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## CHAPTER 9

### The role of manning agencies or the seafarer's recruitment in the maritime employment market

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**Résumé:** Dans le cadre de l'éclatement de la fonction armatoriale, les sociétés de manning interviennent dans la gestion de la main d'œuvre maritime, afin de fournir des équipages, de gérer les contrats d'engagement maritime, de rémunérer les gens de mer, parfois pour fournir et embaucher elles-mêmes les gens de mer et les mettre à la disposition de l'exploitant du navire. Les sociétés de manning sont parfois des ship managers, des exploitants de navires. La conférence maritime internationale et de la Baltique (BIMCO) propose deux contrats type SHIPMAN (Standard Ship Management Agreement) et CREWMAN, centré sur l'équipage, distinguant Crewman A (Cost plus fee) pour le compte de l'exploitant du navire et Crewman B (lump sum) en son nom propre. L'encadrement des sociétés de manning hésite entre approche internationale et approches nationales. La convention du travail maritime de l'OIT de 2006, convention consolidée et universelle, constitue une base substantielle minimale. L'Union européenne n'a pu adopter, jusqu'à présent, une directive concernant les obligations des Etats fournisseurs de main d'œuvre, liée à la mise en œuvre de la convention de l'OIT. L'Espagne fut le premier Etat membre de l'Union européenne à ratifier cette convention du travail maritime dès 2010; les agences de manning installées en Espagne ont été certifiées dans le cadre d'une procédure administrative formelle, sans lien avec la convention relative au travail maritime. La loi de 2014 sur la navigation maritime affirme la responsabilité solidaire des armateurs et des agences, installées en Espagne, qui recrutent des marins ressortissants nationaux ou résidents, pour des embarquements sous pavillon étranger. Dans un marché international du travail, la mise en œuvre effective de l'encadrement des sociétés de manning constitue évidemment un défi.



## 1. Introduction

The qualification as maritime companies of those acting as intermediaries for recruitment seafarers has become a problematic question. In fact, in this industry, the interposition of the employer figure is very frequent, existing agencies whose are involved in the signing of the maritime employment contracts, but they are not the receivers of the seafarers' work. Stated more clearly, in the maritime industry it is very habitual to found intermediaries specialised in the recruitment of seafarers who are then «granted» to provide services on board a ship operated by someone other than the one who has formally contracted the services and even different to the one who has actual ownership of the property. The purpose of these practices is not only to speed up the contracting in the maritime ambit, to which the ship owner was once directly dedicated, but, of course, to consciously reduce the labour costs of ship operation. It is clear that the end also achieved in this way is none other than the elusion of the final responsibility arising from the assuming of the condition of employer to the intermediary, who sometimes is but a fictional employer without the means to face any claims the seafarers may make<sup>1</sup>.

In line with this issue, we must emphasise the *modus operandi* used for recruit seafarers, improved thanks to the possibilities provided by open registers<sup>2</sup>, the existence of an absolutely globalised maritime employment market<sup>3</sup>, and «disinterest» from states in regulating the labour factor in maritime transport, aware of the indubitable role that this industrial sector offers in the framework of the global economy<sup>4</sup>. Various doctrinal works have been aimed at the study of this reality, focusing partially or wholly on the analysis of the organisations that act as intermediaries in the seafarers recruitment and their qualifications as employers from the legal perspective<sup>5</sup>, distinguishing between the shipping agencies<sup>6</sup> on the one hand and the manning agencies on the other<sup>7</sup>. Regardless for the moment of the

1) In the same sense, on various occasions, see Meléndez Morillo–Velarde, L (2002), *La dimensión laboral del empresario maritime*, Ediciones Laborum, Murcia.

2) McCuskey, W.S (1998), «Registers and manning: How some compare», in AAVV, *Which register, which flag...now? Lloyd's Ship Manager, Shipping News International*, Lloyd's of London Press, inc. Essex House, New York, October 19-20. Also, Laguna Ibañez, F (1960), *A propósito del contrato de enrolamiento*, Instituto editorial Reus, Madrid, 20. Alonso Barcón, A (1978), *La condición obrera de los marinos mercantes. Aspectos sociológicos del trabajo en el mar*, Akal editorial, Madrid, 192 and ff.

3) Wu, B. and Winchester, N (2005), «Crew Study of seafarers: a methodological approach to the global labour market for seafarers», *Marine Policy*, 29, 323–330.

4) For a general description of this reality, vid. Dimitrova, N (2012), *Seafarers' rights in the globalized Maritime Industry*, Kluwer International, Netherlands, 12-14.

5) Bornaechea Fernández, J.I (1985), «Contrato de embarco entre trabajador español y armador extranjero, interviniendo consignataria española. Informe sobre la naturaleza jurídica y la legislación aplicable al contrato», *Relaciones Laborales*, vol. II, 805-815. Ruiz Soroa, J.M and Díaz Sánchez, J (1986), «Reflexiones sobre las banderas de conveniencia y el derecho marítimo y laboral español»,

role played by shipping agencies, we will now focus on the manning agencies and the instruments that these companies use in the framework of intermediation in maritime labour in the world-wide context. I refer specifically to the ship management contracts, but above all, for their very high specialisation in this ambit in crew management contracts, given that these latter are dedicated to crews only while the former (ship managers) also undertake the technical management, commercial administration, ship operation and chartering as well as the recruitment of the ship's captain and crew. Despite the differences between the types of contracts mentioned, from the employment point of view it is true that both have the same question mark – to whom to channel a triangular relationship of this type from the legal point of view, since its purpose is to protect seafarers from the diversification of subjects in the ambit of their recruiting, contracting and later undertaking of services<sup>8</sup>.

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*Anuario Derecho Maritime* vol. IV, 71 and ff. In a confused way with regard to employment questions, Górriz López, C (1998), «Análisis comparativo entre los Acuerdos-tipo *Shipman* para la gestión de buques, *Crewman*, para la gestión de la tripulación», *Anuario de Derecho Maritime*, vol. XV, 421-451. More recently, and dedicating an entire chapter to this question, Meléndez Morillo-Velarde, L (2002), *La dimensión laboral del empresario marítimo*, Laborum, Murcia, 237–271.

6) On this specific aspect, among others, Orione, M (1995), «Brevi osservazioni sull'arruolamento di marittimi per il tramite dell'agente raccomandatario», *Il Diritto Marittimo*, vol. II, 159-160. Other works on the Italian doctrine can also be consulted in the work of Bevilacqua, S (2005), «Liberalizzazione e flessibilità del mercato del lavoro marittimo: le agenzie di lavoro e l'arruolamento dell'equipaggio», *Rivista di Diritto dell'economia, dei trasporti e dell'ambiente*, vol. III, 1-10.

7) Shipping agencies are organisations which in some cases act as intermediaries in the contracting of seafarers. They are individuals or companies that act on behalf of the ship owner –manager or charterer– who assist them in all the necessary legal acts –administrative, technical and commercial– as well as materials for dispatching the ship in the ports it visits [Gabaldón García, J.L and Ruiz Soroa (2002), *Manual de Derecho de la Navegación marítima*, Marcial Pons, Madrid, p. 379. Ruiz Soroa, J.M (1990), *Manual de Derecho Marítimo: El buque, el naviero, personal auxiliar*, Escuela de Administración Marítima, IVAP, Oñati, 123-124]. In principle, the functions of the ship's agent include the recruiting and contracting of the crew, although at the same time the statutes constituting these companies rarely refer to these activities. Despite this, personnel recruitment and contracting personnel who then provide services in the ambit of the organisation of the ship owner or ship manager is a widespread practice by ships' agents. The differences between manning agencies and agents is that a) manning agencies do specifically and formally recruit personnel; b) agents undertake more functions than manning agencies, such as, for example, the commercial management of the ship in port, which brings them close to ship management contracts; c) usually the ship does not visit the port in which the manning agency is located but it does where the agent is located; d) the purpose of the agent's activity is not only to recruit workers and sign embarkation contracts but also includes paying wages, determining holiday periods, giving orders relating to embarking and disembarking, etc, so that to the workers it has a wide range of powers belonging to the employment entrepreneur (but on behalf of the ship owner).

8) For a specific study of crew management agreements, see Díaz de la Rosa, A (2011), «*Los contratos de gestión de tripulaciones de buques. Crew Management Agreements*», La Ley, Madrid.

## 2. Crew administration agencies and crew manning agreements

As stated, crew administration agencies are trading organisations that act as intermediaries for recruiting seafarers in the shipping industry and, very especially, in the context of the open registers. These companies form part of the group of organisations that act in current maritime traffic as external ships' managers whose rise, heyday and later consolidation in the sector is due to diverse causes<sup>9</sup>. Generally, it can be said that their existence fulfils the need of shipping companies to adapt to current maritime navigation conditions, the complexity of which requires the ship owner to resort to third parties who, depending on their specialisation, undertake various aspects of ship management including, in this case, crew administration. In fact, the resort to companies that recruit and/or contract ships' crews is so frequent that these are not only well known in the sector but are easily accessible to ship owners<sup>10</sup>. In addition, and despite what one might think, they act almost without restriction by locating themselves in places that are the most convenient to them, normally in emerging maritime labour supply countries<sup>11</sup>. It is therefore not strange that they have formed real world-wide networks where crew managers contact ship owners with the crew to provide services on the ships they operate or own.

The contractual relationship that connects the ship owner to the crew management company is through the signing of a manning agreement<sup>12</sup> through which the manager

9) The reasons for their appearance depend on each historic moment in which they arise and are developed. Thus, Rodríguez Docampo, M.J (2014), «*Contrato de gestión naval: criterios para la determinación del régimen jurídico*», doctoral thesis defended in the University of La Coruña, 2014, 23 and ff. This work can be consulted at [www.ruc.udc.es/bitstream/2183/.../RodriguezDocampo\\_MariaJose\\_TD\\_2014.pdf](http://www.ruc.udc.es/bitstream/2183/.../RodriguezDocampo_MariaJose_TD_2014.pdf)

10) It is sufficient to enter the phrase «manning agencies» in Google for an idea of what the above is saying.

11) See for example, the situation in some Asian countries, Hawkings, J (2001), «Quality shipping in the Asia Pacific Region,» *International Journal of Maritime Economics*, vol. 3, number 1, 79-101 and Zhao, M. and Amante, M.S.V (2005), «Chinese and Philippine seafarers: A race to the top of the bottom,» *Modern Asian Studies*, vol. 39, number 3, 535-557. Taking into account that the predominant nationality in maritime labour is Philippine, we cannot fail to quote some works on the subject, such as Margatas, S.V.A (2003), *Philippine global seafarers: A profile*, Seafarers International Research Centre (SIRC), Cardiff. Also, Terry, W.C (2009), «Working on the water: On legal space and seafarer protection in the cruise industry,» *Economic Geography* 85 (4), 463-482. Meanwhile, and to show the size of these practices in the Philippines, see the official Web site of that country's Department of Employment and Labour with the POEA agency (Philippine Overseas Employment Administration) which manages the expatriation of seafarers with that nationality. Recently, and in relation to the case of Vietnam, vid. Nguyen, T.T; Ghaderi, J; Caesar, L.D and Cahoon, S (2014), «Current Challenges in the Recruitment and retention of seafarers: An Industry Perspective from Vietnam,» *The Asian Journal of Shipping Logistics*, vol. 30, number 2, 217-242.

12) On agencies acting as intermediaries for contracting seafarers, Martín Osante, J.M (2001), *La responsabilidad civil del naviero por abordaje*, Government of the Basque Country Central Publications Service, Vitoria-Gasteiz, 235-236.

commits to the owner to manage the crew in exchange for remuneration. With regard to the management of the crew and its contractual channelling, the parties resort to the so-called forms law<sup>13</sup>, that is, standard contracts that can be called «atypical» in that they are not covered by international law and their compliance is relegated to the strictly private ambit. This is because they are crew agreements created by the BIMCO (Baltic and International Maritime Council<sup>14</sup>) which, as such, is an international maritime association accredited as a non-governmental organisation with the United Nations. This organisation has created various contractual modes, notably including for our interests those dedicated to crew management. Originally, the first of these formulas created by the IMCO was the 1988SHIPMAN agreement (Standard Ship Management Agreement), modified 10 years later, the latest edition of which is that of 2009. Originally, this agreement covered a wide range of commitments relating to the administration or management of the ship, including human resources. Indeed, as well as the obligation assumed in the management of crews, they are also dedicated to technical management (choice of the ship's maintenance inspectors, repairs, etc) or commercial management (services for chartering, insurance, accountancy, collaboration in the purchase and sale of the ship or bunkering). It was soon necessary to diversify the diverse types of management through other, more specific, instruments, creating the standard CREWMAN agreement in 1994, limited exclusively to crew management<sup>15</sup>. This last has been used by the ship owners exclusively either in combination with the previous one or excluding elements relating to the crew from the SHIPMAN agreement. As well as the purpose of the contract itself, the fundamental difference between the two agreements lies in the way in which the ship manager or crew manager relates to the crew or, to be more exact, in the way in which the managers exteriorise their position with the workers according to both agreements. So, while in the SHIPMAN agreement, the manager generally acts on behalf and in the name of the ship owner, in the CREWMAN Agreement, the administrator acts on behalf of the ship owner but in its own name<sup>16</sup>. In both cases, it must be remembered that the seafarer signs the maritime employment contract with the agency, thus producing the triangular relationship mentioned above.

Over time, the needs of the increasing specialisation in the outsourcing of crew management and its adapting to the new international regulations to be obeyed such as the ISM Code, led the BIMCO, as occurred with its Shipman counterpart, to create the CREWMAN A and CREWMAN B agreements, in force since 2009, which

13) See Boi, G.M (2008), *I contratti marittimi. La disciplina dei formulari*, Giuffrè, Milan, especially pp. 42–44 which speak of the CREWMAN A and CREWMAN B contracts.

14) <https://www.bimco.org>

15) Górriz López, C (1998), «Análisis comparativo entre los Acuerdos-tipo *Shipman* para la gestión de buques, *Crewman*, para la gestión de la tripulación», *Anuario de Derecho Maritime*, vol. XV, 422.

16) Górriz Lopez, C (1998), «Análisis comparativo entre los Acuerdos-tipo *Shipman* para la gestión de buques, *Crewman*...», loc. cit. 435.

set the rules for the contractual relationships arising from the crew management contracts. In essence, the first pages of both instruments contain various mentions identifying the main elements of the contract so that for these purposes there is no discrepancy. However, according to their contents, they differ in the following aspects. Firstly, and as the most important aspect, in CREWMAN A, contracting is undertaken on behalf of the ship owner, compared to the CREWMAN B agreement where it is the manager who contracts the crew in its own name. In the standard CREWMAN A agreement, the manager, acting on behalf of the ship owner, assumes as an additional part of the contract the same obligations as in Shipman 98 with regard to the preparation of budgets and annual balance sheets and may also assume accountancy services as an addition to the contract, which does not occur in the CREWMAN B agreement. Likewise, in the former, insurance policies can be negotiated and contracted not only relating to the crew but of other types, something that does not occur in the CREWMAN B. Another difference between them relates to the way in which services are paid for. Not in vain is the CREWMAN A agreement called Cost plus fee, meaning that the ship owner pays a predetermined sum monthly and in advance, while in the case of CREWMAN B, a lump sum is paid, also monthly in advance, that covers all the costs of managing the contract. Finally, the non-compliance penalties are similar except for the amount to be paid. Not in vain must 10 times the annual sum be paid in CREWMAN A compared to CREWMAN B where the payment is six times the lump sum. In both cases, the manager is freed of all liability for the crew's acts or omissions unless there is evidence of these being due to the so-called fault in selecting.

Despite these differences, the typical obligation relating to the crew management is identical. Both involve:

- a) Selecting, contracting and managing the crew, including, when applicable, the negotiation of salaries, the negotiation of pensions, social security contributions, taxes and other obligatory concepts relating to their employment, payable in the state of residence of each crew member.
- b) Ensuring that the requirements of the flag state's legislation are complied with regarding the rank, qualifications and certificates of the crew as per the requirements of STCW95 and also employment regulations such as the crew's taxes and social insurance.
- c) Ensuring that all the crew members have passed a medical check-up by a qualified doctor (flag state requirements or other, higher, medical standards agreed with the ship owners).
- d) Ensuring that crew members work with a common language (as per the ISM Code and the ISG Code – international safety code), as well as a sufficient knowledge of English to carry out their work safely (multi-cultural crews).
- e) Ensuring that crews receive training in the ISM Code.
- f) Instructing the crew to obey all the reasonable orders of the ship owners or of



the company, including orders relating to safety, and navigation, preventing pollution and protecting the environment.

- g) Ensuring that nobody sails without the prior consent of the ship owners and/or of the company.
- h) Taking care of the crew's transport, including their repatriation.
- i) Crew training.
- j) Undertaking trade union negotiations.
- k) If the company's policy on alcohol and drugs requires measures to be taken before the crew joins the ship, undertaking these measures.

It is thus possible to state that for the purpose of the contract, from the perspective of the obligations the manager assumes regarding the crew are very wide, which raises enormous questions regarding its qualification as an employer. In this sense, the fact that in CREWMAN A contracting is undertaken on behalf of the ship owner, compared to the CREWMAN B where, as we have stated, it is the manager that contracts the crew in its own name, has meant that from the perspective of the commercial law studies, the ship owner is considered –depending on the contents of the maritime employment contract<sup>17</sup>– as the real employer of the crew in CREWMAN

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17) In fact, this is the posture of British courts, which although attaining a laudable objective from the employment law perspective, is based –in my judgement– on an excessive formalism by making the employer dependent on the ship owner as indicated in the seafarer's employment contract. In this sense, see the judgment handed down by the High Court of Justice Queen's Bench Division Commercial Court, *Ferryways v Associated British Ports* (2008) EWHC 225 (Comm), in a case in which a ship's officer was hit by a tug vehicle driven by an employee of a port operator to which the defendant had sub-contracted this activity, resulting in death. The ship's P&I Club paid the relevant compensations for death and the repatriation of the body to the family of the deceased seafarer. The plaintiff in this case, as the bareboat charterer of the ship and member of the insurer, tried to recover the amounts paid by suing the port operator. The question in this case was none other than to determine whether these sums were recoverable, which in turn depended on whether or not the plaintiff (bareboat charterer) was the employer of the deceased seafarer. In this case, the bareboat charterer had contracted the crew management and the ship's technical management separately. With regard to the personnel management contract, this had been signed with the agency Ambra Armatorial Limited Cyprus («Ambra») using the BIMCO CREWMAN A agreement for the purpose. In virtue of the crew management contract between both companies, the plaintiff was classified as the owner while Ambra appeared as the crew manager. The definition of «company» in the document was, «*The owner of the vessel or any other organisation or person who has assumed the responsibility for the operation of the vessel from the owner and who, on assuming such responsibility, has agreed to take over all duties and responsibilities imposed by the ISM Code.*» In the maritime employment contract, the employer was Ambra and the employee, the deceased seafarer; that is, no reference is made to the bareboat charterer in the context of the employment contract. Despite these data, typical in this context, the British court argued that although it is sometimes excessively formalist, given that it did not analyse the exercising of power to direct, it reached the conclusion that the bareboat charterer was also the co-employer together with Ambra regarding the obligations and responsibilities arising from the employment relationship. Thus, the British court stated that, 1) although only Ambra appeared in the maritime employment contract as employer,

A, while in CREWMAN B, as far as the manager contracts in its own name, it will appear as employer for the crews. This distinction means that obviously the operators in the sector use and in fact is recommended to use the second of the standard agreements, above all the large ship owners needing large-scale labour supply. However, regardless of this doubly lucky manifestation giving rise to various theories being prepared from the commercial law perspective on the representation, agency and/or mandate for legally channelling a type of policy exempt from *ad hoc* regulation also, generally, in national rights<sup>18</sup>, the truth is that from the legal and labour law point of view the situation is not so simple, if I may say so. Indeed, for this branch of law, an employer is anyone who exercises and assumes the so-called power to direct the crew, regardless of the formal mechanism used by the intermediaries to avoid labour law's responsibilities in this context. One thing therefore seems clear, without prejudice to the parties or employers involved in recruiting seafarers trying to avoid appearing as employers through the type of agreement used, the truth is that from our perspective what is really important is who exercises the employer's powers to the seafarers.

there was no specific exclusion for imputing responsibilities to others; 2) the law applicable to the contract was the law of the flag, so that the judge considered that the legal regulations chosen were the more favourable to the charterer than to the crew agency, and 3) although the contract stated that in principle only Ambra could be considered as the beneficiary of the provision of the seafarer's services, in reality a detailed analysis of the clauses in the contract led to a different response – in particular, those relating to the procedure for resolving conflicts, the application of the company's code of conduct and its policy regarding safety management systems (SMS). In this sense, the judge understood that as the crew management agency was small, it was difficult for it to have sufficient personnel to carry out the conflict resolution procedures, that it had capacity to set up a code of conduct or that it could structure an SMS for each of its client's ships. The judge also considered whether the worker had previously provided services for any of the bareboat charterer's ships, which in fact happened. Not in vain did the maritime employment contract signed with Ambra date from 2005 and the seafarer has provided services for it from the start of 2003 through voyages contracts. Thus this judgment shows that, without prejudice to the contents of the maritime employment contract identifying the agency and not the principal as the employer, it was necessary to investigate beyond the formalities. It remains to be seen what would have occurred if the crew management agency had been larger and with greater capacity, to manage even technical questions.

18) At least in the Spanish case, since until the adoption of the Maritime Navigation Law in 2014, there was no specific regulation for this type of contract, which can now come under the standards in Title IV of the naval management contract, articles 314 and ff, the concept of which is, «*Through the naval management contract, a person undertakes in exchange for a remuneration, to manage on behalf of the ship owner all or some of the aspects involved in the operation of the ship. These aspects may refer to the commercial, nautical, employment or insurance management of the ship*».

### 3. How to handle crew management legally through manning agencies? Between an international regulation of minima and national legislative solutions

Given the above, it is not easy to respond from a juridical point of view to a challenge such as that of the intermediation of maritime labour in the globalised context. In this sense, the most appropriate would be that given any phenomenon on which capital is supported to evade the national legal and employment standards, one could also respond with an international regulation that could play in the same league and with the same intensity. To this end, and as is well known, the international organisation with competences in the matter is the ILO which, from its start, has been concerned precisely with the existence of manning agencies in the context of labour relations in general and especially in the maritime sector. In fact, one of the first regulatory actions carried out by this organisation was the adopting of the 1920 Convention 9 on the placement of seafarers<sup>19</sup>, later modified by Convention 179 of 1996<sup>20</sup> on the same question. From that time to date, the ILO has not ceased in its interest in the regulatory treatment of these intermediation activities, the latest contribution being, without looking further, in the Maritime Labour Convention (MLC 2006) in the context of the definitions, where according to article II, paragraph 1.h) MLC 2006, the seafarer recruitment and placement service must be understood as, any person, company, institution, agency or other organization, in the public or the private sector, which is engaged in recruiting seafarers on behalf of shipowners or placing seafarers with shipowners. While this is so, and although the process developed to date is praiseworthy, we cannot forget that this organisation's Conventions are but regulatory products subject to a consensus between the members of its tripartite composition, so that, as will be seen below, the regulation in MLC 2006 shows the difficulties of balancing the economic interests underlying this industrial sector with due protection for the workers in the sector in a question as ticklish as this.

#### 3.1. The regulatory action of the ILO versus the contracting, placement and supply of maritime labour in MLC 2006

MLC 2006 is an important regulatory milestone at the international level in relation to seafarers' living and working conditions<sup>21</sup>. Specifically, and regarding seafarers'

19) Adopted on 10 July 1921 and came into force on 23 November 1921. ratifications number 41.

20) Adopted on 22 October 1996 and came into force on 22 April 2000. This Convention was ratified by only 10 states, Bulgaria, Croatia, Philippines, Finland, France, Ireland, Morocco, Nigeria, Norway and Russia.

21) On this particular, *inter alia*, Charbonneau, A (2009), *Marché International du travail maritime. Un cadre juridique en formation*, Presses Universitaires d'Aix-Marseille. Charbonneau, A. and Chaumette, P. (2010), «The ILO Maritime Labour Convention 2006 (MLC, 2006): An example of innovative normative

recruitment and placement, regulation, the contents of the convention can be considered as relatively complex. In this sense, in the text of the revised Convention, we must distinguish, firstly, the part that can be considered as the main core of the regulatory option of the ILO in the matter. Not in vain does Rule 1.4 (developed specifically in the A1.4 standard and recommendations in guideline B1.4) and also, albeit partially, Title V, establish a system of control and certification for the activity carried out by these intermediation agencies<sup>22</sup>, in what can be considered as a palpable proof and also hopeful of the attempts to set a level and limits through the actions of the states involved –flag, port and suppliers of maritime labour– relating to these formulas for elusion of employment responsibilities with regard to seafarers. Indeed, the revised Convention chooses to establish the requirements for certificates or licenses that each member state must require an issue to the manning agencies –above all the private ones– to operate in its territory as well as the possibility of controlling these agencies by the port state since the certification system includes this possibility through the inclusion in the maritime labour certificate and declaration of Maritime Labour Compliance (Appendices 5-I and 5-II) of the aspects relating to the recruitment and placement of seafarers. Together with both states, the responsibilities of the states supplying maritime labour are also associated in accordance with rule 5.3 of MLC 2006. The standard and guideline establish that the member states introduce effective systems for inspection and control as well as judicial procedures that guarantee compliance with the responsibilities relating to the supply of labour in accordance with the Convention. For these purposes, the states supplying labour are expected to ensure that the private seafarer contracting and placement services established in the member's territory and making seafarers available to a ship owner, regardless of its residence, duly comply with the terms of the employment agreements signed with the seafarers<sup>23</sup>.

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consolidation in a globalised sector», *European Labour Law Journal*, vol 1, number 3, 332–345. Chaumette, P. (2009), «El Convenio sobre el trabajo marítimo, cuarto pilar del Derecho internacional marítimo», *Revista del Ministerio de Trabajo e Inmigración* number 82, 65-76. Chaumette, P; Charbonneau, A and Proutière-Maulion, G (2010), «Les Conventions ILO sur le travail maritime de 2006 et 188 sur le travail à la pêche de 2007», Scritti in onore di Francesco Berlingieri, number sp. *Il Diritto Marittimo*, Genoa, 337–360. Charbonneau, A and Marin, M (2007), «La Convention du travail maritime 2006: vers une codification du droit du travail maritime international?», *Le Droit Maritime Français*, 110 and ff. Bollé, P. (2006), «La nouvelle convention sur le travail maritime: un instrument novateur», *Revista Internacional del Trabajo*, 157 and ff. Fotinopoulou Basurko, O (2006), *Algunos aspectos del Convenio refundido sobre trabajo marítimo de la OIT, 2006*, Government of the Basque Country Publications Service, Vitoria-Gasteiz. Doumbia-Henry, C (2004), «The Consolidated Maritime Labour Convention: A marriage of the traditional and the new» in *Les normes internationales du travail: un patrimoine pour l'avenir, Mélanges en l'honneur de Nicolas Valticos*, Geneva, ILO, 319 and ff.

22) On the system for certification in maritime transport and the difficulties relating to it in CTM 2006, consult Lefrançois, A (2011); *L'usage de la certification. Nouvelle approche de la sécurité dans les transports maritimes*, Presses Universitaires d'Aix-Marseille.

23) For more on the regulation in MLC 2006, McConnell, M.L.; Devlin, D and Doumbia-Henry, C (2011), *The Maritime Labour Convention, 2006*, Martinus Nijhoff Publishers, Leiden-Boston, 261–273.

As can be seen, the Convention has apparently shown an interest only in regulating the activity of these agencies when they carry out mediation functions in the employment market, that is, only when their condition as public or private manning agencies can be determined, excluding any mention of the problems arising from classifying these agencies as true employers<sup>24</sup>, a mention that is missing in the context of the definitions used in the international instruments that we are discussing. Indeed, as we have mentioned, considering that these agencies are not limited in their activity to putting the shipowners and seafarers in contact, it is possible that on more than one occasion they could be considered as employers, assuming the relevant responsibilities for the workers supplied to a maritime employer. From this perspective, it is true that it would be possible to appeal, nevertheless, to the amplitude in which MLC 2006 moves when defining the notion of ship owner. According to article II, section 1.j) of CTM 2006<sup>25</sup>, this concept covers the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities imposed on shipowners in accordance with this Convention, regardless of whether any other organization or persons fulfil certain of the duties or responsibilities on behalf of the shipowner. Thus the definition of ship owner in the MLC is enormously positive since with it, the ILO sets minimum bases in substantive international regulation that allow employment and social security responsibilities to be imputed to any individual or organisation involved in the recruitment and placement of seafarers.

However, as can easily be deduced, the success of MLC2006 with regard to the existence of these placement and contracting formulas will therefore depend on what the regulation of these agencies covers with respect to seafarers and with respect to the attributing of employment and social security responsibilities, to which the internal legislations of each state in the Convention are sensible to this reality, ordering –on the one hand– a system for certification and real and not exclusively formal control of these companies' activities and, on the other, of the inclusion –whether in general employment legislation or in maritime legislation when it exists– of regulations aimed if not to qualify these agencies as true maritime employers at least to impute the consequences in some regulations when the intermediation of maritime work occurs illegally, such as occurs in the Spanish case<sup>26</sup>.

24) In the same sense, Ruiz Soroa, J.M (2006), «Las cuestiones laborales en el anteproyecto de ley general de la navegación marítima» en VVAA: *Cuestiones actuales de Derecho laboral marítimo*, Government of the Basque Country, Vitoria-Gasteiz, 107.

25) Following the notion of «company» used by the IMO, specifically in the SOLAS Convention on human safety at sea, 1974, as well as the defining elements described in article 1.1.c) of ILO Convention 179.

26) Indeed, in Spanish legislation, and especially in the 2014 Maritime Navigation Law (LNM), it avoids

That is, regulating the joint responsibility of the ship owner and the agency with regard to any employment non-compliances.

### 3.2. Which regulatory and case-law action in the European Union with respect to maritime manning agencies?

Until now we have been able to check the scope that the ILO regulations have on seafarer placement and contracting systems, which leave states with the true impulse to limit labour intermediation practices and to impose, when possible and feasible, the responsibilities in employment and social security matters to the employers involved in them. In line with the above, and remembering that the EU has adopted a firm position for member states to ratify and/or implement MLC 2006 in their respective internal legislations, I consider it timely to cover, albeit briefly, the role of this regional supra-national organisation on the specific matter although it should be noted that the EU regulations also do not appear to deviate at any moment from the path opened by the ILO in this sense. From this perspective, I consider it necessary and, without qualifications, to describing the position of the EU as schizophrenic since although on the one hand, it emphasises the enormous concern caused by the drop in maritime employment office for EU crews in favour of the massive resort to seafarers from third countries<sup>27</sup>, the existence of ship management companies (including those dedicated to crew management) is encouraged and protected by the extension of these taxation benefits on tonnage, as for maritime transport companies<sup>28</sup>.

It is true that to obtain these advantages, not considered as state aid by the Commission itself<sup>29</sup>, it is necessary –however– to comply with some requirements

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considering crew management companies as true entrepreneurs for employment purposes. Despite this, however, we must acknowledge that the LNM (article 164.2 LNM) attributes joint responsibility to the agents and representatives of foreign ship owners who contract national or resident seafarers in Spain to provide services on foreign ships.

27) See, for example, the study by the European Commission (2011), *Study on EU Seafarers employment final report*, on the base of the contract tender MOVE/C1/2010/148/SI2.588190. Also, from the trade union perspective, see the report of the ETF prepared by Chaumette, P, Kahveci, E and Lillie, N (2011), *How to enhance training and recruitment in the shipping industry in Europe*, which shows that social dumping also exists even at the intra-community level with regard to this aspect. Not in vain are Poland and Romania emerging states for Maritime Labour supply compared to traditionally maritime states which are, on the other hand, «importers» of seafarers.

28) Communication from the Commission providing guidance on State aid to shipmanagement companies COM (2009/C 132/06), 11 June 2009. This communication notes the adhesion of Cyprus to the Community given that it is a country with the largest ship management sector in the world.

29) Following the line of the Sloman Neptun case, Joined cases C-72/91 and C-73/91, Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG. ECJ of 17 March 1993-I, pp. 887-937, gave the European instance the possibility of pronouncing on the compatibility of German legislation on the second registration of ships (GIS) with community law (article 117 EEC

such as, for example, that the ship management company has a connection with the economy of the Community, for which it must carry out its activity in the territory of one or several states and that most of the persons employed on board ships or in land activities have community nationality. However, the scope of the economic connection with the Community will depend on the tonnage controlled by these companies, in turn allowing them to operate in a decentralised way in third countries. Not in vain is the requirement that the management of ships be controlled from (and not in) the territory of the EU. Likewise, and with regard to crews, so that the managers can opt for these aids, it is necessary that these companies guarantee the application of MLC 2006 as well as –obviously– Directive 2009/13/EC<sup>30</sup>, which incorporates the previous one into community law, noting that they must specifically comply with the dispositions relating to the agreement on the employment of seafarers, the loss or sinking of the ship, medical care, the ship owner's responsibility, including the payment of salary in the case of accident or illness and repatriation. As can be seen, it is relatively curious that nothing is said specifically on the compliance by these companies with the rules on the placement and recruitment of seafarers since, without prejudice to their not being regulated in Directive 2009/13/EC, they are in the contents of MLC 2006, which fully applies to the member states that have ratified it. This, however, should not surprise us since the reinforcing at the EU level of the standards on maritime work is carried out from an economic approach and, to be more exact, an essentially competitive one<sup>31</sup>, as well as taking into account the peculiar structure of the EU and its regulation system<sup>32</sup>, the ways of implementing MLC 2006 in Europe are occurring in a fragmented way in various community acts. These instruments, adopted in what is known as the Erika III packet, cover various questions that regulate the international instrument. However, and at the time these pages were written, the Directive relating to labour supplying responsibilities of States has yet to be adopted, accompanying the Directives on the responsibilities of the port state<sup>33</sup> and the flag

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Treaty), as well as –mainly– whether the GIS regulation was compatible with the then article 92 EEC treaty. As is known, the ECJ interpreted –unlike the Commission's opinion– that the regulatory conflict on the maritime employment conflict with a non-community national established in the regulation that affects the GIS is perfectly compatible with the system of aids in article 92 ECC Treaty.

30) Directive 2009/13/CE of the Council, of 16 February 2009, by which the Agreement between the Association of European Community Shipowners Association (ECSA) and the European Federation of Transport Workers (ETF) on the Maritime Labor Convention 2006 and amending Directive 1999/63/EC.

31) This is affirmed without circumlocution in the Document COM (2006) 287 final, of 15 June 2006, on the strengthening of maritime labour standards in accordance with article 138, section 2 of the EC Treaty. This Communication gave rise to the adoption of Council Decision 2007/431/CE, of 7 June 2007, authorising Member States to ratify, in the interests of the European Community, the Maritime Labour Convention, 2006, of the International Labour Organisation (OJ L161, 22 June 2007).

32) Miranda Boto, J.M (2009), *Las competencias de la Comunidad Europea en materia social*, Aranzadi, Pamplona.

33) Directive 2013/38/EU of the European Parliament and of the Council of 12 August 2013 amending Directive 2009/16/EC on port State control Text with EEA relevance (OJ L218, 14 August 2013).

state<sup>34</sup> in complying with and controlling the application of MLC 2006, expected to be adopted in a still distant future<sup>35</sup>. It is possible that the EU shows a certain lack of interest in adopting the standard described insofar as its member states are, with certain exceptions such as Poland and Romania, normally seafarers «importers» and that the control and inspection of the documents annexed to MLC 2006 (Maritime labour certificate and declaration of maritime labour compliance) these items include the question of the placement and recruitment of seafarers already form part of the user checks according to the contents and regulations in the respect of the various national legislations. However, it should not be forgotten that a good number of ship owners who contracts to these management companies are European and neither must we forget the fact that many ship managers are located in one of the member states, such as the specific case of Cyprus, without going further.

Neither is the jurisprudential vision especially encouraging in relation –already in this case– with the attribution of employment and social security responsibilities to the maritime labour intermediation agencies from the European perspective. Indeed, the famous Voogsgeerd case<sup>36</sup> partially confirms the bad omens regarding this question. Not in vain does it base its argument around the interpretation to be given to the conflict of law rule about place of business regulated in article 6.2.b) of Rome Convention and article 8.3 of Rome I, which –in my opinion– that is excessively formal, excluding from the consideration as employer for applicable legal purposes the factual question relating to who exercises the power of direction over seafarers. Stated more clearly, in this judgment –in debt to its Koelzsch<sup>37</sup> precedent– the ECJ leads to the understanding that the crew management agency and the ship owner concerned in the case could be considered as contracting establishments for the purposes of the standards as a function of what the maritime employment contract states formally, opening the door to a related demand only in the case in which it is shown that one of the two companies acted on behalf of the other<sup>38</sup>, which happens

34) Directive 2013/54/EU of the European Parliament and of the Council of 20 November 2013 concerning certain flag State responsibilities for compliance with and enforcement of the Maritime Labour Convention, 2006 Text with EEA relevance (OJ L329, 10 December 2013).

35) Note in this sense, article 6.2 of Directive 2013/54/EU which states, «No later than 31 December 2018, the Commission shall submit a report to the European Parliament and to the Council on the implementation and application of Regulation 5.3 of MLC 2006 regarding labour-supplying responsibilities. If appropriate, the report may include proposals for measures to enhance living and working conditions in the maritime sector»

36) ECJ Judgment of 15 December 2011, in the Case C–384/10. For a critical commentary, which we also share, vid. Maestre Casas, P (2012): «El contrato de trabajo de marinos a bordo de buques mercantes (A propósito of the STJUE de 15 December 2011, Jan Voogsgeerd and Navimer SA, As. C–384/10),» *Cuadernos de Derecho Transnacional*, vol. 4, number 2, 322–341.

37) ECJ Judgment of 15 March 2011, Case C–29/10.

38) Note that the ECJ first declares that for the intermediary company to be taken into consideration it is necessary that it forms part of the main company structure. In this point, what it states –lightening this



in CREWMAN A but not when it is employed the CREWMAN B agreements discussed above. Thus, the ECJ will interpret this question excluding any analysis of whether or not there had been transfer of direction power<sup>39</sup>. As a positive aspect, it must be said that at least the Luxembourg Court suggests that the consideration of business place of contracting could be imputed to both companies as long as there is an objective element that allows a real situation to be established that differs from that in the terms of the contract<sup>40</sup>.

### 3.3. The role of the states in relation to the implementation of MLC 2006 in matters of seafarer placement and recruitment: the case of Spain.

Both by means of the conventional international instrument and by the path used by the EU, it is true that the success of the effectiveness of MLC 2006 depends on what

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first opinion – is that it is possible to consider the intermediary as an establishment if it acts on behalf of another company. Thus, as Jault–Seseke (2012) says, «*Il est finalement à la lecture de l'intégralité de l'arrêt difficile de savoir si l'établissement d'une société tierce qui intervient dans le processus d'embauche alors même que cette société n'a pas la qualité d'employer.*» This author affirms that there would have been a little more clarity by the ECJ in the «*Loi applicable aux salariés mobiles: la Cour de justice de l'Union Européenne poursuit son travail d'interprétation de l'article 6 of the Convention of Rome,*» *Revue de Droit de Travail*, 118.

39) On the particular, the General Advocate clarifies this position in the his opinion to the judgment. Indeed, sections 86 to 90 specifically state –as it could not be otherwise– that the exercising of power to direct constitutes a central part for considering existence of an employment relationship. Although this is so, and although the employer generally has the power to direct, its delegating of certain powers cannot be ruled out.

40) In this sense, Chaumette, P (1993). who tackles this problem, stating that «*S'il apparaît que les sociétés propriétaires des navires, gestionnaires commerciales des navires, gestionnaires des équipages sont imbriquées, quant à la composition de leur capital, quant aux dirigeants et managers, quant aux statuts ou avantages conventionnels du personnel sédentaire, il se peut qu'elles constituent un groupe de sociétés ou mieux encore une unité économique et sociale, c'est-à-dire une entreprise unique au delà des découpages obtenus par l'utilisation du droit des sociétés,*» en «*Le marin à la recherche de son employeur*», *Il Diritto Marittimo*, 173–174, especially, 164. Palao Moreno, G (2000), *Los grupos de empresas multinacionales y el contrato individual de trabajo*, Tirant lo Blanch editorial, Valencia, 169, states that to be able to apply the conflict of law rule contained in article 6.2.b) RC to these cases it would be for the company recruiting seafarers to actively intervene in contracting and that the ship owner group has a secondary establishment with a certain permanence in this place. Meanwhile, Prof. Carbone, who states that the application of article 6.2.b) RC or article 8.3 Rome I could be complex given the underlying reality in this industrial sector (generally favouring the applicability of the closests connection clause), does not hesitate in affirming that its operation would be feasible precisely taking into consideration certain real factors such as the establishment place coinciding with the place from which the ship is effectively used or not coinciding with the establishment in which the ship owner has its own decision or business place and/or activity centre. He also defends the possibility of applying this conflict of law criterion when the establishment coincides with the state of the ship's usual port (real and not administrative port) or with the operational bases located in the sense of North American jurisprudence in the Jones Act. In this sense, Carbone, S.M (2010), *Conflits de lois en droit maritime*, L'Académie de Droit International de la Haye, 185–187.

purpose it regulates but, above all, on what effectively is done in each state member or part of mentioned international instruments. In this sense, I would like to describe what happened in Spain regarding this issue<sup>41</sup>. Not in vain do I consider that ours could be a «good» example of how, through the regulatory action of the states, we have managed to clean the facade somewhat but much remains to be done with regard to the foundations<sup>42</sup>. Thus, as is known, Spain was the first European state to ratify MLC 2006 in 2010, with its coming into force in August 2013, such that it is a standard that forms part of our internal legal system. Regarding crew management agencies, the relevant authorities certify all these agencies based in Spain in accordance with the international Convention. However, from the legal point of view, it must be said that the legal rule used to allow the certification of the activity of these companies is erroneous since it sweetens reality. Not in vain has Royal Decree 1796/2010, 30 December, regulating manning agencies<sup>43</sup>, been used, the purpose of which is to adapt Spanish regulations to ILO Convention 181 on manning agencies which specifically excludes from its scope of applying article 2.2 to the recruiting and placement of seafarers, given the existence in this international organisation for specific Conventions on the matter. Without going into other important aspects<sup>44</sup>,

41) It must be noted that the search for information on manning agencies and the national regulations existing on the matter, is enormously complicated given the opacity in which we often move and, in other cases, because MLC 2006 is still not in force in some ratifying countries such as Argentina, Bangladesh, Congo, Fiji, Gabon, Iran, Ireland, Kenya, the Lebanon, Maldives, Mauritius and Montenegro.

42) In this sense, and from a compiling of the data available on the Web site of the ILO itself in this respect, it could be said that we have found almost no variation with respect to the contents of MLC 2006 in national legislation is. This is the case of the Republic of the Marshall Islands (Standard 6 Marine Notice number 7-045-1 of the Maritime Administration Bureau), the Isle of Man (Maritime Labour Notice, 2012 which distinguishes between Employment Business, Employment Agency and Placement Business for the purposes of control and inspection), Norway (Notice of the maritime authority in this country), Malta (Arts. 17 to 19 Subsidiary legislation 234.51, developed in the Merchant Shipping Act – Cap. 234 and Merchant Shipping – MLC) Rules, 2013. LN 145, 2013), the Philippines (in this country, the regulation development and its access is simpler, distinguishing between Philippines embarked on foreign ships for maritime cabotage transport – Order 129 of the Department of Work and Employment 2013– or embarked on international transport ships – Order 130, 2013), Cyprus (Arts. 36 to 39 of Law 6 (III)/2012, The Maritime Labour Convention 2006 (Ratification) and for matters connected therewith Law of 2012), Panama (Article 16 Employment code of Panama in Cabinet Decree 252, 30 December 1971, modified in 1995 and, with regard to this matter, vid. Arts. 22 to 30 of Executive Decree number 84, 22 February 2013), Singapore (Note of the Singapore Maritime and Port authority. Circular number 16, 2012), Tuvalu (Marine Circular MC-8/2012/1), the Bahamas (information bulletin number 147), Australia (Marine Order 11 – Living and working conditions of vessels, 2013), Antigua and Barbuda (The Merchant shipping –maritime labour convention, 2006– Regulations, 2012. Statutory Instrument number 15, 2012. *Official Gazette* Vol. XXXII, number 41, 2 August) and Gibraltar (Subsidiary legislation 2013/120 made under s. 118 of the Gibraltar Merchant Shipping Act, 1993. Standard that in turn transposes 1999/63/EC and 2009/13/EC).

43) Official State Bulletin 318, 31 December 2010.

44) Such as if, for example, the activity of the manning agencies can be subjected and/or the ambit of the Spanish manning standard, given that «*Employment intermediation is the set of actions designed to put into contact the offers for employment with workers seeking employment for their placement.*»

this means that all the certificates issued in our country with regard to these agencies are void in law. As can be imagined, resulting from the above and the speed with which the certification has been carried out, it does not seem that the authorities have made an exhaustive control of the activities of these agencies. All this means that in our country, from the strictly formal point of view, they have complied with the requirements regarding the certification of these companies. What appears very incoherent with this situation is that then, when penalising what other countries do in this respect, we are more holy than the Pope. Indeed, Law 5/2000 on infringements and penalties of social order, reformed by Law 40/2006, regulating the citizen's statute abroad, describes « *The contracting of Spanish seafarers by the foreign ship owning companies carried out by persons or organisations not authorised by the employment authorities to carry out this task* » as a serious administrative infringement. Considering the complacency and permissiveness in which we move in this matter, there is always doubt as to what is to be done in practice. I greatly fear that the inspectors enabled in other states will be limited –because it is very graphical– to placing an X in the relevant box, confirming that everything is in order with regard to compliance with the minimum prescriptions in MLC 2006 and *vice versa*. This is a reality in a country such as Spain which although not in the best economic moment in its history, is at least a state with means to tackle, if it wished, the requirements involved in adapting international regulations to the content of this international Convention in general and with regard to the placement and recruitment of seafarers in particular. Evidently, and without wanting to be excessively pessimistic, it must be asked whether this occurs in the rest of the countries that have ratified the Convention for controlling and checking questions belonging to the intermediation of maritime labour. And in this case, I refer to any country, whether in its condition as flag, port or labour supplier state.

As a counterpoint to the above, it must be recognised that in Spain, our lead internal employment legislation is positive with regard to the imputing of joint responsibilities in employment and social security matters to those who intermediate in labour management, whether because the institute of legal ceding in article 43 of the Workers' Statute so states or whether it is specifically regulated in the 2014 Maritime Navigation Law in article 164.2 LNM on contracting crews, which states that *The agents or representatives of foreign ship owners who contract national or resident seafarers in*

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*Employment intermediation has the purpose of providing workers with employment that matches their properties and of facilitating employers with the most suitable workers for their requirements and needs*». It seems difficult to sustain that all these companies (or even most of them) can be classified as mere placement agencies when the crew managers do not appear to carry out the employment intermediation activity in the strict sense, given that they do not match employment offers and demands, on the margin of the resulting legal business, but that the crew manager, as the direct representative of the maritime entrepreneur, participates in the signing of the employment contract but also covers the question of all employment aspects, greatly exceeding the functions attributed to a manning agency.

*Spain to provide services on foreign ships will be jointly responsible with the ship owner for complying with the contract signed<sup>45</sup>.*

#### **4. Final reflection**

Evidently, and as we have repeatedly stated until now, the success of MLC 2006 with regard to setting up a control and limits on crew management activities worldwide depends on how the national regulations of the countries supplying maritime labour and its receiving or importing countries are established for the purpose. It is to be hoped, to reach a real conclusion on what happens in a world as opaque as that of seafarer recruiting and placement, but after a reasonable time has elapsed we will know the true scope of the success of MLC 2006 in the matter in the various states.

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*45) They are also obliged to take out financial insurance which provides compensations of a similar amount to those set in the Spanish social security review for cases of death, disability through accident and repatriation. The emigration authorities do not approve contracts signed that do not comply with this requirement.*

