on the terms and conditions of the Agreement, and to enter into individual contracts of employment with each seafarer which incorporates the terms and conditions of the Agreement ("the ITF Employment Contract").

A Seafarer to which the Agreement is applicable shall be covered with effect from the date on which he is engaged or the date from which the ITF Special Agreement is effective as applicable, whether he has signed articles or not, until the date on which he signs off and/or the date until which, in accordance with these Agreement, the company is liable for the payment of wages,

---

[210]. This is according to the ITF Standard Collective Agreement 1 January 1994.

whether or not the ITF Employment Contract is executed between him and the owners and whether or not the ship's articles are endorsed or amended to include the ITF rates of pay.

Words in the masculine gender is stated to include also the feminine.

Duration of Employment Wages and Allotments (Arts 3 4 & 5)

The Agreement provides that a seafarer shall be engaged for six months, which may be reduced to five or increased to seven for operational convenience. The employment is to be automatically terminated upon the terms of the Agreement at the first arrival of the ship in port after expiration of that period, or of any other period specified in his ITF employment contract.

These Agreement also sets schedules upon which the wages of a seamen are calculated, and provides that the seaman shall be entitled to payment in cash in US Dollars or in a local currency at the seafarers opinion, and that there shall be no deductions save for the statutory ones and those authorised by the seaman. All net wages not drawn shall accumulate to he seaman and may be drawn by him at any time when the ship is in port. The seaman is to be paid on a monthly basis, which for the purposes of calculating wages shall consist of 30 days.

Any Seafarer, if he so desires, shall be allowed an allotment note, payable at monthly intervals, of up to 70% of his basic wages after allowing for any statutory deductions.

Hours of Duty, Overtime and Watchkeeping (Arts 6- 12)

The Agreement provides details pertaining to hours of duty, overtime and watchkeeping. The ordinary hours of duty of all seafarers is stated to be eight per day, Monday to Friday

inclusive. It further provides that in case of day worker, the eight hours shall be worked between 06.00 and 18.00, Monday to Friday inclusive. The Agreement provides a wage scale to determine how hours in excess of eight worked on these days is to be paid. The Agreement requires overtime records to be kept of individual seamen either by the master or head of the department, and the seaman must have access to the same at short intervals to approve and retain a copy thereof. If no overtime records are kept as required the seafarer shall be paid a monthly lump sum for overtime worked, calculated at 40 hours at the weekday hourly overtime rate, and 64 hours at the hourly overtime rate for Sundays, Saturday, and Public Holidays, without prejudice to any further claim for payment for overtime hours worked in excess of these figures.

If a holiday falls on a Saturday or Sunday, the following working day shall be observed as a holiday.

Ship's crew are not required or induced to carry out cargo handling and other work traditionally or historically done by dock workers without the prior consent of the ITF dockers union concerned, and provided that the individual seafarers volunteer to carry out such duties, for which they shall be adequately be compensated.

Overtime work does not include any additional hours worked during an emergency affecting the immediate safety of the ship, its passengers and crew.

The Master shall arrange for watchkeeping at sea and in port (when deemed necessary) on a three way basis. The Master and chief engineer are exempt from standing watches.

Rest Period, Manning, Medical Attention Sick Pay and Paid Leave (Articles 13- 18)

The Agreement provides detailed provisions regarding rest Period, and stipulates that each seafarer shall have at least one period of 8 (eight) consecutive hours of duty in each period of 24 (twenty four) hours. This period of 24 hours is to begin at the time a seafarer starts work immediately after having a period of at least 8 consecutive hours off duty. Where for some reason it is not possible for the seaman to be given off duty as stated, the seaman shall be compensated by overtime payment as calculated under the Agreement, in addition to any other overtime payments the seaman would be entitled to. However, the reduction in consecutive hours off duty shall not occur more than twice a week in seven days and shall not exceed a total of four hours in that period.

Adequate provisions are stipulated regarding manning. The ship is to be completely and adequately manned so as to ensure its safe operation and the maintenance of a three- watch system whenever required and in no case manned at a lower level than as recommended by the Agreement. Where the complement falls short, for whatever reasons, of the agreed manning, the wages of the shortage category shall be paid to the affected members of the concerned department. Such shortage is to be made up before the ship leaves the next port of call.

On medical care , the Agreement provides that a seafarer who is discharged owing to sickness or injury, shall be entitled to medical attention (including hospitalisation) at the owner's expense for as long as such attention is required. The shipowner is liable to defray the expense of medical care and maintenance until the sick or injured person has been cured or until the sickness or incapacity has been declared to be of a permanent character.

When a seafarer is signed off and landed at any port because of sickness or injury, his wages are to continue until he is repatriated at the owner's expense or has arrived at his home or at the place of his original engagement. Thereafter the seaman is entitled to sick pay at a rate equivalent to his basic wages and subsistence allowance (daily subsistence allowance whilst on paid leave US $ 18 as per Article 25) while he or she remains sick or injured up to a maximum of 112 days. Proof of his continued entitlement to sick pay shall be by submission of satisfactory medical certificates. At the time he leaves the ship the seafarer is to be paid an advance of his sick pay for the estimated number of days certified by a doctor for which he is expected to be sick or injured.

Every Seafarer to whom the Agreement applies shall, on the termination of employment for whatever reason, be entitled to 6 days paid leave for each completed month of service: broken periods of 15 days or less shall qualify for 3 days' leave and broken periods of over 15 days but less than 30 days for 6 days' leave. Qualifying service shall count from the time a Seafarer is originally engaged, whether he has signed Articles or not, and shall continue until his employment is finally terminated. The Agreement stipulates how and when leave may be taken, and its calculation.

Loss of Life, Disability and Insurance (Articles 19- 22)

The Agreement provides that if a seaman dies whilst in the employment of the Owners, including death occurring whilst travelling to and from the vessel, or as a result of marine or other similar peril, the Owners shall pay US $60000 to the widow or widower and US $15000 to each dependant child under the age of 21 subject to a maximum of 4 children. If the seafarer leaves no widow or widower the fore- mentioned sum shall be paid to the person or body empowered by law or otherwise to administer the estate of the Seafarer.

Where a Seafarer Serves in Warlike Operation Areas, the Agreement requires him to be given full information regarding the nature of the surrounding, and the possible harm to life. A Seafarer shall then have the right to accept or decline the assignment without risking losing his employment or suffering any other detrimental effects.

The Agreement stipulates detailed provisions regarding Disability, and inter-alia provides that a Seafarer who suffers injury as a result of an accident from any cause whatsoever whilst in the employment of the Owners, regardless of fault, and whose ability to work is reduced as a result thereof shall, in addition to his sick pay, be entitled to compensation according to the degree of the disability. Article 21 provides how this is to be calculated.

The Agreement further stipulates that the Owners shall conclude appropriate insurance to cover themselves fully against the possible contingencies arising from the articles of this Agreement.

Repatriation (Article 23)

A Seafarer is entitled to repatriation at the Owners' expense (including the wages and subsistence allowance) either to his home or to the place of his original engagement (at the Seafarer's option):

- after 6 months' continuous service on board- always subject to the provisions of Article 3;
- when signing off owing to sickness or injury;
- when his employment is terminated owing to discharge by the Owners;
- upon the loss, laying- up or sale of the ship;
- if the ship has been arrested for more than 14 days;

- if the Owners have not complied with the provisions of the agreement the Seafarer is entitled to claim the outstanding wages and to be repatriated at the Owners' expense;
- on discharge on grounds of the Seafarer terminating his employment because the voyage terms have been materially altered, or that he does not wish to work in war like conditions (Article 27 (b)(c)).

Repatriation is to take place in such a manner that it meets all reasonable requirements with regard to comfort. The Owners are liable to maintain the Seafarer ashore until repatriation takes place.

When, during the course of a voyage, the spouse or , in the case of a single person, a parent falls dangerously ill whilst the Seafarer is abroad, every effort will be made to repatriate the Seafarer concerned as quickly as possible, at the Owners' cost.

Food Accommodation Bedding Amenities, etc (Article 24).

The Agreement makes detailed provisions regarding Food, Accommodation, Bedding, Amenities, and entitles the Seafarer to sufficient food of good quality; accommodation of adequate size and standard; one mattress and at least one pillow, three blankets, two sheets, one pillow- case and two towels. The sheets, pillow- case and towels to be changed at least once a week; necessary cutlery and cookery; laundry facilities; recreational facilities in accordance with ILO Recommendation No.138 (1970).

The accommodation standards should generally meet those criteria contained in relevant ILO instruments relating to crew accommodation.

Subsistence Allowance and Crew Efforts (Articles 25 & 26)

The Agreement stipulates that while on paid leave a Seafarer shall be entitled to a daily subsistence allowance of US $ 18. When food and or accommodation is not provided on board the Owners shall be responsible for providing food and or accommodation of good quality ashore. Where a Seafarer suffers total or partial loss of, or damage to, his personal effects, due to whatever cause, whilst serving on board the ship or travelling to and from the ship, he shall be entitled to recover from the Owners compensation up to a maximum of US $ 3,000.

Termination of Employment (Article 27)

The Agreement stipulates comprehensive provisions relating to termination of employment. A Seafarer may terminate his employment by giving one month's notice of termination to the Owners or the Master of the Ship either in wring or verbally in the presence of a witness. If the Seafarer was employed for a specific voyage, which voyage is subsequently altered substantially, either with regard to duration or trading pattern, he is entitled to terminate his services as soon as possible. The Seafarer is also entitled to terminate his employment where he is required to sail into a warlike operation area as defined by the Lloyed's, and also where a ship is declared substandard or does not posses any one of the certificates required, as discussed in the foregoing sections.

The Owners, on the other hand, can terminate the employment of a Seafarer:

- upon the total loss of the ship, or
- when the ship has been laid up for a continuous period of at least one month, or
- upon the sale of the ship, or

- upon the misconduct of the Seafarer giving rise to a lawful entitlement to dismiss, provided that in the case of the dismissal for misconduct of the Seafarer the Owners shall give a written notice to the Seafarer specifying the misconduct. The requirement for the notice is mandatory.

A Seafarer is entitled to receive compensation for two month's basic pay on termination of his employment for any reason except where:

- the termination is the result of the expiry of an agreed period of service in his ITF Employment Contract, or
- the termination is as a result of notice given to the Seafarer as aforesaid, or
- the Seafarer is lawfully and properly dismissed by the Owner's as a consequence of the Seafarer's own misconduct.

Refusal by any Seafarer to obey an order to sail the ship shall not amount to misconduct of the Seafarer where:

- the Ship is unseaworthy or otherwise substandard, or
- for any reason it would be unlawful for the ship to sail, or
- the seafarer has a genuine grievance against the Owners in relation to implementation of the Agreement or his ITF Contract of Employment, or
- the Seafarer refuses to sail in a warlike operation area.

Membership Fees, Welfare Fund and Repatriation of Seafarers (Article 28)

Subject to national legislation, all Seafarers shall normally be members of either an appropriate national trade union affiliated to the ITF or of the Special Seafarers' Department of the ITF. The Agreement stipulates that the Owners shall pay on behalf of each Seafarer the Entrance and Membership fees in accordance with the terms of the relevant organisation. The Agreement enjoins the Owners on their own behalf to pay contributions to the ITF Seafarers' International Assistance, Welfare and Protection Fund in accordance with the terms of the Special Agreement.

Through the Agreement also the Owners acknowledge the right of Seafarers to participate in union activities and to be protected against acts of anti-union discrimination as per ILO Conventions Nos. 87 and 98. The Owners also acknowledge the right of the ITF to appoint a liaison representative from among the Seafarers who shall not be dismissed nor be subject to any disciplinary proceedings unless the ITF has been given advance notice and sufficient time to ensure that adequate shore based representative is provided.

Breach, Amendment, Waivers and Assignments (Articles 29- 31)

These articles provide for what is to happen in the event of breach of the Agreement, and where the Owners are themselves in the breach the ITF, for itself or acting on behalf the Seafarers, and/or any Seafarer is entitled to take such measures against the Owners as may be deemed necessary to obtain redress.

The terms and conditions of the Agreement are to be reviewed annually by the ITF and if the Owners and the ITF at any time mutually agree to changes these shall be made in writing and signed by the parties and considered incorporated in the Special Agreement.

The Owners undertake not to demand or request any Seafarer to enter into any document whereby, by waiver or assignment or otherwise, the Seafarer agrees or promises to accept variations to the terms of this Agreement or return to the Owners, their servants or agents any wages (including backwages) or other emoluments due or to become due to him under this Agreement and the Owners agree that any such document already in existence shall be null and void and of no legal effect whatsoever.

The ITF has, in addition to these term and conditions, provided wage scales to be applied, and also detailed policy on manning of ships, and of safety on board.

A Total Crew Cost (TCC) Agreement

TCC agreements are signed by an ITF affiliate (or the ITF Secretariat directly- in the event that there is no national trade union for the crew), usually in a crew supplying country, and a ship owner or manager. Each one is slightly different because it has been tailored to the particular circumstances of the employer and/or crew nationality. Before being applied to any ship, the TCC agreement must first be approved by the ITF Fair Practices Committee Sub-committee which measures the basic conditions and total cost of the agreement against a set of benchmarks. These include:

- The total monthly crew cost equal to a minimum figure;
- The total monthly wagepackage for the lowest adult grade seafarer must be no less than $750 and for an Able seaman no less than $1000 ($1,100 from January 1994 on), calculated as 61% of ITF Standard rates. The monthly wage package includes: basic wages; overtime pay for no more than 103 (40 hour week) or 85 hours (44 hour week); leave pay and allowances; contractual cash bonuses and allowances; any other quantifiable

financial benefits to the seafarer and his or her dependants;

- That the agreement contains more comprehensive social benefits than the ITF Standard Agreement;
- That the vessel's manning is in line with ITF policy (between 9 and 23 according to size and trading area).

A National Agreement

These are agreements signed by the unions in the country of beneficial ownership of the Foc vessel. Such agreements should reflect national flag conditions and must apply equally to crew members, irrespective of nationality. The use of national agreements must also be approved by the Fair Practices Committee Sub-committee.

Only the above three Agreements can be submitted for ITF Approval. Submission must be made by an ITF affiliate (or the ITF Secretariat directly), and accompanied by standard information about the ship. This information allows the ITF to check any outstanding claims against the owner and to consult the appropriate unions in the country of true ownership of the vessel.

If clearance is given, a "Special Agreement" (which is legally binding) is signed between the ITF and owner or his representative, individual contracts of employment for the crew are signed and incorporated (along with pay rates) into ship's articles, proof of union membership in an ITF affiliate is

provided (or crew are enrolled directly in the ITF Special Seafarers Department (SSD) if there is no national affiliate),[211] and ITF "Welfare Fund" dues are provided.

If all documentation is provided satisfactorily, the agreement is accepted for the vessel if it meets the approval criteria. A "Blue Certificate" is issued to the ship to certify approval. However, a Blue Certificate is not a confirmation of approval of an accepted agreement- ITF Inspectors and affiliates always check to see whether an agreement is approved.

The ITF is committed to assisting seafarers serving on Foc ships to get just wages and proper collective Agreement coverage. It believes that the shipowners should pay national wage rate of the country they come from (because that is where the profits end up), not, as many shipowners wish, the prevailing rates in the country a seafarer comes from. It is wrong to pay seafarers who do the same job different rates because of the country they come from.

The ITF, upon receiving information concerning the welfare of seafarers sends its inspectors[212] to visit the said Foc vessel. If the inspector establishes that the vessel does not have acceptable collective agreements he attempts to negotiate the same with the owners or the master. The inspector also liaises with dock workers' unions who may take action against vessels without acceptable agreements whenever it is possible, and he has the authority of taking legal and/or industrial action to make sure that seafarers receive backpay to which they are entitled.

[211]. SSD is a special department set up by the Constitution of the ITF. It functions both as the administrative centre for the Foc campaign and as the trade union for seafarers who cannot, for a variety of reasons, join one of the ITF seafaring affiliates.

[212]. ITF Inspectors are not employees of the ITF. They are officials of national affiliates (either seafarers or dockworkers) of the ITF in the country concerned who devote all or part of their to the conduct of the Foc campaign.

Inspectors also provide emergency support (food, water, accommodation) for seafarers who are on strike or are abandoned by the shipowner. He also liaises with the harbour authorities, immigration officials, police and other governmental bodies to ensure that a ship is seaworthy, and that minimum international and/or national standards of safety, certification, crewing levels and crew accommodation are all being properly observed.

4.5 _Case Study Two: The Missions to Seamen[213]

The Missions to Seamen is one of the Christian voluntary organizations engaged in welfare work for seafarers. It is a mission project of the Anglican Church, and mandated with the obligation of meeting, and where possible satisfying the spiritual, physical and moral welfare of seamen. Though an independent entity, the organization has working relationship with the ITF, and works even more closely with the Transport and General Workers Unions.

Mission to seamen was started in 1835 by Rev. John Ashly, who was motivated by the fact that at the time seafarers were actually a forgotten segment of the society. The concerns which motivated Rev. Ashly, unfortunately, still abound today, as has been aptly observed by Rev. Lange in an interview for this study. He said:

[213]. Mission to seamen is affiliated to International Maritime Christian Association- ICMA- which is an Association of national and international organizations engaged in welfare work for intending, active and discharged seafarers and fishers, their families and dependants. It is distinctively "Christian" in that its members are non- profit organizations and are integral parts, affiliated to or officially connected with Christian Churches or communities recognised by the World Council of Churches or the Vatican. Its objectives are to promote the spiritual, social and material welfare and religious education of all mariners, their families and dependants, and secondly, the relief of their need, hardship or distress.

For further information please refer to the ICMA 7th Plenary Conference, Helsinki 1994.

> "The treatment accorded seafarers has only marginally changed from the position in 1835. Today for example, whenever there is a maritime casualty involving injury or death of seamen, a threat, or actual pollution to the environment, damages to cargo or ship, the latter activities are highlighted and take precedence over the lives of the crew. Often, the casualty is blamed on the crew."[214]

Rev. Lange in support of his thesis cited the recent case of the Apollo Sea, among others, and said it is time the maritime community took highly the safety of seamen.

The Missions to Seamen at Cape Town provides relevant information and assistance to seamen, at times of injury, sickness, or mistreatment (including beatings) at sea. The majority of those sailors in need come from third world countries, working in predominantly flags of convenience ships. Now however, due to the opening up of the Eastern Europe, mainland China and Russian sailors also frequent the Missions.

Problems recorded at the Mission

Most sailors working on some Foc ships arrive in port exhausted, sick and overworked. The mission would have to give them rest, feed them and avail medical treatment. They also have access to the Chapel. Occasionally the mission has to link seafarers with lawyers who initiate legal proceedings in claim of seamen wages and other emoluments. Where these actions are successful the seamen are paid and then repatriated to their homes of origin. A case in point is the **MV Leningrad** [215]. The ship was arrested in Cape Town through action brought by creditors. The action was successful and the ship was sold. The 12 sailors (from Russia)

[214]. Reverend Lange is the Minister in charge of the Cape Town regional office of The Mission to Seamen.

[215]. Under authority of Case No. AC 55/95 Relating to Case No. AC 19/94 in the Cape Provincial Court.

submitted their claims arising from unpaid wages and other maritime emoluments. Their claims were successful and they were paid and flown back to Russia. Before this, however, they lived in abject poverty and deplorable conditions in the port, and had it not been for the work of the Mission, a situation undescribable would have ensued. It may be noted here that these sailors were being paid below US$ 8 dollars per day, with the captain receiving US$ 8.

Often sailors find that they have been cheated into entering an agreement whose terms, when explained to them in a foreign port they cannot accept. Such sailors normally have no alternative but to return home. Being in no funds the Mission feels obliged to maintain them while at the same time organizing their return fare. The Cape Town Mission to Seamen office has reported a number of such cases, with the victims mainly coming from Eastern Europe.

According to Rev. Lange, the greatest threat to maritime safety in Cape Town is posed by fishing vessels, mainly of Taiwan and Mainland China registries. Many of these vessels have very poor living conditions (in which sometimes crews use a single bed in alteration while others work, no toilet facilities etc.). Crew are overworked, sometimes at no salary at all. These ships are hard to regulate or supervise, as they spend four- to-five months of their time at sea, and only come to port occasionally. When a fisherman dies at sea, the profits expediency normally takes precedence, and the body is frozen together with the fish until such a time as the ship may be ready to return to port.

Rev. Lange says that the problems discussed above have to date no solution. But he has suggested that the maritime industry should come up with laws and regulations which apply universally on board ships, whether fishing vessels or not, whether Focs or not. In his view the bad ship could be targeted using dockworkers, state port control and transport authorities. He adds that countries must be obliged to take proper control of

their shipping vessels: "if one can apply good standards, why can't others?".

In conclusion Rev. Lange has pointed out that out of the 1.5 million seafarers manning the 80,000 world fleets, two thirds (of these seafarers) come from the third world including Africa. 92% of goods eaten are shifted through shipping: it is therefore about time the international maritime community considered seriously the dangers and stress under which seafarers work to feed the world.

4.6 Case Study Three: Transport and General Workers Union (TGWU) of South Africa

The current level of unionisation within the industry varies dramatically between companies and also regions. Those falling under the National Council of Trade Unions (NACTU) umbrella have not been very successful in group representation, whilst the Congress of South African Trade Unions (COSATU) affiliated unions are far more vigorous in their approach and have successfully concluded bargaining agreements for both dock-workers and some commercial seafarers.[216] The Transport and General Workers' Union- TGWU (herein after called "the union") a COSATU and ITF affiliate, is currently the most active in recruiting members and has the largest representation within the shipping sector. The Seamens' Maritime Union was recently de-registered and its members incorporated into the Transport and Allied Worker's Union (TAWU), an affiliate of the National Council of Trade Unions (NACTU, also ITF affiliate). Other active unions include the Trawler and Line Fishermens' Union (TLFU-also ITF affiliate), the National Union of Mine Workers' is active in the off-shore marine diamond industry. The South African Railway and Harbours Union (SARHWU) represents those employed by the government sector. However, in spite of all these, there remains a significant body

[216]. See South Africa Maritime Business Location Safmarine/ Unicorn/ Griffin May 1995, P.8.

of non-unionised South African seafarers. The majority of seafarers are employed in the private sector, mainly by such companies as Safmarine, Unicorn, and Griffin. These three companies own most of the ships on board which most South African seafarers work.

The Transport and General Workers Union, in addition to representing seafarers also represent other categories of transport workers. TGWU is affiliated to the ITF, and through it the ITF polices the ships docking in South African ports, and negotiates new Crew Agreements with shipowners.[217]

Nature of Representation

For purposes of collective bargaining the union represents crew and not officers. But where an agreement is negotiated for an entire ship, it normally covers crew as well as officers.

In concluding collective agreements the union is not bound by the terms and conditions of employment provided under the **Merchant Shipping Act**. The union regards the Act as the minimum basis for bargaining, and always strives for better terms. In fact the union considers the provisions under the Act as obsolete and out of reality with the present maritime commercial environment. So, the union uses the ITF guidelines as its objectives, since the ITF guidelines are more detailed, both in structure and in peculiar individual instances which are not found under the Act.[218]

---

[217]. Mr. Harold Harvey, who is the TGWU responsible for seafarers in Cape Town, is also the local ITF representative and Inspector in Cape Town.

[218]. This is the result of the interview I had with Mr. Harvey of the TGWU.

Seafarers Problem from the union point of view.

Employment

Over the past few years the union has recorded the decline in union membership arising from either retrenchment or simple lack of jobs for South African seafarers. The reason behind employment scarcity is mainly the result of low training of South African seamen, which has paved the way for the local companies to employ foreign seafarers who themselves are not members of the union.

Another problem is caused by the nature of employment itself. According to the union, there are 68 registered South African owned cargo vessels. Of these, 53 are flags of convenience vessels. Focs then employ the largest number of seafarers with the attendant result that it is virtually hard to regulate employment in these Focs because their employees do not belong to the union. This fact cuts off any meaningful union involvement in negotiating better terms and conditions of employment.

The local commercial shipping industry consists in the main of two participants, the Safmarine Group (Safmarine) and the Grincor Group (Griffin and Unicorn), including their respective subsidiary and associated companies. Together these two companies beneficially own approximately 60 vessels of which only 4 are South African registered. Majority of these vessels employ non-unionised South African seafarers amongst their crew. Safmarine also largely recruits through a foreign crewing agency, which enlists foreign seamen. These seamen are not members of the South African trade unions. At safmarine, employment is based on contract. This means that when the contract is over there is no employment for the seaman. Under these conditions the union is rendered helpless, and unable to assist the affected seafarers.

The union encounters less employment problems from Unicorn company limited. Unicorn's ships are all registered in South Africa and hence are obliged by law to apply the law of the land.

The Unicorn employees also belong to the union and are hence able to negotiate better terms and conditions of employment.

Pay

According to the union pay for union members is good, and is well above that earned by an average South African. Pay is divided into two components: the first component is made of cash which is paid to the seafarer directly, while the second component is paid to the seafarer's family on agreed ratio. However, because seamen stay away from home for a long period of time, pay needs to be revised periodically to take into account the loss of amenities. For non- union member seamen, however, pay is pathetically low. The problem is intricately related to the Foc concept, and hence solution thereof lies in solving the Foc issue.

Insurance

The union has difficulty with the insurance requirement under the ITF collective agreement. This is a mandatory scheme for all vessels covered by ITF approved Agreements, with exemption only being granted where it can be shown that equivalent or better cover exists or that seafarers are covered by government social security schemes that provide equivalent or better cover. The union has problem with this requirement because it is the single most important factor militating against the acceptance by shipowners of the ITF approved Agreements. The assured sum involved, and premiums payable thereunder are very high, (see the section on ITF above) and "unrealistic" in the sense that most companies in South Africa can not afford such cover for their top executives. If the sum assured and the premiums payable were reduced, the union is of the view that the ITF approved Agreements would be more popular. However, neither the union nor I are of the view that the amount involved should be reduced. The

problem of costs should be addressed from the international trade perspective, rather than from the South African perspective. Shipping is an international industry and shipowners the world over operate under virtually the same conditions. If, for instance, English shipowners can afford for their seafarers such covers, South African shipowners can do the same. Secondly, seafaring is a very peculiar profession. Unlike the land based professions, it is very difficult for a seafarer to get a job in any other industry when, due to several factors such as injury, he looses his job. A seafarer then requires a most comprehensive insurance cover.

Safety

The union is concerned for the safety of seafarers. Recent ship casualties which have left several seamen either dead or injured begs for a more adequate safety measures. The union is concerned that a memorandum of understanding of port state control- such as is used to regulate safety among the European Union countries- is not found in South Africa. The Department of Transport only manage to inspect about 10% of the vessels which come to port. Safety issues therefore need to prioritised. Unfortunately the union cannot help since it has no jurisdiction over safety.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 CONCLUSIONS

Just like in the past, economic needs and a sense of adventure continue to motivate people to seek employment off shore. With the rising volume of international maritime commerce and trade, employment in this sector of maritime industry is expected to increase, and trained seafarers will continue to be required to man the ever increasing world fleets. Therefore, employment at sea must be made as comfortable as any on land.

Definition of "seaman"

The definition of the term "seaman" as found under the South African Merchant Shipping Act and the Labour Relations Act is wide enough, and will, for a foreseeable future remain useful. However, as technology increases and new situations arise which may not be envisaged under present legislations (for example in the field of offshore work), the definition of "seaman" may need to be expanded alongside that of the United States of America (both under Title 46 and the Jones Act), so as to afford legal remedy to as many seamen as possible in cases of injury or death.

Substandard Ships and Maritime Safety

Whilst navigation is today a much more safer activity than it was in the Seventeenth and early Eighteenth centuries due to considerable advances in the field of maritime safety, seafaring is still a perilous occupation. Much remains to be done especially in the construction and manning of vessels. Greatest

threat to safety is posed by flags of convenience vessels. In order to avoid maritime casualties and to make navigation a safer vocation, it is imperative that all Seafarers' unions in maritime countries are aware of the work done by the IMO. They must press national authorities and their governments to ratify the IMO conventions, and to keep safety standards on board vessels flying their countries' flags. The present trend towards second registries must be resisted.

Substandard ships

In the last few years, the battle against substandard shipping has been stepped up, not only in the continuing struggle waged by the ITF, but now also by governments in the United Kingdom and other European countries, as well as the United States, where port state authorities have declared war on substandard shipping, increasing inspection staff and targeting ships from certain Foc registries for increased inspections. And they have begun practices of publishing information on ships, and registries which are detained in their ports. All such moves have, of course, led to increased publicity, not only in trade journals, but also in the mainstream press regarding substandard ships, and the plight of men and women who crew them. It is hoped that this trend will help improve the terms and conditions under which seafarers work.

In 1973, only 36% of the world's fleet was over 10 years old. Today, however, average age is 18 years. On the average the world's ships are therefore getting older. This has further implications for the safety of seafarers.

Job Security

The employment situation on the waterfront is changing rapidly. Workers from traditional maritime countries are being replaced with those from poor countries where wages are low and unemployment is high. Even then, seafarers' occupation is today one of the least secure. The employment is by way of contract the duration of which ranges between 6-24 months. When the contract expires there is no guarantee that a seafarer will secure another employment. Seafarers who are unable to secure employment are tempted to seek for employment on board flags of convenience vessels, where they are unable to negotiate for suitable terms and conditions of employment, and where they are paid starvation wages. Majority of the African and the third world seafarers fall within this category.

Like in the past, seafarers' labour is today treated like a commodity to be sold on an open market like any other. The law of supply and demand dictates the market terms, and a seafarer is treated as having no interest in the vessel on which he serves, beyond his wages and other emoluments. However, seafarers have had the conditions and terms under which they work stabilised through international legal instrument, and through the general maritime law which has become increasingly international in character. There exists a comprehensive and sufficient body of international Recommendations and Conventions which regulate safety and conditions of employment at sea today. These efforts, unfortunately, do not apply uniformly to all seafarers. The institution of flags of convenience erodes most of the benefits which accrue to seamen under these instruments, and today, crew working on board Foc vessels are ruthlessly exploited, in addition to working under unsafe and deplorable conditions.

African seafarers, coming from third world states where wages are low and where ships are not owned, bear the brunt of these ruthless exploitation, as they are compelled to seek employment on board Foc vessels.

This is where union representation is most useful. South African seafarers who are members of the Transport and General Workers Union (TGWU) have less problems. The conditions and terms under which they are employed are negotiated on their behalf by the union. Unfortunately, the majority of South African seafarers work on board flags of convenience of foreign nationality, and are thus unable to benefit from the union representation. The TGWU has expressed concern at the loss of jobs in the shipping industry as a result of flagging out and the increasing casualization of the shore based labour force. Non-unionised seafarers continue to serve merely as sources of cheap labour which are discarded as soon as new, cheaper source arrives.

Flags of Convenience (Foc) [219]

By transferring a ship from a genuine national register to an Foc register, an owner runs away from taxation, safety regulations and from trade union organizations. Although the institution of Focs is undesirable, it nevertheless is a common practice. From the study of the ITF and TGWU unions practices it is clear that

---

[219]. The only authoritative definition of Foc status is the ITF List. This list is drawn up by a joint Committee of ITF seafarers' and dockers union that runs the IFT Campaign against Focs (the Fair Practices Committee). Countries are added to the list according to certain criteria - the most important being that a majority of vessels in a register are foreign owned or controlled.

Currently FOC countries in the ITF list are:
Antigua and Barbuda; Bahamas; Belize; Bermuda; Canary Islands (Spain); Cayman Islands; Cook Islands; Cyprus; Gibraltar; Honduras; Lebanon; Liberia; Malta; Marshall Islands; Mauritius; Netherlands Antilles; Panama; St Vincent; Sri Lanka; Tuvalu; Vanuatu.

the Foc system is singularly the most important threat to the achievement of favourable employment terms and conditions in maritime legal labour field.

Double Booking

Some disreputable operators of the Foc ships run a system of double- booking,-where a crew is asked to sign two different sets of documents; one which stipulates ITF wages, and one which shows what the seafarer really gets every month. The system of double booking is used because the shipowner has signed an agreement with the ITF to avoid facing problems with the ITF-affiliated seafarers' and dockers' unions, but does not want to pay the crew accordingly. If an ITF Inspector boards the ship to carry out an inspection, the master will show him the set of accounts which state ITF wages. Unless the inspector can prove that these are not the real wages received by the crew, he can do little to help them get their ITF wages, even if he suspects something is wrong unless he gets assistance from the seafarer himself.

Sometimes the crew is forced to agree to hand any backwages recovered by ITF or have it deducted from their future wages, under the threat of action by unsympathetic authorities in their home countries.

This is possible because seafarers who are hired to work on Foc Vessels are often given strict instructions not to make contact with the ITF. Some are even made to sign legally binding contracts or loyalty letters in which they promise not to approach the ITF and which specify sanctions against seafarers or their families if they do so.[220]

[220]. Ibid.

The Foc system undermines the efficacy of the International and domestic legislations and conventions which control the maritime legal labour field, and introduces a playing field free of rules and regulations or any measures of control, with the obvious danger to human life and the promise of economic waste arising from consequential maritime casualties.

In the field of labour, the Foc system is the greatest enemy to the third world labour supplying countries whose nationals are deprived of the benefits from their labour, and which countries are themselves denied valuable income from the shipping industry.

Shipowners should pay the national wage rate of the country they come from (because that's where the profits end up), not, as many shipowners wish, the prevailing rates in the country a seafarer comes from. It is wrong to pay seafarers who do the same job different rates because of the country they come from, yet all work aboard the same ship.

Because ships flying an Foc flag have a special status different from those flying a genuine "national" flag, the ITF policy lays down much higher minimum standards that apply to them. The ITF Collective Agreement lays down very detailed set of working conditions and minimum standards as well as a wage scale for Foc vessels. Whenever Shipowners' Organisations argue that the minimum wage recommended by the International Labour Organization (US $356 per month for an able Seaman)[221] should apply to all ships, ITF policy applies this absolute minimum only to genuine national flag vessels. To be acceptable to the ITF, Foc vessels should be covered by agreements which include much higher levels,-as much as US $ 821 per month basic pay plus overtime and other extras.[222]

[221] Flags of Convenience - The ITF's Campaign p 35

[222] Ibid, p.8

Under the Foc system shipowners are free to pick and choose what laws they will obey and what wages they will pay. This is what the ITF rejects. The ITF Standard Collective Agreement is designed, not just to provide a good income for the crews, but also to act as a disincentive to shipowners to flag out their ships in the first place.

The fact that most ships are owned by nationals of developed countries, and that the third world countries provide the bulk of the world crew means that the third world crews would be paid inferior wages paid in their home countries.

The ITF campaign is therefore a welcome measure for third world crew. In enforcing this objective the ITF uses a variety of methods and strategies that vary from dockers' boycott action against a ship, to legal arrest procedures through maritime courts. These procedures also vary from country to country.

The ITF Foc Campaign depends crucially on the willingness of dockers, (who get no direct benefit for themselves), to take solidarity action- including sympathy strikes and boycotts- in support of Foc crews which are not coved by ITF acceptable agreements. Shipowners and those who charter their ships know that if they do not have an "ITF agreement" they are at risk of action in many parts of the world ports. Some are prepared to take that risk, but many are not, and the possibility that the crew may get in touch with the ITF makes many owners grant better wages and conditions than they would if the free market was the only factor involved. This has been demonstrated clearly in the recent cases of Eastern and Central Europe and the newly independent states of the ex-USSR. Shippers were jubilant at the crumbling of the Eastern bloc and the commercial opening up of these countries, seeing great opportunities for cheap and well trained crew. But the changes also saw the formation of independent and democratic trade unions. Many of the Eastern and Central Europe's transport workers are now ITF members. Seafarers' unions from Hungary, Poland, Romania, the Baltic

States, the Czech and Slovk Federated Republic, Bulgaria, Croatia and Slovenia and the former USSR have all been accepted into the ITF membership, and ITF collective agreements based on the established benchmark for Total Crew Cost Agreements have been or are being negotiated on behalf of their members.[223]

The worker solidarity sweeping the Eastern and Central Europe will, hopefully, extend to Africa, where crew national wages rates are equally poor. In a cut throat industry where a small number of individual shipowners get very rich by exploiting a large number of poor seafarers, the existence of the ITF to provide a "floor" in the labour market is an encouraging news.[224]

Major cause of casualties:

Human element and Fatigue

The question of fatigue and "human element" has become a main issue within the IMO, because about 80% of all accidents are found to be caused by "human error". Seafarers can not accept being singled out for the blame in maritime casualties. In many cases discussed in chapter three, the causes range from fatigue and bad management, to lack of training,-all factors for which the seafarer cannot be blamed.

[223]. Report of the ITF Bulletin, p.11.

[224]. Not every port is "ITF active" but recent events show that this campaign is bearing fruit. The year 1994 saw the first ITF Foc boycotts in such ports as Copenhagen, Denmark and Gydnia, Poland. For example, a successful boycott action in November 1994 against the Maltese flag **A. Bardis** in Turku, Finland resulted in the signature of a new standard ITF collective agreement and a settlement of US $135,139 for the Russian-crewed, Greek-owned vessel. The action was co-ordinated by ITF Finnish Inspector. See p. 5 ITF Bulletin, supra.

If acceptable measures of navigational safety can not be achieved, sailors working on some Foc ships may, as a last resort, be advised to jump ship in extreme conditions. This may not be a lasting solution, but it will provide a temporary solution to the victims of exploitation who are cheated into entering a contract whose terms are oppressive. The side effect of this measure is that the manning agency who originally enlisted the seaman may refuse to re- enlist them.

Seafarers are part of the international society. A just society must put the interests of its people first, ahead of profits. All social and economic policy must be evaluated by their effects on the working people. Employers need be persuaded to accept that labour is not a commodity, and that workers have a right to fair treatment and dignity in work. It is in the light of these observations that I make the following recommendations.

5.2 RECOMMENDATIONS [225]

The plight of African seafarers is tied to the state of the African shipping industry. From the north to the south, the industry must encourage African entrepreneurship of seagoing vessels. This will facilitate the repatriation to the African owned vessels of the bulk of African seafarers serving on board Foc vessels of foreign registration. South Africa should lead in the creation of the African register, to be followed by other African countries such as Kenya, Mozambique or Liberia. This recommendation must be seen in the wider context of making Africa commercially self-sustaining.

[225]. I have discussed these recommendations with the TGWU. It may be that some of these recommendations may find their way into the Labour Relations, Bill which is currently under debate.

South Africa

In South Africa, any changes in the terms and conditions of employment for seafarers may be made within the framework of changes proposed for the entire maritime industry.[226] This is proposed to begin firstly by popularising the country's ship registry not only to attract foreign shipowners to register in South African registry, but also to create employment opportunities for South African seafarers in the domestically registered foreign owned vessels. This, it is hoped, will in turn encourage foreign investment in the country whilst at the same time expanding the country's taxable capacity through remittances abroad.

There is a reluctance on the part of the South African youth to venture into the maritime industry. It is imperative at this stage that South Africa creates a truly maritime culture. This achieved, South African shippers are expected to employ South African seafarers. In commercial terms, both groups have a stake in the well being of the country to whom they will look in times of difficulties. To do this South Africa must create a shipping environment as user friendly and financially competitive as any in the world today -to attract foreign shipowners to fly its flag by offering a first class registry and administrative environment and well trained crew, who will in turn insist on their own well worth, and thereby having a say on the terms and conditions under which they may accept employment.

[226]. See the Recommendations of the Maritime Transport Policy Working Group Report to the Plenary, July 1995.

Safety

In Lord Donaldson's United Kingdom report on the **Braer** sinking (1994) there are some positive suggestions.[227] The report invites the maritime authorities to consider the following:

- Human factors such as stress, alertness and psychology when considering safe manning at sea.
- Ensure that living, welfare and employment conditions do not fall below those needed to ensure good morals and motivation.
- The master and officers must be able to communicate properly with each other. The Senior Petty Officers must always be able to communicate with the crew.
- Adapt English formally as the international language of the seas with minimum standards of comprehension and ability to communicate.

To achieve the above objectives, however, there should be international mandatory standards on rest periods, working time limits and periods of responsibility in the revised STCW convention.

The IMO Convention on Standards of Training, Certification and Watchkeeping for Seafarers (SCTW) consultants must, in line with decisions made within the IMO and in the joint IMO/ILO Committees on training, consider the following principles:

- The watch system shall be structured to ensure that watchkeeping personnel are not impaired by fatigue. Watchkeepers shall be sufficiently rested before commencing a watch.
- Administrations shall establish working hours taking into account ILO Convention Number 147 (on Minimum

---

[227]. Flags of Convenience: The ITF's Campaign, p. 29

Standards in Merchant Shipping), IMO Assembly Resolution A. 487 (XII), 1978 SCTW Conference Resolution No. 22 and IMO Assembly Resolution A. 722 (18) to ensure it is possible to be sufficiently rested before commencing a watch.

Basic Training for all Seafarers

Donaldson's report recommends that it be ensured that "all crew receive basic craft, safety and survival training as well as higher technical training". ITF has also recommended basic safety training for all seafarers, even those not covered by the said revised STCW Convention.[228]

Sea- going Service

The minimum sea going service for different categories of seafarers has still been untouched in the proposed convention texts. It would be important if guidelines were included requiring minimum sea- going service.

These recommendations, if implemented may prove very useful in minimizing casualties at sea. The fact that the key ILO/IMO and other International conventions are now widely accepted by countries whose combined merchant fleet represent 97% of the world total indicates how successful the IMO policy has been.[229]

[228]. Ibid.

[229]. Ibid, p. 29.

American Bureau of Shipping (ABS)

The American Bureau of Shipping (ABS) has recently called for a major review of the stability and strength of the bulk carriers designed to end the continuing toll of sinking ships and loss of lives.[230] ABS has observed that most of the bulk carriers now being build have structural design weaknesses. The bureau believes new design concepts need to be explored for bulk carriers, and is currently investigating the possibility of hull construction. ABS is promoting its Safe Hull for bulk carriers and intends to make it part of the classification society's rule as soon as possible. The six points that the ABS strongly believes should be implemented throughout the industry are:

- An-evaluation of existing safety margins to allow for dynamic loading, and damaged strength and stability.
- The design of all new bulk carriers should be analysed using finite element methods.
- Particular attention should be addressed to the critical areas of cargo- hold side frames, transverse corrugated bulkheads, cross deck structures and hatch covers and bow structures.
- New concepts should be explored to improve bulk carrier designs.
- Measures should be implemented to ensure that excessive shear forces are not created during loading and discharge.
- A system of rigorous annual inspections of forward cargo-hold side frames and hatch covers should be introduced.[231]

---

[230]. Lloyed's List Friday May 12 1995 p. 3.

[231]. Ibid.

Age of Sea-going vessel

I recommend a maximum age limit for sea-going vessels. This age should not be more than 15 years.

Port State Control

Port state control in South African ports is not as effective as it should be. This study found out that only about 10% of the vessels that come to the port of Cape Town are supervised under this system. South Africa should accede to the relevant International convention to enable its ports to exercise powers of port state control.

Legislation

Labour Relations Act to cover Seafarers

The need has arisen for the peculiar situation of workers in the maritime industry to be addressed. Given that workers in the maritime sector are at the cutting edge of South African increasing incorporation into the global economy, and further given the peculiarly international nature of the maritime industry, and some problems which workers face because of the internationalization of ownership and trade in the sector, the South African law needs to, in some instances, increase the ability of South African workers to play a role in what is essentially a struggle in an industry where national boundaries are becoming increasingly meaningless.

There are essentially three issues which underlie the recommendations contained in this section:

Seafarers work mainly beyond South Africa's Territorial limits

The Labour Relations Act (LRA) (No. 28 of 1956 as amended to date) does not secure the rights of seafarers or other maritime workers in the performance of work in international waters, or within the territorial waters of other nations. The Merchant Shipping Act at section 355(3) would appear to safeguard such rights of the seamen working under the above conditions. However, the section is far from clear for it only refers to specific instances (here- where there is any agreement or award under the LRA which is binding in respect of any seaman employed on board any ship which is registered in the Republic...shall be binding in respect of such seamen while the ship is outside the Republic). The definition of "seaman" under subsection 5 "includes all persons employed or engaged in any capacity on boar any ship.

I recommend that the Labour Relations Act comprehensively provide for the rights of seafarers in a manner that leaves no doubts regarding any issue. One may argue that seafarers are adequately covered under international conventions, and that there is no need for local legislation in respect of such matters. My view is that as a maritime power on its own right South Africa must develop its own maritime law arising from the dictates of its own maritime culture. International conventions must, at all times, remain a minimum guide.

South African Seafarers are often employed by South African companies under Flags of Convenience (Foc) National laws.

The reality of the South African maritime sector is that in the cargo vessel trade, only 15 out of the 68 ships beneficially owned by South African companies are registered in the country's ship register. This means that by using a system of brass-plate companies in countries such as Panama, 53 South African-owned

vessels do business in terms of the national laws of the flag of convenience vessels. Therefore, there is need for the law to maximise the extent to which workers employed by South African companies are protected by South African law, irrespective of the actual flag flown on the vessel itself.

Employment on such vessels will generally be characterised by three different forms of employment:-

i. Direct Employment on fixed terms contract:

Here the registered owner (the brass-plate company) will employ the seafarer direct on vessel-specific contract for a period ranging between 6 - 12 months.

ii. Permanent Employment:

Some South African companies (Eg. Unicorn) will under certain circumstances employ Seafarers directly on permanent contracts. This is clearly the preferred option since it will be the beneficial owner who employs directly.

iii. Employment by Crewing Agencies:

This type of employment is frequent with Safmarine where a subsidiary company, Safman, registered in the Isle of Man, employs South African seafarers on Safmarin's behalf under British and Isle of Man law.

Right to take strike action

Transport and General Workers Union, as an affiliate of the ITF, is part of the campaign against flags of convenience. This campaign has been characterised by dock workers internationally boycotting, or taking blacking action, against ships which do not comply with the minimum conditions of safety and employment as laid down by the ITF. The objective of this campaign has not only been to enforce worker rights, but also to bring pressure on ship owners to take their vessels back to genuine national registers in the countries of beneficial ownership. South African dockers need the right to become part of this campaign, and to engage legally in such boycott actions.

Other areas requiring changes

Section 183 Labour Relations Act:- A new Labour Relations Act should expand the definition of "Republic" to include "internal waters, territorial waters, contiguous zone, exclusive economic zone, and all artificial islands, installations, structures, pipelines, cables and vessels and appliances and their respective adjacent areas as referred to in the Maritime Zones Act, 1994 (Act No. 15 of 1994). The "Republic" to further mean any ship, vessel or craft used or designed to be used for navigation not propelled by oars... or any other vessel with a proven link of beneficial ownership in the Republic irrespective of the actual port of registry of such vessel.

The definition of "employer" needs to be inserted under section 183, which definition should include a provision which extends the definition as follows:-
"Employer" means..., including any person, legal entity, company or institution in the Republic, who, in the case of the maritime industry, it can be shown is the beneficial owner of any ship, vessel or craft irrespective of the actual port of registry.

Ranking of Crew claims

Crew claims should not rank below claims for salvage. Rather they should rank above the salvage claims, or at least on equal footing. The rationale here is that crew claims are normally very minimal in comparison with those of salvage, and where a ship's sale realizes a limited fund, the crew may fail to get their claims if salvage claims are more substantial.

For the same reasons the ranking of preservation costs at the top is prejudicial to the interests of seafarers. The port is able to charge all the money arising from a sale of a ship on account of preservation. In any event, port preservation costs should rank above from date of arrest and not before. Port does not provide any necessaries to a vessel before arrest.

The Admiralty Jurisdiction Regulations Act No. 105 of 1983 should be amended to effect the recommendation on ranking.

Registration of Ships

Whilst there is a need to popularise the South African registry in order to attract foreigners to register on it so as to boost the shipping industry and also to create a maritime culture conducive for expansion of employment opportunities, I fear that a door may, unwittingly, be opened for the South African registry to become a register of convenience.[232] In my view, there should be no problem with the proposition provided:-

- there is a genuine link between the ship owners and the flag the ship flies, and

[232]. Though the proposers of the "relaxation of registration rules theory" maintain that the idea is not to make the South African registry a Foc, the conclusion I have reached above appears to be irresistible.

- the talk of investment and employment creation is real and not a mere talk.

On the other hand, the Merchant Shipping Act, in my opinion urgently require to be updated and brought to par with international practice to accommodate the changes I propose. Further, the Act in my view is too wide. The government is urged to break the Act into several separate acts for greater efficiency. One such acts should be "Registration of Ships Act" as already recommended in other quarters.

Maritime Policy on Training.

The training of seafarers in South Africa is an issue which requires immediate attention. Well trained seamen and masters are hard to find, with the result that there is a considerable dependence on foreign skill. To break this awkward situation the Maritime Industrial Training Board should be enabled to identify training needs in the country, coordinate and standardize training, establish an equitable distribution of training costs within the industry in line with its objectives when it was established in 1990. It should provide equitable training opportunities which cut across the racial divide, and geared to the creation of a maritime culture among school leavers. At present, there is a racial imbalance in skilled seamanship, and competition for the better paying positions tend to reflect this imbalance[233] In attempting to address the problem caused by imbalance training, regard must be had to the fact that South Africa has operated under a policy which sanctioned and championed racial segregation. Hence, policy must be geared not toward affirmative action *per se*, but mainly to promote change in attitude at the work place. It is only when the attitude is transformed that a healthy relationship will exist among crew members themselves, and between them and the officers of a ship.

---

[233]. Unicorn is already addressing this problem and it is hoped that Safmarine and other companies will follow suit.

It is hoped that such transformed attitudes will permeate also into the Department of Transport where the aforesaid racial imbalance is clearly apparent.

Trade Union

The trade union movement in South Africa is firm. However, in the international Maritime Trade Unionism, European and the American unions are the biggest, in terms of economic and power relations. Yet majority of seafarers come from the third world. There is of course potential for disagreement between ITF Seafarers' unions from the industrialised countries where the ships are owned and who see their members' jobs disappearing through flagging out, and those from poorer labour supplying countries. In the long run, however, the most important thing for seafarers worldwide is to be united against shipowner attempts to play one's nationality off against another in search of ever cheaper sources of labour. A way forward for seafaring in developing countries is in joint ventures using national flag ships and including share-holdings by nationals of the country, not as sources of low cost labour which can be discarded as soon as another, cheaper, supply can be found.

Since low wages in Africa will for a foreseeable future continue to attract flags of convenience vessels, the African maritime industry must seriously address the issue of crew wages, their terms and conditions of employment, and raise maritime legal instruments to the level at par with the international practice. I suggest that South Africa adopts the position taken by the German International Shipping Register (GIS) ships: The German Transport Workers Union (OTV) recommends non-German crew to join the union, which then demands national wage rates for member crew seafarers. Third world crew serving on Focs are at liberty to join the foreign unions. South Africa may negotiate or enter into memorandum of understanding with foreign countries to allow South African seafarers serving on board Foc vessels to join foreign

unions. Crewing is an industry where unionised labour should be encouraged, and employers need to negotiate only with one union or a federation of unions to ensure that pay and other conditions are uniform in the industry.

Insurance

The government should legislate for crew insurance cover commensurate with the risks at sea. Peculiar nature of seafaring should influence the amount of cover. Seafaring as a profession has no substitute on land. Hence if for some reason a seaman looses his employment, he may not get another job. His only remedy will be his insurance.

Seafarers' Welfare Fund

There should be established the Seafarers' Welfare Fund under management of a board of trustees. The fund should make provisions for retirement, medical aid and prolonged disability.

Employment Benefits

A mariner's contract of employment should include both pay and non-pay benefits which give the greatest total material and non-material satisfaction to an employee. This kind of arrangement makes work the main source of the individual's economic, social and psychological fulfilment through which man can meet challenges and overcome obstacles, develop their aptitudes and abilities and enjoy the satisfaction of achievement. Because seamen contribute to the development of the whole universe, they deserve to get satisfaction from their employment just as do their counterparts who work on land. The principles of free competition can not apply unmodified to an industry without which many communities could not survive. The decision to make the life

of a seaman worth living must be taken on the basis of need, not just on whether they are profitable financially. Broader social costs and benefits must be taken into account in this important transport sector. In South Africa and other African countries, a way forward in seafaring lies, I believe, in join ventures using national flag ships and including share holdings by nationals of the country, not as sources of low cost labour which can be discarded as soon as another, cheaper, source becomes available.

Like the ITF, I am most strongly persuaded that the maritime industry must be subject to proper international regulation. There must be a genuine link between the owner of the ship and the laws and social conditions which apply to it. Developing countries must be encouraged to build up their own merchant fleets and benefit directly from the advantages which flow from them . At present it is the employers from rich countries which draw the profits from cheap labour, throwing nothing but a few crumbs to the economies of the countries that supply it.

5.2.1 _Comparative Approach at providing Solutions to problems_ of Maritime Legal Labour

How may the principles contained in the Shipping Law on Maritime issues with International conseguences and implications (such as the control of Pollution and the regulations of Navigation) be used to enforce uniform wages and conditions of service for seafarers?

International conventions have with a measure of success been used to regulate marine pollution and international navigation. The approaches which secured these successes in these two areas of international concern may in the future be adopted to enforce uniform conditions of employment for seamen.

Pollution

The world outcry arising from the sinking of the Torrey Canyon in march 1967, and later followed by the sinking of Amoco Cadiz, and the threats of marine pollution; the threat of radioactive; these and others like them have in the recent years galvanized the international community into action.[234] Alerted, policy makers, legislators and the public generally became aware of the growing problem of marine pollution. The results have been very detailed conventions which, apart from being widely, almost universally ratified, have proved very effective.

Prior to the Law of the Sea Convention 1982, the MARPOL Convention (which superseded the 1954 Oil Pollution Convention) was the relevant marine pollution convention. Now, however, the Law of the Sea Convention places obligation on flag States to adopt pollution regulations for their vessels which "at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.[235] Enforcement jurisdiction is given to the coastal state by way of obligation, that is, the coastal state is obliged to exercise judicial jurisdiction where pollution laws are violated by their ships regardless of where the violation takes place. In particular, flag State must lay down penalties adequate in severity to discourage violations; prohibit their vessels from proceeding to sea unless they comply with the requirements of the international rules and standards; ensure their vessels carry the certificates required by such rules; periodically inspect their vessels; and investigate alleged violations of the rules by their vessels, etc.[236]

[234]. The Torrey Canyon ran aground on the Seven Stones Reef discharging 118,000 tons of oil into the sea, and Amoco Cadiz capsized 11 years later discharging 210,000 tons of oil into the sea.

[235]. Article 211(2)

[236]. Article 217.

The most radical innovation made to the enforcement of marine pollution standards by the Law of the Seas Convention concerns powers given to port State on pollution: a state may arrest and prosecute a vessel in one of its ports which is alleged to have violated that state's pollution laws or applicable international rules in its territorial sea or EEZ. Further, a port State can also take legal proceedings where a vessel is alleged to have discharged polluting matters outside the state's territorial sea or EEZ "in violation of applicable international rules and standards established through the competent international organizations or general diplomatic conference".

Collision

The first navigational rules of the road were drawn up in 1840, and enacted in the British Steam Navigation Acts in 1846. These were improved upon, and by 1910 there emerged the 1910 Regulations which remained in force until 1954, followed by revised set of Rule in 1977,-the 1977 Collusion Avoidance Rules. These rules have been successfully used to regulate navigation.

Even international law relating to the consequences of collusion at sea (especially relating to fault and the apportionment of damages recoverable arising from an accident caused by negligence), the practice in which states varied significantly, have now been universalised trough international convention. The 1910 Convention for the Unification of Certain Rules of Law with respect to collusion between vessels tackled contributory negligence head on, and established principles which, for the states parties thereto, set the baseline for domestic legislation. Thus the English or South African Maritime Conventions Acts follow the minimum format. None party states continue to be guided by this convention.

The International Convention on Maritime Liens and Mortgages, 1993

This is another area in which the international maritime community may succeed in universalising the rules relating to liens and mortgage.[237] The parties to this convention recognise the desirability of international uniformity in the field of maritime liens and mortgages, and, being conscious of the need to improve conditions for ship financing and development of national merchant fleets, are convinced of the necessity for an international legal instrument governing maritime liens and mortgages.[238]

The success of above conventions is due to the publicity given to the hazards associated with the events desired to be regulated. It has been realised that unless there are universally agreed rules, it may be very difficult to regulates these activities or to determine liability in the event of doubt. In some areas the problems of marine pollution have led to states which can agree on little else agreeing to prevent marine pollution. Thus both Israel and its Arab neighbours, as well as Greece and Turkey, are parties to the Mediterranean Convention; and both Israel and Arab states of the Gulf have signed the Kuwait Convention.

It is clear that the international community has prioritized the need to regulate activity in these areas, hence the measure of success. To achieve approximate results for seafarers, the plight of seafarers must be brought to the attention of the world. Whenever there is a casualty at sea, the maritime industry must not highlight the damages caused to the ship, the cargo or the environment alone, but also the injuries and death suffered by the crew must be brought to light, so that the world community

[237]. The Convention comes into force in 1996 after being signed by the minimum number of states required. This convention is likely to be very successfully ratified.

[238]. See the Preamble to the Convention.

may be aware that human beings (who, besides themselves have wives, husbands, children and parents to take care of) work and live on seas. It is only after such an awareness is achieved that universally applicable conventions may achieve wide ratification.

5.2.2 "Flags of Convenience: Minimum Employment Conditions Convention"

There is an urgent need for an international convention prescribing minimum employment conditions on board flags of convenience vessels. The proposed convention will apply to all ships which fly flags of convenience. It may not apply to ships with genuine links with countries of registration. These kind of ships may offer such employment terms and conditions as are determined by national interests. The convention may formally adopt a definition of "flag of convenience". It will cease to regard the flag of convenience as an anathema to shipping. This convention should accept the whole concept, and even encourage states to register under it, since it will be as good as any registry. The motivation for this convention will be set out in its preamble and will, inter-alia, include the recognition that:

- Seafaring is a profession in which national boundaries are becoming increasingly meaningless, and the need to secure the interests of every seafarer as though they were employed by same employer;
- Seafarer as the worker who, by his ardours, lonesome and worrisome employment feeds the world through navigational transport;
- Seafarer as absentee family man or woman;
- Seafarer as a worker with little possibility of job substitution on land.

Whilst the ITF continues to perform a commendable job for seafarers, ITF's work falls below the needs of the bulk of the third world's seafarers working on flags of convenience vessels: the ITF's Collective Agreement, Total Crew Agreements or National Agreements have, apart from labour boycotts in certain ports, no force of law and therefore apply only to those shipowners that accept them. The ITF as a workers' federation must not be left alone to fight for the plight of seafarers. Its work must be taken a step further, by clothing it with a universal legality.

The justification for the proposed convention is that shipping is an international business. With very minor variations shippers operate their businesses under same conditions. They suffer virtually same operational costs, same insurance costs, same navigational costs and same building costs. If other shippers are able to provide acceptable terms and conditions of employment for seafarers, there is no justification why other shippers can not.

The proposed convention should clothe coastal states with legislative and enforcement powers to board and inspect a Foc vessel docked in its port and within its EEZ, and to inspect the conditions on board and the terms under which the seafarers are engaged. It should also empower the coastal state to exercise full powers to enforce universal employment conditions for seafarers. It should also empower any court before which a matter is brought to declare "oppressive null and void" the terms and conditions of employment which, as evidenced by the contract of employment or the articles are, on the face of the records, manifestly unjust like in the MV "Vecherniy Leningrad"[239]. In such events, the terms contained in the convention becomes applicable automatically.

[239]. Supra, where the Master, the highest paid officer on board, earned the wages of US$ 8 per month. Such a contract of employment would not be valid under the proposed convention.

I foresee less resistance to the acceptance of the proposed convention. States, being desirous of improving the terms and conditions under which their nationals work, would not hesitate to ratify the convention.

I am very strongly persuaded that seafaring is an occupation where freedom of contract may still admit occasional limitations.

SELECT BIBLIOGRAPHY

BOOKS

Allan Rycroft and Barney Jordan, A Guide to South African labour Law, 2nd ed., (Juta & co. ltd., Cape Town).

Australian Labour Law: Cases and Materials, (Butterworth, Sidney, 1990).

Benedict on Admiralty V.1. 7th ed., (New York, Mathews Bender, 1974).

Chorley & Giles, Shipping Law 8th Ed.

C.L.R. James, Grace C Lee, and Pirre Chaulieu, Facing Reality, (Detroit 1974).

C. Dillon & J.P.Van Niekerk, South African Maritime Law and Marine Insurance: Selected Topics, (Butterworth, Durban/Pretoria, 1983).

Christopher Hill, The World Turned Upside Down: Radical Ideas in the English Revolution, (New York, 1972).

Charles Napier Robinson, The British Tar in Fact and Fiction (London, 1964).

Eric Hobsbawn, The general Crisis of the European economy in the 17th Century,(1954).

Garry B. Nash, The Urban Crucible: Social Change, Political Consciousness, and the Origin of the American Revolution (Cambridge, Mass., 1979).

H.L.A. Hart, The Concept of Law, (Clarendon press, Oxford, 1961).

Jonathan Kitchen, Labour Law and Off-shore Oil, (London, 1977).

John Hare, Arrest of Ships (Lloyed's of London Press ltd, London 1987).

John Rule, The Experience of Labour in Eighteenth Century English Industry (New York, 1981).

Joyce Appheby, Economic Thought and Ideology in Seventeenth Century England (Princeton, N.J., 1979).

Karlmarx, Capital, A Critique of Political Economy, trans Ben Fowkes (New York, 1977).

Kahn Frend, Labour and the Law, (1983).

Martin J. Norris, The Law of Seamen, V.1 3rd ed, (Rochester, NY, 1970).

M. Anstey, Negotiating Conflict, (1991).

Ned Ward, The Wooden World Dissected: In the Charter of a ship of war, (1708: reprinted London, 1756).

P. Wailer, Governing the workplace: The Future of Labour and Employment Law, (1990).

Peter Clerk, "Migration in England during the late Seventeenth and early Eighteenth Centuries, (London, 1979).

Robert W. Malcolmson, Life and Labour in England, 1700-1780 (New York, 1981).

Redikker, Between the devil and the deep blue sea (Cambridge Univ. Press. NY, 1987).

Richard B. Morris, Government and Labour in Early America, (New York 1946).

Robert Crime, Shipping Law, 2nd Ed, (London, Sweet & Maxwell, 1991).

Ralph Davis, The Rise of the English Shipping Industry in the Seventeenth and the Eighteenth Centuries, (London, 1962).

Slush, The Navy Royal: Or a sea cook Third Projector, (London, 1709).

Sir William Petty, "Political Arithmetic", The Economic writings of Sir William Petty, ed. Charles Henry Hull (Cambridge 1899).

Theodorus Poolman, Principles of Unfair Labour Practice, (Juta & co. ltd., Cape Town).

Thomas J. Schoenbaum, Admiralty and Maritime Law (West Publishing Co. St. Paul, Minn. 1987).

ARTICLES

C O'Regan, "Possibilities for worker participation in Corporate Decision Making", (1990) Acta Juridica, p.113.

H. Forest, "Political values in industrial Employment Law", 1980 MLR 361.

Runyan, "The Rolls of Oleron and Admiralty Court in the Fourteenth Century England", 1975 American Journal of History, p.95.

Shields, "Seamens' Rights to Recover Maintenance and Cure Benefits", 55 Tul. L. Rev. 1046 (1981).

SKUD No. 3 October 1994 p. 11 "The Worldwide demand for supply of Seafarers"

Barlow's Journal (London, 1744) "The Life and Adventures of Mathew Bishop".

Tony Person, "Ship Supply of South Africa's oldest business", South Africa Shipping News and Fishing Industry Review, (Nov/Dec 1994) p.9.

UNPUBLISHED WORKS AND PAPERS

Eric K. Okumu Ogola, Judicial Activism: Kenya's Post-Independence Experience, (LLB) (Dissertation, Nairobi, 1990).

Safmarine/Unicorn/ Griffin: South Africa Maritime Business Location, May 1995

NEWSPAPERS AND MAGAZINES

Cape Times.

Lloyed's Register of World Fleet Statistics, December 1993.

Lloyed's List.

South Africa Shipping News and Fishing Industry Review (Non/Dec 1994).

SKUD No. 3 October 1994.

Seaviews, vol. 4. No. 10 October 1994.

Seafarers' Bulletin No. 9 of 1994.

The Daily Nation (Kenya).

The Argus.

OFFICIAL REPORTS AND PUBLICATIONS

International Labour Office, Collective Bargaining in Industrialised Market Economy, (Geneva 1973).

The Donovan Commission Report.

The Complete Weihahn Report, (Johannesburg, Lex Patria Publishers, 1982).